

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB - REGISTRY OF SHINYANGA
AT SHINYANGA

LAND CASE NO. 04 OF 2022

ALLY JUMA MLINDWA.....PLAINTIFF

VERSUS

THE ATTORNEY GENERAL1ST DEFENDANT

SHINYANGA MUNICIPAL COUNCIL.....2ND DEFENDANT

REGISTRAR OF TITLES.....3RD DEFENDANT

COMMISIONER FOR LANDS.....4TH DEFENDANT

KULWA ALLY BWATANI (administrator

for the estates of the Late Ally Bwatani)5TH DEFENDANT

KONDO ALLY BWATANI.....6TH DEFENDANT

KULWA ALLY BWATANI.....7TH DEFENDANT

HAMISI ALLY BWATANI.....8TH DEFENDANT

DOTTO ALLY BWATANI.....9TH DEFENDANT

DOTTO ALLY BWATANI (administrator

for the estates of the Late Ally Bwatani).....10TH DEFENDANT

RULING

16th October, 2023 & 8th February, 2024.

S.M. KULITA, J.

This is a Preliminary Objection on point of law. In this case, the plaintiff claims against the 5th, 6th, 7th, 8th, 9th and 10th Defendants for trespass on Plot Number 10 Block "P" located at Majengo Street, Mjini Ward within Shinyanga Municipality. Further, the plaintiff seeks for the 2nd, 3rd and 4th Defendants, be ordered to change name of the title owner for the said plot from the name of Ally Bwatani to the name of the Administrator of the Estates of the late Chiku Ally Bwatani, who is Ally Juma Mlindwa, the Plaintiff.

The story behind this case in nut shell is that, the late Ally Bwatani had been owning the property in dispute till when he decided to transfer the same, by way of gift, to his daughter one Chiku Ally Bwatani who was also known as Chiku Ally Mlindwa, the Plaintiff's mother.

Following being gifted the above mentioned property by her father (Late Ally Bwatani), the late Chiku Ally Bwatani repaired the said House. As along as Chiku Ally Bwatani had been living in Dar es Salam, she decided to put her father, the late Ally Bwatani, in the said house, just for taking care. Before official transfer of ownership for the said house,

Chiku Ally Bwatani passed away. Following her death, Juma Mussa Mlindwa who was the husband of the late Chiku Ally Bwatani, was appointed the administrator for the estates of the late Chiku Ally Bwatani. The facts show that, Juma Mussa Mlindwa continued letting the late Ally Bwatani taking care of the house in question.

Later on, Ally Bwatani passed away. Within a short period, Juma Musa Mlindwa (administrator for the estate of Chiku Ally Bwatani) also died. This happened before Juma Mussa Mlindwa had finished the process of transfer of ownership of the house in question.

Having Seen this, the plaintiff herein, applied to be appointed the administrator for the estate of the late Chiku Ally Bwatani, his mother, just to finish what Juma Mussa Mlindwa had failed to do, following the intervention of his death.

The facts further reveal that, during the administration, there arose the 5th, 6th, 7th, 8th, 9th and 10th Defendants who showed that, the Late Ally Bwatani had revoked the deed of gift that he had made in favor of the late Chiku Ally Bwatani, and gave it to them. That move, is what made the plaintiff herein to institute this land case.

In the reply thereto, the 1st to the 4th Respondents filed a joint written statement of defense together with 4 (four) Preliminary Objections to the effect that; **one**, the court has no jurisdiction to entertain this case as it has been filed as a Land Case instead of Probate and Administration Cause, **two**, the suit is incompetent for not disclosing the cause of action against the 1st, 2nd, 3rd and 4th Defendants, **three**, the suit is incompetent for none disclosure of the description of the suit land, **four**, the suit is incompetent for misjoinder of the parties, that is the 1st, 2nd, 3rd and 4th defendants.

Additionally, the 9th and 10th defendants also raised preliminary objections to the effect that; **one**, the plaintiff's suit is time barred and **two**, the present suit is *res judicata* with Probate Cause No. 223 of 2007 which was heard and finally determined by Kinondoni District Court on 30th July, 2021.

As the law requires preliminary objections be argued first, on 16th October, 2023 the said preliminary objections were heard. Mr. Frank Samwel Advocate, appeared for the Plaintiff, whereas Mr. Mussa Mpogole, State Attorney, appeared for the 1st, 2nd, 3rd and 4th defendants. The 6th, 7th, 8th and 9th Defendants appeared in personal. The 5th and 10th Defendants didn't show up.

Submitting in support of the first ground of preliminary objection, Mr. Mpogole stated that, the plaintiff's suit does not fall within the ambit of section 167 of the Land Act. He added that, the pleaded facts too at paragraphs 26, 27, 28, 29, 30 and 31 of the plaint reveal that the matter is probate in nature, not a land case as it has been filed. To him this is a wrong move, which renders this court lacking jurisdiction to entertain the same. Mr. Mpogole cemented his argument by citing the case of **Charles Rick Mulaki vs. William Jackson Magero, Civil Appeal No. 69 of 2017, HC, Mwanza District Registry.**

Mr. Mpogole asserted further that, the plaintiff's plaint shows that, the plaintiff is challenging the "**will**" which turned the house in question from being owned by Chiku Ally Bwatani to other people. To him, this should be determined by a probate court. To bolster his assertion, he cited the case of **Mohamed Kihango vs. [1999] TLR 319.**

Further, Mr. Mpogole averred that, the reliefs sought in the plaint do not relate to the pleaded facts. He added that, the plaintiff himself knows that the property is in the name of their Late Father and his estates has not yet been closed. He insisted that, the **reliefs sought** do not fall under the ambit of section 167(1) of the Land Act, but under the Probate and Administration of Estates. To bolster his assertion, he cited

the case of **Salama Ismail Hanya vs. Tunu Ismail Hanya, Land Appeal No. 88 of 2020, HC DSM Zone Registry** and the case of **Mgeni Seifu vs. Mohamed Yahaya Khalfani, Civil Application No. 1 of 2019, CAT at DSM.**

Concerning the preliminary objections raised by the 9th and 10th Defendants, the 9th Defendant who also represented the 10th Defendant prayed for the court to adopt them as their submissions.

