

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(MOROGORO DISTRICT REGISTRY)

AT MOROGORO

LAND APPEAL NO. 45 OF 2023

(Originating from the District Land and Housing Tribunal for Morogoro in Land Application No. 94 of 2014)

JAMES CHRISTIAN BASIL..... **APPELLANT**
(administrator of the estate of the late Christian Basil Kirua)

VERSUS

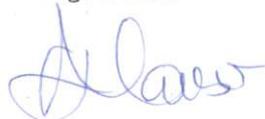
TWAZIHIRWA ABRAHAM MGEMA..... **RESPONDENT**

JUDGEMENT

LATIFA MANSOOR J.

Date of Ruling on: 12/12/2023

This appeal arises from the decision of the District Land and Housing Tribunal for Morogoro in Land Application No. 94/2014. The factual background of the matter as per the records reveals that, in the life time of the late Christian Basil Kirua, he owned a plot of land No. 395 Block "B" at Kola Hill, in Morogoro Municipality within Morogoro Region, which is the subject matter of the dispute. Both parties herein are related to the deceased, the appellant is the biological son, while the respondent is a niece.



It has been alleged by the appellant that, upon the demise of the appellant's father (the deceased) in 2001, the respondent's father who is now the deceased, unlawfully invaded the disputed plot of land, possessed it and through unlawful means, prepared documents to transfer the right of occupancy from the deceased to himself and subsequently to the respondent. On the contrary, the respondent claimed to be the lawful owner of the disputed land having inherited from his late father who purchased the land in dispute from the Claud Benedict (the deceased) and built a house thereon.

The dispute landed before the District Land and Housing Tribunal as Land Application No. 94 of 2014. Upon determination of the dispute, the District Land and Housing Tribunal, herein referred as "the Trial Tribunal" partly allowed the application and ordered the respondent to remain with the disputed plot, but ordered him to compensate the heirs of the late Claud Benedict.

Aggrieved therein, the appellant successful appealed to the High Court of Tanzania at Dar es Salaam, whereas it was decided that, the suit land

belongs to the deceased Claud Benedict, thus, forming part of his estate which is subject to the administration of the appellant.

The squabbles were far from the end, aggrieved therein, the respondent appealed to the Court of Appeal of Tanzania (CAT), which Court nullified the proceedings and judgement of the Trial Tribunal and those of the High Court and set aside all the orders emanating therefrom because of the failure of the Trial Tribunal to frame an issue related to forgery. Hence, proceeded to order the whole matter be retried by the District Land and Housing Tribunal before a different chairman and a new set of assessors.

Parties adhered to the Order of the CAT, hence on 29/6/2022 the case was heard afresh before the District Tribunal, this time before Hon. E. Mogasa Chairperson. On the course of hearing, the respondent notified the Tribunal that, the appellant is no longer an administrator of the estate of the deceased after being his letters of appointment been revoked by the appointing court, thus he lacked locus standi. The appellant herein acknowledged the fact that, he is no longer an administrator, but also notified the tribunal that, he had appealed against the revocation order. Consequently, the tribunal dismissed the application for lack of focus standi of the appellant herein.

The appellant being aggrieved thereto, he preferred the instant appeal to this court armed with two grounds of appeal as follows;

1. That, the trial District Land and Housing Tribunal, erred in law and in fact in dismissing Land Application No. 94 of 2014.
2. That, having been informed that there is a Pending Appeal challenging the revocation of the Appellant herein appointment as the administrator of the estate of the Late Christian Basil Kirua, the trial District Land and Housing Tribunal erred in law in not ordering the stay of land Application No. 94/2014 pending determination of that Appeal.

With the leave of the Court, the hearing of the application was canvassed by way of written submission by the order of this Court dated 1st of November, 2003.

Although at the hearing of this appeal, both parties appeared in person, and unrepresented, but their submission was drawn by the learned counsels, whereas Mr. Benjamin Jonas, submitted for the appellant, on

the other hand, Miss Irene Felix Nambuo also learned advocate, submitted for the respondent.

Submitting in support of the appeal in relation to the first ground, Mr. Benjamin amplified that, it was not correct for the tribunal to dismiss the Land Application No. 94/2024 as it was not heard on merit, he highlighted that, the application was instituted in 2014 and the contested revocation of the letters of administration granted to the appellant was made on 29th April, 2022 and there was a pending appeal challenging the impugned revocation, which was instituted in 2014, he was of the view that, the proper order was not to dismiss the application but to stay the same pending determination of the appeal.

He depicted further that, the impugned application was not heard and determined on merit, as to him by dismissing it the tribunal implied that the case was heard and determined on merits and moreover he referred this court to the case of **Yusuph Shaban Matimbwa v. Exim Bank (T) Ltd and others**, Civil Application No.162/16 of 2021(unreported) to support his contention.

Mr. Benjamin maintained further that, by dismissing the impugned Application he would not have a chance to come back to any court or

tribunal with the same suit even when he succeeds in his appeal against revocation of the administration. He further urged this court to find that the dismissal order entered by trial tribunal was erroneous and set it aside.

