**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**
**(MOSHI SUB REGISTRY)**
**AT MOSHI**
**LAND APPEAL CASE NO. 20 OF 2022**

*(From the District Land and Housing Tribunal for Moshi at Moshi in Application No. 35 of 2019)*

**AUGUST HERMAN MLATIE**
**DEOGRATIUS HERMAN MLATIE** } **.....APPELLANT**
**ANTHONY HERMAN MLATIE**

**VERSUS**

**JOACHIM ALOYCE MREMA.....1ST RESPONDENT**
**EDNA PANCRAS MREMA** (As administrator of the estate of Pancras Mrema)**.....2ND RESPONDENT**

**JUDGMENT**

*Last order: 19/12/2022*
*Judgment: 23/1/2023*

**MASABO, J.:-**

The parties contend over a parcel of land identified as Plot No. 131 Block AAA section III, measured 1040.2 square meters at Industrial Area Moshi Municipality which we shall hereby refer to as 'the suit land'. Before the District Land and Housing Tribunal for Moshi (the trial tribunal), it was averred that sometimes in 1985, one Joachim Mrema, the first respondent herein together with Herman Mlatie (the appellants' late father) and Pancras Mrema, the 2nd respondent's deceased husband) jointly established a garage which they named TULIVU GARAGE. Later on, the garage was allocated the suit land by the District Commissioner for Moshi and on 1987 they managed to register it as a small factory. Using funds jointly contributed, they fenced

the suit land and erected some buildings for better operation of the garage. Pancras Mrema died in 1989 leaving behind Joachim Aloyce Mrema (the 1st respondent) and Herman Mlatie as surviving partners.

At all material times during the lifetime of Pancras Mrema and after his death, the garage was operating under the direct management of Herman Mlatie. In 2009, Herman Mlatie, Joachim Mrema and Pancras Mrema's family, held a meeting and resolved to conduct an evaluation of the suit land for ascertainment of its value. It was resolved further that, after the value is ascertained Herman Mlatie who was still operating the garage could, if interested, buy the shares of the two partners and retain the garage under his ownership. Before this was finalized, Herman Mlatie fell sick and at his demise in 2018 the valuation had not been conducted. Believing that their shares of the surviving partner and that of the deceased ones were intact, the respondents approached the late Herman Mlatie's children (the appelants herein). To their surprise, much as the appellants were present and fully participated in the 2009 meeting, they denied any knowledge of the meeting and averred that the land was solely owned by their late father. respondent's share in the suit land. Believing that they have a legal right fit for determination, the respondents knocked the doors of the District Land and Housing Tribunal for Moshi seeking for an order ascertainment of the value of the suit land, sale and division of its proceeds into three equal parts so that, Joachim Aloyce Mrema, the sole surviving partner and the first respondent herein, can get his share and so are the heirs of Pacras Mrema and Herman Mlatie. The respondents disputed all the claims. They

maintained that the suit land solely belonged to their father, the late Herman Mlatie.

After hearing the parties, the tribunal ruled in favour of the respondents. It subsequently ordered valuation and sale of the suit land and division of its proceeds to the parties. Disgruntled the appellants have come to this court armed with the following six grounds of appeal:

1. The tribunal erred in law and fact by failing to properly analyze the evidence tendered during trial;
2. The tribunal erred in law by holding that the respondents are co-owners of the suit land and that the same was jointly acquired without evidence to that fact;
3. The trial tribunal erred in law in adjudicating a dispute while it lacks jurisdiction over the same;
4. The tribunal erred in law and fact by failing to give due weight to evidence of the appellants;
5. The tribunal erred in law by entertaining and adjudicating a matter without joining the necessary party;
6. The tribunal erred in law by entertaining and adjudicating a matter which was time barred;

Hearing of the appeal proceeded in writing. Both parties had representation. Submitting in support of the first ground of appeal, Mr. Patrick Paul, learned counsel for the appellants argued that evidence rendered before the tribunal credibly established that the land was solely owned by the late Herman

Mlatie. Thus, it was materially wrong for the tribunal to hold that it was jointly owned. Besides, as the land is registered, it was incumbent for the respondents to provide a certificate of title or documentary evidence as to ownership but none was produced. All what they produced were a certificate of registration of the factory (Exhibit P1), minutes of the 2009 meeting between the shareholders and their respective families (Exhibit P2) and letters for appointment of the 2nd respondent as administratrix of the estate of Pancras Mrema (exhibit P3). These did not offer credible proof as to ownership as none of them specifically mentioned the suit land. Thus, they cannot be relied upon as proof of ownership.

