

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOBA SUB-REGISTRY

AT BUKOBA

LAND APPEAL No 61 OF 2023

(Arising from Land Application No.28 of 2023 of the District Land and Housing Tribunal for Kagera Kyerwa at Kaisho)

ALCHARD OGAMBAGE.....APPLICANT

VERSUS

CHRISTIAN SONGAMBELE.....1ST RESPONDENT

LESTUTA ALFRED NDONGO.....2ND RESPONDENT

RULING

22/05/2024 & 07/06/2024
E.L. Ngigwana, J.

In this application, the respondent has moved the court under the provisions of Section 43 (1) (b) and (2) of the Land Disputes Courts Act, [Cap. 216 R.E 2019] seeking for the following orders:

- 1. That, the Honourable Court is pleased to call for and revise the proceedings of the District Land and Housing Tribunal in Land Application No. 28 of 2023.*
- 2. That, the Honourable Court is pleased to declare that the judgment and the proceedings in Land Application No. 28 of 2023 are tainted with illegalities and revise the same.*

- 3. That, the Honorable Court be pleased to order that the Applicant be granted the right to be heard in Land Application No.28 of 2023 after not being a party to the said application*
- 4. Costs be provided for*
- 5. Any other orders the Honorable Court may deem fit and just to grant.*

The application is supported by an affidavit of the applicant. Briefly, the background of this application as can be discerned from the affidavit is that, on **07/12/2022**, the applicant and the 2nd respondent were appointed by the Primary Court of Kyerwa District at Mabira through Probate and Administration Cause No.02 of 2022 to administer the estate of the late Alfred Lazari who demised on 25/03/2003.

On the 9th day of February 2023, the 1st respondent instituted a land case to wit; Land Application No. 28 of 2023 at the District Land and Housing Tribunal for Karagwe at Kayanga against the 2nd respondent claiming title over the suit land which according the applicant and the 2nd respondent, forms part and parcel of the deceased's estate.

Following the establishment of the DLHT for Kyerwa, the said, case was transferred and heard by the DLHT for Kyerwa at Kaisho. The applicant was

not a party to the said proceedings. On 31/07/2023 the applicant learned that the said was instituted but he was not made a party and the judgment was already delivered on 30/06/2023 therefore, he approached the DLHT and obtained a copy of the judgment and then, filed this application.

In her counter affidavit, the 2nd respondent did not dispute the contents of the founding affidavit in relation to her appointment as co- administrator of the estate of the late Alfred Lazari, (her late husband). Furthermore, she did not dispute the fact that the land which was involved in Land Application No.28 of 2028 was part and parcel of the decease's estate, and that the said case was conducted between her and the 1st respondent without the knowledge of the applicant.

On his side, the 1st respondent contested the application through a counter affidavit sworn by his advocate Mr. Samwel Angelo. The applicant's advocate deposed that the applicant and the 2nd respondent have set the environment to circumvent justice since they know that the suit land is not the deceased's property.

When this application was called on for hearing, the applicant appeared in person but also represented by Mr. Ibrahim Mswadick, learned advocate, the

1st respondent appeared through Mr. Samwel Angelo, learned advocate while the 2nd respondent appeared in person, unrepresented.

Submitting in support of the application, Mr. Mswadick reiterated the contents of the founding affidavit. He added that since administrators were two, the land matter ought to have been instituted against both administrators.

In reply, Mr. Samwel Angelo submitted that the 2nd respondent in her Written Statement of Defence (W.S.D) filed in the trial tribunal alleged that the suit land belonged to her. He further stated that as per that law, parties are bound by their pleadings therefore, the 2nd respondent should not be allowed to depart from her pleadings.

According to the learned counsel, after the death of the husband, the land became the property of the 2nd respondent therefore there was no need for probate. He referred to the case **Paul Bwishuku versus Magdalena Bwishuku** (Land Case Application 74 of 2020) [2021] TZHC 3637 (2 June 2021). He went on to submit that where there are two or more administrators, one of them may sue or be sued on the deceased's estate

therefore, it was not bad to sue the 2nd respondent alone. He concluded his submission urging the court to dismiss this application for want of merit.

On her side, the 2nd respondent submitted that she told the Hon. Chairman that she could not proceed with the matter in the absence of her co-administrator (Applicant) because he was the person possessing all necessary documents proving that the land in dispute is the property of her late husband.

