IN THE HIGH COURT OF TANZANIA

TEMEKE SUB-REGISTRY

(ONE STOP JUDICIAL CENTRE)

AT TEMEKE

CIVIL REVISION NO. 09 OF 2022

(Arising from Civil Revision No. 29 of 2022 at Temeke District Court at One Stop Judicial Centre)

DILIGENT GROUP LIMITED ..... APPLICANT

VERSUS

ABASI ZUBERI MTEMVU.....1st RESPONDENT
IBRAHIM ZUBERI MTEMVU .....2nd RESPONDENT
JASMINE ZUBERI MTEMVU.....3rd RESPONDENT

RULING

Date of last order: 06/01/2023
Date of Ruling: 06/04/2023

OMARI, J.

The genesis of this matter in brief is that the Applicant herein, Diligent Group Limited, bought a property known as Plot No.1036/2 with Certificate of Title No.DSM1014601 located in Msasani Peninsular, Kinondoni, Dar es Salaam (hereinafter interchangeably called the property and house) from one Abasi Zuberi Mtemvu (the 1st Respondent herein) who at the time of the transaction presented himself as the legal and personal representative of the late Sitti Mgeni Kilungo by virtue of being an administrator of her estate. All the three Respondents in this matter are siblings, their mother the late Sitti

Mgeni Kilungo died intestate in 2017. The 1st Respondent was appointed to be her administrator vide Administration Cause No. 474 of 2017 at Temeke Primary Court. His letters of appointment were subsequently revoked and all actions carried out by him subsequently annulled as a result of the proceedings and orders of Administration Cause No. 474 of 2017 being nullified vide Civil Revision No. 29 of 2022 at the Temeke District Court filed by the 2nd and 3rd Respondents.

By the time Civil Revision No. 29 of 2022 was filed and came to an end the impugned administrator had already; as part of administering the deceased's estate, sold the property to the Applicant. The Applicant was not a party in the Revisional proceedings before the District Court but is affected by the fact that the said proceedings among other things annulled the sale of the property which they had subsequently taken vacant possession of and were in the course of developing.

She has thus, approached this court under section 44(1) (b) of the Magistrates' Courts Act, CAP 11 RE 2019 (the MCA) and section 95 of the Civil Procedure Code, CAP 33 RE 2019 (the CPC) seeking to be heard on an Application for orders that:

1. This honourable court be pleased to revise the proceedings, ruling and orders of Hon. Swai (SRM) made on 28 November, 2022 in Civil Revision No. 29 of 2022.
2. Any other order(s) which this honourable court may deem fit to grant.
3. Costs of the Application.

The Applicant's accompanying Affidavit is sworn by one Gulam Ashfaq Lakhu a shareholder and Director of the Applicant. The 1st Respondent conceded to the Application through an Affidavit while the 2nd and 3rd Respondents contested it vide an Affidavit sworn by Ibrahim Zuberi Mtemvu. When the Application was called for hearing; the Applicant enjoyed the services of Messrs. Edward Chuwa and Ignace John Laswai both learned advocates. The 1st Respondent enjoyed the services of Mr. Baraka Masse, learned advocate while the 2nd and 3rd Respondents enjoyed the services of Mr. Obadia Kajungu also learned advocate.

Submitting in support of the Application, Mr. Chuwa averred that the laws under which they brought this Application give the court powers to entertain proceedings of this nature and where it appears that there is an error which is material on the face of the record to quash the proceedings. He sought to adopt the Affidavit of Gulam Lakhu as part of his submission and went on to submit on the two issues that the Application is hinged on. The first issue being, that the propriety or lack thereof of the decision of the District Court which was procured in the absence of the Applicant and the second being resulting annulment of the appointment of the administrator's appointment when inventory had already been filed, administration done and the matter marked closed.

The learned counsel submitted that the District Court as well as the parties to the Revisional proceedings were aware that the property had been sold to the Applicant as evidenced on the last paragraph of page 13 which goes

through to page 14 of the District Court's Ruling. He passionately argued that as the court was aware and even observed in its decision then it was wrong for it to proceed with the matter in the absence of the Applicant, which in effect abrogated her right to be heard. To buttress his point, he made reference to the case of **Abdallah Thabit Huwel v. The Registered Trustees of Movimento Popular De Libertacao De Angola (MPLA) and 4 Others,** Civil Application No. 562/17 of 2018 and referred this court to the second paragraph on page 15 of the Judgment where the Court of Appeal was clear that where a person has an interest in a matter it is necessary for them to be joined so that their claim can also be heard. He also went on to submit that in the circumstances the only remedy available for his client was through Revision proceedings as it was held by the Court of Appeal in **Halais Pro-Chemie v. Wella AG** [1996] TLR (CAT) 266. He finalized this first point by praying that the court revises the proceedings of the lower court.