In reply Mr. Frank Samwel, Advocate submitted on the issue of this suit being time barred. On this he said that the defendants have not explained on it. What the Counsel commented is that, the plaintiff knows that the defendants trespassed into the land in question in 2021, and that, as this case was filed in 2022, then, it is well filed within the 12 years' prescribed time limit.

On the issue of *res judicata* Mr. Frank Samwel stated that, the cases which were determined at Dar es Salaam, were concerned with probate and administration. He said that, the same tasked the court to appoint the administrator for the estates of the deceased. He averred further that, as this current case is concerned with land matter which seeks to determine ownership, then he formed an opinion that, the doctrine of *res judicata* does not apply.

Concerning the jurisdiction issue, Mr. Frank Samwel stated that, probate courts have their own separate powers. The same should not extend to what they are not mandated to do. As well, the land courts have their powers to deal with land matters only.

Mr. Frank Samwel went ahead contending that, the preliminary objections raised by Mr. Mpogole do not have qualities of being regarded the preliminary objections as per the case of **Mukisa Biscuits Manufacturing Company Lts v. West End Distributors Ltd [1969] EA 696.**

It was Mr. Frank Samwel's contention that, as the plaintiff shows interest over the ownership of land in question, he is right to file this case at the land court. The Counsel contended that; Ally Bwatani had given the plot in issue to Chiku Ally Bwatani through deed of gift. He added that, the defendants No. 5 - 10 have trespassed into the said land giving reason that, Ally Bwatani had revoked transfer of the said land to Chiku Ally Bwwatani that he had made through deed of gift. Mr. Frank Samwel submitted that, this is not true. He gave reason that, one cannot revoke gift according to the law. He thus stated that, they seek for transfer of the property ownership from Ally Bwatani to Chiku Ally Bwatani. Mr. Frank Samwel, Advocate, insisted that, this is not a probate

and administration cause, the matter which could have compelled the plaintiff to have filed the same at the probate court. Mr. Frank Samwel also distinguished all cases cited by Mr. Mpogole.

In rejoinder, Mr. Mpogole reiterated his submissions in chief.

I have earnestly gone through both parties' pleadings and the available records. I have also taken full consideration of both parties' submissions. Upon scrutinizing them, I find the issue for determination is whether the plaintiff's suit is properly filed before this land court.

In this case, there is no dispute from both parties that the house in question had been owned by the late Ally Bwatani. Also, there is no dispute that, the late Chiku Ally Bwatani was the daughter of the late Ally Bwatani. It is further undisputed that before his death, the said late Ally Bwatani issued a deed of gift for the suit house to Chiku Ally Bwatani. What this suit shows is that, the plaintiff claims for interest over that said house, through his mother, Chiku Ally Bwatani, whereas the defendants No. 5 – 10 claim interest over the house through their late father, Ally Bwatani. For the defendants No. 5 – 10 the reason behind is the allegation that the said deed of gift was revoked by the late Ally Bwatani before his death.

The difference between these parties is that, the plaintiff argues that, Ally Bwatani had passed ownership of the property in question to Chiku Ally Bwatani through deed of gift which was legally registered while the defendants No. 5 - 10 claim stated in their written statements of defense, that, there was no valid disposition over that said property between Ally Bwatani and Chiku Ally Bwatani.

However, the plaintiff went ahead contending that, the defendants No. 5 to 10 claim for ownership of the said property through a "WILL" purported to have been authored by Ally Bwatani before his death. The said will is alleged to have revoked the deed of gift on the said property from Chiku Ally Bwatani to the defendants No. 5 - 10.

Actually, the plaint shows at paragraph 30 to have challenged the said "WILL" that it is not valid. In this litigation the questions that look to have been raised by the plaintiff in his pleading, include; **one**, whether it is valid for the WILL to exclude some heirs, **two**, who had kept it and before whom the said WILL was exposed?, **three**, why the said WILL was not produced during the funeral of the purported author, Late Ally Bwatani?, **four**, why the WILL did not mention location of the house in question as it was so done in the deed of gift?, **five**, whether the WILL must be registered for it to be valid.

Pleading is what determine the case, as it was stated in **Charles Rick Mulaki** (supra) then, the above enlisted issues by the plaintiff, to me, calls for determination by the probate court, not the land court.

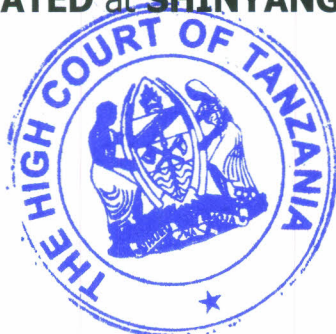
As all parties claim for interest on the property at issue, which originally was owned by the same person, Late Ally Bwatani, I find it that, when the Probate Court makes determination over the validity of the "WILL" in question, this matter will completely be determined.

For that matter, I am of firm mind that, the plaintiff's suit is incompetent for being filed at the Land Court instead of the Probate and Administration Court. On that account, the preliminary objection sustains. **I thus proceed to dismiss the suit.** This being a family matter, I grant no order as to costs.



S.M. KULITA
JUDGE
08/02/2024

DATED at SHINYANGA this 8th day of February, 2024.



S.M. KULITA
JUDGE
08/02/2024