

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOSHI DISTRICT REGISTRY
AT MOSHI
LAND CASE NO. 6 OF 2021

BONAVENTURA MICHAEL KIMAMBO1ST PLAINTIFF
(Also is Administrator of the estate of the late Marselina Michael Kimambo)
GEORGE ONESMO SWAI2ND PLAINTIFF
INNOCENT ALEX BARIDI3RD PLAINTIFF
EMMANUEL DAUDI MREMA4TH PLAINTIFF
PHILOTHEA ANDERSON RINGO5TH PLAINTIFF
GABRIEL DAUDI MREMA6TH PLAINTIFF
JOB MSHIU7TH PLAINTIFF

VERSUS

JOHN MICHAEL KIMAMBO DEFENDANT

JUDGMENT

10th & 31st March 2023

A.P.KILIMI, J.:

The plaintiffs in this case namely; **BONAVENTURA MICHAEL KIMAMBO, GEORGE ONESMO SWAI, INNOCENT ALEX BARIDI, EMMANUEL DAUDI MREMA, PHILOTHEA ANDERSON RINGO, GABRIEL DAUDI MREMA** and **JOB MSHIU**, hereinafter first, second, third, fourth, fifth, sixth and seventh respectively, have brought this matter contesting against the

Defendant by praying for the judgment and decree on the following orders, namely: -

- (a) Declaratory Order that the 2nd, 3rd, 4th, 5th, 6th and 7th Plaintiffs are in lawful occupation of the Suitland.
- (b) Declaratory order that the Suitland is lawful property of the second, third, fourth, fifth, sixth and seventh plaintiff.
- (c) Permanent restraining order against the Defendant from interfering with the 2nd, 3rd, 4th, 5th, 6th and 7th Plaintiffs' occupation of the Suitland or dealing with the Suitland in any manner whatsoever.
- (d) General damages.
- (e) Costs of the suit.
- (f) Any other relief this Court may deem just and equitable to grant.

In the amended plaint duly signed and verified by all Plaintiffs filed on 6th October 2022, at para 3 it avowed the disputed land is situated at Manambeni Hamlet, Korini Kusini Village, Mbokomu Ward, Moshi District which is approximately 1.25 acre, with the boundaries as follows, North: 52 and 04 paces, Bonaventura Kimambo and Onesmo Makundi South: 50 paces Edmund Mmbando East: 75 paces, Odilia Mkala and Anna Urio West: 60 and 25 paces Andrew Tairo and Robert Benson Maeda.

Furthermore, the plaint averred at paragraphs 6, 7 and 9 that, the original owner of the suitland was one **MICHAEL JUSTINE KIMAMBO** who died in the year 1987, before his death in 1987 he distributed his land to his three wives namely Grace Mlay, Bertha Machoo and Zita. Bertha Machoo who is a biological mother of the Defendant John Michael Kimambo was given a parcel of land located on Northern Western side of the suitland. He also gave to her daughter Marcellina d/o Michael Kimambo the suitland above measuring one and a quarter acre in the year 1987. The said Marcellina d/o Michael Kimambo is the mother of 2nd to 6th Plaintiffs mentioned above. on 09th November, 1996 the 2nd to 6th Plaintiffs' mother died, and her piece of land in which she had already constructed a three roomed residential house, was inherited and distributed customarily to her five children 2nd, 3rd, 4th, 5th and 6th Plaintiffs, thereafter these Plaintiffs had been in possession of the suit land each one occupying a portion of land allocated to him/her by the Clan Meeting.

Years later, on 2nd July, 2002 the first Plaintiff applied at Moshi Urban Primary Court, in Probate no. 21/2002 and was appointed administrator of the estate of the late Marselina Kimambo, the 2nd to 6th Plaintiffs' deceased mother. The plaint at paragraph 13 also averred that the first Plaintiff did

not file any inventory to show distribution of the suitland to the Plaintiffs mentioned due to lack of knowledge of legal procedure since the suitland had already been distributed customarily to five Plaintiffs by the Clan Council on 14th November, 1996. These plaintiffs later gave three portions from the suitland measuring 23 by 12 metres, 23 by 12 metres and 28 by 12 metres to the 7th Plaintiff, who had developed by constructing a permanent block three residential houses from 2004.