On the second issue the Mr. Chuwa vehemently argued that it was wrong for the District Court to annul the grant after the closure of the administration. He recounted that in the Counter Affidavit Mr. Ibrahim Zuberi Mtemvu attached a search report that shows the Applicants tenure on the property commences on 01 October, 2021 and from the decision of the District Court page 4 through to 5 it is shown that the accounts of the said estate were submitted on 05 November, 2021. This in his view means that the sale was conducted, the property registered in the name of the Applicant and the administration of the said estate was completed and it was therefore

wrong for the Magistrate to annul the said administration for there was nothing to annul. To support his argument, he referred to the Court of Appeal decision in **Ahmed Mohammed AL Laamar v. Fatuma Bakari and another**, Civil Appeal No. 71 of 2012. The learned advocate submitted that in the said case the Appellant was declared *fanctus officio* in a situation that is similar to the present case. He went on to argue that although he submitted in the first issue that his client was not heard; the cumulative effect of that and the fact that the estate was already administered and the matter marked closed makes the administrator *fanctus officio* thus the matter cannot be re-tried.

He went on to submit that in his Affidavit the 2nd Respondent alleges that the security of title of the Applicant is based on fraud since there was a caveat on the said property. He explained that the search report depicts that the caveat was registered on 01 February, 2022 while the tenure began in October, 2021 so the caveat was filed subsequent to the Right of Occupancy being granted, therefore the issue of fraud cannot arise. In his view even if there were allegations of fraud the proper cause of action was that which is described in the **Ahmed Mohammed Al Laamar v. Fatuma Bakari and another** case (*supra*). Mr.Chuwa vehemently argued that his client was a *bona fide* purchaser for value with no notice of defect, if any, on the title of the vendor. He pointed out that the Counter Affidavit alleges that there was fraud in the way that the title was obtained by the Applicant; these allegations in his view should have been against the Commissioner for Lands and the Registrar of Titles as the Applicant has no control of the procedures

and actions of the two officials. Mr. Chuwa added that the proceedings of the District Court are a nullity because the same could not have transpired to the extent of nullifying the right of his clients without bringing on board the Commissioner for Lands and the Registrar of Titles.

Mr. Chuwa finished his submission by attacking the Joint Counter Affidavit of the 2nd and 3rd Respondents, stating that it is defective. He argued that it was only the 2nd Respondent who swore the Affidavit and did not state that they are authorized by the 3rd Respondent to do the same on their behalf. He averred that the Affidavit is not properly before the court and should not be acted upon by the court. He supported his argument by referring the court to the Court of Appeal's decision in **Melau Mauna and 24 Others v. The Registered Trustees of Evangelical Lutheran Church in Tanzania (ELCT)Arusha and another**, Civil Application No. 89/02 of 2021 where the court held if there is a joint Application then each of the parties must swear their own Affidavit, otherwise a single Affidavit is incurably defective. To cement that the Affidavit should not be relied on Mr. Chuwa explained it was also a false Affidavit because it had false depositions against his clients as well as the Commissioner for Lands. To this end he referred the court to the case of **Kidodi Sugar Estate and 5 others v. Tanga Petroleum Co. LTD.,** Civil Application 110 of 2009 where the court spoke to the issue of an Affidavit containing falsehoods. He then concluded by praying that the proceedings of the District Court be quashed with costs.

When it was his turn Mr. Baraka Masse the learned counsel for the 1st Respondent supported the Applicant's submissions, prayed to adopt the Affidavit deponed by Abasi Zuberi Mtemvu as part of his submission and lastly stated that he would also trail the same path that the Applicant's advocate did.

On the first issue he stated that it was his submission that the District Court was wrong to annul the grant of letters without granting the Applicant the right to be heard despite being informed of the Applicant's interest in the matter. As regards to the second issues he concurred with what was already said by Mr. Chuwa and added that since the probate was closed it could not be opened. He also referred to the **Ahmed Mohammed Al Laamar v. Fatuma Bakari and another** case (*supra*) and emphasized that it was wrong for the District Court to annul the grant since the administrator's duties were already discharged therefore there was nothing to annul. He prayed that this court set aside and quash the proceedings and decision of the District Court.

Regarding the Counter Affidavit of the 2nd and 3rd Respondents Mr. Masse also concurred with Mr. Chuwa that it was defective and had depositions that were hearsay because the said Respondents deponed that they have received information from various persons mentioned in the Affidavit yet there were no Affidavits to accompany these claims, thus making the same hearsay. He beseeched this court not to act on hearsay referring it to the High Court of Tanzania case of **Deograsia Ramadhan Mtego v.Deodatus**

Rutangwerela, Miscellaneous Civil Application No. 43 of 2020. He concluded that a lot had already been submitted by Mr. Chuwa and being that they are not opposing the Application it was therefore his prayer that this court grants the prayers in the Chamber Summons.

Submitting on behalf of the 2nd and 3rd Respondents, Mr.Obadia Kajungu resisted the Application by introducing separate grounds before replying to the submissions by the Applicant's and 1st Respondent's counsels. He started by vehemently arguing that the Applicant had not established a cause of action for instituting this Application as he has failed to prove his interest. He then went on to attack the notion of the Applicant being a *bona fide* purchaser as stated in the Affidavit by posing the question that is the Applicant *bona fide?* He averred that the law does not protect a mere *bona fide* purchaser but a *bona fide* purchaser for value. He went on to fiercely argue that the Applicant needed to have furnished consideration for his rights to be protected by the court. To buttress his point, he relied on the case of **Stanley Kalama Masiki v. Chihyo Kuisia w/o Nderingo Ngomuo** [1981] TLR 143 where it was held that where an innocent purchaser for value has affected developments on the land courts should not disturb them. He proceeded to submit that the property in dispute is a probate property alleged to have been sold by the 1st Respondent. This was evidence on the bar as neither the Applicant nor the 1st Respondent have presented the sale agreement which passes the title to the Applicant. He once again fiercely argued that the procedures for the disposition of a Right of Occupancy were regulated by the Land Act, Cap 114 RE a 2019 which

requires the transferee to present to the Registrar of Titles the sale agreement with the transfer of Right of Occupancy application that is Forms number 35 and 29 together with the Commissioner's Approval of the disposition of the Right of Occupancy. This, in his opinion is what will assist the court in ascertaining the innocence of the purchaser and not just a Tittle Deed without the history on how it was acquired.