Regarding the second ground of appeal, it was argued that the finding that the land is jointly owned was erroneous as there was no evidence to that effect. No partnership deed was tendered in support of the purported partnership by which the suit land was purportedly jointly acquired. Citing the case of **Paulina Samson Ndawavya v Theresia Thomas Madaha**, Civil Appeal No. 53 of 2017, CAT, Mr. Patrick argued that in civil case the burden of proof lies on the person who alleges and never shifts to the opponent party unless it has been discharged and the standard of proof is proof on the balance of probabilities. None of these two was discharged as the respondents rendered no proof of their case.

On the issue of jurisdiction (ground 6 of the appeal) it was submitted that the tribunal adjudicated on the presence of a partnership, a matter which was outside its jurisdiction. It was elaborated further that, existence of a

contract/partnership or otherwise ought to have been reserved for determination by an ordinary civil court and so are matters concerning dissolution of the partnership and the distribution of its assets and liabilities. Thus, by deciding on these matters the tribunal usurped the jurisdiction not vested in it.

On the fourth issue it was briefly argued that the court erroneously omitted to accord weight to the evidence rendered by the appellants. On the fifth issue regarding non joinder it was argued that the omission to join the administrator of the estate of the late Mlatie was a fatal error to the proceedings. He reasoned that, it was also crucial to join the wife of the late Mlatie but she was not joined although she was a necessary party. In fortification, the appelants cited the case of **National Housing Corporation v Tanzania Shoe Company and Others** [1995] TLR 251, where it was held that failure to join the necessary party was fatal as it rendered the proceedings a nullity. He also cited the decision of the Court of Appeal in **Farida Mbaraka and Farid Ahmed Mbaraka**, Civil Appeal No. 136 of 2006. He concluded by praying that for reasons of non-joinder of necessary parties, it is fair and just that the proceedings be nullified and the case file be remitted to the tribunal for retrial.

In reply, Mr. Chiduo Zayumba, counsel for the respondent maintained that the appeal is with no merit and should be dismissed. As to the first ground, he argued that the evidence tendered by the respondents was heavier compared to the evidence by the appellants. Hence, there is nothing to fault

the tribunal. He submitted that the testimony of PW1 and PW2 as corroborated by PW3, PW4 and the documentary evidence produced during trial sufficiently established the respondents' case. He argued the court not to rely on the property tax receipt which was the only documentary evidence tendered by the appellants as it does not prove ownership. He also implored upon the court not to accord any weight to the oral testimony rendered by the appellants as it was with no merit. He added that as the appellants attended the meeting of the shareholders, it is obvious that they knew the arrangement and their denial of the same is none than an afterthought. Further, he argued that as the deceased did not complete the task before his demise, his beneficiaries are duty bound to discharge the terms agreed during the partner's meeting (see **Juma Ramadhan Mkugenzi v Ramadhani Amin Athuman** [1991] TLR 183.

On the second ground of appeal, he cited the case of **Hemed Said v Mohamed Mbilu** [1984] TLR 113 and argued that the respondent ably proved their case as their evidence was heavier compared to the appellants'. On the sixth ground of appeal regarding jurisdiction, it was argued that the dispute between the parties was a land dispute hence within the jurisdiction of the tribunal as per the Land Disputes Courts Act [Cap 216 RE 2019]. Cementing his submission, he cited the case of **Issa Abdallah v. Mwananyasini Mustafa & 6 others** [1998] 536 (HC) and **Omary Mohamed v Awadh Abdalla**h [1992] TLR 35 (HC) and argued that the appellants being the heirs of Herman Mlatie owes a duty to evaluate the suit

land, sale it and distribute the proceeds to the surviving partner and the heirs of the deceased partners.