And lastly at para 17 the plaintiffs averred that, in 2020 the Defendant started to claim once again the suitland and in cooperation with one Riley Maluta Kimambo now deceased, they claimed that the suitland belongs to the Defendant, that he was given the land by his deceased father Michael Kimambo, the late Riley Maluta Kimambo petitioned for letters of administration aiming to include the suitland as part of the estate of Michael Kimambo, the 1st Plaintiff lodged his objection against the petition by the Defendant but the trial court appointed both the first Plaintiff and the deceased Riley Maluta Kimambo as joint administrators of the estate of the deceased in Probate No. 148/2020 on 28th December 2020.

In his written statement of defence filed on 7 March 2023 by the order of this court, apparently in alternative to normal defence it contained two preliminary objections on point of law, but since the defendant was unrepresented, it appears he opted to proceed with main trial because he argued nothing in respect to the objections raised. In alternative to the said objections, the defendant vehemently denied all claims by the plaintiff and averred they should proof the alleged facts thereof.

When the parties appeared before me for hearing, the plaintiff was represented by Mr. Chiduo Zayumba, Learned advocate while the defendant stood himself. Two issues for determination were drawn and agreed upon the parties as follows: -

1. Whether the suit land is legally owned by the Plaintiffs or the Defendant.
2. To what reliefs are parties entitled to.

The counsel for plaintiffs was able to call six witnesses while the defendant brought four witnesses.

PW1 Bonaventure Michael Kimambo, the first plaintiff testified to the effect, he knew the disputed land mentioned above belonged to his grandfather Ndeinasia Justine Kimambo, later in 1970 the ownership of it went to his father Michael Justine Kimambo, now deceased. The said

Grandfather gave his father the Land approximately three acres out of 7 acres he possessed.

PW1 further said in 1987, before the death of his father, he divided the land to his three wives, and the other land gave to the child of his sister Yasinta Silayo, and the remaining part declared it belong to him and Marcelina Michael Kimambo. Marcelina Michael Kimambo is the mother of Plaintiff number five children hereinafter second to six plaintiff respectively. He mentioned the three wives to be Grace Mlay, Zita and Bertha Mashoo. The mother of Defendant named Bertha Mashoo was given land $\frac{1}{4}$ acre, the mother of Marcelina Michael Kimambo got nothing because she was remarried, instead the land in dispute which is $1\frac{1}{4}$ acres was given to Marcelina Michael. He also said before his father passed away informed him that Marcelina was given the large part because he took care of him when he was sick. Marcelina Michael until she died, she has built one room and cultivated the land, later her children after growing up built two room for their mother. He also added that the defendant who is a young brother was given land from his mother Bertha Mashoo.

PW1 in other part said, in November 1996 when his sister Marcelina Michael died, the clan meeting was convened, thereat he was selected and

one Veronica Kimambo to supervise children. Then the land of the deceased was decided to be given to her children who are Philothea Anderson Ringo, Gabriel Daudi Mrema, Emanuel Daudi Mrema and Innocent Alex Baridi, then the said clan meeting was documented in a paper, he tendered the same for identification and marked ID1.

Later, in the year 2002, Defendant and his brother Anthony Michael Kimambo brought chaos claiming the said land, the case was filed at Moshi Primary Court, against the five children of Marcelina Michael and the court ordered Defendant and his fellow not to enter the said land. Thus, since 2002 it was until 2021 defendant came again and said the property belong to him. PW1 further has said he was appointed by Moshi urban Primary Court to be the administrator of the deceased estate of Marcelina Michael, PW1 tendered a letter for appointment as administrator of the Estate of Marcelina Kimambo which was admitted and marked "P1".