Counsel went on to submit that at the time the 1st Respondent is claiming to have made an application for closure of probate proceedings in the Primary Court on 05 November, 2021 having been granted the letters on 13 October, 2017 was past his time to file the inventory which is four months. He sternly argued that without an extension of time from the court, the jurisdiction of the court had expired four months from 13 October, 2017 after which there was no administrator. In his strong opinion at the time of closing the probate the court was closing in favour of a non-administrator, he had no powers as his mandate was time barred.

The learned advocate also averred that, the Applicant's advocate and the Affidavit state that they made due diligence before the purchase and found that the vendor had Form No. IV meaning he was the administrator of the said estate. Counsel invited this court to inquire if the mere existence of Form No. IV which is the letters grants powers of disposition on the holder under the Land Registration Act, Cap 334 RE 2019(the LRA). He went on to assert that sections 67 and 68 of the LRA provide for the procedure regarding dispositions of this kind. He went on to say that the disputed facts that the

2nd Respondent received from the Commissioner for Lands were indeed received from that office.

The learned counsel then went on to submit that the proceedings of the Primary Court were quashed because it lacked the jurisdiction. The deceased was Christian, this according to section 18(1) (a) (i) of the MCA denied the Primary Court jurisdiction automatically. In addition, the advocate submitted that the property in dispute was also registered land, therefore the Primary Court lacked jurisdiction to handle the matter. In the counsel's opinion the Applicant was not innocent for failure to comply with the law and was negligent for failure to exercise diligence. Having made his independent submission counsel segued to reply to the Applicant's and 1st Respondent's Submissions.

On the first issue the learned counsel for the 2nd and 3rd Respondent argued that the annulment was not wrong since the inventory was filed out of time without the courts leave so it was a nullity and the ground cannot stand. He went on to argue that it was true that the court was made aware that property was sold to the Applicant and this fact is on record however, there was no prayer to join the Applicant. The Applicant did not move the court to be joined. Arguing that the Applicant has an interest and that the inventory was already filed are baseless claims, he prayed that this court to distinguish the **Ahmed Mohammed AL Laamar v. Fatuma Bakari and another** case(*supra*), as in the said case the inventory was filed on time unlike in this one. Likewise, in the **Halals Pro Chemie v. Wella AG** case (*supra)* the

Applicant was unaware of the proceedings. In the present case the Applicant was served with a temporary injunction by the 2nd Respondent on 04 October, 2022 and in defiance she went on and demolished the structures on the disputed property on 28 November, 2022 and to show that the 1st Respondent believes that he is still the owner of the land he has preferred an Appeal in this same court which is scheduled for hearing in March, 2022.

The learned advocate passionately submitted that it is trite law that Revisional jurisdiction is only exercisable in exceptional circumstances; being that the Applicant was aware of the Revision in the District Court and waited until the court determined the proceedings, he waived his right to interfere so he should wait for the determination of the Appeal. He supported his argument with the Court of Appeal of Tanzania case of **Isdore Leka Shirima and Catherine R. Barong v. The Public Service Social Security Fund (as a successor of PSPF, PPF, LAPF and GEPF) and 3 Others,** Civil Application 151 of 2016 which held that Revision should not be an alternative to an Appeal and prayed that this court hold that the effect of the success of the Appellant's case (the 1st Respondent herein) will bring the same right to the Applicant and this court should not be used for forum shopping, therefore this Application should be dismissed.

The learned advocate went on to argue that the allegations as regards to fraud as averred by the counsel for the Applicant and their reference to **Deograsia Ramadhan Mtego v. Deodatus Rutangwerela** case (*supra)*; it is true that the averments are hearsay but it was also true that the persons

are public officials and they have privileges, this court had the powers to order the files from the said offices for inspection. The said **Deograsia Ramadhan Mtego v. Deodatus Rutangwerela** case (*supra*) is distinguishable in that the officers have no powers to depone but the court can order the files for inspection to prove that there was a *bona fide* purchase.

On the defective Counter Affidavit, the learned counsel argued that the anomalies pointed out are not fatal since the fact that it was sworn by one person only does not contravene Order IX Rule 8 of the CPC. He went on to argue that the Counter Affidavit was intended to be joint evidence of the 2nd and 3rd Respondents as declared on the verification clause that he was instructed to proceed and this is not fatal. The other alleged defect that it has in the verification clause that there are averments of the Commissioner for Lands but the said paragraph is on different issues is curable because deponent has prayed for the Commissioner for Lands and other officials to be summoned; therefore, they will produce oral testimony.

