**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**MOSHI DISTRICT REGISTRY**

**AT MOSHI**

**LAND CASE APPEAL NO. 66 OF 2022**

*(Arising from the decision of the District Land and Housing Tribunal of Moshi District at Moshi in Land Application No. 104 of 2017)*

**EMMANUEL VICENT.....1ST APPELANT**

**EDWARD FREEMIN KIMARIO.....2ND APPELANT**

***Versus***

**NESTORY EPIMAKI.....1ST RESPONDENT**

**NOVATI EPIMAKI.....2ND RESPONDENT**

**JUDGMENT**

9th & 16th August, 2023

**A.P.KILIMI, J.:**

The appellants in this appeal are challenging the decision of the District Land and Housing Tribunal of Moshi in Land Application No. 66 of 2022 where the tribunal declared the respondents herein the lawful owners of the suit property.

The background of this matter which gave rise to this appeal is as follows. At the District land tribunal, the appellants were sued by the respondents for having trespassed on the suit land. Thereat, appellants

claimed that they gave money to the respondents' father named Naboli Epimark @ Mzee Naboli when he was sick as loan and they both agreed the suit land which they knew belong to him to be put as security in respect to the said loan, also they claimed it was agreed upon failure to return the said loan, the suit land will be taken by the appellants instead of. What happen the said Mzee Naboli failed to return the loan, consequently the appellants entered written agreement to take said security thus became owner of the suit land. Respondents also tendered at the tribunal a Judgment of Usseri Primary court in Probate no. 7 of 2010 which appellants herein objected the administration of the appointed Administratix one Epifania Naboru, the wife of Mzee Naboli. Also they tendered judgment of District court of Rombo in Probate Appeal no. 1 of 2011 which affirmed Usseri Primary Court decision state above.

The Respondents herein claimed at the District Land and housing tribunal that they are the owners of the suit land which was bequeathed to them by their grandfather through a will. The tribunal considered the said will, which was tendered and marked " exhibit P1" and having no doubt of it, relied on it and was of the view, since the suit land was bequeathed to the respondents, then Naboli Epimark was having no title in respect to the

suit land to pass it to the appellants. Consequently, the tribunal declared respondents to be the legal owner of the suit land.

Aggrieved by the decision above, the appellants appealed to this Court armed with five grounds of appeal as follows;

1. That the learned chairman erred in law by deciding the dispute jointly while the alleged cause of action against the 2nd appellant arose way back in 1997 different from that against the 1st appellant allegedly arose in 2007.
2. That the learned chairman erred both in law and in fact for his failure to analyze and evaluate appellant's evidence amply and ostensibly available on records.
3. That the learned chairman erred in law by relying on obliterated and hence highly doubtful exhibit P1 (last will of the respondents' grandfather) which had never been proved by way of probate before a court of competent jurisdiction.
4. That the learned chairman erred in law by basing his judgment and opinion on a non-existing law to wit section 25(10' (sic) of the Sale of Goods Act Cap 214 R.E. 2002.
5. The learned chairman erred both in law and in fact thereby considering the disputed parcels of land collectively without proper identification hence resulted into issuing a defective and non-executable decree.

At the hearing of this appeal, appellants enjoyed the service of Mr. Castro Pius Shirima learned advocate while respondents were not represented, thus appeared themselves in persons. They both prayed the appeal be argued by way of written submissions, I acceded with them, and I thank them for their research and timely submission as per schedule issued,

however, I will consider all submissions but, I will not reproduce all they have submitted, save briefly to what in my view, I see are necessary in this appeal.

In respect to jurisdiction of the tribunal to this matter, Mr. Shirima submitted that both respondents at the trial tribunal said they acquired the suit land in 1968, but on 1997 they were more enlightened about it, counting from above to when this matter was filed at the tribunal, shows the Tribunal lacked jurisdiction to entertain the suit, since was brought outside the statutory time. To support his stance the counsel referred the provision of section 3 (1) of Law of Limitation Act CAP 89 R.E. 2019 also, the case of **Fanuel Mantiri Ng'unda vs. Herman Mantiri Ng'unda& 20 Others**, Civil Appeal No.8 of 1995 and **Juma Mtungirehe vs. The Board of Trustees of the Tanganyika National Parks t/a Tanzania National Park**, Civil Application No. 221/02 of 2022 (Both unreported).

