

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY OF MOSHI

AT MOSHI

CONSOLIDATED CIVIL APPEAL NO. 52 & 56 OF 2022

(Appeal from the decision of the Moshi District Land and Housing Tribunal at Moshi dated 30/08/2022, in Land Application No. 146 of 2019)

ESTER RODRICK KYARA..... APPELLANT

VERSUS

NDARAI SELEMANI MSANGI1ST RESPONDENT

NDARAI SELEMANI MSANGI
(As administrator of the late Selemani Msangi) 2NDRESPONDENT

AMIRI SELEMANI MSANGI3RD RESPONDENT

JUDGMENT

27th March. & 30th May 2023

A.P.KILIMI, J.:

Initially in this court, Civil Appeal No. 52 of 2022 was filed and later Civil Appeal No. 566 of 2022 both emanating from Moshi District Land and Housing Tribunal of Moshi at Moshi in Land Application No. 146 of 2019.

Upon this court noted above, the two appeals were consolidated.

The facts gleaned from the trial tribunal records were to the effect that; Ester Rodrick Kyara (Appellant hereinabove) and respondents (mentioned hereinabove) are close related, as respondents are sibling to appellant's deceased husband. Appellant made an application before District and Land and Housing tribunal claiming the ownership of the following properties; one Plot No.12 'A' situated at Himo township, two; suit land situated at Makuyuni, Himo township Moshi District and third; suit land situated at Rotima, Himo township Moshi District . She then prayed therein, one; the tribunal to declare that is the owner of the suit lands mentioned above, two; be paid general damage and three; second respondents mentioned above be removed on suit land.

At the tribunal, the point of contest was whether appellant above is the owner of Plot No. 12 "A" at Himo area, and other suit lands stated above. In proving the same, the appellant stated at trial tribunal that, she acquired the land with her husband since 1994, and later she and husband were given another land at Makuyuni area by her father-in-law one Selemani Msangi (deceased). To prove the same, she paraded five witnesses while the respondents as mentioned above, also procured five witnesses. Upon hearing all parties, the trial tribunal decided that the land

measured one acre wherein three houses were built belong to the appellant, also the Plot No. 12 "A" at Himo area and the farm remaining after removing 20 acres be distributed to the heirs of the late Selemani Omari.

Both parties being aggrieved decided to challenge the decision of the trial tribunal. In moving this Court to allow this appeal, ESTER RODRICK KYARA relied on the following grounds of appeal:

1. That, the learned trial chairperson erred in law and fact by failing to properly evaluate the evidence hence reaching a wrong conclusion as he should have found that the Appellant had good title by prescription over Plot No. 12 "A" Himo Township.
2. That, the learned trial chairperson erred in law and fact by giving a decision in favor of the Respondent while the claim by the Respondent if any was time barred.
3. That, the learned trial chairperson erred in law and fact by failing to expressly describing the suit land in his decision.
4. In alternative to the above grounds, that, the learned trial chairperson erred in law by recording proceedings and judgment in Kiswahili contrary to the law.

In view of the above, the Appellant prayed this court to allow this appeal and find That, the suit lands are lawfully owned by her as prayed in trial tribunal.

While in part of respondents also dissatisfied with the decision of the trial tribunal have appealed in this court basing on the following grounds:-

1. That, the trial tribunal erred in law and fact for not finding that the applicant who filed land Applicant No. 146/2019 had no *locus standi*.
2. That, the trial tribunal erred in law and facts for adjudicating upon a case which was filed against a wrong party.
3. That, the trial chairman erred in law for dictating how the deceased's properties should be administered and distributed while the matter he was presiding over was not a probate cause.
4. The trial tribunal erred for leaving the most important issue un determined.
5. That, the trial chairman erred in law and facts for failure to properly evaluate and analyze evidence given by the parties thus reaching at a wrong and unjust decision.

In the course of hearing this appeal, the learned counsel Mr. Elikunda Kipoko appeared for the appellant, while Learned counsel Mr. Erasto Kamani appeared for all respondents.

