

IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MOROGORO DISTRICT REGISTRY

MOROGORO

CIVIL APPEAL NO. 45/ 2022

(Arising from Probate Appeal no. 3/ 2022 of Kilombero District Court at Ifakara)

SAKINA MUSSA KIYONJO APPELLANT

VERSUS

YUSUPH KIYONJO..... RESPONDENT

JUDGEMENT

Date of last order: 02/03/2023

Date of judgement: 21/04/2023

MALATA, J

This judgement is in respect to an appeal by the appellant herein emanates from Civil case no. 03 of 2022 of Kilombero District Court and Mirathi no. 7 of 2021 (herein to be referred to as Probate Cause no. 7 of 2021) whereby the appellant became aggrieved by the decision thereof.

The factual background is that, on 2014 in Ifakara Urban Primary Court

the respondent was appointed administrator of the estate of late Fadhili Mussa Kiyonjo in Mirathi no. 25 of 2014 (herein to be referred as Probate Cause no. 25 of 2014), later the appellant was appointed to be the administrator of estate of late Mussa Mfaume Kiyonjo in Probate Cause No. 07 of 2021.

It is alleged by the respondent that, the appellant included the property of the late Fadhili Mussa Kiyonjo in the administration of Mussa Mfaume Kiyonjo, thence, the dispute.

The respondent objected distribution of the estate of Mussa Mfaume Kiyonjo at the Primary Court pending determination of the Land disputes at the District Land and Housing Tribunal, the Primary Court ruled in favour of appellant that the distribution in Probate Cause no. 7 of 2021 should continue without waiting for the outcome of Land Application at the DLHT.

Aggrieved thereof, the respondent filed appeal to the District Court (Probate Appeal no. 3 of 2022), challenging the decision of Ifakara Primary Court in Probate Cause no. 7 of 2021 pending the outcome of the Land disputes at the DLHT.

The appellant herein being aggrieved by the decision of the Probate appeal no. 3 of 2022 of Kilombero District Court appealed to this court based on the following grounds;

- 1. That, the Resident Magistrate erred in law and facts in quashing the order of the Ifakara Urban Primary Court in Mirathi no 7/ 2021 and setting it aside pending whichever decision of the land tribunal by proving an inclination in Mirathi no. 7/2021 on administration of the properties of the late Mfaume Mussa Kiyonjo of which the administration of estate of probate properties is not among the roles of the land tribunal as per the requirement of the law.*
- 2. That, the Kilombero District Court erred in law in finding merit the appeal considering the appellant in finding the respondent to have no locus standi while she was appointed and approved by the Ifakara Urban Primary Court on 21st of December 2021. It should be noted that the respondent was advised to file the same Mirathi no 7/ 2021 regarding seeking administration of the Estate of her father and the Magistrate stood on the point the Respondent having fall locus standi and aside with the respondent to deal with the matter and found merit.*

3. *That, the Magistrate erred in law and upon fact in concluding that, the Primary Court decide a land matter while the matter was of probate estate properties the land were part of the probate properties and that the dispute was not of a land ownership but who is the right administrator/ administratrix of the Mirathi the matter to be re subjudice as no court had a decision on the same estate considering the respondent in mirathi was not of his brother but was of the family father one Mussa Kiyonjo. Further the members at the alleged meeting to attend the family were imaginative as the appellant did not participate that no matter was instituted between the same parties. As the first case no 25/2014 one Fadhil Mussa Kiyonjo.*
4. *That, the District Court erred in law in being satisfied that, the probate properties changes from the deceased to the administrator while the court is aware that, the probate properties are to be divided to the heirs and heiress not to use as it to the respondent who has decided to own the properties even if was an administrator a situation is not entertainable before the eyes of the law.*

The appellant prayed to this court to strip the respondent the administration of the Estate probate properties of the late Mussa Kiyonjo

and order for recovery of that has been producing from probate properties from 2014 to date and ordered the estate probate properties to divide to the dependants and order the respondent to further use and sale the probate properties and thus uphold the decision of the Ifakara Urban Primary Court and quash and set aside the civil appeal (probate) no 3 of 2022. And the respondent to bear the costs of this appeal.

The appeal was heard by way of written submission and both parties had filed their respective submission within time.

The appellant in her written submission in the support of the appeal submitted that, the subject matter was the probate properties of Mussa Mfaume Kiyonjo and not otherwise.

She further submitted on the second ground of appeal that, she was legally appointed as the administratrix of the estate of late Mussa Mfaume Kiyonjo by Ifakara Urban Primary Court thus she had full mandate of administering the estate, the respondent want to confiscate the probate properties, hence this appeal, the appellant prayed for this court to interfere and order the return of the properties so that the appellant can divide.