In respect to 7th Plaintiff, PW1 stated to the effect that, 7th Plaintiff entered agreement with all children of deceased to build Houses for them to live, in exchange of giving part of the land, the clan meeting consented to the said proposal. Then three Houses were built for residential purpose of the children, PW1 added they lived in peace, the conflict arose in 2021.

Before that year the Defendant was present and did say nothing to the said buildings which started earlier and now is about 18 to 20 years.

In cross examination by the defendant, PW1 said according to the clan meeting they were selected two administrators, but the other was very old so he went alone to petition. When was appointed as administrator he had nothing to administer because the deceased divided all of his property. He also said he was given a duty by clan to take care of children after the death of their mother, he don't know their father's name, that is why their grandfather before death said those children belong to Kimambo's clan.

The remaining plaintiffs' witnesses may be grouped into three clusters, the first is those who were closely relatives to the deceased Michael Justin Kimambo and Marcelina Michael Kimambo, who are PW4, Anna Elinamu Orio and PW6, Oridia Justine Kimambo, both said they was present at the clan meeting of the late Michael Justin Kimambo, they further reiterated on what stated by PW1 in respect to distribution done by deceased Michael Kimambo before his death and how the children of Marcelina inherited the land from their mother.

The second cluster are children of the late Marcelina Michael Kimambo who are PW2 Gabriel Daud Mrema and PW5 George Onesmo Swai both stated that they were present at clan meeting held on 14/11/1996 which decided the land which was given to their mother by their grandfather as stated by PW1 above be given to all five children of Marcelina Kimambo as heirs of her estate. Later they entered agreement with Job Mshiu, and agreed he will take a land not exceeding $\frac{1}{4}$ acre, and built three houses for three children, the same was built in 2004, 2007 and 2009 respectively, and the three house belong to George Onesmo, Innocent Baridi and Emmanuel Daudi.

And the last one was PW3. Job Nelson Mshiu, as testified above he secured land from the children who inherited land of the late Marcelina Michael Kimambo after he entered the agreement in consideration to build three houses for three children, the land given to him as consideration is a portion of land measures $\frac{1}{4}$ acre. PW3 tendered three agreements of the said buildings he built and the land given to him which were admitted collectively as P3.

The defendant's case started with the defendant himself, he testified to the effect that, sometime before the death of his father late Michael Kimambo called them as men and told them that their sister Marcelina has children by different men. Then he told them after giving land to them as men, he will give land to Marcelina to take care of the children, after they are grown up, they will go to their father, and Marcelina will have no power to add any part of land. DW1 further said he returned to Arusha, sometime later he returned home and found that his father has distributed land to Bonaventura Michael Kimambo, Mose Michael Kimambo, Antony Michael Kimambo and Marcelina Michael Kimambo.

DWI also said after the death of his father in 1987, his elder brother Bonaventura Kimambo (PW1) was selected by clan to administer the estate of their deceased father. He came at Moshi 1989 and told him to show his portion of land, Bonaventura replied him to come with his brother Laurian. He returned again on 1991 the answer remains the same. He went and returned again between the year 1992 and 1993 he can't recall exactly and found already Bonaventura has given the land to his brother Laurian. When he requested for his land, he was told he should wait until December but the same was not honored. He took the matter to the church for two consecutive

years 1996 and 2000 nothing was honored despite of many promises, he took the matter at police later to ward land tribunal for three years, he was later advised to go to District Commissioner where he was advised to file Probate case at Primary Court, but he had no a Certificate of Death.

DW1 further said later he was called and went to the court in the case of Probate Cause 148 of 2020, the case was for administration of the late Michael Justine Kimambo, thereat administrators appointed were Bonaventura Michael Kimambo and Riley Maruta Kimambo, whom the court tasked them to collect deceased estate, till the date of this testimony the case is pending in Primary Court Moshi Urban, he added that Marcelina Kimambo was given a land merely for building three rooms house. DW1 also tendered several documents for identification purpose received as ID1 both of them were uncertified copies which I hold I can't accord any weight to them.