In respect to will be tendered at the trial tribunal, Mr. Shirima contended that, the learned Chairman erred in law and fact by relying on exhibit "P 1" -last Will of the respondents' grandfather which was obliterated and had never been proved in a probate cause before a court of competent jurisdiction for that regard. The fact that respondents claimed

that the said Will was admitted without objections from the appellants at the trial, does not remove its authenticity to be highly doubtful. This is because it has been obliterated and there is no proof that it had been proved before a probate court.

The counsel for appellants further submitted that, the said will after admission was not read out aloud in court, therefore, the effect of failure to read out the contents is that, it is not clear from the records and the parties whether the parcel of land allegedly bequeathed to the respondents form part of land in dispute. Also, the counsel added that, it is undisputed the appellants possess two separate parcels of land which are not adjoining against one another. Thus, there is always a possibility that the alleged exhibit "P1" does not even mention either of the two. In that respect he invites the court to reassess this documentary evidence solely relied upon, by assessing its probative value against the rest of the other evidence on record, because admission of exhibit "PI" in itself does not mean that its content is conclusive proof of the respondents' ownership to the disputed parcels of land. To buttress this assertion referred the case of **Kilombero Sugar Company LTD v. Commissioner General (TRA),** Civil Appeal No. 161 of 2018 CAT at Dodoma. **Ruwala vs. R** [1957] EA 570 as quoted

in the case of **Damson Ndaweka vs. Ally Saidi Mtera**, Civil Appeal No 511999 CAT at Arusha and **Kaimu Said vs. The Republic**, Criminal Appeal No. 391 of 2019 (both unreported).

Responding to the above, the respondents contended that, the exhibit P1 which was tendered during hearing at the tribunal was not obliterated and was proved in probate cause No.1 of 2011 whereas as per the findings of the court it was found that the respondents were the owners of the suit land. Furthermore, the respondents argued that failure by the appellants to object admission of the said exhibit P1 or questioning its authenticity is tantamount to admission that the form and content of the tendered document was absolutely correct and true. To bolster this stance, they referred the case of **Joseph Deus @ Sahani & Another vs. Republic** Criminal Appeal 564 of 2019 CAT (unreported). They further contended that challenging the same at this stage was an afterthought which should not be given any attention by this court.

In brief rejoinder Mr. Shirima reiterated that, the appellants have proved by evidence how they came into possession of their parcels of land. The respondents on the other hand have claimed ownership based on a

disputed Will, but under normal circumstance they ought to launch their claims way back in 1997 when their father sold the suit land to the second appellant. He further insisted that, there is no copy of the decision regarding the said Probate and Administration Appeal No. 01 of 2011 supplied for the court to appreciate its content thus there was no proof of it and also, the position taken regarding probate of will was erroneous, and further reiterated that a will must be proved by way of probate for it to be effective and operative.

I have considered all grounds of appeal, the above submissions by both parties, the trial tribunal judgment and all exhibits tendered to prove this dispute at the District Land Tribunal, I am convinced to start with ground number three. And this is because, after going through the record of the trial tribunal I noted that gist of this matter is based on a dispute over ownership of a suit property which the respondents claimed at the tribunal to be the rightful owners through a 'Will' while the appellants contested the same alleging to be the owners after a lawful purchase from the respondent's father.

Not only that, this third ground also touches the matter of jurisdiction of the court in respect to the finding on the validity of the said will.

Therefore, it my settled view should be determined first before proceeding to other grounds. (See the case of **R.S.A Limited vs. Hanspaul Automechs Limited and Another,** Civil Appeal No. 179 of 2016, CAT at Dsm; **Shahida Abdul Hassanal Kassam vs. Mahedi Mohamed Gulamali Kanji,** Civil Application No. 42 of 1999; **Tanzania Revenue Authority vs. Tango Transport Company Ltd**, Civil Appeal No.84 of 2009 and **Mwananachi Communications Ltd and 2 others vs. Joshua K. Kajuia and 2 other**, Civil Appeal No. 126 /01 of 2016 (both unreported) to mention few.

