

**IN THE HIGH OF THE UNITED REPUBLIC OF TANZANIA
(SUMBAWANGA DISTRICT REGISTRY)**

AT SUMBAWANGA

LAND APPEAL CASE No. 10 OF 2022

*(Originating from Land Application No. 50/2020 of the District Land and Housing
Tribunal of Rukwa at Sumbawanga)*

OSWARD MWANISAWA.....APPELLANT

VERSUS

ALISTID JUMBE.....1ST RESPONDENT

MALIUS JUMBE.....2ND RESPONDENT

RICHARD JUMBE.....3RD RESPONDENT

MODEST SIMBEYE.....4TH RESPONDENT

JUDGMENT

05/06/2023 & 20/07/2023

MWENEMPAZI, J.:

The appellant is an Administrator of the late Micheal Kishangu Simbeye's (deceased) estate through the letters of Administration dated 11th day of Septmeber, 2020 from the Probate Cause No. 05 of 2020 at Kaengesa Primary Court. In executing his duties as the Administrator in one of the properties (land) purported to be owned by the deceased, he

encountered the respondents as they denied him the right of executing his duties whereas, he intended to divide the said land amidst the beneficiaries of the deceased person.

The appellant thereafter filed an application at the District Land and Housing Tribunal for Rukwa at Sumbawanga (trial tribunal) where he prayed for judgement in his favour against the respondents so that the he executes his duties as the administrator of the deceased's estate by dividing the land in question amidst the beneficiaries of the deceased. The decision of the trial tribunal was in favour of the respondents, whereby the learned trial chairlady was fortified that the appellant had not proved that the disputed land belonged to the deceased person and in that, the respondents were declared as lawful owners of the disputed land.

The appellant was not amused by the decision of the trial tribunal and thus filed a petition of appeal to this court which consisted of seven (7) grounds of appeal in which I find prudent to reproduce as herein;

1. That, the learned trial chairperson erred in law and in facts when failure to entertain the land in question as land dispute relating to the estate of the deceased Micheal Kishangu Simbeye.

2. That the learned trial chairperson erred in law and facts when failure to consider the petitioner's Application that the Trial Tribunal to order the Respondents to allow the petitioner to divide the deceased's property as Administrator.
3. That, the learned Trial Chairperson erred in law and in facts to disbelieve the petitioner as Administrator of the estates of the deceased Micheal Kishangu Simbeye as appointed in Probate and Administration Cause No. 05 of 2020 at Kaengesa Primary Court of Sumbawanga at Sumbawanga.
4. That, the learned Trial Chairperson erred in law and in facts to mis regard that the same dispute was already been determined by the Trial Tribunal in Land Appeal No. 16/2018 in which the matter was delivered in favour of the petitioner and in Application No. 50/2020 in which the decision was entered in favour of the Respondents.
5. That, the Trial Chairperson misdirected to determine two cases which arises from one cause of action which form two different decisions.
6. That, the Trial Chairperson erred in law and in facts to exercise her jurisdiction to the dispute arises from Probate and Administration of Estates of the deceased while its jurisdiction is in all proceedings relating to land.

7. That, the Trial Chairperson erred in law and in facts to restrict the petitioner to exercise powers and duties vested under the Probate and Administration of Estates Act, as legal representative for all purposes of the deceased person.

It is for these grounds of appeal that the appellant prayed for this court to quash the judgment of the trial tribunal and set aside the decree thereof, and the judgment to be entered in his favour and the costs be borne by the respondents.

When the matter was scheduled for hearing, both sides had no legal representation meaning they appeared for themselves, and for the interest of justice, the court advised the parties to dispose this appeal by way of written submissions where they might be able to outsource legal aid. Both parties agreed and complied to the scheduling of filing their submissions respectively.

The appellant submitted first that, he prays to adapt his grounds of appeal and in so doing he will only submit for the 1st, 2nd, 3rd and 4th grounds of appeal and chose to abandon the 5th, 6th and the 7th grounds of appeal.

Submitting for the 1st ground of appeal, he was of the view that it is a trite law that the issue of Jurisdiction needs to be considered before

determination of any case. The appellant then cited the case of **Shyan Thanky & Others vs Ned Palace Hotel [1971] EACA**, and insisted further that the issue of jurisdiction is the creature of statute and parties cannot give jurisdiction to the court. The appellant again referred this court to the case **Fanuel Manthil Ngunda vs Herman Manthil Ngunda & 2 Others, (1995) TLR 155 CAT** where it was held that, the issue of Jurisdiction is very important and it goes to the root of the case.

