

IN THE HIGH COURT OF TANZANIA

(MOROGORO SUB-REGISTRY)

AT MOROGORO

LAND CASE NO. 33 OF 2022

STAMILY SALAHE MATUBULILA.....PLAINTIF

VERSUS

ANISOARA A. MWAMPAMBA (As an Administratrix of the Estate of the Late

EPHRAIM NJAWALA MWAMPAMBA) DEFENDANT

RULING

30th June, 2023

CHABA, J.

This ruling is a result of preliminary objections on points of law raised by the Defendant in respect of the suit filed by the Plaintiff on the following points, to wit: -

- i. That, this Honourable Court is not clothed with jurisdiction to entertain this suit; and
- ii. That, this suit is hopelessly time barred.

When the matter was called on for hearing of the preliminary objections, the Plaintiff was represented by Prof. C. S. Binamungu, the learned counsel, while the Defendant enjoyed the service of Mr. Benjamin Jonas, also learned counsel. With the parties' consensus, the preliminary objection was argued and disposed

of by way of written submissions. Both parties complied with the Court's scheduled orders.

As the counsel for the Defendant raised two grounds of appeal as shown above, during submission of the pleadings, he formally withdrew the second point of objection and remained with the first ground. He therefore, submitted only on one ground of preliminary objection which touches on the issue of jurisdiction of this Honourable Court to entertain the suit at hand.

With regard to this point of preliminary objection, Mr. Benjamin submitted that, looking at the nature of claim and the reliefs sought by the Plaintiff as presented in the plaint, it is obvious that the Plaintiff is claiming to have some interest in the suit property which constitutes part of the estate of the late Ephraim Mwampamba.

The counsel placed reliance on the authority of the Court of Appeal of Tanzania in **Mgeni Seifu vs. Mohammed Yahaya Khalfani**, Civil Application No. 1 of 2009, CAT (unreported), wherein the Court observed that, the person claiming interest in the property or estate of the deceased like the Plaintiff herein has to do so in the Probate Court, where at page 14 of the decision, the Court of Appeal went on to state:

"As we have said earlier, where there is a dispute over the estate of the deceased, only the probate and administration court seized of the matter can decide on ownership".

To buttress his argument, Mr. Benjamin further relied upon the authority in the case of **Monica Nyamakare Jigamba vs. Mugeta Bwire Bhakome & Another**, Civil Application No. 199 of 2019) (CAT) (unreported), in which the Court held *inter-alia* that, a party who alleges to have an interest in the estate of the deceased and wishes to assert her interests, has a right to enter a caveat against the grant of the probate or letters of administration under section 58 (1) of the Probate and Administration Act [CAP. 352 R. E, 2002].

From the above observation by the Court, the counsel averred that, it is clear that the Plaintiff has placed herself in a wrong Court as she claims for beneficial interest in the suit property which constitutes part of the estate of the late Ephraim Mwampamba, which in essence are to be pursued and determined in the Probate Court. Based on the such anomaly, the counsel prayed the Court to find this point of objection meritorious and dismiss the suit in its entirety with costs.

In rebuttal, the counsel for the Plaintiff, Prof. Binamungu accentuated that the Plaintiff who was a wife of the late Ephraim Mwampamba has been living in the disputed premises that she constructed herself for 26 years ago, and that she never participated in the Administration Cause No. 54 of 2016 in the Primary Court of Morogoro, at Chamwino.

He submitted further that, what prompted the Plaintiff to institute this suit seeking for redress, is the threat to be thrown out of her accommodation by

the Defendant. In his view therefore, the case can only be decided fairly after this Court has heard the parties on merits.

In conclusion, he contended that, since the facts in this case are serious and requires a careful attention of this Court in order to do justice to the Plaintiff, he prayed the Court to dismiss the point of preliminary with costs.

In his brief rejoinder, Mr. Benjamin insisted that the claims by the Plaintiff's counsel show that, the matters are to be raised and determined in the Probate Court and not in this Court. He added that, going by the averments in the plaint and the reliefs sought, the matter has been wrongly brought in this Court something which has not been refuted by the Plaintiff's counsel. Mr. Benjamin therefore submitted that, his objection on the issue of jurisdiction must be upheld by the Court and the suit be dismissed in its entirety.

I have considered the rival submissions with regard to the raised objection. At the outset, I would like to point out that upon perusing the plaint, I am inclined to sustain the same as it has merit. I will soon elaborate hereunder.

At paragraph 2 of the plaint, the Plaintiff stated that, her claims against the Defendant are for declaratory orders that the landed developments over the disputed premises was by constructive trust acquired by the Plaintiff together with the deceased Ephraim Mwampamba, and that the Plaintiff is entitled to beneficiary interests in the landed property. This is contained and exhibited at paragraphs 5 to 7 of the plaint. I will reproduce the said paragraphs for ease of reference:

"5. That, in 1998, the couple jointly completed their first three-bedroom house at the premises in dispute and moved in. The plaintiff lives on the said plot together with her children to date. Rent collected from tenants living in the house is fully utilized by the plaintiff to sustain her life and her children.