In considering the said above gist, I have noted that the trial tribunal ruled in favour of the respondents basing on evidence of the will (Exhibit P1). For purpose of clarity, I reproduce page 7 and 8 to the effect;

> *"Kuhusu 'kiini cho mgogoro 'kinochosema ni nani mmiliki wa eneo la mgogoro, Madai ya wadai ni kwamba walipewa eneo hilo na Baba yao mwaka 1968. Wanasisitiza madai haya kwa kutoa wosia wa tarehe 14/10/1968 ( kielelezo No."P1". Nimepitia kilelelezo hiki (wosia) cha tarehe 14/10/1968 ambapo Epimaki Kakiki alitoa eneo kwa Novati Epimark na Nestory Epimaki. Hati hii ilishuhudiwa na mashahidi 3 akiwepo ndugu wa mtoaji Nominic Andrea. Sababu ya mtoaji wa eneo kwa wajukuu alieleza wazi kuwa mtoto wake*

*alishataka kuuza maeneo ya familia ( kihamba). Nanukuu sehemu ya kielelezo hili kwa rejea:-*

*"Mtoto wangu Naboru Epimaki alitaka kuuza kihamba hicho kwa ajili ya Denl alilokula kwa Paul Mtana ... "*

*Kwa maelezo haya sina sababu ya kutia shaka kielelezo hikl (exhibit "P1")."*

It was after the above finding, the trial tribunal proceeded to hold that respondent father had no better title to pass it the appellants herein after satisfied the said suit land was bequeathed to the respondents through a Will. From the above excerpt it is undisputed that the tribunal tested the validity of the said will. Having so done, the next point to be considered by me is whether the District Land tribunal was proper and had jurisdiction to determine the validity of the will.

It is a trite law that the issue of validity of a WILL is exclusive domain of probate Court and not otherwise. This is in accordance with rule 8 of GN. No.49 of 1971, the Primary Courts (Administration of Estate) Rules regulating matters and conduct of probate and administration of deceased estates in Primary Courts. The said rule provides as follows;

*"Subject to the provisions of any other law for the time being applicable the court may, in the exercise of the jurisdiction conferred on it by the provision of Fifth Schedule to the Act, but not in derogation thereof, hear and decide any of the following matters, namely-*

*(a)* ***whether a person died testate or intestate***

***(b) whether any document alleged to be a will was or was not a valid or subsisting will;***

*(c)* ***any question as to identity of persons named as heirs, executors or beneficiaries in the will;***

*(d)* ***any question as to the property, assets or liabilities which vested in or lay on the deceased person at the time of his death;***

*(e) any question relating to the payment of debts of the deceased person out of his estate;*

*(f) any question relating to the sale, partition, division or other disposal of the property and other assets comprised in the estate of the deceased person for the purpose of paying off the creditors or distributing the property and assets among the heirs or beneficiaries;*

*(g) N/A*

*(h) any question relating to expenses to be incurred on the administration of the estate."*

(Emphasis added)

In my interpretation of the law quoted herein above, it is apparent that the determination of validity of a Will is vested into the probate court. Also, the above provisions enshrines that any disputed connected to the issues accrue from inheritance should be determined by probate court. In this matter, the facts as alleged that the respondents were bequeathed land through the will tasted by their grandfather, I am settled the dispute in this matter indeed concern the administration of the estate of the said grandfather and cannot skip to be entertained by probate court unless there was a probate court resolved the above issue of inheritance through will.

As said above, the respondents contended that, the exhibit P1 which was tendered during hearing at the tribunal was not obliterated and was proved in probate cause No.1 of 2011 whereas as per the findings of the court it was found that the respondents were the owners of the suit land. While the appellants alleges that the said will was obliterated and had never been proved in a probate court.

In proving their case, each part tendered evidence of the copies of judgment probate cases existed before this matter was decided by the Trial

District Tribunal, these are, Probate cause no.7 of 2010 of Usseri Primary court and Probate Appeal no. 1 of 2011 of Rombo District Court. At the trial tribunal, in plaintiff case the same were tendered by Novati Epimark ( AW1) and it were admitted as "P2" and "P3" respectively, while in defendant case, the same were tendered in the same manner by one Edward Fremini Kimario (DW2) and it was admitted as "D2" and "D3" respectively.