Mr. Kipoko prayed to abandon grounds number four. On the remaining grounds, he also prayed to argue first and second grounds together as one cluster and the remaining grounds number three to be argued separately.

Submitting in respect to first and second grounds, He submitted that at the tribunal the dispute was land, the Plot No. 12 at Himo Township, it

was not disputed that Ester Rodrick Kyara lived there as residential place since 1994, she was forced to file the case against Nderai Selemani Msangi being admistrator of estate of Selemani Msangi and Amiri Selemani Msangi an invitee. Therefore, the appellant asked the tribunal for determination whether the House and the plot itself belong to appellant or Deceased Selemani Msangi.

Mr. Kipoko argued further that, mentioned deceased passed away 2000, then in 2019 which is more than 12 years, Ndarai Selemani Msangi as administrator started to claim the land alleging belong to deceased. The tribunal saw this is long occupation by Ester Rodrick Kyara, then tribunal correctly observed Ester Rodrick Kyara did not bring the building receipt which shows costs to that effect, also hold correct that there were no written Evidence that the deceased Selemani Msangi gave Ester Rodrick Kyara with her husband who was the son of the deceased.

In his proceeding to support the appeal, Mr.Kipoko also argued that, he object the tribunal holding that the house belong to deceased Selemani Msangi, because Ndarai Selemani Msangi as administrator went to tribunal in 2019 to claim it. Therefore, this is contrary to the Law of Limitation Act item 22 of schedule, which says that the administrator must claim the

deceased land before 12 years, also read together with section 9 of Limitation Act. Thus, prays this court to see the tribunal misdirect to the application of this law, it was required to accord the law and order the property to remain in the hands of Ester Rodrick Kyara. He also contended in respect to receipts showing costs of building, and prayed this court to consider the evidence of witnesses who testified that they witnessed Ester Rodrick Kyara building the House.

Arguing in regard to ground number three, Mr. Kipoko submitted that, the tribunal declared and gave Ester Rodrick Kyara land, but misdirected not to describe the boundaries of the said land, taking regard in her application she described it, therefore the tribunal was required also to do so.

On the part of respondents, Mr. Kamani replied that Amiri Seleman Msangi (the 3rd Respondent hereinabove) did not file written statement of defence, according to the record the written statement of defence filed 28/8/2019 is for Ndarai Selemani Msangi alone, therefore there was no joint written statement of defence, therefore the tribunal misdirected to hear Amiri Selemani Msangi while he did not file written statement of defence.

He further said according to issues raised, did not mean whether parties need to know, if the land belong to deceased or Ester Rodrick Kyara, but prudently parties wanted to know who is the owner between the parties before the court and not deceased Selemani Msangi. He added that, if at all the need was directed to the deceased the tribunal misdirected to prepare issues of the dispute.

In respect to receipts, Mr. Kamani responded that, the tribunal did not base on the building of the House plot No. 12 at Himo Moshi, according to page 6 of typed Judgment, the tribunal Chairperson said that the transfer was not effectively passed from deceased to Ester Rodrick Kyara, and this was transfer of surveyed land, which can't be done without transfer deed, and that was reasons for decision. He also responds that, it is not true that it was 2019 Ndarai Selemani Msangi and Amiri Selemani Msangi started to claim the land, according to exhibit D4 as per page 5, it shows that the House situated at Plot 12A Himo Moshi was already distributed as estate in 2017 and the file of Administration of estate was already closed, on 12/6/2017. Therefore in the circumstance, it could have not be correct and possible for Nderai Seleman Msangi and Amiri Selemani

Msangi to claim the said land belong to them, while they were already distributed to heirs of their late father.

In respect to the boundaries, Mr. Kamani argued that, it is true and he agree with Mr. Kipoko that, the tribunal did not state the boundaries of the land belong to Ester Rodrick Kyara, but also brought a new issue which was not therein, when stated a farm of one acre with three Houses are properties of Ester Rodrick Kyara, which she did not claim in her application, so the tribunal chairman decided on the matter not before the tribunal.