6. That, the plaintiff while working as a plumber, secretary and programmer, managed to raise income and applied the same to develop the plot six times beyond what was there at the time of moving in.

7. That, the current developments on the plot which are to the tune of estimated value of Tshs. 350,000,000/= are substantially developed by the plaintiff under constructive trust of the deceased Ephraim Mwampamba.

In view of the above excerpt from the plaint, I agree with the learned counsel for the Defendant that, the matter at hand is purely a Probate matter as she highlighted in her plaint, in which the Plaintiff has narrated how she has a protectable interest in the suit premises.

In my considered view, the Plaintiff is in fact not claiming ownership rather beneficial interest as a legal heir of the late Ephraim Mwampamba with whom they jointly built the said disputed property for the first time in 1998, before she managed to raise income and develop the property in question under constructive trust of the deceased. Hence, looking at the nature of the claims, I find it that, the same is based upon the extent in which the Plaintiff made her

contribution and not for recovery of an immovable property in which this Court could have jurisdiction to entertain the matter on the basis of the provision of section 37 (1) of the Land Disputes Courts Act [CAP. 216 R. E, 2019] which provides: -

"Section 37 (1) - Subject to the provisions of this Act, the High Court shall have and exercise original jurisdiction:

(a) in proceedings for the recovery of possession of immovable property in which the value of the property exceeds three hundred million shillings."

(b) NA;

(c) NA;

(d) NA;

(e) NA.

From the foregoing, the Plaintiff having beneficial interests (of or relating to the use or benefit of property, other than legal title) in the said estate as a spouse of the deceased as revealed in paragraph 4 of the plaint, has all the rights to challenge any wrong committed by the administrator of the deceased estate but in a proper Court as it was correctly observed by my brethren Hon. Justice I. C. Mugeta, J., in the case of **Jacqueline Ntuyabaliwe Mengi and 2 Others vs. Abdiel Reginald Mengi** (Administrators of The Estate of The Late Reginald Abraham Mengi) **and Others (Civil Revision No. 1 of 2022) [2022] TZHC 11745 (11 August 2022)** extracted from www.tanzlii.go.tz, wherein this Court held inter-alia that: -

*"In this jurisdiction, a right to matrimonial properties which is in one spouse's name belongs to that party until when it is proved that the parties either intended to have community ownership of the properties or the other spouse proves his/her contribution in the acquisition of the property concerned. **Therefore, when a spouse dies the surviving party cannot sue in a normal civil court or on matrimony rights for determination of his/her share in the property on ground of contribution in its acquisition**". (Emphasis added)*

That being the position of the law, the question that arises in respect of the matter under consideration is, whether such a matter regarding the extent of contribution of a surviving spouse concerning the disputed property can be entertained and determined.

The answer however, is not far-fetched. In our jurisprudence, there are numerous precedents which are shedding lights on the above question including the case of **Leticia Mtani Ihonde vs. Adventina Valentina Masonyi**, Civil Appeal No. 521 of 2021, CAT sitting at Musoma (unreported), where the Court of Appeal of Tanzania upon being faced more or less with the same issue, it observed that: -


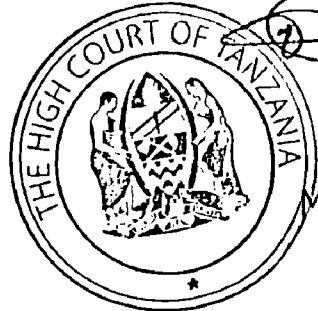
*"Where the husband has died, the surviving spouse cannot seek distribution of the matrimonial assets in a matrimonial cause, **and any claim or perceived rights thereto must be sought in a probate and administration cause**".*

Although the instant matter has not been instituted in this Court as a matrimonial cause but a land case, I am of the settled mind that, as it was underscored by the CAT in the case of **Leticia Mtani Ihonde** (supra), similar situation can be safely extended and applied in the circumstance of this case, because looking at the pleadings filed by the Plaintiff before this Court, the Court is being moved to determine the extent of contribution of the Defendant being the surviving spouse in a matrimonial property. Be that as it may, the truth will remain that it is only the Probate Court which is placed in a better position to deal and decide on the issue.

Having so found and done, I am inclined to agree with the learned counsel for the Defendant that, in as much as the matter at hand is concerned, this Court lacks jurisdiction to handle the matter.

In the result, the preliminary objection raised by the counsel for the Defendant is upheld and the suit is hereby struck out with no order as to costs. **I so order.**

DATED at MOROGORO this 30th day of June, 2023.



M. J. CHABA
JUDGE

30/06/2023