On the fourth ground that the evidence rendered by the appellant was disregarded, it was briefly submitted that the tribunal cannot be faulted as it ably performed its duty and analysed the evidence on record. Regarding the non-joinder of the administrator, it was argued that by the time the suit was instituted the administrator of the estate of the late Mlatie had not been appointed and from the scheme of events, it was plainly clear that the appellants were playing a cat and mouse game. As for omission of Herman Mlatie's widow, it was argued that the purported widow was a mere girl friend of the deceased with whom he cohabited before his death. The deceased had a legal wife who is based in Marangu and she has no claim whatsoever on the land. Thus, he argued, the issue of non-joinder of a necessary party does not arise. He concluded by praying that the appeal be dismissed for want of merit.

Rejoining, Mr. Paul argued that the suit was time barred as, from the respondent's argument it is obvious that the late Mlatie stayed in the land since 1985. Thus, 24 years reckoned from this year to 2009 when the partners purportedly held the meeting, had lapsed since during which the late Mlatie enjoyed uninterrupted and a peaceful occupation of the same. Thus, it is obvious that the matter was time barred as the time for institution of a land suit against him had already lapsed when they meet in 2009. He further reiterated that the evidence on record show that the appellant's

father owned the suit land and there was no partnership as purported. Concerning jurisdiction, Mr. Paul reiterated that the tribunal exceeded its mandate by entertaining the matter to which it had no jurisdiction and the proceedings are, consequently, a nullity hence should be quashed and set aside.

After carefully considering the tribunal's record and the submissions by the parties, I observed that the kernel of the dispute is the purported partnership between Joachim Mrema and the late Herman Mlatie and Pacras Mrema and that, the main issue for determination by the tribunal was whether the suit land was jointly owned by these three persons. In its finding, the tribunal answered this question affirmatively hence the order that the value of the suit land be ascertained so that it can be sold and its proceeds distributed to the surviving partner, Joachim Mrema and the heirs of the two deceased partners, that is Herman Mlatie and Pancras Mrema.

The task ahead of me in this first appeal it to reassess the evidence on record and make an independent finding on whether the respondent ably established that the suit land was jointly owned by the three partners and whether the court erred in answering this question positively. I am in addition tasked to determine whether the tribunal was clothed with jurisdiction to entertain the application, whether the application was time barred and whether there was non joinder of necessary parties. I prefer to start with the last one. In the 5th ground of appeal, the appellant has contended that the widow to the late Herman Mlatie and the administrator

of his estate were necessary parties and ought to have been impleaded. The omission to implead them was fatal and vitiated the proceedings. This argument was ardently objected by the respondent's counsel.

In my scrutiny of the record to appreciate the arguments advanced by the parties, I observed that, indeed the administrator of estate of the late Harman Mlatie was omitted. Also, the appellants were sued in their personal names and not as legal representatives of the late Herman Mlatie. As this was not adequately canvased in the submissions by the parties, I found it prudent to invite them to address me on this issue.

Addressing the court on behalf of the appelants, Mr. Paul argued that the appellants were wrongly sued in their own names as they had no *locus standi* to defend the interest of the late Herman Mlatie. The one with *locus standi* is the administrator of his estate. Since the administrator was not sued, the suit was incompetent for suing a wrong party. He added that when, as in the present case, a person has a legal claim against the deceased, he can enforce it by suing the administrator of his estate and not otherwise.
On his party, Mr. Zayumba, learned counsel for the Respondents, while conceding that the appellants were not administrators of the estate of the late Herman Mlatie's estate, he argued that they were correctly sued because, at the time of institution of the suit no administrator has been appointed. Hence, they were responsible, as heirs of the late Mlaties, to be sued in their own name as the failure to have the administrator timely appointed was tantamount to a delay tactic. He further argued that, suing