The appellant proceeded that, referring to the tribunal's records, the disputed land was the key issue at the ward tribunal and later on at the District Land and Housing tribunal while the deceased was still alive between him and the respondents, and after his death, the appellant was appointed the administrator of his estates. He added that, the District Land and Housing Tribunal under Section 3 (1) (2) and Part V of the Land Disputes Courts Act (Cap. 216 R.E. 2019) has that power to entertain land matters alone and not matrimonial or probate matters. And therefore, the appellant finalised by stating that trial tribunal had no power to entertain this matter as it did.

Submitting for the 2nd ground of appeal, the appellant stated that his application at the trial tribunal was for an order to the respondents to allow him to distribute the deceased's property as administrator but it

misdirected itself in discussing and deciding about the land in dispute as it is governed by the Magistrate's Courts Act, Cap 11 R.E. 2019 to the 5th schedule, Part II which pronounces powers and duties of the Administrator appointed by a Primary Court, the appellant then quoted it as follows;

"An Administrator appointed by a primary court, shall with reasonable diligence collect the properties of the deceased and the debts that were due to him, pay the debts of the deceased and the debts and costs of the administration and shall thereafter distribute the estate of the deceased to the persons or for the purposes entitled there to and, in carrying out his duties, shall give effect to the directions of the Primary Court."

He then prayed for this court to allow this appeal and dismiss the decision of the trial tribunal and direct the matter to be determined by the court of with a competent jurisdiction to the issue at hand.

Coming to the 3rd ground of appeal, the appellant submitted that the deceased had acquired the disputed land and died intestate, which means he died without making a will, and that is why he applied for being appointed as the administrator of the deceased's estate at the

Primary Court in terms of Section of 2 (a) of the 5th Schedule of the Magistrates' Court Act, (Cap 11 R. E. 2019).

He added that, the court has power to appoint an administrator "either of its own motion or an application by any person interested in the administration of the estate appoint one or more persons interested in the estate of the deceased to be administration of administrator thereof, and, in selecting any such administrator, shall, unless for any reason it considers in expedient so to do, have regard to any wishes which may have been expressed by a deceased."

The appellant therefore insisted that the trial tribunal ignored the powers and duties of the appellant as an administrator legally appointed by the Primary Court.

Submitting of the 4th ground, the appellant submitted that it is the principle of the law that if a suit which finally decided by a competent court, then the same suit between the same parties and the same matter in issue should not be tried in a subsequent suit by another court of the same jurisdiction or lower rank.

He proceeded that in terms of Section 9 of the Civil Procedure Code [Cap. 33 R.E. 2022] it provides that, and he quoted:-

"No Court Shall try any suit or issue in which the matter directly and substantially in issue had been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim litigating under the same title in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court."

The appellant then expressed his views that, the decision made by the trial tribunal was the same as the decision it made in the former suit. In insisting on his point, he referred this court to the case of **Julias Joseph Mihayo vs Abel Ngeleja, Land Appeal No. 21 of 2021** at Mwanza Registry (unreported).

In conclusion, the appellant submitted that this appeal has merits and the proceedings, judgment and orders of both the Ward Tribunal and the DLHT should be produced a nullity and set aside judgment and orders from the Ward Tribunal and the DLHT. And therefore, he prays for this court to allow this appeal in its entirety with costs.

Responding to the appellant's submissions, the respondents jointly submitted that this appeal lacks merits and should be dismissed with

costs. They proceeded by drawing the attention to the appellant that the term Petitioner as used by the appellant is wrong whereby it means Applicant whilst he is an Appellant to this case, and in so doing, it made his submissions be incompetent before this court.

The respondents submitted against the 1st ground of appeal that, the trial tribunal was proper to determine the land in dispute because the Probate Court cannot divide the land which is in dispute of ownership, that the Probate Court has powers to direct parties to file a suit for the land in dispute to a proper jurisdiction in order to determine the lawful owner then continue with the division of the said land after Land Court determines the lawful owner. They added further that, the issue of the applicant that jurisdiction has to be considered before the determination of any case, they respondents agree to it that it is true, but they insist that the particular position cannot be applicable when the land in dispute is not yet determined by the trial tribunal.

