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

**ARUSHA SUB REGISTRY**

**AT ARUSHA**

**LAND APPEAL NO. 219 OF 2022**

(Originating from the decision of the District Land and Housing Tribunal of Karatu at Karatu in Land Application No. 15 of 2021)

**DAATI SIIMA ..... APPELLANT**

**VERSUS**

**ERRO SIIMA ..... RESPONDENT**

**JUDGMENT**

10th July & 21st August 2023

**KAMUZORA, J.**

This appeal emanates from the decision of the District Land and Housing Tribunal of Karatu at Karatu in Land Application No. 15 of 2021(the trial tribunal) in respect of the Preliminary objection on points of law that was raised before it. Briefly, the Appellant and her children were involved in a dispute over ownership of land after the demise of the Appellant's husband one Siima Waree.

The gist of the dispute emanates from a claim by the Appellant that being a surviving spouse after her husband's death, all properties acquired jointly with her husband reverted to her by virtue of right of

survivorship. The record shows Siima Waree died interstate and was survived by a widow (the Appellant herein) and eleven (11) children. One of Appellant's daughter, Lucia Siima instituted Land Application before the District Land and Housing Tribunal (DLHT) for Karatu against the Appellant and her brother (Appellant's son) claiming for one acre of land allegedly allocated to her by her father, the late Siima Waree. The DLHT declared the Appellant the lawful owner of the disputed land.

On appeal to the High Court in Land Appeal No. 66 of 2018, this court directed issue of ownership to be determined after the appointment of administrator of the estate of the late Siima Waree. Thus, nether Lucia Siima nor Daati Siima (the Appellant herein) was declared lawful owner of land. Following the High Court directives, one Erro Siima, another son to the Appellant and the late Siima Waree instituted a probate matter, Shauri la Mirathi Na. 72/2020 before the Primary Court at Karatu. Although objected by the Appellant and her other son Bura Siima, Erro Siima was appointed administrator of the estate of the deceased Siima Waree.

In an attempt to perform his administrative duties of distributing the estate of deceased, he encountered resistance from the Appellant herein who claimed to be the lawful owner of the land. She instituted a

suit before the DLHT, Land Application No. 15 of 2021 praying for declaratory orders that the farms which the administrator intended to distribute which are 6.5 acres, 2.5 acres located at Dipu sub-village, Marera village in Rhotia Ward within Karatu District and 16 acres located at Kirurumo sub-village, Huduma Village in Rhotia Ward within Karatu District, were not subject to administration. She prayed for an order restraining the Respondent and others from disturbing her peaceful enjoyment of the suit land.

In addition to the defence filed in contest of the application before the DLHT, the Respondent raised three points of preliminary objection on points of law as follows; **one,** that, the application is bad in law for contravening the provision of section 6 and 7 of Act No 1 of 2021 (the Written Laws Miscellaneous Amendment) Act,2021, **two,** that, the application is bad in law as was initiated in bad faith for the sole purpose of averting execution of the lawful order issued in Land Appeal No. 66 of 2018 by Hon. Mzuna, J and **three,** that, the Appellants Special Power of Attorney is defective in law hence it should not be used in prosecuting the matter. Based on the above points of objection the Respondent prayed for the application before the trial tribunal to be struck out with costs.

Upon hearing parties on the preliminary objections, the trial tribunal dismissed the application before it with costs and held that the Appellant ought to have referred the matter to the court that dealt with the appointment of administrator if he had any interest with the disputed suit and not to institute an application before the trial tribunal. The Appellant was aggrieved by the decision of the trial tribunal and preferred this appeal which is hinged on five grounds;

1) *That, the honourable Chairman of the District Land and Housing Tribunal Grossly erred in law and in fact by dismissing the Appellant's Land Application No. 15 of 2021 based on uncertain facts and without any proof by evidence.*
2) *That, the Honourable Chairman of the District Land and Housing Tribunal grossly erred in law and in fact by holding that, the Appellant was not entitled to institute Land Application No. 15 of 2021 before the trial tribunal.*
3) *That, the Honourable Chairman of the District Land and Housing Tribunal grossly erred in law and in fact for improper exercise of jurisdiction and thus, arrived at a wrong and unfair decision.*
4) *That, the Honourable Chairman of the District Land and Housing Tribunal grossly erred in law and in fact for not participating and for not indicating the assessor's opinion in arriving to his decision dismissing the Appellants' application.*
5) *That, the Honourable Chairman of the District Land and Housing Tribunal grossly erred in law and in fact for relying on the*

*decision of the High Court in Land Appeal No. 66 of 2018 by Mzuna, J in dismissing the Appellant's application.*

The appeal was argued by way of written submission by the leave of this court. Mr. Nelson Massawe, learned advocate appeared for the Appellant while Dr. Ronilick Mchami, learned advocate appeared for the Respondent. Parties filed their submissions as scheduled and the same will be considered by this court in reaching its decision.