When he was cross examined by Mr. Zayumba, DW1 had this to say; since his father passed away it is almost 33 years, during the time he was doing effort to fight for his right to leaders and tribunals, he is afraid to go to the area in dispute where includes Tomb of his father because he can be

killed, all his fellow children were given land except him. Further said there is a case at Primary court Probate 148 of 2020 which was stopped pending this case.

DW2 Antony Michael Kimambo, a brother of one mother with the Defendant testified that, he knows the area the Plaintiffs have built is the land remained for Defendant, because her sister Marcelina was given a land to take care of her children only, the land remained is the land of Defendant and Laurian Michael Kimambo, he was present when his late father uttered the same, therefore he gave the Land to his children and not to his wives. DW2 further reiterated on what DW1 said in respect to dishonored promises given by Bonaventura Kimambo to the defendant and steps taken and later how gave land to Laurian Kimambo. He also added that, the probate was filed of the deceased Michael Justine Kimambo, people appointed are Bonaventura Kimambo and Maruta Kimambo.

When DW2 was cross examined by Mr. Zayumba had this to say; since their father died it is almost 33 years, his land gave to the son of his sister called Amani Kimaro, he gave that land while his mother was present, and it is not true that the said land was given to their mother. Defendant was given

a piece of land, he said is a small portion and refused, but later when he came back the said place was already built a house, Bonaventura Kimambo was appointed by the clan, but he did division of properties without being filed the probate cause, he added their father died intestate.

DW3. Laurian Michael Kimambo, also a brother to the defendant testified that, before the death of his father Michael Justini Kimambo, he had a farm and distributed to his brother Bonaventura Moses and Antony, after his death he was given a piece of land by following the map of division of land left by their late father which was left to one Christopher Justine Kimambo, then after being given his part, it remain a part of land for his young brother who is the Defendant, later the said land was invaded by the children of their sister and build therein. In the cross examination made by Mr. Zayumba learned counsel, DW1 had this to say; no any wife of deceased was given land but only children were given. Marcelina was not given any land, there is a map showing distribution of the Land of their late father, Marcelina was living at the disputed land for farming, in her mother womb they were born two himself and his sister Julita, no any of their sisters were given land, so even Marcelina being also their sister was not given land. In

re-examination DW1 said, Marcelina was not given land, the land was given to Defendant, and Marcelina has only a right to stay on that land for farming.

The last witness in Defendant case was DW4, Semeni Robert Njau, he is a division officer (Afisa Tarafa) of Hai Mashariki, he testified that Defendant came to his office on 7/11/2019 to complain against Bonaventura Kimambo, he complained that he was not given land as heirs, He did call them for meeting on 19/11/2019 but quorum was incomplete, he scheduled to be on 23/11/2019, whereon both attended, but the dispute remained unresolved, then it was resolved that on Christmas holiday since all clan members come to their homeland the same be discussed, and result be communicated to his office, again it was unfruitful. Another meeting held on 1/2/2020, wherein after long deliberations they reached the conclusion that Administrator appointed was not approved by the law. Christopher Kimambo who is the clan leader prayed to be given time, they gave him time until 17/4/2020, still it remained unsolved. Later on 5/5/2020 he received message from Bonaventura Kimambo that the dispute has failed due to chaos, thus his office wrote a letter to Defendant to go the law enforcing organs to settle the matter. When he was cross examined by Mr. Zayumba

he said, since defendant father died in 1987 until when defendant came to his office it is almost 32 years.

After I heard all witnesses for both parties the counsel for plaintiff prayed to file final submission, I conceded for both parties to do so if they wish, however is only the counsel for plaintiffs filed the same and on time scheduled.