From the above, I have taken judicial notice that, there were probate cases, one of the first instance and the second at the appellate level of the District Court. Next, I have asked myself whether the said Will or the issue of inheritance of respondents herein was resolved on those cases. To start with the probate cause no. 7 of 2010, in this case it was one Epifania Naboru, the wife of Mzee Epimark Naboru petitioned therein to administer the estate of her late husband, the appellants herein appeared therein and objected her to include the suit land, since it was sold to them by her late husband, thus is not the part of the estate. At page 7 of typed judgment of this case, the court observed that;

*"Kwa mujibu wa mirathi hii tunaona kuwa mali lliyoombwa mirathi ni ardhi ikiwa ni pamoja na walizinunua wapinzani.*

***Hata hivyo, ardhi hizo tumeona kuwa (Hususani aliyenunua mpinzani No. 1) iishajadiiiwa kwenye baraza la kata-Kirongo Samanga na kutolewa uamuzl.***

*Kinachotakiwa kwenye shauri hilo ni kutekeleza yale yaliyoamuriwa kwenye hukumu hiyo ama kwa upande mmoja hakuridhika basi wangekata rufaa kupinga maamuzi hayo. Tulichokiona kwenye ushahidi ni kwamba, ukoo walichanga hela shs. 200,000/= ili mpinzani No. 1 arejeshewe na cha kuchangaza ni kwamba fedha hizo hazıkufikishwa kama ilivyokuwa imeamriwa. Hiyo siyo kazi yetu kwa sasa kujibu hilo, ni juu ya wenye kesi wenyewe hutekeleza hilo kwa wakati jinsi ilivyokuwa.*

*Kwa upande wa mpinzani No. 2 mahakama tunaona kutojadiliwa sana kwenye Kesi hii japo inadaiwa kwenye ushahidi kuwa alinunua sehemu ya bonde ambalo huwa halilimwi (sehemu ya kustawishia majani ya mifugo) na ni miongoni mwa sehemu waliyoombea mirathi hii.*

*Kwa vile kwa mujibu wa kielelezo exhıbit D. 2(1) (2) ni hati za mahuziano kati ya mzee Nabori Epimaki na kwa hakıka ukoo (mwombaji)* ***hawakuwahi kuwalalamikia tangu mauzo hayo yafanyike 9/3/1997 mahakama hii yaona kuwa ni mapema mno kuweza kutamka kama ni haki yake au laa.*** *Swala kama hili lingefaa kupelekwa/kusikilizwa na vyombo vya sharia vinavyohusika na mgogoro wa ardhi.*

*Kutokana na uchambuzi huo na kwa jinsi ushahidi ulivyo, mahakama yaona kuwa, maombi ya mwombaji yamepita kiasi na kiasi yameshindwa.* ***Sehemu ambazo zimebaki bila kugaiwa na marehemu au kugaiwa watoto n.k*** *mahakama yaona kuwa ndizo mwombaji asimamie kwa manufaa ya warithi.*

***Sehemu zilizokwishauziwa wapinzani zinabaki kama zilivyo kwa sasa kwa maamuzi yaliyotolewa na baraza la ardhi la kata hayajabadilishwa. Hii ni sambamaba na eneo alllouziwa mpinzani No. 2 kwani hamna shauri lolote lililowahi kufunguliwa juu ya uhalali wa yee kuuziwa hapo."***

[Emphasis added]

Briefly, according to the above, initially before verdict, the primary court asked itself whether it was proper, the land bought by objectors (appellant's hereinabove) to be returned to the petitioner therein. However, the primary court left the question unanswered, but later its answer can be inferred through its final decision, this is when it stated at last paragraph of page 7 that, the fact that since on 9/3/1997 nobody has complained of the said sale was valid or not, it was early to declare that it was right or not. But lastly concluded that, the land sold to the first objector (first appellant herein) should maintain that status quo since the

decision of the ward tribunal have not challenged, further observed the same status to be to the second objector (second appellant herein) because no dispute filed on the validity of sale effected against him.