In respect to limitation of time, Mr. Kamani responded that, the counsel for appellant has misdirected in law, section 9(2) of the said Act, and section 35 of the said Act, talks when the time accrue to file the case for claim of deceased land, in the schedule it gives limit to all land matters to be filed. But no provision says after a certain period deceased ceased to be owner, the properties continue to be the properties of the deceased until they are available administrator to distribute to heirs, therefore, time runs against the person claiming to recover to land and not the person whom the suit is filed for. Therefore, he prays this court to see the case be returned at trial since there are irregularities on procedure.

Submitting in chief on his grounds of appeal, Mr.Kamani argued in respect to first ground that, Ester Rodrick Kyara was having no locus stand, despite of her Plaint paragraph 6(a) says the three farm belong to her, which Plot 12(a) Himo, Makuyuni (No. size) and Farm at Lotima Himo (No size), but the witnesses at the tribunal proves that is not the owner of all three plots stated. According to page 2 of typed proceeding, PW1 said that the farm of Mbugani was bought by husband of Ester Kyara before their marriage, also PW2 on the same page, said that the House of Himo (Plot 12A) was built by Kipande Selemani (Late Husband of Ester Kyara), and also PW2 continued to say at page 3 of Judgment that the land at Makuyuni belong to Kipande Selemani ,PW2 said the farm of Lotima belong to Kipande. PW3 also being witness of Ester Kyara said that the father (Selemani Msangi) distributed the area to Kipande Selemani and also said the area at Makuyuni belong to Kipande Selemani, PW5 also said the farm at Kifula is owned by Kipande Selemani. Therefore, according to these witnesses brought by Ester Rodrick Kyara herself, shows all farms belong to Kipande Selemani and not Ester Rodrick Kyara.

The counsel further argued that, he knows that Ester Rodrick Kyara is the wife of the late Kipande Selemani, but being a wife, the right does not

acrued to all estate of the deceased. Therefore, since the properties were not belonged to her, she has no authority to file the case to claim the ownership that could be possible if she could have been appointed as the Administrator of the deceased estate. The issue of filing a case without authority is misdirection in law, therefore prays the proceeding and Judgment be dismissed in its entirety.

In respect to 2nd ground of appeal, Mr. Kamani submitted that, the case was filed in 2019 including Ndarai Selemani Msangi as Administrator of the estate, according to exhibit D4 at Tribunal, Ndarai Selemani Msangi was already discharged as being administrator of deceased estate, therefore to sue him as administrator of estate it was not proper, instead he was required to be sued as beneficiaries if at all he got something instead as Administrator of the estate. But, further more in application at the tribunal he was sued twice being personal and as administrator, but the plaint does not show Ndarai Selemani Msangi on how he was sued in personal capacity, since no any evidence tendered to show Ndarai Selemani Msangi what has done in respect to the properties, therefore this renders the proceeding to be void.

Arguing, in respect to ground number 3, Mr. Kamani submitted that, the tribunal error in law to dictate on how the deceased properties should be distributed, according to the Judgment typed at page 7, the chairman encroached issues of administration of estate, by directing how the farm of the deceased should be distributed and who should be given, instead of declaring who is the owner. He quoted page 7 of the typed proceeding which stated as hereunder;

"Hivyo kiwanja namba 12Akitagawanywa kwa warithi wa mirathi ya Selemani Omari ambapo pia mume wa Mdai anastahili kurithi".

Then, Mr. Kamani argued that, by uttering above, the tribunal acted ultra-vires, therefore erred in law.

Further, submitting on fourth ground, Mr. Kamani argued that, the tribunal misdirect in law by leaving one important issue undecided, the first issue was, who is the owner of disputed land, nowhere it was decided in the Judgment of the tribunal, in that typed Judgment the chairman decided on one acre of land having three house, which is situated at Makuyuni, there is no dispute brought to that tribunal in respect to one acre with three house situated at Makuyuni, therefore the Chairman did decide

something which was not brought in court which means its execution cannot take off.