Starting with the first issue, which is whether the suit land is legally owned by the Plaintiffs or the Defendant. I have considered the evidence adduced by both sides; I have noted briefly that the genesis of this matter is the piece of land which formerly was owned by Michael Justine Kimambo deceased. According to the evidence it is alleged by plaintiffs' side that the said land was given to Marcelina Michael Kimambo who also deceased, their relations was a father and daughter respectively. It is undisputed that the father died on 1987 while the daughter was in 1996. The plaintiffs also allege that after the demise of the daughter the clan sat and distributed the said piece of land to her five children (second to sixth plaintiff hereinabove).

In the other hand, the defendant DW1 is disputing all the above assertions and is supported by his two blood brothers who came to testify

before me as DW2 and DW3. Moreover, before I proceed further with the merit of this matter at hand, I have noted according to the evidence of DW1 there is pending probate case at Moshi Urban Primary court (henceforth "probate court"), and in this respect I quote his testimony hereunder;

*"We went to the court in the case of **Probate Case 148 of 2020**, the case was for administration of the estate of the late **Michael Justine Kimambo**, and appointed administrators were **Bonaventura Michael Kimambo** and **Riley Maruta Kimambo**. Then we were required to collect deceased estate, **till now the case is in Primary Court Moshi Urban**, a letter to go to the village government, I went there to the village, they wrote a letter to the clan members not to do anything, Marcelina Kimambo was given a land merely for building three rooms."*

(Emphasis added)

This has triggered me to call for the record of the mentioned probate case in order to be acquainted of what transpired and the way forward of the said court. According to the record reached to me, it is true there is a pending Probate cause no. 148 of 2020 filed at Moshi urban primary court filed on 7/10/2020. It also revealed the said probate court on 28/12/2020 appointed

Riley Maluta Kimambo and Bonaventura Michael Kimambo (PW1) to be the administrators of the estate of Michael Justine Kimambo, further the record shows after that appointment, the court proceeded to order that the appointed administrators should file inventory on 28/05/2021.

Furthermore, the record shows the same was not filed despite of several adjournments, then it appears some of heirs dissatisfied with the administration of the estates wanted to be heard by the said probate court, thus on 28/08/2021 the court heard the two administrators appointed , Philotea Kimambo, Laurian Michael, Julita Kimambo and the two sons of deceased who are Antony Kimambo hereinafter DW2 and John Kimambo hereinafter DW1, then the probate court ordered a task to administrators and adjourned the matter until 17/08/2021, also record shows before the said task is executed PW1 being one of the administrator informed the probate court that the probate matter be suspended because he has filed a land matter at this court, the probate court kept adjourning it until 19/05/2022 when it acknowledged and ordered staying it pending determination of this matter.

Also, there is also no dispute that first Plaintiff was granted letters of administration in respect of the estate of Marcelina Kimambo by Moshi Urban Primary Court in Probate Cause No.21 of 2002 the ruling of the said court dated 2/7/2002 was admitted and marked exhibit P1. No evidence adduced that the same was concluded by filing inventory by this administrator appointed.

From the above, in my view the issue of whether this court have jurisdiction to decide this matter is inevitable, my take-off point in determining this issue is whether the dispute at hand is a pure land matter as brought to be determined by this court as land court or is a probate matter to be decided by probate court.

The plaintiffs have prayed to this court as a land court to issue declaratory order that the Suitland is lawful property of the second, third, fourth, fifth, sixth and seventh plaintiff. This means they have moved this court as a pure land court. But from the plaintiffs evidence it was averred that the second to sixth defendant inherited the said land from their deceased mother Marcelina Michael Kimambo who was given that land by the late his father, nonetheless, as said above the defendant and his two

brothers who are sons of the deceased have testified disputing it strongly. Therefore, in my view the gist of the matter is claim of ownership accruing from inheritance.