The learned counsel went on to refer to sections 51 and 80 of the LRA, both of which provide for disposition to a *bona fide* purchaser for value. In his view, because of failure to prove payment, the registration of the administrator as a legal personal representative, assent to the bequest of the Right of Occupancy and capital gain clearing certificate, the Applicant has not proved to be an innocent or a *bona fide* purchaser for value. By merely tendering of the Title Deed without proof of legality through which

he has acquired the said Title Deed; it shall not be unlawful for the court hold that the title was acquired by conspiracy and therefore the proceedings liable to dismissal. He vehemently argued that the passing off of the estate to a third person cannot make the otherwise invalid probate proceedings valid. To bolster his point the learned advocate questioned the Applicant's choice of forum, that is this court for Revision while he is sure that at the time of the purchase the transferer was the administrator. On this point, he concluded that the Applicant had no cause of action because he had failed to prove interest in the probate cause which was by itself invalid, he prayed for the Revision to be dismissed.

In their Rejoinder, the Advocates for the Applicant opted to take turns. Mr. Chuwa learned advocate began by bemoaning, the advocate for the 2nd and 3rd Respondent had not replied to the submission and he had in fact misconstrued the Application before this court. He stated that the Application before this court is not a suit, therefore it is wrong to submit that the Applicant has not disclosed a cause of action, this in his opinion was a misplaced argument since even if it were the case the proper thing to do would have been to raise a Preliminary Objection and not a paragraph in the Counter Affidavit. He went on to add that the counsel has belaboured on the issue of the Applicant not having interest, but this was so because he was unaware of what transpired in the District Court. It was the 2nd and 3rd Respondents who informed the court that the Applicant has purchased the land for value, this is on page 13 of the Judgment which makes reference to paragraph 11 of their Affidavit. From the proceedings before the District

Court, it is clear that the Applicant has interest in the said property. To that end the learned counsel stated that the 2nd and 3rd Respondents have produced a search report as part of the Counter Affidavit and the Certificate of Title therein is conclusive proof of ownership, he therefore has interest.

On the principles of conveyancing as submitted by counsel for the 2nd and 3rd Respondents when he was alleging the property was not disposed properly as sections 67 and 68 of the LRA were not adhered to Mr. Chuwa rejoined that the land in question belonged to the deceased but the Certificate of Tittle was first registered in the name of his client as the previous title was surrendered and vested in the President. There was no proof that the land was registered in the name of the deceased in the Land Registry. If this was the case, that is transmission by operation of the law, then section 67 and 68 of the LRA would apply and his argument would hold water. The Applicant is the first registered owner on the land. The deceased only had equitable interest on the said land.

On the proceedings of the Primary Court being a nullity because the deceased was Christian the learned counsel submitted that in their Affidavit, they annexed Form No. I and No. IV as filed in the Primary Court. Form No. I was also referred to Counsel Obadia, the part of religion the space was filled as Islam therefore the argument that this court can revise the decision of the Primary Court on this point is wrong. About the inventory and closure of probate which was done after time had lapsed without leave of the court is a matter of evidence since the four months is not absolute as there is room

for variation and this is the practice and there is no proof that the variation was not provided the court should consider this.

He went on to argue that the argument that the Applicant was aware of the Application in the lower court and should have taken action at that juncture, they were not party to the proceedings and there is no proof that they were served. As for applying to be made a party, he could not without knowledge or being served, that the court was made aware, it should have acted *suo motu* to bring in the Applicant or order that the 2nd and 3rd Respondents join the Applicant.

Mr. Chuwa closed his Rejoinder submission by asserting that the allegations of conspiracies and fraud are serious and criminal allegations and not in the purview of this court as held in the **Ahmed Mohammed Al Laamar v. Fatuma Bakari and another** case (*supra*) the 2nd and 3rd Respondents are free to institute criminal proceedings and for the allegation of no value paid by the Applicant, they can file a civil suit against the administrator.

In addition to what had already been submitted in Rejoinder by his co-counsel, Mr. Laswai, learned counsel came in and submitted that a lot has been submitted to mislead the court on the nature of the Application. The Application has been brought under section 44(1) of the MCA. The injustices are that the court was made aware that the Applicant has interest but went on ahead and nullified the grant without the right to be heard. The interest is shown in para 2 of the Affidavit and annexture A. He went on to say that

it is important to revert to the **Abdallah Thabit Huwel v. The Registered Trustees of Movimento Popular De Libertacao De Angola (MPLA) and 4 Others** case(*supra*) to establish the interest that their client has. He called upon this court to look into what is in the Chamber Summons and not the issues counsel for 2nd and 3rd Respondents is seeking this court to call additional evidence and look into. The Appeal that has been instituted has nothing to do with their client as he is not a party to the said Appeal and could not be because she was not a party in the lower court, which distinguishes this case from the **Isdore Leka Shirima and Catherine R. Barong v. The Public Service Social Security Fund (as a successor of PSPF, PPF, LAPF and GEPF) and 3 Others** case (*supra*). He finished by a prayer that the Application be granted.

