

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
ARUSHA SUB REGISTRY
AT ARUSHA**

CIVIL APPEAL NO. 37 OF 2022

*(C/F Misc Civil Application No 04 of 2022 before Arumeru District Court originating
from Probate Cause No 18 of 2010 before Enaboishu Primary Court)*

MOSSES THOMASAPPELLANT

VERSUS

ANNA H. THOMAS..... RESPONDENT

JUDGMENT

12th September & 08th November, 2023

KAMUZORA, J.

The Appellant herein Mosses Thomas was appointed by the primary court to administer the estate of the late Hosea Thomas in Probate case No. 18 of 2010 in its judgment dated 22nd September 2010. The Respondent herein was later appointed to join the Appellant as co-administrator by the same primary court in its ruling dated 07th March 2022. The Appellant's appointment was later revoked for failure to comply with the requirement to secure sureties. He appealed to the district court *vide* Civil Appeal No. 17 of 2011 but his appeal was dismissed on 15th

August 2011 and the Respondent was approved to continue with administration duties.

In course of performing administration duties, the Respondent presented before the primary court an inventory to the estate of the deceased but the same was objected by Hendry Hosea and Mosses Hosea (the Appellant herein). The reasons advanced before the primary court was that some of the properties listed were distributed by the deceased before he died hence, they wrongly included in the estate to be distributed. After hearing parties on the objection, the trial court made a decision on 01st October, 2014 that there was no proof of oral WILL to support the alleged distribution. The primary court ordered all properties listed to be administered as deceased's estate.

In March 2022, the Appellant herein preferred Application No. 04 of 2022 for extension of time with view of challenging the primary court's ruling dated 01st October, 2014. The reasons advanced in the affidavit in support of application was that the primary court dealt with land matter which it had no jurisdiction. Before the district court, the Appellant claimed to have purchased the land from Hosea Thomas Mollel and that he had instituted a land matter before the District Land and Housing Tribunal. For him, the primary court lacked jurisdiction to adjudicate issue related to land. He thus prayed for the district court to extend time to file an appeal

to challenge the primary court's decision dated 01st October, 2014 which he considered as determining issue of land out of jurisdiction.

The district court was satisfied that the Appellant has no any good reason for the grant of extension of time. It held that, apart from failure to account for delay, the Appellant failed to establish if there was any illegality that needed court's determination. His application was therefore dismissed. The Appellant is aggrieved by that decision hence, the current appeal which is premised on six grounds which are reshaped as hereunder: -

- 1. That, the district court erred in law and in fact for not extending time and for not seeing that the primary court acted without jurisdiction in determining land matter.*
- 2. That, district court erred in law and in fact by not considering that illegality in primary court's ruling and order was vividly and clear on face of record.*
- 3. That, the district court erred in law and in fact in holding that the applicant (Appellant herein) appealed against the proceedings and not the ruling and order of the primary court.*
- 4. That, the district court erred in law and in fact for not taking into consideration that issue of illegality and jurisdiction could be traced in the proceedings and decision of the primary court.*
- 5. That, the district court erred in law and in fact for basing its decision on a quotation instead of the whole ruling and order of the primary court.*

6. That, the district court erred in law and fact for it misinterpreted the Court of Appeal decision on jurisdiction of probate court.

When the matter was called for hearing, Mr. Gabriel Rwahira appeared for the appellant while the Respondent was ably represented by Mrs. Kimale. Counsel for the parties opted to argue the appeal by way of written submissions and they both complied to the submission schedule.

In his submission in support of the 1st and 6th grounds of appeal, the counsel for the appellant argued that the primary court in its order dated 14th June, 2014 dealt with issue on ownership of land which it has no jurisdiction. That, as the Appellant and his brother were objecting part of the land for not being part of the deceased's estate, the primary court wrongly determined the status of ownership of land which it has no jurisdiction contrary to the provision of section 3 and 4 of Cap 216 RE 2019. He was of the view that the district court misinterpreted the decision of the Court of Appeal in **Mgeni Seif Vs. Mohamed Yahaya Khalfan**, Civil Application No. 1 of 2009 as the court in that case directed the matter to be remitted to the primary court for compliance to the law, meaning going first to the land court.

On the 2nd and 4th grounds, the Appellant submitted that there was issue of illegality which the district court could have considered in granting extension of time. To him, illegality was on face of record as the primary

court stepped into the shoes of the land court by determining issue of land while dealing with probate matter. He added that the illegality of the proceedings resulted to the illegality of the decision and the two cannot be separated. He added that, the proceedings of the trial court indicate that the trial court intended to assess the legal owner of the houses and land in dispute which justify the claim that it dealt with land matter. He was of the view that, had the district court considered that the primary court assumed jurisdiction over land matter, it could have allowed extension of time on the basis of illegality. He supported his submission with the decision **Amour Habib Salim Vs. Hussein Bafagi**, Civil Application No 52 of 2000 (unreported).

On the 3rd and 5th grounds, the Appellant's counsel reiterated his submission in chief and added that the Appellant moved the district court to challenge the ruling and order and not the proceedings. He concluded with the prayer that the appeal be allowed by setting aside the ruling and order of the district court.