On this point, I find it irresistible to refer the case of **Mgeni Seif v. Mohamed Yahaya Khalfani**, Civil Application No. 1/2009, Court of Appeal at Dar es Salaam (unreported) where the issue for determination was who the rightful successor to the estate of the deceased, at page 8, it was held:-

*"It seems to us that there are **competing claims** between the applicant and the respondent over **deceased person's estate**. In the circumstances, **only a probate and administration court can explain how the deceased person's estate passed on to a beneficiary or a bona fide purchaser of the estate for value**. In other words, a person claiming any interest in the estate of the deceased must trace the root of title back to a letter of administration, where the deceased died intestate or probate, where the deceased passed away testate".*

(Emphasis added)

at page 14, the court further held: -

*"..... Where there is a dispute over the estate of the deceased, only the **probate and administration court seized of the matter** can decide on the ownership"*

(Emphasis added)

Furthermore, I am also persuaded to follow the decision of this court in the case of **Malietha d/o Gabo vs. Adamu s/o Mtengu**, Misc. Land Appeal No. 21 of 2020 HC Kigoma (unreported), when observed that, when the claim of ownership stemming from the right of inheritance or purchase for value arise while the probate and administration Court is still seized with the matter, meaning the administrator has not filed a final account and the court having not approved the same, the probate and administration court must determine whether title property passed through administration of the estate.

In his final submission, Mr. Zayumba learned counsel submitted that the Defendant was never allocated the suitland by his deceased father Michael Kimambo, but the deceased gave the suitland to Defendant's deceased half-sister Marcelina Kimambo who is the biological mother of the five Plaintiffs. The counsel said so basing on grounds that the six plaintiffs

had been in long uninterrupted possession of the suitland beyond the limitation time, he says since 1987 suitland had never been no action on part of the Defendant to date, which is almost thirty four years passed, until when he took the deceased defendant to petition for letters of administration and include the suitland as part of the estate of his deceased father.

The counsel further argued that where a person has occupied land for over 13 uninterrupted years, he acquires the title by acquiescence, meaning that when a person occupies land for a long period even if he invaded that land, he becomes the lawful owner and any other person is barred from claiming the land. To fortify his argument, he has referred the case of Shabani **Nassoro vs. Rajabu Simba** 1967) HCD n.233, **Nassoro Uhadi vs. Mussa Karunge** [1982] TLR 302 and the case of Magoiga **Nyankorongo Mriri vs. Chacha Moroso Saire** Civil Appeal No. 464 of 2020 CAT at Musoma (Unreported). Also, he the counsel added that even if the Plaintiffs had no evidence they acquired ownership by adverse possession, since the alleged owner did nothing.

With respect, in my view the counsel has misapprehended the above cases in respect to the principle of acquiescence and adverse possession. In my view, the above cases referred are distinguishable and not applicable in

the circumstances of this case. On those cases cited above the opponents in those cases were given land for special purposes by agreement contrary to this matter at hand where it is alleged plaintiffs or those in possession of the land in dispute acquired through the dominion of inheritance from deceased father of the Defendant. In the case of **Magoiga Nyankorongo Mriri vs. Chacha Moroso Saire** (supra) it was observed that the doctrine of acquiescence arises from the common law principles of equity, it does not apply where the suit land was specifically given to the respondent by the appellant and non-interference of the acts inconsistent with the agreement was not on acquiescence but in furtherance of friendship and undertaking between them, that the respondent will only occupy the land and nothing else.

The court went on to refer with approval the case of **Registered Trustees of Holy Spirit Sisters Tanzania v. January Kamili Shayo and 130 Others**, Civil Appeal No. 193 of 2016 (unreported) and observed that the principle of adverse possession, that a person who does not have legal title to land may become an owner of that land, based on continuous possession or occupation of the said land. However, the principle cannot

apply in circumstances where the possession roots from the owner's permission or agreement.