On his part the counsel for the 1st Respondent Rejoined the submission of the counsel for the 2nd and 3rd Respondent by saying that having averments that are hearsay in an Affidavit without accompanying Affidavits and saying the makers of the said averments are government officials thus, have privilege without stating the exact privilege that precludes them, the law is very clear even government officials can swear an affidavit. The hearsays should be expunged as was the position in **Jamal S. Mkumba and Abdallah Issa Namangu v. Attorney General,** Civil Application 240/01 of 2019 Court of Appeal of Tanzania at page 9.

As for the Primary Court lacking jurisdiction on the basis of a deceased being Christian, counsel argued that the Primary Court is not restricted from

entertaining probate matters of Christians and this was the position of the court in **Yohana Mgema Escobar @ Yohana John Mgema v. Richard Francis Mgema,** Miscellaneous Civil Revision No. 4 of 2020 at page 3 of the judgment it is clear that it is not precluded. He then prayed for the orders of the District Court to be quashed and prayers sought granted.

Having gone through what counsels submitted for and against this Application it is now opportune for me to determine whether the Application before me has merits or otherwise and what should follow. In order to do this, there are several questions that sprout from the counsels' submissions that need to be looked into and they are what assisted this court to methodically determine the Application, these are:

i. Whether the Primary Court lacked jurisdiction to entertain the matter by virtue of the deceased being Christian;
ii. That the Applicant has not established the cause of action for instituting the Revision and the propriety of the decision of the District Court which proceeded in the absence of the Applicant;
iii. Whether it was proper for the learned magistrate to annul the grant of administration of the estate while inventory was already filed and the matter was marked closed;
iv. Whether the administrator had powers of disposition and if the said disposition was done right;
v. Is the Applicant a *bona fide* purchaser for value; and
vi. The Counter Affidavit of the 2nd and 3rd Respondents.

Nevertheless, before delving into the above questions I find it necessary to look into the history of this matter for it is what will also assist the court to determine the Application. After labouring through the record, what can be discerned is this matter snowballed from the 08 June, 2022 letter from the 1st Respondent to the Magistrate in Charge of the Temeke Primary Court complaining that the 2nd Respondent has refused to accept his share of the proceeds of a sold house; which he had sold as the administrator. The said letter also sought for the said money to be deposited in the court's account where the 2nd Respondent could get it. It also informed the recipient that the 2nd Respondent was living in the said house. Following the said letter, on 18 August, 2022 the presiding Magistrate gave orders for a hearing to be conducted on 22 August, 2022; a notice to appear for both the 1st Respondent and 2nd Respondent. The said hearing was adjourned to 29 August, 2022 and after the hearing the Ruling was scheduled for 31 August, 2022. In response to the letter and subsequent hearing the learned magistrate in her 31 August, 2022 Ruling among other things acknowledges that the administrator was appointed on 13 October, 2017 and the matter was closed on 05 November, 2021. The 2nd Respondent was ordered to receive the money, failure to which the administrator was ordered to pay the same into the court account and produce a receipt; he was also ordered to vacate the property. All of this was predicated on the fact that since the appointment of the 1st Respondent to the time of being summoned to appear, the 2nd Respondent had never approached the court with any objection as explained on pages 5 through to 6 of the typed Ruling.

Noteworthy is that, the learned Magistrate knew the matter was marked closed yet went on to hear the matter and make orders.

Almost corresponding to the above; the record also depicts that on 19 August, 2022 the 2nd Respondent wrote a complaint letter about 1st Respondent (as the administrator of the estate of Sitti Mgeni Kilungo in Administration Cause No. 474/2017). In the said letter which is marked to have been received on 22 August, 2022 the 2nd Respondent narrated what had transpired after the administrator's appointment he then asked the court to do four things, I quote verbatim:

1. *Kumtaka ndugu Abasi Zuberi Mtemvu kuweka wazi kiasi cha fedha alicho uza nyumba hizo kama kweli zimeuzwa na tathmini ya thamani ya nyumba hizo wakati wa kuuza.*
2. *Kumtaka Abasi Zuberi Mtemvu kuweka wazi na kuwashirikisha warithi wote mchakato mzima wa mauzo ya nyumba.*
3. *Kumtaka Bw. Abasi Zuberi Mtemvu kugawa pesa iliyo patikana/itakayo patikana kwa warithi wote bila ya upendeleo kwa mujibu wa sheria na taratibu za nchi.*
4. *Na amri yoyote ambayo mahakama yako tukufu itaona inafaa.*

This letter seems to have not been replied to so the 2nd Respondent wrote a letter to the District Magistrate in Charge at the One Stop Centre on 29 August, 2022 and it was stamped to have been received the same day. The heading of the said letter also depicted it was a complaint that the author was unsatisfied with the proceedings of Administration Cause No. 474/2017 that had ended before Hon. Maira in the Temeke Primary Court.

