

IN THE HIGH COURT OF TANZANIA

MUSOMA DISTRICT REGISTRY

AT MUSOMA

LAND APPEAL NO. 05 OF 2023

(Arising from the Land Application No. 170 of 2022 in the District Land and Housing Tribunal for Mara at Musoma)

BETWEEN

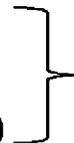
MCHUNGAJI BARNABAS JUMA MBONDYA APPELLANT

VERSUS

MAJEMBE SONG'ERA

(Administrator of the Estate of

GREGORY MATEBESHA NYAWAYA)



..... RESPONDENT

JUDGMENT

25th May & 08 June, 2023

M. L. KOMBA, J;

Appellant herein was aggrieved by the decision of District Land and Housing Tribunal for Mara at Musoma (the DLHT) in Misc Application No. 170 of 2022 where he was applying to set aside expert hearing order which was granted in respect of Application No. 116 of 2018 claiming that he was not properly served with summons. On the other side respondent argued that applicant had knowledge of existence of the case but he was hiding from the service that's why it was ordered substituted service method to be used. Applicant's application to set aside ex-parte judgment was dismissed.

In a nutshell, at DLHT the respondent filed an application no. 116 of 2018 suing the applicant on ownership of a piece of land 3.44 acres located at Buhare claiming to be the property of the late **Gregory Matebesha Nyawaya**. For that matter, the respondent was sued under the capacity of administrator. The DLHT proceed to issue ex-parte judgment after being satisfied that the service was proper.

Appellant was dissatisfied by the decision of the DLHT, his attempt to set aside the ex-parte judgment failed hence this appeal with three grounds which I will not reproduce them here for the reasons I will mention latter on.

At the hearing of this appeal, appellant was serviced by Mr. Daudi Mahemba, learned advocate while respondent stand solo, without representation.

Parties made submission on grounds filed. In the course of submission this court noted that the appeal is connected with the property which the respondent was administering via **Probate Cause No. 186 of 2017** in which the respondent was appointed as Administrator. Because it was not part of the grounds of appeal, I invited parties to address this court on the closure of probate or otherwise and its effect or consequences.

Respondent was of the submission that he was appointed as administrator in Probate cause No. 186 of 2017. After his appointment he collected properties of deceased for the purpose of distributing to lawful heirs, he said before the said distribution applicant filed application No. 158 of 2020 and he waited till its finalized then he distributed properties to heirs. To his surprise in the year 2020 he received complaints over the property then cases were going on. He informed this court that distribution of property was done and the probate was closed.

Mr. Mahemba, counsel for respondent submitted that, according to the record supplied by respondent in lower tribunal it seems respondent has already closed probate on 10/09/2021. By that time there was application pending in court application which is application no. 158 of 2020 that means he closed probate while case was on court thereafter it follow appeal No. 73 of 2021 which was filed on 15/09/2021 while the appeal was in court the respondent closed probate.

It was his submission that respondent closed the probate while cases were on going concerning the property of deceased. He noted the position of the law that respondent is no longer entitled to appear under that capacity. But he complained that respondent closed the probate purposely because there

is no option for the appointment of another respondent and that the appellant will not have his right to be heard. He prayed this court to set aside the ex-parte order as prayed in appeal so that appellant can sue beneficiaries which is the only solution left.

Literary, probate comes to an end upon on filling Forms No. V and VI (inventory and final Accounts) and after the order of the court closing the matter. The emphasis here is that, the administrator must present his reports to the court in time so that the trial court can proceed to put the matter to an end.

As was said in the Case of **Beatrice Brighton Kamanga and Amanda Brighton Kamanga vs. Ziada William Kamanga**, Civil Revision No. 13 of 2020 HC At Dar es Salaam that “there was no life time administrator”, the order of the trial Court in Probate Cause No 186 of 2017 which was given 10/09/2021 closed the matter which made the respondents ceased to be administrator of the estate of the Late **Gregory Matebesha Nyawaya**. Having vacated office as an administrator, he has no capacity to sue or being sued in that capacity. Even if the matter remains pending for a longer period, the appointment ceases to exist by operation of the law as already pointed above, there is no lifetime administrators in our legal schemes. See **Beatrice**

Brighton Kamanga and Amanda Brighton Kamanga vs Ziada William Kamanga (supra).

Apparently, the counsel for the appellant, and the respondent agree the probate was closed and therefore that it was wrong for the appellant to have sued respondent in his capacity as an administrator. That means, the application was filed against a person who had no capacity to act as an administrator as his activities will be rendered illegal just as was decided in **Andrew C. Mfuko vs. 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 closed 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 closing the Probate Cause may have been erroneous.**'*

It does not matter whether the fact that the order closing the Probate Cause may have been erroneous as submitted by the counsel for respondent that

there was a pending suit while the probate was closed, once closed it is marked close and that is it. The respondent in the case at hand was no longer administering the Estates of the Late **Gregory Matebesha Nyawaya** since 10/09/2021 when the matter was closed and ceased to perform legal role from that date thus incapable of suing or be sued in that capacity. That mean all proceedings after such court order were conducted contrary to the law and they are worthless to be maintained. See also **Ahmadi Daud Nyabu (the Administrator of the Estate of the late Daud Mathew Nyabu) vs Rehema John Lyimo (the administratrix of the Estate of late Jamila Daud Nyabu)**, Probate Appeal No. 01 of 2023 HC Morogoro.

Therefore, this appeal is wrongly filed as the respondent is *funcus officio* and that *this Court like all courts can do justice only in accordance with the law and not otherwise. See Hadija Masudi (as the Legal Representative of the late Halima Masudi) vs. Rashid Makusudi*, Civil Appeal No. 26 of 1992.

In the upshot, the appeal is hereby dismissed. As the orders I have made results from an issue raised by the Court *suo motto* and since it is a matter concerning probate, I make no order as to costs.

It is so ordered.

DATED at MUSOMA this 08th day of June, 2023.



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M. L. KOMBA
Judge