In relation to the second ground of appeal, Mr. Benjamin insisted on the demonstrations he aforesaid and he maintained further that since his appointment has been restored by the order of the District Court of Morogoro dated 14th April 2023 in Probate Appeal No. 7/2022, the order dismissing the impugned application on ground of locus standi cannot and should not be allowed to stand.

The Counsel urges this court to set aside the impugned decision of trial tribunal with cost and to allow the impugned application to proceed.

Responding to the submission by the appellant, Miss. Irene, the Counsel for the respondent, in relation to the first ground of appeal she argued that, the trial tribunal rightly dismissed the impugned application after it determined that, at the time of filling it the applicant had no locus standi and the same should have been filed again by the person with locus standi. The Counsel referred this court to the case of **Peter Mpalanzi v. Christina Mbaruku**, Civil Appeal No. 153 of 2019 (2021) 1 TZCA 510 to

support the contention that a person cannot maintain a suit or action unless he has an interest in subject matter.

Responding in relation to the second ground, Miss. Irene argued that, it was undisputable that during the determination of the impugned application the appellant had no locus stand and he conceded. Miss Irene highlighted further that, the appellant wishes for the trial tribunal to speculate upon the pending appeal defying the underlining principle of the law that the court cannot adopt speculative explanation without any evidence to support it and on this, the Counsel referred this court to the case of **Roseta Cooper v. Gerald Nevil and Another** (1961) EA 63 and the case of **Sekunda Mbwambo v. Rose Ramadhani** (2004) TLR 436.

The Counsel for the respondent prayed this court to dismiss the instant appeal with costs and uphold the decision of the trial tribunal.

After a careful consideration of the submissions of the parties and the records of appeal, the issues for determination are: **one**, whether the appellant had locus standi to file the impugned application and **two**, the propriety or otherwise of the dismissal order of the application which is subject of this appeal.

As to the issue of locus standi, this need not detain this court much as the records reveal that, the appellant was appointed and he was issued with the letters of administration as the administrator of the estate of the late Christian Basil Karua on 18th of September 2007 via Shauri la Mirathi Na. 173/2007 at Morogoro Urban primary court before Hon. Nganga and he filed the impugned application on 18th day of June 2014. It therefore goes without saying that, at the time of institution of Land Application No. 94 of 2014 at the DLHT, the appellant had a locus standi.

Looking further at the trial DLHT's proceedings and judgment thereof both are clear that the impugned application was dismissed after the respondent's notification to the Tribunal that, the appellant is no longer an administrator of the estate of the deceased after being revoked by the appointing court, thus he lacked locus standi.

Without a shadow of doubt it does not need crystal ball to see and rule out as rightly submitted by the appellant that the appellant rightly knocked the doors of the trial tribunal via the impugned application and that the issues of locus standi was raised after appellant's revocation on 29th of April, 2022. The Trial District Tribunal therefore did not err to hold that at

the time of the institution of the Application before the DLHT, the appellant's letters of administration were already revoked, thus, the appellant did not have locus standi to institute a suit for the estate of the Late Christian Basil Kirua.

Regarding the propriety or otherwise of the dismissal order, the appellant herein acknowledged before the trial tribunal the fact that, he is no longer an administrator, but also notified the tribunal that, he had appealed against the revocation order, this meant that, the appellant had acknowledged that the application cannot proceed and decided on merit upon his revocation. As such the application was not determined to its finality and thus it was not capable of being dismissed having not being determined on the merits. I am fortified in that regard, because it is settled law as rightly argued by the appellant that, where an appeal or application is found to be incompetent, the remedy is to strike it out instead of dismissing it. This was emphasised in the case of **Ngoni Matengo Co-operative Marketing Union Ltd. vs. Ali Mohamed Osman** (1959) E.A. 577. In that case, the appeal was found to be incompetent for not being accompanied by a necessary decree. Having considered the distinction between a dismissal and striking out of an appeal, the Court was of the view that the proper remedy was to strike

out the appeal instead of dismissing for the latter phrase implies that a competent appeal has been disposed of, while the former phrase implies that there was no proper appeal capable of being disposed of. This broad statement of principle that an incompetent matter before the court deserves to be struck out as it is not capable of being dismissed was followed in the cases including **Cyprian Mamboleo Hizza vs Eva Kioso and Another**; Civil Application No. 3 Of 2010, **Joan Constantine vs Mohamed Sleym**, Civil Application No. 25 of 2012 (both unreported).

Given the circumstances, I agree with the appellant that, the proper remedy was to strike out the impugned application instead of dismissing it so as to afford the applicant a chance to file a competent application if need so arises. Given the circumstances in the matter at hand, I am not at one with the appellant that the honourable chairman was supposed to stay the application as the appropriate substitute because, there was nothing pending before the tribunal in which the appellant was privy to.

In this regard, I quash the dismissal order of the impugned application and substitute it with the striking out order so as to enable the applicant at the opportune time to revert to tribunal to seek for appropriate order.

In view of what I have endeavoured to discuss, I find the application merited and it is hereby allowed to the extent stated. Given the circumstances of the matter, I make no order as to costs.

It is so ordered.

**DATED AND DELIVERED AT IJC MOROGORO, THIS 12TH DAY OF
DECEMBER, 2023**



**LATIFA MANSOOR
JUDGE
12TH DECEMBER, 2023**

