

**IN THE HIGH COURT OF TANZANIA  
MUSOMA DISTRICT REGISTRY  
AT MUSOMA  
MISC. LAND APPLICATION NO. 90 OF 2023**

**MARY LOUISE ELIKANA MKONO.....APPLICANT**

*VERSUS*

**PILLY ALEX ..... RESPONDENT**

**RULING**

28<sup>th</sup> November & 12<sup>th</sup> December, 2023

**M. L. KOMBA, J:**

This is a ruling on a preliminary objection raised by the counsel for respondents in regard to prayer for temporary injunction restraining respondent or her agents from entering into the disputed land and making any development in order to maintain status quo of the subject matter pending determination of the matter.

Upon filling of the same, counsel for respondents raised preliminary Objection which pray to be heard on the date scheduled for hearing of Application that;

*That the applicant has no locus-stand to seek a temporary injunction without being appointed as administratrix of the deceased estate as*

*in the main case she is claiming the joint ownership of the dispute land as co-ownership(sic) with deceased Nimrod Mkono.*

When the matter was scheduled for hearing, applicant had a legal service of Mr. Gervas Emmanuel while respondent was represented by Mr. Cosmas Tuthuru, both learned advocates. As the tradition of the court that preliminary Objection should first be entertained as was in the case of **Khaji Abubakar Athumani vs. Daudi Lyakugile TA D.C Aluminium & Another**, Civil Appeal No. 86 of 2018, this court allowed counsel for the respondents to submit over the preliminary objection as raised.

Mr. Tuthuru had a very short submission that applicant is claiming the ownership of the disputed land jointly with her deceased husband without being appointed as administratrix and therefore she has no legs to stand on the application. Elaborating on this counsel submitted that at paragraph 5 and 6 of the plaint, applicant explained together with her late husband they purchased a piece of land in dispute. To him, it was not right for the applicant to claim land owned jointly with deceased as there might be relatives and other beneficiaries of the said property and he find the proper way was for the appointment of the administrator. Relying on **Victoria Daud Chanila vs Doroth Mazula** Land Case Appeal No. 9 of 2005, he

prays this court to maintain precedent that applicant could have valid claim if the husband could have been alive otherwise, she is supposed to be appointed administratrix. He also supplied the decision on **Said Kibwana and General Tyre EA vs Rose Jumbe** (1993) TLR 175 CAT that any claim against deceased should pass to legal representative.

Mr. Gervas on the other hand submitted that the objection has no qualification as was elaborated in the case of **Mukisa Biscuit Manufacturing Company LTD vs West End Distributors LTD** [1969] E. A 696, that PO must be on pure on point of law and the counsel for the respondent did not mention any provision of law which require applicant to be appointed administratrix. He proceeded to submit that the question for determination by this court is whether a widow has a right to claim ownership of the land occupied jointly with her husband. To him the answer is yes as the land was owned jointly and when one dies, he said the principle applicable is survival ownership as in section 59 of the Law of Marriage Act, Cap 29 R.E 2019 (Cap 29) which explain jointly acquired property becomes matrimonial property and no one can make disposition without the consent of the other and one dies the remaining person remain to be the owner of the property as was in **Jackson Nyansari vs Nyama**

**Sagere Mansari** PC Probate Appeal No. 6 of 2007 HC. He differentiates the case of **Victoria Daud Chanila vs Doroth Mazula** (supra) that in **Victoria** the deceased had more than one wife that's why it was mandatory to have a legal representative bearing in mind deceased died long time. He explained further that section 161 of Cap 29 as was analysed in the case of **Victoria Daud Chanila vs Doroth Mazula** (supra), it was couched in the circumstance when deceased had more than one wife the same was in **Nyamasagare Nyansari vs Jackson Nyasa & Nyansari Mang'aria** High Court Civil Revision No. 9 of 2004. He further submitted that the case of **Said Kibwana vs General Tyre** (supra) is distinguishable as it set a general rule of administration of property but there is exception which fall under survival like husband and wife. he insisted that the case does not focus married couple but general society. He prayed the PO to be dismissed with cost.

During rejoinder, Mr. Tuthuru explained that the case of **Victoria Chanila** (supra) was not about many wives but **inter vivo**. He insisted the issue of locus of the applicant is legal issue and pray the PO to be found with qualification and merit while insisting the importance of the applicant to be appointed administratrix.

I have subjected to the contending arguments of the trained minds for both parties to proper scrutiny. The issue for determination by this court is whether the Preliminary objection is meritorious. Before determine this preliminary objection let me visit and refresh over renowned decisions of various courts of law over the matter; to mention few are the case of **Mukisa Biscuit Manufacturing Company LTD vs West End Distributors LTD** (supra) **Hezron Nyachiya vs Tanzania Union of Industrial and Commercial Workers and Others**, Civil Application No. 70 of 2001 (unreported), **Tanzania Telecommunications CO. LTD vs Vedasto Ngashwa and Four others**, Civil Application No. 60 of 2009 (unreported), **Ayubu Bendera and 10 Others vs AICC**, Civil Application No. 9 of 2014 (un reported), and **Alphonse Muhatwa vs Juliet Roda Alphonse** Civil Reference No. 9/01/2016 CAT at Dar Es Salaam (unreported)

The latter case expounded the decision in **Tanzania Telecommunication case** (supra) to the effect that preliminary point of objection must meet three conditions which are; **first** the point of law raised must be pleaded or must arise as a clear implication from the proceedings. **Secondly**, it must be a pure point of law which does not require close examination or

scrutiny of the affidavit or counter affidavits. **Thirdly**, is that the determination of such point of law must not depend on court exercise its discretion.

Among those listed, the second condition, as argued by both counsel, that objection must be on a pure point of law and on face of record which does not require close examination. In the case at hand Mr. Tuthuru submitted that applicant has no locus as she is not appointed as administratrix although she pleaded that the disputed land was owned jointly with her deceased husband. Mr. Gervas said the counsel does not provide specific section of law which require the applicant to be administratrix and the conditions as set in **Mukisa Biscuit Manufacturing Company LTD vs West End Distributors LTD** (supra) was not met. There is no doubt that applicant and deceased own the disputed land as pleaded. After the death of deceased, the status of the applicant is not disclosed. I agree with Mr. Gervas submission that PO lacks legal qualities as it need scrutiny of evidence to prove that applicant is not administratrix, that action of scrutinizing document disqualifies the preliminary objection as was argued in the Case of **Aphonice Buhatwa vs Juliet Roda Aphonice** (supra).

On the basis of the position stated above, I find the Preliminary Objection as raised by the counsel for respondent is non meritorious. Costs to follow events.

Dated at **MUSOMA** this 12 day of December, 2023.



  
**M. L. KOMBA**

**Judge**

12 December, 2023