In reply, the counsel for the Respondent submitted that the proceedings of the trial court do not show if it was intended to establish ownership. To him, the proceedings which led to the ruling dated 01st October, 2014 was intended to ascertain the decease's properties which were undistributed. He insisted that since the proceedings did not intend

to determine issue of ownership, the issue of jurisdiction was wrongly raised hence, the 1st and 2nd grounds are meritless.

The Respondent further submitted that the application for extension of time was dismissed as there was no good reason advanced for the delay. That, the Appellant was bound to state why he could not take action for the period of 8 years if indeed, there was illegality in the matter. Referring the case of **Sebastian Ndaula** cited in **Yazid Kassim Mbakileki Vs CRDB 1966 Ltd Bukoba Branch and another**, Civil Application No 412/04 of 2018, the Respondent counsel insisted that the Appellant was bound to account for delay.

On the 2nd and 4th grounds, the Respondent submitted that the same are also founded on illegality which the Respondent dispute that no illegality in the trial court's decision. That, the matter for determination was whether the houses in dispute were part of the estate or were distributed before the deceased death. He contended that the case of **Amour Habib Salim** is inapplicable to the circumstance of this case as in the matter at hand, no illegality that was established.

On the 3rd and 5th grounds, the Respondent does not dispute the fact that the Appellant was challenging the ruling and order of the primary court. He however contended that the background of the ruling and order have to be traced from the proceedings conducted. The Respondent urged

this court to go through the chamber application in Misc. Civil Application No 4 of 2022 and see if there is any point deponed by the Appellant which support grant of extension of time.

In addition, the Respondent blamed the Appellant for employing delay tactics by filing baseless applications and appeals to hinder the Respondent performance of her duties. He referred five applications and appeals preferred by the Appellant but not decided in his favour. He also added that the even the land matter, Application No. 78 of 2013 referred by the counsel for the Appellant, was struck out in 2021 by the DLHT for being incompetent. He therefore prays for the Appellant's appeal to be dismissed with costs.

I have considered the grounds of appeal and submissions by parties and I will deliberate to all grounds jointly. Having perused the record of the two trial courts, the pertinent issue for determination is whether the district court was correct in denying the Appellant's application for extension of time.

As well pointed out in the above analysis, only one ground was advanced in the affidavit deponed in support of application for extension of time. In his chamber application and affidavit, the appellant herein alleged illegality in the decision and order of the trial court dated 01st October, 2014. To him, the trial court assumed jurisdiction over

land matter. Reading the said ruling and order of the court, I find nothing related to the determination of land ownership. The said ruling resulted from the complaint from the Appellant and his brother Hendry Hosea who claimed that some of the properties listed in the inventory were already distributed to them by the deceased before his death. The trial court gave them opportunity to prove such fact which was interpreted as oral WILL. In his evidence before the trial court, the Appellant herein explained that they had a family meeting in which their father distributed properties to them. Thus, the question before the trial court was not dispute over ownership as they all acknowledged the original owner to be the deceased. Their argument was on whether there was any arrangement which gave them right over deceased's properties. As well captured by the district court, the trial court only assessed if the properties listed in the inventory were distributed to the beneficiaries before the deceased's death or if they were forming estate of the deceased. Such determination is within the ambit of the probate court to assess if there is any valid arrangement that could make some of the properties from not forming part of the estate. The claim that the Appellant purchase land from Hosea Thomas Mollel came as an afterthought as it was raised by the Appellant in his affidavit in support of application for extension of time but not before the primary court. Before the primary court, he only alleged that the house

was distributed to him by the deceased before he died. This court do not buy the Appellant's idea that there was land dispute ousting jurisdiction of the trial court. I therefore agree with the district court that the Appellant failed to demonstrate existence of any point of illegality that could justify extension of time.

On the Appellant's argument that the district court misinterpreted the decision of the Court of Appeal in **Mgeni Seif Vs. Mohamed Yahaya Khalfan** (supra) this court find the same baseless. The Court of Appeal in that case made assessment of the claim by the applicant that he purchased the house forming estate from the administrators. The court agreed that ownership issue touching the estate can be determined by the probate court hence, directed the primary court to determine the issue on whether the estate belonging to the deceased was dealt with by any court. The contention by the Appellant that the interpretation in Mgeni's case suggest that the determination had the meaning of going first to the land court is in my view, misconceived.

Apart from failure to prove illegality, the appellant was unable to plead or even demonstrate in his submission the reason for not pursuing his right for the period of almost seven years and six months. The record shows that the decision which the appellant intend to challenge was delivered by the primary court on 01st October, 2014 but an application

for extension of time was preferred before the district court in March, 2022. It was expected for the appellant to explain the reason for his failure to pursue this matter for that long. Hiding behind issue of illegality in this matter, did not relieve the appellant from accounting for period of delay. Since the appellant was unable to prove illegality or account for the delay, the district court was correct to dismiss his application for extension of time. I therefore find no merit in this appeal hence, dismiss it with costs.

DATED at **ARUSHA** this 08th Day of November, 2023



A handwritten signature in blue ink, appearing to read "D.C. Kamuzora".

D.C. KAMUZORA

JUDGE