In clarification they submitted that, is trite of the law that only competent land court has jurisdiction to determine ownership and not probate court, and they cited the case of **Deogratus Mayuya vs Sumuni Faida Mayuya, Land Appeal No. 24 of 2022** where it was held as follows and they quoted:-

"I therefore allow this appeal partly to the extent that in the circumstances and facts of the dispute at hand only the competent land court has jurisdiction to determine ownership and not probate."

They added by citing Section (2) and (3) (1) of the Land Dispute Courts' Act [Cap. 216 R.E. 2019] which stated that, subject to Section 167 of the Land Act and Section 62 of the Village Land Act, every dispute or complainant concerning land shall be instituted in the court having jurisdiction to determine land dispute in given area. That, the regarding the position of the law, that this case was a pure land matter and that the trial court had jurisdiction to entertain the same.

The respondents then cited the case of Ibrahimu Kasanga vs Emmanuel Mweta [1986] TLR 26 (HC), where the court gave direction as here under and they quoted:-

"There may be cases where the property of the deceased person may be in dispute. In such cases all those interested in determination of dispute or establishing ownership may institute proceedings against the administrator or the administrator may sue to establish claim of the deceased property."

Submitting against the 2nd ground of appeal, the respondents jointly submitted that the Trial Tribunal has no jurisdiction to divide the property of the deceased person only a Probate Court has that jurisdiction. That, the Trial Tribunal was proper to decide the lawful owner of the land in dispute and not to direct the petitioner to distribute the deceased property because the power of dividing and distributing properties of the deceased person is vested to a Probate Court. It is the respondents' submissions that the appellant tried to mislead the court by saying that the trial tribunal was not proper for failure to allow the appellant to distribute the property of the deceased person. The respondents' referred this court to the cases of **Flora Adam Mwamagemo vs Emmanuel Maftaha Tungaraza, Misc. Land Appeal No. 184 of 2021** and **Mahamud Mohamed Babu & 2 Others, Land Case No. 229 of 2007** where it was held that;

"This Court is vested with Exclusiveness Jurisdiction on Land matters but not with matter subject of probate intricacies."

They submitted further that, the trial tribunal cannot grant orders which he did not have jurisdiction by ordering the appellant to collect and distribute the deceased properties to the heirs, that the act of the tribunal to deal with the division of the deceased properties was pure probate matter which is dealt with another court as provided in Section

3 to 6 of the Probate and Administration of Estate Act [Cap 352 R.E. 2019], in which it is the provision which has given the jurisdiction to the court to entertain Probate matters.

As for the 3rd ground of appeal, the respondents argued that the trial tribunal withdrew the Land Appeal No. 16 of 2018 due to appellant's lack of locus to institute the case which led to the appellant to file the Application No. 50 of 2020 after being chosen as the administrator of the estate of the Late Micheal Kishangu Simbeye, that the claim of the applicant regarding the trial tribunal disbelieve him as administrator of the estate, according to them the claims are not true as they insist that the appellant himself failed to prove on how the disputed land belongs to the deceased who passed away in 1951 and that the respondents used the said land without any interference after 2020 being chosen as the administrator of the estate it is almost 69 years.

Submitting against the 4th ground of appeal, the respondents stated that, this ground lacks merits since the Land Appeal No. 16 of 2018, the appellant had filed against Alistidi Jumbe only at the District Land and Housing Tribunal in which the judgement was delivered on the 11th day of August, 2020 where it held that the irregularity by the trial tribunal of allowing the appellant to institute the suit while he lacked the

locus stand is fatal and makes the proceedings and judgment thereof a nullity.

The respondents referred this court to Section 9 of the Civil Procedure Code [Cap. 33 R.E. 2019] which states as follows;

"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties under whom they or any of them claim litigating under the same title in a court cannot be applicable in this position since this matter was not determined the appellant as a lawful owner but nullify the proceedings. In that, the respondents submit that they pray this appeal to be dismissed with costs.