There was a change in the tone of the letter, now the Primary Court was being blamed for *inter alla* not adhering to the law and the procedures when it appointed the 1st Respondent to administer the estate of Sitti Mgeni Kilungo who was Christian; there being questionable ability of the court to act justly as it appointed the administrator and allowed him to close the administration without having finished the distribution of the estate to the entitled beneficiaries. In the same letter the 2nd Respondent also complains of the "clandestine" sale of the property which he alleges took place after closure of the administration and that he registered a caveat on the said property on 15 February, 2022. The 2nd Respondent went on to say that after being forcibly evicted on 13 July,2022 he reported the matter to the Police where he was eventually told that a representative of the purchaser had allegedly told the police that the money for the purchase had been deposited with the Primary Court and should be obtained there. He further states that he went to court on 19 August,2022 and was told there was no such money deposited with the court neither was the court supposed to be keeping money for beneficiaries. He was instructed to submit his complaint in writing, which he did (the letter dated 19 August, 2022) but was also summoned to appear in court on 22 August, 2022. He writes on that:

> *'Cha kushangaza na kustua, Mhe. Hakimu siku hiyo ya tarehe 22 August, 2022 alinlsomea maombi yaliyo wasilishwa na msimamizi wa mirathi kupitia kwa Wakili Peter Wandiba ya kunitaka mimi kuondolewa kwenye nyumba wakati akijua hakuwa na mamlaka tena juu ya file hilo kwa kuwa tayari ameshalifunga toka tarehe 05 November, 2021.'*

He then sought for the court to call for and revise Administration Cause No. 474 of 2017 to see the illegalities and to quash all the orders of the court and revoke the appointment of the administrator.

Further, the record also shows that the 2nd Respondent filed Land Case No. 17 of 2021 at the High Court Land Division that is; **Ibrahim Zuberi Mtemvu v. Abasi Zuberi Mtemvu and Diligent Group Limited** which was struck out for reason that the court lacks jurisdiction on 11 May,2022.

Then record further depicts that; on 01 September, 2022 the 2nd and 3rd Respondents filed Misc. Civil Revision No. 29 of 2022. The learned Magistrate's Ruling gives a vivid illustration of what transpired in a brief and concise manner; because of their importance; I choose the following: that the 1st Respondent was appointed and the administration was closed after the requisite procedures. However, on 31 August, 2022 the court went ahead and gave orders regarding a matter that was already closed. At the hearing the issue of the jurisdiction of the Primary Court as provided for in the Primary Courts (Administration of Estates) Rules GN 49 of 1971 (the Rules) and section 18 (1) and 3 (1) of the MCA came up. As did the filing of an inventory and accounts on 05 November, 2021 which was argued to be out of time, it was also argued in court that the property having been sold then the purchaser should have been joined as the orders will not affect them since they are not party to the proceedings. In his Ruling; the learned Magistrate Ruled that the deceased Sitti Mgeni Kilungo, as per the evidence on record, was Christian in spite of Form No. 1 stating she was Muslim.

At this point let me begin delving into the questions and themes identified earlier by starting with the issue of jurisdiction which is linked to the religion of the deceased Sitti Mgeni Kilungo. This in my view should have been dealt with at the time of appointment where the court could then interrogate her mode of life, a funeral and being interred in a manner that suggests one is Christian or Muslim would not in itself suffice to reach a conclusion since where a person might have been either or both of the religions in their lifetime; there is a tendency of those left behind scrambling for which side should be the one to conduct the funeral and interment according to their rites and rituals. The reasons for this perhaps ought to be left to ethnographers. For this court, the more pertinent issue is the argument that by virtue of the deceased being Christian then the Primary Court lacked jurisdiction and the proceedings thereof become a nullity as argued by the 2nd and 3r Respondents. The framers of the MCA and the Rules did not intend for Primary Courts to be rid of the jurisdiction to adjudicate on administration causes involving Christians. In the **Yohana Mgema Escobar @ Yohana John Mgema v. Richard Francis Mgema** case *(supra)* on page 3 of the typed judgment it was observed that:

> *'...this understanding of Paragraph 1 (1) of Part 1 of the 5th Schedule of the MCA is a long-standing perversion of the interpretation if the law.'*

On page 4 of the same judgment, it is further stated that the said law does not exclude Christians or any other denomination from administration of their

estates by the Primary Court. Therefore, the Primary Court had jurisdiction to entertain the administration of the estate of the late Sitti Mgeni Kilungo.

As for the Applicant's interest in the property and their resort to this Revision and the propriety of the decision of the District Court which proceeded in the absence of the Applicant. In the District Court the 2nd and 3rd Respondent's advocate was adamant that the Applicant was not a party to the administration proceedings. He sought to distinguish what happened in the District Court with the case of **Juliana Francis Nkwabi v. Lawrent Chimwaga,** Civil Appeal No. 531 of 2020 CA Dodoma that the advocate for the 1st Respondent referred to. The District Court making reference to **Mgeni Seifu v. Mohammed Yahaya Khalfani,** Civil Application No. 1 of 2009 Court of Appeal, concluded that it (the court) would not be a proper forum to deal with the interests of the buyer. This should perhaps be read being cognizant of the Land Division's decision in **Ibrahim Zuberi Mtemvu v. Abasi Zuberi Mtemvu and Diligent Group Limited** (*supra*).