the appellants in their respective names was a proper cause as they were intermeddling in the estate of Herman Mlatie. In fortification, he cited the case of **Sabitina Daudi Mbura v Mary Tumaini & Another**, Land Case No. 39 of 2013, HC at Tanga. He argued further that as there was a contract between the late Herman Mlatie and the respondents and the same was well known to the appellants, they were duty bound to enforce it. The failure, rendered them personally liable. The case of **Juma Sultani Mkugenzi v Ramadhani Amin Athuman [1991] TLR 183 (HC)** was cited in fortification. Further it was argued that, since the suit land has remained under the occupation of the appellants since their farther, they have become intermeddlers. Hence, suing them in their own names was a proper cause. The case of **Geita Gold Mining Ltd and Another v Iganas Athana** Civil Appeal No. 227 of 2017, CAT at Mwanza was cited in support.

Rejoining, Mr. Paul distinguished all the three cases and argued that the proceedings are fatally defective and should be quashed.

I have considered the submissions made by both parties in support and opposition of this issue as well as the cases cited in fortification. Starting with the decision of the Court of Appeal in **Geita Gold Mining Ltd and Another v Iganas Athana** (supra), I can not comprehend why it was cited by the counsel as its facts are substantially distinguishable from the facts at hand. For this reason, I will not dwell on it. Similarly distinguishable is the authority in **Juma Sultani Mkugenzi v Ramadhani Amin Athuman** (supra) because, in the said case, the sole heir and legal representative of

the deceased had committed himself in writing to finalize the transfer of premise which was left uncompleted by the deceased. To the contrary much as the appellants herein were purportedly present during the 2009 meeting, they did not execute any agreement as the agreement contained in Exhibit P1 was executed by Hernan Mlatie, Joachim Mrema and Mrs. Pankrasi Mrema (Edna).

As for the case of **Sabitina Daudi Mbura v Mary Tumaini & Another** (supra), much as I subscribe to the interpretation of the provisions of Order XXII rule 4 of the Civil Procedure Code [Cap 33 RE 2019] and its application when the heirs of the deceased defendant/respondent are reluctant to move the court for appointment of an administrator, it would appear that, Mr. Zayumba's argument was advanced oblivious of the fact that the question whether the heirs can be sued is not at issue in the present case. What is at issue is whether they can be sued in their own name. Had the learned correctly directed his mind to this issue, he would realized that the question attracts a negative answer as implicitly demonstrated in the final orders issued by the court in the above case which reads as follows:

> I order the appellant to substitute the name of the heir(s) of the respondent who is currently in possession of the land in in dispute as **legal representative of the deceased respondent.**

The order is concise, clear and leaves no doubt that the heir was to be substituted not on his own name but as a legal representative of the

deceased which not the case at point as the appellants were sued in their respective names. This was a serious anomaly which ought to have been cured through an amendment at the trial stage so as to add a caption ***"as the legal representatives of the deceased"*** to the appellant's names. Needless to emphasize that, it is a settled position that the caption above must be added even when the suit is preferred by or against a legally appointed administrator. Dealing with a similar issue in **Abdulatif Mohamed Hamis vs Mehboob Yusuf Othman & Another**, Civil Revision 6 of 2017, the Court of Appeal held that:

> We have purposely supplied emphasis on the extracted entry to underscore the fact that the 1st respondent's ownership of the suit land was not in her personal capacity, rather, it was on account of her being the legal representative of the deceased. Thus, in our view, to the extent that the suit land was vested upon the 2nd respondent by virtue of her capacity as the deceased's legal representative, any suit with respect to that property ought to have been instituted against her in that capacity.

In the foregoing, I am constrained to agree with Mr. Paul that, the appellants had no *locus standi* to defend the suit in their own names and that by entertaining the application filed against the appellants in their respective names, the trial tribunal slipped into a material error. As at this stage there can be no amendment of the application to rectify the error, I am constrained to invoke the revisional jurisdiction of this court, nullify the entire

proceedings of the trial tribunal and quash and set aside the respective judgment and decree as I hereby do. Costs to follow event.

It is so ordered.

**DATED** and DELIVERED at **MOSHI** this 23rd day of January, 2022.

X

Signed by: J.L.MASABO

**J.L. MASABO**

**JUDGE**

**23/1/2023**