She added that, she told the Hon. Chairman that it was not proper for the 1st respondent to sue her in absence of her co-administrator. She went on to submit that after she had raised her concerns, the Hon. Chairman did not listen and attach any weight to them, and as a result, she moved out of the room in which proceedings were conducted.

After carefully considering the record of the trial tribunal, the founding affidavit, counter affidavits by the respondents, and submissions for and against this application, I would like to start by stating that as a matter of law, revision is preferred only where the appellate process has been blocked by judicial processes or it is barred by operation of law; much as revision is not an alternative to appeal. This position was emphasized in the case of

Dr. Muzzammil Musa Kalokola versus the Minister of Justice and Constitutional Affairs and Another, Civil Application No.567/01 of 2018

where the Court of Appeal had this to say;

"When the principle of law governing revision applications is considered, certainly; the power of revision of the court may be invoked only where there is there is no right of appeal or when a party has provided sufficient reasons amounting to exceptional circumstances"

Again, it is common understanding that an appeal should be against the same parties who were heard in the trial. It cannot be preferred against a stranger to the trial proceedings who was not at all heard or a non-party to the proceedings. In that respect, a person who was not a party to the proceedings but has interest over the matter may only knock on the doors of the court by way of revision.

The matter at hand was filed by a person who was not a party to the proceedings in Application No. 28 of 2023. The judgment was delivered in favor of the 1st respondent on 30/06/2023. The applicant claimed since he was the 2nd respondent's co - administrator and since the suit land is the

property of the late Alfred Lazari, he ought to have been joined in the suit as a co- administrator.

However, reading the applicant's affidavit, it goes without saying he did not state that the 2nd respondent was sued as an administrator of the estate of the late Alfred Lazari. Upon reading the plaint that was filed in the DLHT by the 1st respondent on 09/02/2024, it is apparent that the 2nd respondent was sued in her personal capacity and she filed a W.S.D on 06/03/2023, disputing the 1st respondent's claims.

Indeed, there was no preliminary objection raised in the W.S.D to the effect that the 1st respondent sued a wrong party. However, she stated therein that she found her late husband using the suit land and then, both of them went on using the same, and even after the death of her husband, she went on using the said land.

However, the record of the DLHT revealed that when the matter came for hearing, the 2nd respondent who appeared in person, unrepresented, she was asked whether she was ready for the hearing and she responded as follows; *"Sisikilizwi mimi, naomba msimamizi wa miradhi ndiye aje kusikilizwa, mimi ni muolewa kwenye hiyo mali, nimeingia kwenye ardhi ya*

marehemu mume wangu... Eneo bishaniwa ni mali ya marehemu mume wangu"

In my view, the response of the 2nd respondent suggests that there is a dispute over the land; whether it was the deceased's land or the land of the 1st respondent. Therefore, the question that would have come into the mind of the DLHT was whether, under the circumstances of the case, it had a jurisdiction to determine ownership of the suit land.

I am saying so because there is no doubt that the applicant successfully petitioned for letters of administration through Probate and Administration cause No. 2 of 2022. It is also clear that the 2nd respondent was appointed as his co – administrator. In the said probate Cause, the suit land located in Mabira Village whose size is estimated to be 10 acres was mentioned to form part of the deceased's estates.

Again, there is no dispute that Administrators (applicant and 2nd respondent) were appointed on 07/12/2022 but Land Application No. 28 of 2023 was filed in the DLHT on 09/02/2023.

The response of the 2nd respondent in the DLHT also suggests that she was wrongly sued in her own capacity.

Unfortunately, the trial tribunal did not attach any weight to 2nd respondent's concerns touching the question of jurisdiction and locus standi, instead; the hearing of the case commenced but the 2nd respondents moved out of the room where proceedings were conducted.

Finally, the tribunal ruled out that the 2nd respondent had waived her right to be heard, and then, it proceeded ex-parte and finally, delivered ex-parte judgment. For unknown reasons, the 2nd respondent did not appeal to challenge the merit of the decision of the DLHT.