In the current Application it is not disputed that the applicants were not parties to Civil Revision No. 29 which is the subject of this Revision. Not being parties to the Civil Revision in the District Court; the only way to challenge it is by way of a Revision as a third party that they are. The 2nd and 3rd Respondents advocate's argument that the Applicant has no interest or no cause of action notwithstanding. That there is a pending Appeal in this court might be a valid argument if the Applicant herein was a party in the said Appeal. The Court of Appeal has clearly stated that Revisional powers

should not be exercised where the Applicant has other avenues for remedy; see **Modest Joseph Temba v. Bakari Selemani Simba and Chiku Zuberi Salum (as joint administrators of the estate of the deceased Ashura Kongoro) and Another**, Civil Application No. 233/17 of 2019 and Golden **Palm Limited v. Cosmos Properties Limited,** Civil Application 561/01 of 2019. Had the present Applicant held alternative avenues for remedies it would be true that this Application would be incompetent. There is nothing on record that depicts that the Applicant sat on her rights, whilst Revision No. 29 was on going, they were not joined. Lastly, the Application was filed on 16 December, 2022 while the Appeal on 29 December, 2022 so the Application came first regardless of the fact that the Applicant is not a party to the Appeal and to say that the Appeal will determine his rights is rather speculative and in any case the outcomes would essentially be different as observed by the Court of Appeal in the **Isdore Leka Shirima and Catherine R. Barong v. The Public Service Social Security Fund (as a successor of PSPF, PPF, LAPF and GEPF) and 3 Others** case (*supra*).

The Applicant cannot file an appeal so the rule of exhaustion of all remedies available cannot apply as the court in the **Said Ali Yakut & Others v. Feisal Ahmed Abdul (Civil Application 4 of 2021) [2011] TZCA 145** case expressly said that it is only where there is no right to Appeal, the applicants have a right to move the court to exercise its Revisional jurisdiction to resolve their grievances. Therefore, the Applicant having

properly moved this court cannot be condemned to await the determination of an Appeal she is not a party to.

As regards to filing of the inventory and the closure of the administration the learned Magistrate directed himself to the logic of an order for closure of an administration matter. He is very clear that the order is issued after the administrator has exhausted their duty. In the Primary Court this is provided for in Rule 10 of the Rules; it is preceded by submission of Form No. V and VI respectively. After which the beneficiaries, creditors if any and the heirs have an opportunity to inspect the said documents as provided for under Rule 10 (2). This was also explained in the **Ahmed Mohammed Al Laamar v. Fatuma Bakari and another** (*supra*) case, which the learned magistrate also made reference to. He went on to explain that courts do not pronounce judgment(s) in administration and probate matters; they instead issue orders and rulings. This is because the said orders and rulings are not supposed to bring the matter to an end or finalize it. Finality comes with the order that the matter is marked closed making the administrator or executor *functus officio*. After this explanation, the learned magistrate went on to quash the proceedings, annulled the orders therefrom and went on to annul all actions by the 1st Respondent (the administrator) for his grant was null. The properties of the deceased were ordered to be returned to the state they were as of 30 May, 2017; which for avoidance of doubt is the date that Sitti Mgeni Kilungo became deceased.

To understand the cumulative effect of the decision and orders one has to go back to the powers and functions of an administrator. Proceedings in the Primary Court are initiated by filling in Form No. I, which is almost mandatorily accompanied by minutes from the clan/family meeting and a Death Certificate. They are not a legal requirement but one that has evolved with practice and one that primarily assists the court to know there is a family consensus as well as no disputes upon the application.

The powers and functions of the Administrator are provided for under Rule 5 of the 5th Schedule to the MCA. Once an administrator has been appointed, he has the legal mandate to deal with the estate that they are administering as he thinks it appropriate. One of the complaints by Respondents, predicating Revision No. 29 of 2022 is that the administrator decided to sell the house without consultation with the heirs. The administrator though should be encouraged to seek advice is an independent actor; so long as they are acting in good faith. Their functions include; identifying and collection of assets (the estate), identifying creditors and paying off the debts if any, identifying the heirs and distributing to them the estate then to file the inventory and accounts within four months of appointment as per Rule 10 (1) of the Rules; then close the administration. There is no legal requirement for the administrator to seek consent or advice from the heirs for the administrator to effect a sale; see **Mohammed Hassan v. Mayasa Mzee and Mwanahawa Mzee** [1994] TLR 225. Where one is not given their entitlements or where the administrator is not carrying out their legal functions then the heirs can approach the appointing court for revocation of

the administrator or sue the administrator to claim their entitlement; see **Sekunda Mbwambo v. Rose Ramadhani** [2004] TLR 439.

Conceptually that's what an administrator does, and from it one can decipher two things; the first is that administration is a very controlled process, the second is that it is a time bound process in that and it has to come to an end. The end is done by the court making an order to close the matter. In **Beatrice Brighton Kamanga and another v. Ziada William Kamanga**, Civil Revision No. 13 of 2020 this court was very clear, there is no endless administration or a life administrator in our laws.

While the administrator did indeed file the inventory and accounts in excess of the legally required time there being no evidence that there was refusal of the said inventory and accounts for being filed out of time; one can assume that the Primary Court accepted the documents and marked the matter as closed after constructively enlarging the time; there was also neither an objection nor an application for letters to show that the same was an open administration, see **Beatrice Brighton Kamanga and another v. Ziada William Kamanga** (*supra*).

The explanation and procedure for closure of an administration or probate begs the question; what is the role and function of the administrator and that of the court after the closure of the file. The answer is simple; none, they are all *functus officio*. This means the decisions rendered after the closure of the administration are all made after the court was *functus officio*

as was the administrator. Be as it may the purchaser is still in the same murky waters, they bought property from an administrator who has subsequently been revoked and all his actions declared null and she is here seeking this court to exercise its jurisdiction under section 44(i) (b) of the MCA and section 95 of the CPC to revise the proceedings, ruling and order of the district Court in Civil Revision No. 29 of 2022.