Arguing in support of the 1st, 2nd and 5th grounds of appeal, the counsel for the Appellant submitted that in order to dismiss the land application, the tribunal shall be confined to the opinion of assessors upon the case being heard inter-parties and not on interlocutory decision. That, it was wrong for the trial tribunal after hearing the preliminary objection to dismiss the said application instead of striking it out. He added that the reason used by the trial tribunal to dismiss the case is the matter of fact which could be determined in the main case thus it was wrong to be treated as point of law with effect of determining the suit in its finality.

On the holding that the Appellant was supposed to refer the matter to the court which heard the probate matter, the counsel for the Appellant faulted the tribunal holding on account that the fact that probate and administration case was already closed was not proved

before by the trial tribunal by the parties. That, nether the Appellant nor the Respondent was given chance to address that issue and such finding was raised by the tribunal chairman in his own and in surprise to the parties. That, there was no decision of the probate court that shows that the probate matter was finally closed. That, in the absence of such order, the findings of the trial tribunal become nugatory and nullity for being made on reasons that are extraneous matters.

The Appellant's counsel further submitted that, the powers of the land tribunals to deal with land matters are stipulated under section 3(1) of the Land Dispute Courts Act. That, land tribunals have no jurisdiction to deal with issues of succession and inheritance if there is a pending probate and administration cause. That, since it is the finding of the trial tribunal that the probate matter was already closed, then the Appellants application was proper before it.

The counsel added that, section 3 of the Land Disputes courts Act Cap 216 R.E 2019 puts mandatory requirement that all disputes of land in nature be filed before the land tribunal. That, said requirement does not exclude properties obtained by way of distribution of deceased estate. The Appellant cemented his submission with the case of

**Malietha Gabo Vs. Amadmu Mtengu**, Misc. Land Application No 21 of 2020 HC at Kigoma (unreported).

The Appellant went on and submitted that, since the probate matter was already closed, any interest in land passed to the beneficiaries thus, the Application was proper before the trial tribunal as it had all the requisite jurisdiction to entertain the same. The counsel insisted that, the decision of this court in Land Appeal No. 66/2018 guided parties to accomplish administration process before filing land cases to the land tribunal. That, it was wrong for the trial tribunal to direct parties to approach the probate court while the probate matter was already closed.

On the 4th ground, it is the claim by the Appellant that the trial tribunal erred in not indicating the opinion of the assessors in its ruling. That, section 23(1) & (2) of the Land Disputes Courts Act Cap 216 R.E 2019 requires the chairman to sit with two assessors who shall give their opinion before composition of the judgment. That, in the current appeal the chairman dismissed the land application without the aid of assessors. The Appellant prays for the appeal to be allowed.

In opposition of the appeal, the counsel for the Respondent submitted that the trial tribunal did not dismiss the application rather it

struck out the said application for it contained errors. He also submitted that the trial tribunal was correct in holding that the matter ought to have been referred to the court which hear the probate case. he explained that, section 3(1) of Cap 216 does not bar the trial tribunal to suggest the best way of resolving a dispute which is also subject of litigation in a probate case before the Karatu Primary Court.

Responding to the third ground, the Respondent's counsel submitted that the law is always against multiplication of cases of similar nature in different courts as may lead to delivery of judgment which are contradictory for the same subject matter. That, it was proper for the trial court to direct the matter to be filed in the court that determined the probate matter.

Responding to the fourth ground of appeal the counsel for the Respondent submitted that, it is a long legal principle that when hearing a preliminary objection on point of law the tribunal will not sit with the aid of assessors. That, the reason for the same is that, the assessors opine on facts and not legal points. He maintained that the Appellant's application before the trial tribunal was not dismissed rather struck out. He prayed for the appeal to be dismissed with costs.