Submitting on the 3rd and 4th ground of appeal the appellant state that the administrator/ administratrix is the spokesperson on behalf of the

estate and not the beneficiary, the respondent has commiserated the properties of Mussa Mfaume Kiyonjo claiming to be the administrator, even though the respondent is neither the administrator nor heir to the estate, and thus have no mandate to use the probate properties for his personal use.

Replying in the opposition of the appeal, the respondent replied as follows;

On the first ground the respondent stated that, the first appellate court was right to quash and set aside the decision of the Ifakara Primary Court in Mirathi no 7 of 2021 and the judgement entered in favour of the respondent in civil appeal no 3 of 2022, because the nature of dispute is ownership of land which Ifakara Primary Court has no jurisdiction to prosecute the matter.

Replying on the second ground of appeal, the respondent stated that, the said properties belonged to his late father and he is administering them via Probate Cause no 25 of 2014, the probate which the appellant was aware of but opt not to raise any objection, for that reason the respondent stated that the decision of Ifakara Primary Court in Probate Cause no. 25 of 2014 is still live and binding, the respondent added that the properties mentioned by the appellant in Probate no. 7 of 2021 has been mentioned

in the will of deceased describing the way his estate should be administered.

He further stated that, this court has no power to intervene the matter which is pending in another court with competent jurisdiction.

In reply to the third and fourth grounds of appeal the respondent stated that, the appellant as the administrator has no power to collect the property dispute by using force instead the primary function of the administrator is to defend the said estate in question before the court of law by bringing and defending proceedings on behalf of the deceased person.

Upon rejoinder the appellant stated that, the trial court in the exercise of its jurisdiction has acted illegally or with material irregularity to make such order.

It is undisputed facts to this appeal that, first, the appellant is administrator of the estate of late Mussa Mfaume Kiyonjo, second, the respondent is the administrator of the estate of late Fadhili Mussa Kiyonjo.

Three, that there was no dispute between the parties until when the appellant filed probate no. 7 of 2021 and included the properties subject of Probate Cause no. 25 of 2014.

To arrive at the conclusion if this appeal has merit or otherwise determinant factor will be whether the District Court erred in quashing and set aside the order of Ifakara Urban Primary Court in Probate Cause no 7 of 2021. The grievance by the appellant is based on his observation that the primary court is the proper forum as the matter at hand is the probate matter and not a land dispute.

The position of the law is clear, that is, the power to hear and decide disputes against estate property is vested to the court seized with the matter. This was well articulated in the case of **Mgeni Seifu v. Mohamed Yahaya Khalfani**, Civil Application No. 1 of 2009, the Court of Appeal of Tanzania, at Dar es Salaam (unreported), where it was held that:

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

Because this matter arose from Primary Court it is useful to understand the jurisdiction of Primary Court in relation to Probate matters. The jurisdiction of Primary Courts to entertain Probate matters can be derived from provision of Rule 1(1) of the fifth schedule to the Magistrate Court Act, Cap 11 R.E 2002 which denotes that:

"The jurisdiction of a Primary Court in the administration of the deceased estates, where the law applicable to the administration or distribution or the succession to the estate is customary law or Islamic law, may be exercised in case where the deceased at the time of his death, had a fixed place of abode within the local limit of the court's Jurisdiction"

Further, it is important to recall that Rule 8(d) of the Primary Court (Administration of estates) Rules G.N 49 of 1971, states:

"That the primary court can hear and decide any question as to the property, assets or liability of the deceased".

From the above authorities, the Primary Court has jurisdiction to hear and decide any question as to the property, assets or liability of the deceased.

There is no dispute that the appellant and the respondent, are all administrators of estates of their respective deceased. What is in dispute is the plot of Land which form part of estates in Probate no 25 of 2014 to be included in Probate no 7 of 2021. The appellant claimed that the property being subject of the Probate had to be dealt with in a probate Court. On the other and the respondent is of the view that the appellant being an administrator has the right to defend the estate.

Item six (6) of the sixth schedule to the Magistrates Court Act, [Cap 11 R.E. 2019] reads

"An administrator may bring and defend proceedings on behalf of the estate."

Depending on the nature of the proceedings the appellant as the administratrix has a right to sue and be sued on behalf of the estate of the deceased, the same applies to the respondent. It can correctly be said that the administrator or administratrix step into the shoes of the deceased. Thus, the administrator has the same power and discharges the same duties as deceased had when he was alive.

It is the legal position developed and cherished by courts that when the land in question is related to the deceased estate the only the Probate Court is vested with jurisdiction to entertain such matter. In the case of **Kigozi Amani Kigozi vs Ibrahimu Selemani and 5 others**, Land Appeal no 2 of 2019 (HC) where the court held that;

"It is the probate court which is vested with powers to determine whether a disputed property belongs to the deceased person or not through probate cause by way of petition for letters of administration and objection thereof, if any."