Counsel for the Applicant submitted on his client's right to be heard; the fact that the same was not joined albeit being a necessary party. From the **Juliana Francis Nkwabi v. Lawrent Chimwaga** case (*supra*) a necessary party ought to be added in a suit where his proprietary rights are directly affected by the proceedings and to avoid a multiplicity of suits, his joinder is necessary so as to have him bound by the decision of the court in the suit.

The Applicant's advocates were unyielding when submitting that their client is a *bona fide* purchaser for value while that of the 2nd and 3rd Respondent's advocate fiercely poked holes into this assertion. The phrase *bona fide* purchaser for value defined by Black's Law Dictionary (see Bryan A. Garner, editor, Black's Law Dictionary 9th ed., West Group, 2009 at page 1355), as follows:

> *'One who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims or equities against the seller's titles; one who has in good faith paid valuable consideration for property without notice of prior adverse claims. Generally, a bonafide purchaser for value is not affected by the*

> *transferor's fraud against a third party and has a superior right to transferred property against the transferor's creditor to the extent of the consideration that the purchaser has paid.'*

In **Suzana S. Waryoba v. Shija Dalawa**, Civil Appeal 44 of 2017) [2019] TZCA 66 the Court of Appeal referred to its decision in **Stanley Kalama Masiki v. Chihyo Kuisia w/o Nderingo Ngomuo** (*supra*) where it was held that a *bona fide* purchaser for value was entitled to a declaration that he was the lawful owner of the suit plot.

The case of **Ahmed Mohammed Al Laamar v. Fatuma Bakari and another**(*supra*) which all counsels referred this court to one side buttressing their arguments the other seeking to distinguish it from the present Application, the Court of Appeal on page 17 had this to say:

> *'Given the fact that the Appellant had already discharged his duties of executing the will, whether honestly or otherwise, and had already exhibited the inventory and accounts in the High Court, there was no granted probate which could have been revoked or annulled in terms of section 49(1) of the Act.'*

The District Court though was not interested to deal with the fact that the house had been sold by the Administrator knew this fact and went on ahead to observe that it was not the proper forum to deal with the fact that there was a purchaser of the said property. It further annulled the grant and

ordered the estate to be restores to the state it was at the death of the deceased, that is before the grant.

It is in my view that seeking to restore the estate to the state that it was before the administrator's appointment based on the fact that the administrator allegedly acquired the grant fraudulently does not cancel out the fact that the house was sold.

The advocate for the 2nd and 3rd Respondents questioned the alleged sale and subsequent transfer saying no money had changed hands and questioned the manner in which the transfer was effected. He made reference to the **Stanley Kalama Masiki v. Chihyo Kuisia w/o Nderingo Ngomuo** case (*supra*) in which the court spoke of not disturbing an innocent purchaser for value that who has affected development on the land. He further argued that there was no sale agreement that has been presented to show that in deed there was a passing of the title while explaining the steps for disposition of a Right of Occupancy concluding that the Applicant is not a *bona fide* purchaser for value as they did not follow the requisite procedures. In my view this is not the proper forum to inquire into the manner in which conveyancing was effected by the requisite offices and authorities and being that the 2nd and 3rd Respondents are not telling this court that the Tittle Deed presented by the Applicant is a forged document, moreover in their Counter Affidavit they attach a search report issued on 04 January, 2023 the results of which bear the name of the Applicant as the registered right holders from 01 October, 2021 and their

caveat is shown to be registered on 01 February, 2022 then this court's mandate remains to be what is in the Chamber Summons and not enquiring into what transpired in the Land Office; this in my view should be dealt with by the Land Court upon properly being moved. As to the other allegations of criminality I also hold the view that the proper forum needs to be moved to deal with the same as held by the Court of Appeal in **Ahmed Mohammed Al Laamar v. Fatuma Bakari and another**(*supra*).

As for the Affidavit of the 2nd and 3rd Respondents being defective; let me begin by commenting that the Affidavit seems to have been prepared hastily and counsel did not have given this court and the other parties courtesy of proofing it for it is laden with errors. However, I am inclined to agree with the counsel for the 2nd and 3rd Respondents that the anomalies pointed out are curable and do not expunge the whole Affidavit if need be. The verification states that the 2nd Respondent has been authorized by the 3rd to proceed and give evidence in this matter.

Consequently, I find that this Application is meritorious and grant it; order that the proceedings, ruling and orders in Civil Revision No. 29 of 2022 be quashed and set aside. In addition, the proceedings ruling and orders of Hon. Maira dated 31 August,2022 are quashed and set aside. I make no orders as to costs.

A.A. OMARI

JUDGE

06/04/2023

Ruling delivered and dated 06th day of April, 2023 in the presence of Ignas John Laswai, learned counsel for the Applicant; holding brief for Baraka Masse, learned counsel for the 1st Respondent and for Obadia Kajungu learned counsel for 2nd Respondent and 3rd Respondents.

A.A. OMARI

JUDGE

06/04/2023