

IN THE HIGH COURT OF TANZANIA

TABORA SUB REGISTRY

AT TABORA

LAND CASE APPEAL NO.22 OF 2021

*(Arising from Land Application No. 46/2019 of the District Land and
Housing Tribunal for Nzega)*

HAMISA SAID MGAYA.....APPELLANT

VERSUS

**SAID MUSTAPHA KAPALAPYA (Administrator of Estate of the
Late MUSTAPHA SHABANI**

KAPALAPYA).....1ST RESPONDENT

VIETTEL TANZANIA LTD.....2ND RESPONDENT

JUDGEMENT

Date of Last Order: 12/05/2023

Date of Delivery: 16/05/2023

AMOUR S. KHAMIS, J.

This is the first appeal from Land Application No. 46/2019 of the District Land and Housing Tribunal for Tabora. Hamisa Said Mgaya, the appellant herein, is dissatisfied with Judgment and Decree of the trial tribunal, which declared her as a trespasser.

In the impugned judgement, the District Land and Housing Tribunal for Tabora held that Said Mustapha Kapalapya is a legal administrator of the estate of the late Mustapha Shabani Kapalapya, Viettel Tanzania Ltd to pay sum of TZS. 72,000,000/= (seventy-two million) as rental arrears from the year 2016 to 2019, Hamisa Said Mgaya and Viettel Tanzania Ltd were declared as trespasser and were ordered to vacate the suit premises.

Dissatisfied with the findings of the trial tribunal, the appellant herein lodged a Memorandum of Appeal to this Court challenging the decision of the trial tribunal on the grounds that:

- i) The trial chairman misdirected himself in law and fact to rule out that the 2nd respondent pay to the 1st respondent a total of TZS. 72,000,000/= being a debt for rent since 2016 up to 2019 while the rent which was paid to the appellant is 80,000/= per month.
- ii) The trial chairman erred in law and fact to rule out without considering that by the time the appellant and the 2nd respondent entered into rent agreement, the 1st respondent was not an administrator of the estate.
- iii) The trial chairman erred in law and fact to rule out that the appellant had to vacate from land in dispute without considering that she was a wife to the deceased and was living there since then but also, she is among the beneficiaries.

Before me, the applicant and the 1st respondent appeared in person whereas the 2nd respondent enjoyed the service of Ms. Flavia Francis, learned advocate. With the approval of the Court the parties proceeded by way of written submissions.

Submitting on the first ground of appeal, Hamisa Said Mgaya asserted that the rental fee paid to her by Viettel Tanzania Ltd was 120,000/= as shown on page 33 of the typed proceedings of the trial tribunal, therefore the claim of 72,000,000/= by the 1st respondent is unjustifiable.

He also contended that, Viettel Tanzania Ltd stopped to pay rent since the year 2017 when Said Mustapha Kapalapya started disputes over the suit land.

On the second ground of appeal the appellant submitted that Said Mustapha cannot claim payment of rent by the 2nd respondent from the year 2016 to 2019, since he was not an administrator of the estate of the late Mustapha Shabani Kapalapya during conclusion of the contract between Hamisa Said Mgaya and Vietell Tanzania Ltd.

On the third ground of appeal, the appellant contended that she was not divorced by her late husband Mustapha Shabani Kapalapya, hence she stands as the lawful heir to her late husband's estate. Therefore, she prayed this appeal be allowed.

In reply to the first ground of appeal, the 1st respondent contended that the trial tribunal ordered the 2nd respondent herein to pay sum of 72,000,000/=: Therefore, since the 2nd respondent did not take any

legal action against the order it impliedly conceded, the applicant cannot challenge the order not issued to her. He further contended that the 1st respondent had never received proceeds of the rent paid by the 2nd respondent to the appellant.

On the second ground of appeal the 1st respondent demonstrated that despite the fact that the appellant entered into contract with the 2nd respondent before the 1st respondent was appointed as an administrator of the estate of the late Mustapha Shabani Kapalapy, still she had no capacity to conclude contracts on the deceased's estates.

On the third ground of appeal the 1st respondent submitted that the appellant is not among the heirs of the late Mustapha Shabani Kapalapy because she deserted him for a number of years and went on to contract marriages with other men and came back after his demise, thus Hamisa Said Mgaya had no automatic right to dispose off the deceased's estate prior to division of the same.

Ms. Flavia Francis on her reply to the grounds of appeal she generally argued that the monthly payment was TZS 120,000/= therefore, from the year 2016 to 2019 it makes the sum of TZS. 5,760,000 and not 72,000,000/=. She concluded that, the 2nd respondent is included in this case as a tenant, and by the time they concluded the contract there was no legally appointed administrator so they believed the appellant herein was the competent party to the contract.

In rejoinder, the appellant reiterated what she submitted in chief, at this point I see no need to reproduce the same.

I have considered the rival submissions from both parties and read the documents filed by the opposing parties in this appeal. Therefore, I will determine the grounds as raised.

On the first ground of appeal relating to the amount of monthly rent payable to the appellant by the 2nd respondent, the appellant stated the amount as 120,000/= (one hundred and twenty thousand), on the same argument the 2nd respondent claimed that the monthly rent agreed was 120,000/= (one hundred and twenty thousand). On his part, the 1st respondent is claiming 72,000,000/= (seventy-two million) as rental arrears incurred by the 2nd respondent from the year 2016 to 2019.