Also, Mr Kimani argued that the ownership in respect of Plot No. 12A Himo Township also was not decided, the tribunal did not say who is the owner of Plot No 12, even the farm at Mbugani did not state whether belong to deceased or to heirs, therefore the trial tribunal did not finish the dispute between the parties, therefore, he is praying this court to order retrial of the case, so as the owner be known specifically.

On the fifth ground, Mr. Kamani contended that the chairman failed to evaluate the evidence of all parties, because, if the chairman could have evaluated the evidence, first could have known that Ester Rodrick Kyara had no locus stand also could have discovered that Ester Rodrick Kyara had no cause of action, because when you pass through plaintiff evidence nowhere it is stated which wrong have been committed, so the chairman was required to dismiss the application for lack of cause of action.

Mr. Kamani further argued, if trial tribunal could have evaluated the evidence properly, could have discovered that Ester Rodrick Kyara is barred by the doctrine of Estoppel, according to form No. VI which was admitted

as D4 at the tribunal, Ester Rodrick signed form VI, which means she acknowledged that the land divided belonged to deceased Selemani Omari Msangi and received her shares. Also, she signed the memorandam dated 8/6/2019 where she was among the person who attended the distribution process. Therefore, under the said doctrine, she is estopped to reject what she agreed. According to all irregularities, it is clear that the procedure and its decision of the tribunal are null and void, therefore be quashed and order of retrial be issued.

On part of Mr. Kipoko, in his rejoinder contended that, appellant has locus stand because the land belongs to her, also it was a matrimonial property, therefore after her husband passed away passed to her by doctrine of survivorship and she used them in her capacity. While in respect to ground number two, there was allegation that the Ndarai Selemani Msangi in his personal capacity and also being Administrator claimed that the disputed land does not belong to Ester Rodrick Kyara.

Further in respect to ground number three, Mr. Kipoko contended that the tribunal directed properly to issues, what is seen at page no. 2 is a typing error which is not fatal to order trial denovo. And he decided effectively. He further averred the Chairman erred, if could have considered

the law and evidence, he could have decided the owner is Ester Rodrick Kyara.

In answering ground number four. Mr. Kipoko contended that form No. VI does not affect title while existed a letter of offer. So, the tribunal erred to misdirect on evidence and law for failure to declare that the land belongs to Ester Rodrick Kyara. However, he added that, since at the tribunal the issue of estoppel was not raised and no transfer was affected to date, it means Administrator has not finished his work as Administrator.

Mr. Kipoko contended further that, the said Plot No. 12A Himo was not yet distributed, because at the tribunal exhibit shows is in the name of the deceased, and that evidence as gist, shows that the land belongs to the deceased. In respect to boundaries, the tribunal said that Ester Rodrick Kyara should take 20 acres but the tribunal did not mention or describe the boundaries on said acres. In respect to prayer for retrial, Mr. Kipoko contended that this being the first appellate court, can evaluate the evidence and decide on merit and thereafter allow this appeal.

Lastly, in his rejoinder after above submissions by his opponent, Mr. Kamani contended that nowhere the tribunal said who own Land Plot A

Himo Town. Also, in respect to the issue of Estoppel is the point of law which can be raised at any time in the course of proceeding. And finally, in respect to the doctrine of survivorship, he argued the counsel misdirected, the same can be applied if there is co-ownership, in this case no evidence that said properties were co-owned by the two. He further contended that being a wife does not give automatic ownership, therefore Ester Rodrick Kyara was having no locus stand and prayed for retrial order.

I have paid into consideration the above intensive submissions by learned counsels and the evidence on trial court record, this being a cross appeal. I thus conveniently find Ester Rodrick Kyara memorandum of appeal raises two areas of concern. The first, whether the claim of the respondents was illegal because it was time barred, and second, whether the trial tribunal failed to consider issues raised hence reaching at wrong and unjust decision.