The appellant had no any rejoinder at this juncture which left room for my keen perusal of the submissions made from both sides and reading between the lines the records of appeal put before me. In reaching a justifiable decision, I am adamant that, the only determinant issue in this appeal is ***whether the trial tribunal rightfully dismissed the appellant's application.***

I am aware that this court as the first appellate court has mandate to re-evaluate the evidence on record and come to its own findings. See the case of **Kaimu Said vs Republic, Criminal Appeal No. 391** of

2019 which cited with approval the case of **Siza Patrice vs Republic, Criminal Appeal No. 19 of 2010** (unreported) where it was categorically stated that: -

"We understand that it is settled law that a first appeal is in the form of a rehearing. As such, the first appellate court has a duty to re-evaluate the entire evidence in an objective manner and arrive at its own finding of fact, if necessary."

Despite the fact that the above cited cases are criminal cases in nature, all the same, the underlying principle contained therein applies to both civil and criminal cases.

The appellant's grounds of appeal as he submitted them in this court suggests that the trial tribunal had no jurisdiction to determine the matter of ownership of the deceased's land as the same had already been decided before in the same tribunal in a suit where the deceased was the claimant. The grounds suggest further that, the trial tribunal is only vested with jurisdiction to entertain only matters of land in nature alone and not otherwise.

From the records, it is evident that the appellant instituted the suit against the respondents at the trial tribunal as an administrator of the deceased's estate and the cause of action was vacant possession of the

deceased's land so that he divides the same amidst the beneficiaries, as it is known that among the duties of an administrator of the deceased's estate are to gather the properties of the deceased and distribute them wisely amidst the beneficiaries of the deceased.

Comparatively, in the trial tribunal's judgement the learned Chairperson did raise an issue which depicts that the tribunal dealt with the application as a probate cause and went ahead to determine ownership of the same. To clarify my argument, I find it best to reproduce the first page at the second paragraph of the typed judgement of the trial tribunal as herein: -

"Wakati wa usikilizaji wa shauri hili viini vifuatavyo villainishwa ikiwa ni kwa mujibu wa Kanuni ya 12 (3) (b) ya Kanuni za Mabaraza ya Ardhi ya Mwaka 2003 zilizoundwa chini ya Sheria za Mahakama za Utatuzi wa Migogoro ya Ardhi, Sura ya 216 na marejeo yake ya mwaka 2021;-

1. Iwapo eneo gombewa ni mali ya mirathi ya marehemu

Michael Kishangu Simbeye?

2. Mmiliki halali wa eneo la mgogoro ni nani?"

As seen above, it is my fortified holding that the trial tribunal typically decided the application as if the cause of action was ownership

of the land while the appellant had clearly stated in the application form that the cause of action against the respondents was vacant possession over the land which has been listed as the property of the deceased at the probate court.

Under **Section 8 (d) of G.N. No 49 OF 1971 The Primary Courts (Administration of Estates) Rules**, it has been stated that, if any interested party has an objection (question) which concerns either properties, assets or liabilities of the deceased person, the said objection should be directed to the probate court and it will deliver a decision over the raised objection. See **Mniko and Others (Probate & Administration No. 48 of 1996** (unreported).

In the records before me, there is neither argument of the respondents that they had objected over the land in question being listed as one of the properties of the deceased person nor did they appeal against any decision of the Probate Court as far as the land in question is concerned.

It is clear as a broad day light that, the trial tribunal misled itself in deciding about the ownership of the deceased's land, an aspect which was not pled by the appellant. It is the cardinal principle of law that parties are bound by their pleadings, and the court itself is as bound by

the pleadings of the parties as they are themselves. See the case of **The Registered Trustees of Islamic Propagation Centre (IPC) vs The Registered Trustees of Thaaqib Islamic Centre (TIC), Civil Appeal No. 02 of 2020**, CAT (unreported).

As the matter of fact, it is not part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by their pleadings. Otherwise, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. See the case of **Astepro Investment Co. Ltd vs Jawinga Co. Ltd, Civil Appeal No. 08 of 2015, CAT (Unreported)**.

From the foregoing evidence on record, it is my analytical consideration that the trial tribunal erred in dismissing the appellant's application as it made a decision of issues which were not pled by the applicant (appellant herein). Therefore, I do allow this appeal for it has merits and consequently, the decision and decree of the trial tribunal are hereby quashed and set aside respectively. The respondents are ordered to vacate the land in question so that the appellant completes his duties as an administrator. Costs to follow the event.

It is ordered accordingly.

Dated and delivered at Sumbawanga this 20th day of July, 2023.




T. M. MWENEMPAZI

JUDGE

ORIGINAL