In the case at hand the appellant, is the administrator of the estate of his late father, one Mussa Mfaume Kiyonjo and the respondent is the administrator of late Fadhili Mussa Kiyonjo who is Mussa Kiyonjo's son. It is on record that the appellant was present during the clan meeting where the respondent was appointed by the family to be the administrator and when the matter reached the court for appointment the appellant did not raise any objection with regards to the said property. Further the respondent alleged that there is a will of the late Fadhili Mussa Kiyonjo on how his properties should be administered and the land in dispute is inclusive in that will.

The late Mussa Mfaume Kiyonjo passed away on 1993, while the late Fadhili Mussa Kiyonjo passed away on 2013, different of ten years. The respondent immediately after the demise of his father took action to administer his estate, however the probate hasn't been closed to date, while the appellant waited for twenty years to process the administration of estate of his late father. That being the case the appellant had the knowledge of the properties of his late father be part of Probate no. 25 of 2014.

In part of her submission the appellant stated that the respondent has been confiscating part of Mussa Mfaume Kiyonjo estate while he is not the administrator or beneficiary.

This raises the issue of ownership between the parties, as to who is/ was the real owner of the disputed land between Mussa Mfaume Kiyonjo and Fadhili Mussa Kiyonjo.

To answer the above question, Kahyoza, J, In the case of Isack **Stephen Mganga vs. Joyce Derefa Machumu**, PC Civil Appeal no. 48 of 2022, put some test for determination on whether the probate court has jurisdiction to decide the issue of land ownership, he had this to say;

*Thus, in order to answer the issue whether the trial probate court had jurisdiction to decide the issue of land ownership we have to ask ourselves two questions; one, **had the deceased been alive would he have instituted the current suit?** If the answer is in affirmative, the second question would be, where would the deceased have instituted the suit? An affirmative answer to the first question implies that the cause of action is between the deceased or a person who has stepped into the deceased shoes and another. Then that case is not a probate and administrative cause. it is a land case or a civil suit*

depending on the nature of the claim. And if the answer was negative, it would have implied that the dispute was a struggle among heirs to inherit the deceased estate, which has to be determined by probate court.

In the present case, it is gathered that, **one**, two families of the late Musa Mfaume Kiyonjo and Yusuph Musa Kiyonjo are in dispute as each party through administrator claims that the land belong to the deceased he/she represent herein, **two**, as to who is the rightful owner of the land in dispute has not been determined, **three**, the administrators are not in agreement as to where the dispute on land can be resolved, is it by the Probate court or Land courts and **four**, this court is asked to determine as one of the key issue in controverse.

Having noted the test on how to deal with probate matters, I am now assuming if the deceased persons were alive where could they have resolved the dispute on land?. The answer to the posed question will assist the administrators herein who have stepped into the deceased persons' shoes to go through the same root. Upon establishing as to who is the rightful owner of the land in question, that land will form part of the estate of the declared rightful owner of the land in question.

In my view, the first fundamental question here is, who is the rightful owner of the land in dispute between the late Musa Mfaume Kiyonjo or the late Yusuph Musa Kiyonjo and second, through which avenue can this kind of dispute be resolved? It is until the question of ownership of land is determined that is when the said land will become part of either of deceased's estate emerged a victory. Additionally, the land in question will only fall within the probate courts (Primary Court inclusive) after ascertainment of ownership and not otherwise.

Therefore, it is until the land ownership is determined by land courts disputes authorities vested with such prerogative mandate, the land in dispute will then be placed and made part of the emerged victory of either the late Musa Mfaume Kiyonjo or Yusuph Musa Kiyonjo.

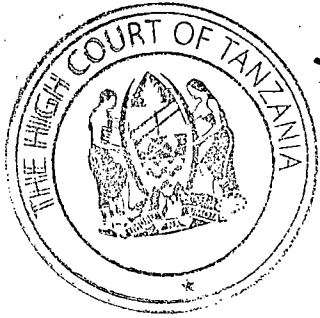
In that regard, I therefore hold that, the land in dispute will become one's estate and be subjected to probate administration after determination of ownership. As the dispute it is not yet resolved at DLHT parties have to conclude it first and the emerging victory will have a cake be placed as part of his estate before the probate court in the respective probate case.

However, the probate court may proceed to deal with other properties not in dispute instead of waiting determination of land dispute by the DLHT.

In upshot, I find the appeal is devoid of merits, as such, I hereby dismiss the appeal with no orders as to cost.

IT IS SO ORDERED

DATED at **MOROGORO** this 21st April, 2023



A handwritten signature in black ink, appearing to read "G. P. MALATA", is written over a horizontal line. The signature is somewhat stylized and overlaps the printed name below it.

G. P. MALATA

JUDGE

21/04/2023