Being aggrieved by this decision of the primary court, the petitioner, as said filed an appeal at the District court of Rombo in Probate Appeal no. 1 of 2011, at page 3 of typed judgment, the appellate court stated in her eleven grounds raised, in essence they fall under challenging the procedure of alleged sale of the land by the deceased persons to the respondents, that no consent was sought and obtained from the wife of the deceased person, (the appellant therein), but also the deceased did not own those suit land. The appellate court confirmed the primary court decision on appointing administrator to administer deceased estate with exclusion of the suit land, but went further to advise the respondents herein to take cause themselves. For easy reference, I reproduce the last part of page 4 of the said typed judgment;

> *"The dispute is on the ownership of the property allege sold by the deceased person to the Respondent. I will be very brief and straight forward that, since there is the evidence from the appellant herself that these pieces of land are and*

*were not the property of the deceased person but are or were the property of the son of the deceased person who are NESTORY and NOVAT, the appellant had no material before her in which she could include those lands, in the estate of the late NOBORU EPIMAK. That alleged owners are present and we are told now are grown up, there is no reason the Appellant is continuing to protect the property without the authority from the rightful owners, if at all.*

*It is for the foregoing reasons I'm of the settled view that this appeal has no merit and I hereby dismiss it entirely. The judgment of the trial primary court as far as to the administration of the deceased properties* ***in exclusion of the lands in dispute is restored****. I make no order as to costs."*

[ Emphasis added]

I have acutely scanned the two judgments above, neither the Will was tendered nor the issue of validity of the said Will was discussed and resolved, the petitioner alleged merely that the suit land was given to her sons (respondents herein) but in which manner was not stated and proved. So far at the primary court the petitioner was interested to administer the estate properties including the one under control of the objectors (appellants herein).

Therefore, it is not true as submitted by the respondents that the above Will was proved to be valid by the Primary and District court. Thus, the trial tribunal relied on a will per se which was not vetted and proved on its validity, and since no any probate court which is vested with jurisdiction to determine validity of that Will, I am of considered opinion the said Will is not enough evidence to establish ownership of the said suit land to belong to the respondents.

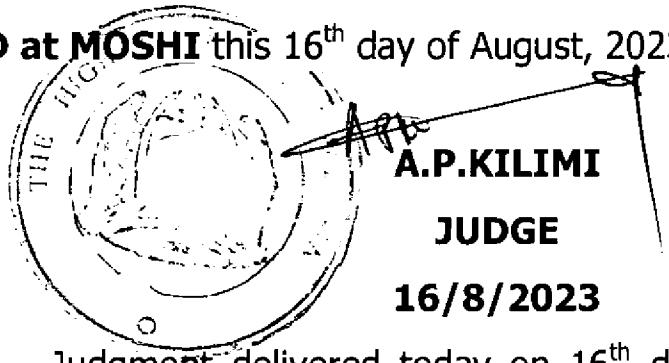
It is important for the probative value of the Will be tested by the probate court, since the said court is the domain of all issue of inheritance, and since Will provides for what the deceased intended his estate to be, there is a need of proving whether, the testator was of legal age and sound mind, whether the will was in writing or oral, whether the document expressed the deceased's clear intent to create a will and whether the document was signed by the testator and witnessed by individuals who are not beneficiaries. Also, whether there is any alteration or amendment of the will as it appears in this will. All these must be determined and settled at the probate court.

In the premises, I am settled that this ground has merit and is hereby sustained, having observed so, it is my considered opinion the above suffice to dispose this appeal. Thus, I see no need to proceed with the determination of the remaining grounds of appeal, which in my view they cannot change my findings aforesaid.

From the foregoing, I hereby nullify the proceedings of the District Land and Housing tribunal of Moshi in Land Application no. 104 of 2017 and set aside the judgment and decree thereof. In the circumstances of this matter stated above, each party will bear his own costs.

It is so ordered.

**DATED at MOSHI** this 16th day of August, 2023



**A.P.KILIMI**

**JUDGE**

**16/8/2023**

**Court:** - Judgment delivered today on 16th day of August, 2023 in the presence of Mr. Hagai Simon Kimaro holding brief of Castro Pius Shirima and all Respondents present.

**Sgd: A. P. KILIMI**
**JUDGE**
**16/8/2023**