In a brief rejoinder the counsel for the Appellant reiterated his submission in chief and added that the ruling of the trial tribunal is like a judgment as it did not allow parties to re-file the application before it rather it directed the application to be referred to the probate court. The Appellant cemented his submission with the case of **Cyprian Mamboleo Hizza Vs. Eva Kioso and another,** Civil Application Ni 3 of 2010 and insisted for the appeal to be allowed.

I have passed through the trial tribunal record and considered the rival submissions of both parties. The main contention in this matter is whether the trial tribunal was correct in directing the dispute to be referred to the primary court that determined probate matter. This entails a determination on whether the trial tribunal determined the issues before it. What was before the trial tribunal were three points of objection. The trial tribunal was bound to determine whether the point of objection met the threshold of pure point of law as ascribed in the famous case of **Mukisa Biscuit Manufacturers Ltd Vs. West End Distributors Ltd** [1969] EA 696, where it was held that,

> *"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct.*

*It cannot be raised if any fact has to be ascertained or what is the exercise of judicial discretion."*

The Appellant alleged that what was raised before the trial tribunal attracted evidence rather than being pure points of law. That, the decision was made on facts that needed evidence on assumption that they were point of law capable of disposing the suit.

From the trial tribunal's decision, the first objection on the use of English instead of Kiswahili in drafting documents and the third objection on the use of powers of attorney were found to have no merit. However, the second objection was upheld by directing the Appellant to refer the matter to the court that determined probate case. Now the question is whether that objection was pure point of law or it attracted evidence.

In arguing that objection it was contended that the application was illegal for it was filed in bad faith for purpose of preventing execution of the lawful order issued in Land Appeal No. 66 of 2018 by Hon. Mzuna, J. That, the Respondent complied to such order by filing probate case before the primary court was and he was already executed his administration duties and closed the probate matter. It is obvious that what was raised before the trial tribunal does not fit in the test of pure point of law.

The claim that the Appellant had bad faith in instituting the application is a fact which need evidence to prove. Similarly, the fact the Respondent was already completed administration duties and closed the probate matter needs evidence to prove so. Since a pure point of law need to be seen in the face of record, the present matter did not fall within the ambit of pure point of law as it attracted evidence to prove such fact. It was therefore wrong for the trial tribunal to consider the application before it as incompetent and in directing the matter to be referred to the court which determined the probate matter. Since the Appellant raised a claim of ownership on the properties that was listed in the deceased estate by the Respondent, it was important for the evidence to be heard and rights of the parties determined.

On the argument that the trial tribunal was not properly constituted when determining the preliminary objection, I find this argument wanting in merit. Section 23 (2) of the Land Disputes Courts Act, Cap 216 R.E 2019 which stipulates the composition of the tribunal states;

> *"(2) The District Land and Housing Tribunal shall be duly constituted when held by a Chairman and two assessors who shall be required to give out their opinion before the Chairman reaches the judgment."*

The above cited provision deals with the composition of the tribunal in hearing and determining the application on merit. The assessors must be in attendance during hearing of the application on merit give their respective opinion before pronouncement of judgment. No provision which imposes mandatory requirement for the assessors to give opinion on a ruling determining the preliminary point of objection. I agree with the counsel for the Respondent that basically, assessors are intended to aid the court to determine factual issues and not to deal with technical legal issues. I therefore find that failure to record opinion of assessors by the trial tribunal in determining the objection was not fatal. Therefore, the tribunal was properly constituted when hearing of the preliminary objections.

Having concluded that the suit was properly before the trial tribunal, I find no reason to discuss the words used to dispose the application. Whether the application was dismissed or struck out, the order was not valid as there was a need for the trial tribunal to determine the application on merit. Since this court has found that the second preliminary objection on point of law did not meet the threshold of pure point of law to dispose the suit, the trial tribunal was wrong in basing its decision on that point.

Having said so, I find merit in this appeal and proceed to allowed it. In the event, the original file be remitted back to the trial tribunal for the determination of the application on merit. In considering the relationship between the parties who are mother and son, I make no order as to costs.

**DATED** at **ARUSHA** this 21st day of August, 2023.


**D.C. KAMUZORA**

**JUDGE**