On the part of the respondents' memorandum of appeal, also I find raises two areas of concern, which are; first, whether Ester Rodrick Kyara (appellant) and Amiri Selemani Msangi (3rd Respondent) had legal capacity to appear before the tribunal over the disputed land, for suing and

defending respectively, and second, whether the tribunal was right to order that some properties belong to deceased and be distributed to heirs.

Before I proceed with these concerns, I am mindful this being the first appellate court, it has a duty to re-evaluate the entire evidence adduced at the trial in an objective manner and arrive at its own finding of fact if necessary. (See the case of **Future Century LTD v. Tanesco**, Civil Appeal No.5 of 2009 and **Makubi Dogani v. Ngodongo Maganga**, Civil Appeal No. 78 of 2019 (all unreported). The Court of Appeal held in **Future Century Ltd v. TANESCO**, (supra) that-

"It is part of our jurisprudence that a first appellate court is entitled to re-evaluate the entire evidence adduced at the trial and subject it to critical scrutiny and arrive at its independent decision."

In the appellant first concern, Mr. kipoko invited me to hold that Ndarai Selemani Msangi as administrator was time barred to claim deceased properties, because went to tribunal in 2019 which is more than 12 years contrary to law of limitation. In my view, I agree with Mr. Kamani when objected the above contention and referred section 9 (2) and 35 of the

same law, in that regard, I found appropriate to reproduce the provision of section 35 of Cap. 89 R.E. 2019;

"For the purposes of the provisions of this Act relating to suits for the recovery of land, an administrator of the estate of a deceased person shall be taken to claim as if there had been no interval of time between the death of the deceased person and the grant of the letters of administration or, as the case may be, of the probate."

According to the record, letter of administration of the estate of Selemani Omari Msangi was tendered and admitted as exhibit D1, the same shows Ndarai Selemani Msangi (first respondent) was appointed as administrator on 20/11/2015. Since his claim is that, the said properties belong to the deceased whom he was appointed to administer his estate, I am settled that according to the law above, he is not time barred, thus I find the second ground by Ester Rodrick Kyara failed.

I next address the concern on whether the trial tribunal failed to consider issues raised hence reaching at wrong and unjust decision. In my view, also I see this concern answers grounds number four and five raised by the respondents. According to the record only two issues was agreed,

first, who is the lawful owner of the suit land and second, to what reliefs are parties entitled to.

In this regard, Mr. Kamani agreed with the argument of Mr. Kipoko that the tribunal did not state the boundaries of the land belong to Ester Rodrick Kyara, but Mr. kamani added that the tribunal brought a new issue which was not there, when stated farm of one acre with three House is the properties of Ester Rodrick Kyara, which was not claimed hence a new matter. Moreover, in his ground he argued that the tribunal did not say who is the owner of Plot No 12, even the farm at Mbugani did not state whether belong to deceased or to their heirs.

The above, has persuaded me to reproduced the part of the application filed on 16/8/2019 in order to clear out what were suit lands claimed for at the tribunal;

"3. Location and Address of the suit premises/ Land: there are three suit lands and will be numbered in three paragraphs:

-Plot No. 12 A, Himo Township, Moshi District, Kilimanjaro Region, with the following neighbours:

North: Abeid Ibrahim Lyimo (Mekuu)

East: Tarmac road (Himo to Marangu)

South: Mama Jenifa Mashashi

West: Cliff Mamuya.

-Suit land at Makuyuni, Himo Township, Moshi District, Kilimanjaro Region, with the following neighbours:

North: Road heading to Kiriche A.

East: Rajabu Juma.

South: Sadiki Ngoyani.

West: Selemani Omari (Mama Mkubwa).

-Suit land at Lotima, Himo Township, Moshi District, Kilimanjaro Region, with the following neighbours:

Noth: Juma Jibu and Rajabu Mmbaga.

East: Abdalah Luhindi, Athumani Luhindi and Rajabu Mmbaga.

South: Railway line.

West: Karinda Nyange and Selemani Omari.”

[Emphasis supplied]

Then at para 7 of the above application Ester Rodrick Kyara prayed the Tribunal to declare that the above suit lands are owned by her.