In view of the above, anybody seek to rely on the above principles should have no colour of right over the suit land except entry on the same without the owner's permission. In this matter, plaintiffs' evidence is to the effect that they acquired the suit land by inheritance. Which means they entered therein with the colour of right. Therefore, it is my settled opinion the same are inapplicable to this matter.

Nevertheless, the Plaintiffs herein are the ones seeking to be protected by the above principles by praying to be declared rightful owners, in another case of **Origenes Kasharo Uiso vs. Jacquilin Chiza Ndirachuza**, Civil Appeal No. 259 of 2017, (unreported), the Court of Appeal of Tanzania directed that:

*"No declaration can be sought on the basis of adverse possession in as much as **adverse possession can be used as a shield and not as a sword ... the appellant cannot rely on the principle of adverse possession in a case which he is a plaintiff.**"*

(Emphasis added)

Moreover, Mr. Zayumba on the other hand, submitted that, the Suitland was given to the late Marcelina way back in 1987 and that her children inherited it customarily in 1996 when clan Members met, agreed and distributed the deceased estate, and since all clan members were satisfied and clan resolution minute sheet was kept for safe custody. The counsel sought in buttress his argument by referring the cases of **Julius Fundi and Modesta Kamakarwe vs. Ernest Pancras**, Probate and Administration Appeal No. 03 of 2013, HC. at Bukoba and the case of **Kenedy Bakebula vs. Edwin Kajumulo** Probate Appeal No 9 of 2017(both unreported). In the latter case it was observed that where clan members mutually agreed to distribute the estate of the deceased and after distributing clan members were satisfied then it does not make sense and not expected, for one member to come in court after 27 years to re-open the matter seeking an order to re-distribute the estate which has already been in the hands of heirs as owners for such long period.

In my view, I have no dispute with the above holding, but I must state the differences with this case at hand, in the above cases the matter started in a probate court and the said holding was of the second appellate court.

In the case **Kenedy Bakebula vs. Edwin Kajumulo** (supra) at page 5 of typed Judgment the said court had this to say;

*"The primary court on its part was correct to appoint the appellant but with directions that the appointed administrator **should not re-distribute the estates again as they were already distributed customarily.**"*

Emphasis added)

In view of the above, even in this case, since the matter emanates from inheritance and there is a pending probate matter at the probate court, in my view, if the counsel thinks there are reasons as stated in above case cited ought to be established on the said probate court, so that the probate court should decide as per circumstances of the case itself. Therefore, since as said above, the probate court is still seized with the matter this means the administrator has not filed a final account and the court have not approved the same, with respect, in my view it was misdirection for PW1 who was the administrator appointed at the probate court instead of telling what transpired with evidence if at all the clan conclusively distributed the land in dispute to legal heirs, he has resorted to assemble the alleged heirs and

jumped to this court as pure land court to seek for declaration orders in respect to ownership of the suitland.

The record of probate cause no. 148 of 2020 at Moshi Urban Primary Court shows the probate was filed by PW1 and one Riley Maluta Kimambo who were appointed by clan meeting after the death of Michael Justine Kimambo by writing a letter to Primary Court, there is no evidence that the defendant forced them to file the said probate, but the evidence reveals that the defendant's started claims that he was bequeathed the said land from the said estate of his father started even before they filed the said probate. Therefore, is not true that is the defendant who went to court to initiate the said probate. Moreover, the evidence in this trial have revealed that the defendant did not follow anybody else to claim for his right accruing from inheritance of his father, he used to follow PW1 who was selected by clan meeting after the demise of his father and this was done even before it reached the probate court. Therefore, in my considered opinion even prudence shows this task is an escapable on part of the appointed administrator to tell the truth with evidence at the probate court which currently is seized with the matter what transpired. Then the probate court will decide regarding to the laws.