After going through records in order to ascertain monthly rent payable by the 2nd respondent, at pp 33 and 36 of typed proceedings of the trial tribunal, Hamisa Saidi Mgya testified that the monthly rent payable by Viettel Tanzania Ltd, the 2nd respondent herein, is 120,000/= (one hundred and twenty thousand).

Also, the original copy of the contract entered between the appellant and the 2nd respondent on its last page titled "Particular Conditions" under item no. 3 named "rentals and payment", despite the fact that it is rubbed/tempered to be rectified, shows the rental fee as 120,000/= (one hundred and twenty thousand). Further, the 1st respondent is claiming a sum of 72,000,000/= as specific damage,

although the records do not reveal justification of the same on how the accrued to make such summation.

Therefore, since this matter arises from family members who are blood related, to wit; mother and son, and since the appellant testified before the tribunal that the 2nd respondent herein stopped to pay rent since 2017 the fact which was not opposed by the 1st respondent herein, it is my considered view that the 2nd respondent pays a sum of TZS 2,880,000/= (two million and eighty-eight hundred thousand) being rental arrear from 29/04/2015 to 29/04/2017.

On the second ground of appeal, after examining the parties' arguments on capacity of the appellant to conclude contracts affecting the deceased's estate without being appointed as an administratrix. I think the law is clear on requisite procedures prior to disposition of deceased's estate, that is application for letters of administration or probate. Since the appellant was not an administratrix at the time of concluding contract with Viettel Tanzania Ltd, she lacked capacity and therefore, the contract was void *ab initio*.

On the third ground of appeal the appellant stated that she cannot vacate the suit premises because she is also the beneficiary from his late husband's estate, on his part the 1st respondent who is the son of the appellant faulted that, the appellant deserted the deceased and married to other men therefore, she cannot enjoy the deceased's estate prior to division among heirs.

Records show that, this Court declared the appellant as the lawful heir of the late Mustapha Shabani Kapalapyia, in **HAMISA SAID MGAYA AND ANOTHER V. SAID MUSTAFA KAPALAPYA, PC PROBATE APPEAL NO. 5 OF 2019** (unreported), at page 7 of the Judgement, this Court held that:

“Since there is no proof of the existence of divorce there is no way the first appellant can be excluded from benefiting the estate of her late husband Mustapha Kapalapyia”

Also, in her testimony before the trial tribunal as shown at page 34 of the typed proceedings, the appellant stated that the High Court declared

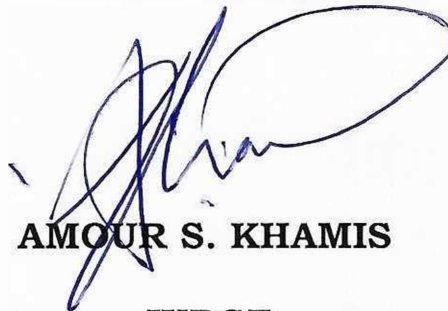
Being one of the beneficiaries of the estate of the late Mustapha Shabani Kaplapyia, the appellant Hamisa Said Mgaya, is equally entitled to enjoy the deceased’s property, namely the house in dispute so long as she does not obstruct the administrator in performing his legal duties of administering the estate and distributing properties to the heirs.

It should also be clear that as administrator of the estate of the late Mustapha Shabani Kapalapyia, said Mustapha Kapalapyia, is solely responsible to administer all properties of the deceased including entering into contracts with third parties for the benefits of all heirs of the estate, leasing out the property and collecting rent therefrom.

Viettel Tanzania Ltd are hereby ordered to recognize administrator of the estate and give him all entitlements of the lease between them and the appellant herein.

For the aforestated reasons, I find merits in this appeal to the extent enumerated herein above. Each party to bear own costs.

It is so ordered.



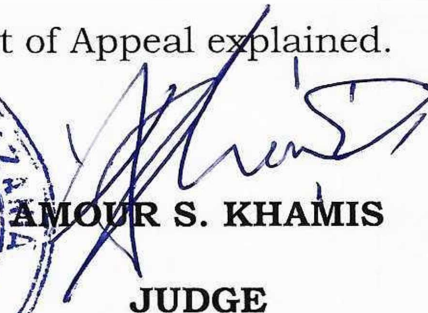
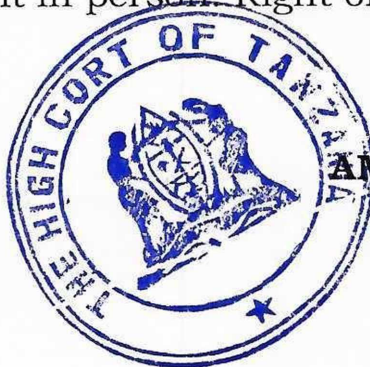
AMOUR S. KHAMIS

JUDGE

16/05/2023

ORDER:

Judgment delivered in open Court in presence of Mr. Saikon Justine, learned advocate, holding brief of Ms. Flavia Francis for 2nd respondent. The appellant and the first respondent are present are present in person. Right of Appeal explained.



AMOUR S. KHAMIS

JUDGE

16/05/2023