Moreover, on the same regard, I have seen it is appropriate to reproduce what was the decision and order of the trial tribunal in respect to above suit land;

"Kwa maelezo haya hapo juu, Baraza linatoa hukumu kama ifuatavyo:-

- Madai ya mdai kwenye eneo la ekari moja lenye nyumba 3 lililopo eneo la Makuyuni limekubaliwa.*
- Madai ya mdai kwenye kiwanja Na. 12 "A" Himo na shamba Mbugani Relini yametupwa kwani hayana ushahidi wa kuthibitisha umiliki wa marehemu Kipande Selemani.*
- Hivyo kiwanja No. 12 "A" na shamba la Mbugani ukiondoa la ekari 20 eneo linalobaki litagawanywa kwa warithi wa mirathi ya Selemani Omari ambapo pia mume wa mdai anastahii kurithi."*

In view of the suit land claimed for which were clearly identified above, issues raised and the decision of the tribunal above cannot tally, also the decision did not explained details, but further contradicted that the farm of Mbugani with exclusion of 20 acres and nothing stated to that effect or who was given those acres, I also agree with Mr. Kipoko and Mr. Kamani that the issue of ownership was not precisely determined, thus incapable of being executed. Therefore, I am of considered opinion ground number one by appellant Ester Rodrick Kyara and ground number four and five by respondents have merit and allowed forthwith.

I next address the legal capacity for parties afore mentioned to appear before the tribunal over the disputed land, for suing and defending

respectively. Starting with Ester Rodrick Kyara, I agree with Mr. Kamani that by being a wife the right does not accrue to all estate of the deceased husband. But since the counsel has contended generally that she had no locus stand totally, to my view, I think that might not be a good approach, because, she might be having legal capacity to sue as a beneficiary from the estate of her husband, either by being heir or there are properties she co-owned by the deceased. However, being a wife might have contributed by joint effort to acquire matrimonial properties, like in this case she claimed to contribute in raising house. To my view it could be absurd to deny her rights on those raised matrimonial properties merely because she has no letter of appointment. For instance, when the appointed administrator is the brother of the deceased husband and does not bother to consider the rights of matrimonial properties acquired jointly.

In essence, the respondent Ester Rodrick Kyara had a duty to demonstrate by evidence that she had a locus stand over the disputed land, either by appointment as administrator or a wife of the deceased acquired certain properties jointly, therefore she had her share therein. But in respect to pure deceased properties, she must hold the letter of administration appointed by a competent court of law. This is because it is

a trite law, court must be certain on the identity of the parties with a view to avoid entertaining fictitious or dishonest person. The court does so in order to ensure that at the end of trial entitlement and rights should go to the rightful person. Likewise, liabilities if any should go to a liable person. Moreover, court can only accord protection to a person having an interest recognized by law. (See the case of **Lujuna Shubi Balonzi v. Registered Trustees of Chama cha Mapinduzi (1996) T.L.R 203.**

With this clear position of law, since the respondent Ester Rodrick Kyara had no letter of administration nor any evidence that she was declared heir of the land in dispute, does not confiscate her right for the properties jointly acquired or co owned as said above, what matter she is required to prove by evidence, thus taking regard her duties as wife of the deceased I cannot hold that she owned nothing to the alleged properties unless there are evidence to the contrary. I have considered the evidence on regard to each party, I am settled each had a duty to prove to the contrary, but in my view the duty was not done to the required standard. In view thereof this ground number one by respondent is allowed to such extent.

Further, Mr. Kamani addressed on issues of suing wrong parties, first he contended that Amiri Selemani Msangi did not file written statement of defence and second, that Ndarai Selemani Msangi sued twice, since he was already discharged as being administrator of deceased estate, therefore to sue him as administrator of estate it was not proper. I have scanned the trial court record, with respect, I think Mr. Kamani did not peruse well the entire record. The third respondent Amiri Selemani Msangi filed written statement of defence on 28th day of August, 2019. This is what has been transpired in the tribunal record. Thus, being a court record always accurately represents what happened. (See the case of **Halfani Sudi v. Abieza Chichili** [1998] TLR 527).