In the case of **Herman Omary Mganga versus Winnie Sheba Seme** (Civil Appeal 368 of 2019) [2022] TZCA 775 (2 December 2022), regarding an appeal against ex parte judgment, the Court of Appeal had this *to say*;

"The position of the law on that aspect is well settled. It is such that, a party to an ex parte decision who is aggrieved by the motion to proceed ex parte, cannot fault such decision in a higher court by way of appeal or revision before first attempting, at the court that pronounced the ex parte decision, to have the same set-aside. He cannot as well combine, in the appeal or revision proceedings, as the case may be, both the complaints on the justification to proceed ex parte and the merit of the decision"

Similarly, in the case of, **Dangote Industries Ltd Tanzania versus Warnercom (T) Limited**, Civil Appeal No. 13 of 2021, the Court observed that;

"It would appear to us to be the principle in the said authorities that, where the defendant intends to challenge both the order to proceed ex parte and the merit of the findings in the ex parte judgment, he cannot challenge the merit of the findings before dealing with an application to set aside the ex parte judgment first. This principle is based on the long-standing rule of procedure that, one cannot go for an appeal or other actions to a higher court if there are remedies at the lower court. He has to exhaust all available remedies at the lower court first". The Court of Appeal in the case of **Dr. Muzzammil Musa Kalokola versus the Minister of Justice and Constitutional Affairs and Another**, Civil Application No.567/01 of 2018 had this to say;

*"When the principle of law governing revision applications is considered, certainly; the power of revision of the court may be invoked only where there is there is no right of appeal or **when a party has provided sufficient reasons amounting to exceptional circumstances**"*

From the herein above authorities, it is clear that an appeal lies against the merit of the decision given ex-parte but not against an order to proceed ex parte. It is also clear that when a party to the case has provided sufficient reasons amounting to exceptional circumstances, the power of revision may be invoked.

Considering that fact that this application was lodged by a party who was not a party to Land Application No. 28 of 2023, the application is competently before this court. As I have said earlier, the suit land was mentioned in probate and Administration Cause No.2 of 2022 as forming part and parcel of the estate of the late Alfred Lazari. It is also apparent that the applicant and the 2nd respondent were appointed as co-administrators on 07/12/2022.

Later on, that is to say on 09/02/2023, the 1st respondent filed Land Application No. 28 of 2023 claiming ownership of said land and the DLHT entertained it to its finality. The issue is whether the DLHT had jurisdiction over the matter. The answer is not far to fetch. In the case of **Ibrahima Kasanga versus Emmanuel Mweta** [1986] TLR 26 (HC), it was held that, *"There may be cases where the property of the deceased person may be in dispute. In such cases, all those interested in the determination of dispute*

or establishing ownership may institute proceedings against the administrator or the administrator may sue to establish a claim of the deceased property"

Similarly, in the case of **Deogratus Nayuya versus Jumuni Mayuya and Faida Mayuya**, Land Appeal No 24 of 2022 that cited with approval the case of **Mgeni Seif versus Mohamed &Yahaya Khalfan**, Civil Application No. 1 of 2007 CAT where it was held that;

"Where there is a dispute over the estate of the deceased the only probate and administration court seized of the matter can determine on the ownership"

Furthermore, in the case of **Kigozi Aman Kigozi versus Ibrahim Seleman & 5 others**, Land Appeal No. 2 of 2019 (HC) it was held that-

*"It is the probate Court which is vested with the power to determine whether a disputed property belongs to the deceased person or not through the probate cause by way of petition for letters of administration and **objection thereof, if any"***

Guided by the herein above authorities, it goes without saying that the DLHT was not the right forum to determine ownership of the suit land. Had the DLHT, resolved the matters/concerns raised by the 2nd respondent before the commencement of the hearing, it would have not proceeded with the matter to its finality.

I would like to touch the issue on whether one administrator can sue or be sued in absence of the other. Principally, powers and duties of administrators are joint and several, meaning that they must act together in their role to ensure consensus and promoting fairness and accountability in the administration of the estate. In that respect, one co-administrator cannot sue or be sued in absence of the other. See **Hadija Rashid & 2 Others vs Lukindo Rashid Maneno** (*administrator Of Estate of The Late Rashid Maneno*) (Land Appeal No. 37 of 2022) [2023] TZHC 15633 (15 February 2023).

In the upshot, for the reasons stated above, I invoke revisional powers of the court under section 43 (1) (b) and (2) of the Land Disputes Courts Act, [Cap. 216 R.E 2019] to nullify the proceedings of the DLHT in Land

Application No. 28 of 2023, quash and set aside the judgment and orders thereto. It is so ordered. I enter no order as to costs.

Dated at Bukoba this 7th day of June 2024.


E.L. NGIGWANA

JUDGE

07/06/2024

Delivered this 7th day of June 2024, in the presence of the applicant and his advocate Mr. Ibrahim Mswadick, 1st and 2nd respondents in person, Hon. A. A. Madulu- JLA, and Ms. Queen Koba, B/C.




E.L. NGIGWANA

JUDGE

07/06/2024