The powers of the primary court in appointment of administrators of the estate are governed by the **fifth schedule to the Magistrates Courts Act**, Cap 11 R.E 2019. In this matter there is no dispute the administrators appointed were selected in a clan meeting. I am mindful that, a primary court exercising jurisdiction on a probate and administration its powers are limited to appointing the administrator, approving the rightful heirs, hearing of matters accrue in the course of administration of estate in respect to inheritance, sale, partition, division or other disposal of the property and supervising the administrator to account for administration of deceased estate.

This is in accordance with rule 8 of GN. No.49 of 1971, the Primary Courts (Administration of Estate) Rules regulating matters and conduct of probate and administration of deceased estates in Primary Courts. The said rule provides as follows;

"Subject to the provisions of any other law for the time being applicable the court may, in the exercise of the jurisdiction conferred on it by the provision of Fifth Schedule to the Act, but not in derogation thereof, hear and decide any of the following matters, namely-
(a) whether a person died testate or intestate

- (b) whether any document alleged to be a will was or was not a valid or subsisting will;*
- (c) any question as to identity of persons named as heirs, executors or beneficiaries in the will;*
- (d) any question as to the property, assets or liabilities which vested in or lay on the deceased person at the time of his death;***
- (e) any question relating to the payment of debts of the deceased person out of his estate;*
- (f) any question relating to the sale, partition, division or other disposal of the property and other assets comprised in the estate of the deceased person for the purpose of paying off the creditors or distributing the property and assets among the heirs or beneficiaries;***
- (g) any question relating to investment of money forming part of the estate; or*
- (h) any question relating to expenses to be incurred on the administration of the estate."*

(Emphasis added)

Reading the provision of the law quoted herein above, it is apparent that the determination of the claim in this matter is vested into the Primary Court upon which currently there is a probate cause no. 148 of 2020 pending.

As analyzed above and taking regard that the defendant has disputed the facts which states that the late Michael Justine Kimambo gave the

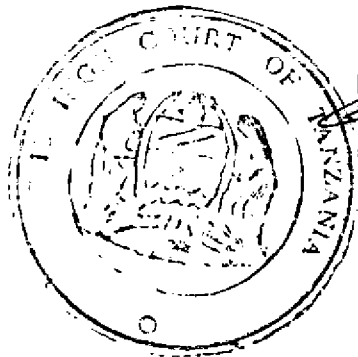
disputed land to Marcerina Kimambo as his daughter and thereafter confirmed by their clan. I am of considered opinion, the crux of disputes in this matter is the land which it is alleged Marcelina Kimambo inherited from his father Michael Justine Kimambo, and the fact the first plaintiff in this case is the administrator of the said probate of Michael Justine Kimambo which is still pending at the Primary court which is probate cause no. 148 of 2020. I am of the view himself and other clan members whom are acquainted of what transpired about the said distribution need to prove before that probate court whether the title passed to Marcelina Kimambo, and I think if it happened they prove so at the probate court, then the next dispute on whether the second to sixth plaintiffs who are children of the deceased Marcelina Kimambo will be simple and straight forward since are sole heirs. Thus, in the context of the authority referred, laws and reasons stated hereinabove, I am of considered opinion this matter should be determined by probate court forthwith.

From the foregoing it is my finding that since the Plaintiffs have moved this court as a pure land court, I am settled that this court is not vested with jurisdiction to determine the dispute between the parties herein.

Consequently, I hereby dismiss this suit in its entirety. According to the circumstances of this case I order each party to bear their costs.

It is so ordered.

DATED at MOSHI this 31st day of March 2023.



A. P. KILIMI
JUDGE
31/3/2023

Court: - Ruling delivered today on 31st day of March, 2023 in the presence of Mr. Chiduo Zayumba learned counsel for Plaintiffs. Also, first, third, fourth, fifth, seventh Plaintiffs and Defendant present. While second and sixth plaintiffs absent.

Sgd: A. P. KILIMI
JUDGE
31/3/2023

Court: - Right of Appeal explained.

Sgd: A. P. KILIMI
JUDGE
31/3/2023