In other part, I agree with Mr. Kamani that the first respondent was wrong sued in the capacity of the administrator of the deceased, this because it was evidenced that he has already filed Forms No. V and VI (Inventory and final Accounts) and after that the probate court closed the probate matter. In wish to fortify my view by referring the case of **Andrew C. Mfuko v. George C. Mfuko (an administrator of the Estate of late Clement N. Mfuko)**, Civil Case no. 320 of 2021 where it was held that;

"On our part having heard the advocates submission to the question we posed, there is no dispute that the order of the High Court in the Probate case dosed the matter with the result that the respondent ceased to be an administrator. Having vacated the office as administrator he could not sue or be sued in his capacity as administrator..... That means the suit was instituted against a person who had no capacity to act as an administrator regardless of the fact that the order dosing the Probate Cause may have been erroneous."

It is therefore my settled view, the second respondent was not rightly sued since he ceased to perform the said capacity upon closure of the probate, therefore proceedings after such court order were conducted contrary to the law. Having so observed ground number two by the Respondent allowed and sustain.

Also, I concede with the argument of Mr. Kamani that the tribunal was not correct and right to order the estate be distributed to heirs. According to the tribunal, nowhere it had a findings that those properties belong to the deceased, and how could have reached such finding if at all is not a probate court. 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)

Therefore, basing on the above, it was not proper for the tribunal to issue such an order, therefore, third ground by the respondents is allowed.

In the circumstances, the determination of grounds I have endeavored above are sufficient to dispose of this appeal and I find no need to consider and determine the remaining grounds of appeal. And having guided by the

determined grounds of this appeal, I am convinced the appeal for both parties have merit, and consequently allowed, the Judgment of the trial tribunal is hereby quashed and set aside.

Next, Mr. Kamani invited me due to these irregularities, I should order retrial, while Mr.Kipoko vehemently refused and urged this court as the first appellate court has to evaluate the evidence available and reach the just decision. I think according to the evidence on record and the requirement of the law as analyzed hereinabove, I am of the view, I have performed the duty of evaluating available evidence as above, it therefore my opinion I cannot reach a just decision of this matter under the above evidence and circumstances stated, thus, the argument by Mr. Kipoko is hereby rejected.

In regard to the order of retrial prayed. I am mindful, it is trite law that before any appellate court makes an order for retrial, the court must find out as to whether the original trial order was illegal or defective and whether making such order for retrial will create more injustice to the accused person (if it is criminal) or any party (if civil matter like this matter). I see appropriate in that regard to refer the celebrated case of

Fatehali Manji V.R, [1966] EA 343, the defunct Court of Appeal for East Africa observed that:-

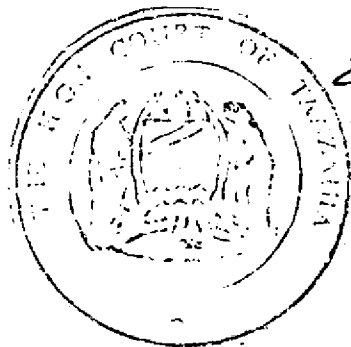
"In general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; it does not necessarily follow that a retrial should be ordered; each case must depend on its particular facts and circumstances and an order for retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause an injustice to the accused person.."

According to the circumstances of the matter at hand, and as analyzed above on the issues of mounting proper parties and their capacity to sue or be sued. Therefore, ordering retrial will be condoning and bless what I have avowed above. In view thereof, it is my considered opinion, there is a likelihood of causing an injustice to any party, if this court orders retrial of this case. I thus, in the interest of justice, order for any party interested in claiming the alleged properties, should file a fresh suit herself/himself forthwith.

According to the circumstances of this matter, each party should bear her/his costs.

It is so ordered.

DATED at **MOSHI** this 30th day of May, 2023.



A. P. Kilimi

A. P. KILIMI
JUDGE
30/5/2023