IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF MANYARA

AT BABATI

LAND APPEAL NO. 41 OF 2023

(Arising from Land Application No. 14 of 2018 from the District Land and Housing Tribunal for Simanjiro at Orkesumet)

ANNA SHININI..... APPELLANT

VERSUS

ALAIS JOHN KULUO .....RESPONDENT

JUDGMENT

30th January and 4th March, 2024

Kahyoza, J.:

This is one of the tricky and challenging cases. The suit is between parties who claim title of ownership of the land based on stories that their relatives owned the disputed land. The appellant alleges that her husband who happened to be a Roman Catholic priest, was the owner of the suit land. She tendered no proof to establish her husband's ownership of the suit land.

The respondent, the administrator of the estate of the late John Nepapa Kuluo, alleged that the suit land belonged to his late father who leased it to the late Fr. Moses Olodejilalo. The respondent never produced a lease agreement. It was the respondent's further contention that the lease

agreement was orally made and that the late Father Moses paid rent in kind upfront up to June 2018. The dispute becomes complex on considering the fact that Father Moses died intestate in 2013. Little is known if letters of administrator of estate of the late Father Moses were sought and granted. The District Land and Housing Tribunal found in favor of the respondent that the suit land belonged to the estate of the late John Nepapa Kuluo. Aggrieved, Anna appealed to this Court raising 12 grounds of appeal.

This is first appellate court bestowed with a duty to re-analyze the evidence. I wish to state the obvious that in Civil suit he sues or claims or alleges anything in his favour must prove and do so on the balance of probabilities. Further, that the burden proof in Civil cases is not static it shifts, after a plaintiff adduces evidence, to a defendant. This position was stated by the Court of Appeal in **Yusufu Selemani Kimaro v. Administrator General and 2 Others,** Civil Appeal No. 226/ 2020, took a stand that once the plaintiff gave evidence the defendant bears a burden to controvert the plaintiff's evidence. It stated-

> *",.... in civil cases, the onus of proof does not stand still, rather it keeps on oscillating depending on the evidence led by the parties and a party who wants to win the case is saddled with the duty to ensure that the burden of proof remains within the yard of his adversary."*

Alais was the applicant before the trial tribunal, hence, duty bound to prove that the suit land was a property of late father. He gave evidence that the suit land was allocated to his later father in 1988 and tendered Exh.P.2, a letter or deed issued by the village government of Terrat. The letter or deed was signed by the village chairman and the village secretary. Following his father's demise in 2017, Alais was appointed to administer his late father's estate. He went to the suit premises as an administrator to discharge his duty, he found tenants who told him that they had lease agreement with Anna, the respondent.

He complained to the village executive officer who summoned the respondent and asked her to prove his ownership. She failed. Alais' evidence was supported by Michael Lukumay (**Pw2**), who was the secretary of Terrat village in since 1985 until 1990, deposed that while they were in office, convinced villagers to build house. Michael Lukumay (**Pw2**), deposed that late John Lukulowo was one of the villagers granted a plot. The village authorities granted the late John Lukulowo a document of title, the village chairman and Michael Lukumay (**Pw2**), the then village secretary signed.

Michael Lukumay (**Pw2**), added that the later late John Lukulowo built his house. He knew the late Fr. Moses, who had no wife as Catholic priests do not marry. Another witness was Tulito (**Pw3**) who deposed that he knew

very well the late John Kuluo, who was veterinary and the owner of the suit land. He added that Fr. Moses rented the disputed house and the respondent was supervising his business.

Alais' last witness was Salieli Moses, a mason, who built the house in question. He deposed that the house belonged to the late John Kuluo. It was late John Kuluo who asked him to build the house. He built the house from 1988 and completed it in 19989.

Anna's evidence was that she was the owner of the suit house. She has owned it from the time she built and she lived in the house from the time she build it. She contended that she built the house with her husband, Moses Sangale Olodonjilalo. She deposed that she had lived in the house for 27 years and that she had lease agreement with the tenants. She tendered the lease agreements ad exhibit D.4. She added that she had children with the late Moses Sangale Olodonjilalo and tendered birth certificates of her three children as Exh.D.2 collectively. She added she contributed to build the houses as she applied and obtained a loan in 1999, 2002 and 2003.

Anna's second witness was her son, Emmanuel (Dw2) who deposed that the house in disputed belonged to his late father, Moses Sangale Olodonjilalo. Paulo Ngoira (**Dw3**) deposed that he knew Fr, Moses Sangale Olodonjilalo who was the owner of the suit land. He deposed that the suit

land was allocated to Fr. Sangale Olodonjilalo in 1992. He deposed that he was not aware that Fr. Moses Sangale Olodonjilalo was married. He added that he used to see the late Fr. Moses Sangale Olodonjilalo together with Anna and that after his demise Anna took over the supervision of the disputed house. He deposed that the house in dispute was built in 1992.

Was the suit properly instituted?

It is from the above evidence the tribunal ruled in the respondent's favour. While composing the judgment, I notice that Alais sued in his individual capacity claiming the property of his late father. I invited the parties to address me on the issue. The appellant's advocate Mr. Mwale, submitted the proceedings and the subsequent judgment were a nullity as Alais filed the case in his person at capacity and not as the legal representative. He argued that a person suing as an administrator must show that in his pleadings. To support his contention, he cited the case of **William Sulus vs Joseph Samson Wajanga (Civil Appeal No. 193 of 2019) [2023] TZCA 92 (9 March 2023)**, where the Court of Appeal held that the applicant had no *locus standi* to sue where the applicant instituted a suit in his own capacity. He cited another case of **Registered Trustee of Sos Children's Villages Tanzania vs Igenge Charles & Others** (Civil

Application 426 of 2018) [2022] TZCA 428 (14 July 2022). He concluded that an individual cannot institute a suit in his own capacity when the deceased's estate is under consideration.

The respondent's advocate Ms. Josephine, submitted that the suit was properly instituted as the tribunal granted the respondent to amend the application. She argued that at first the respondent instituted the application in his own capacity. On 28.09.2021, the applicant filed an amended application titled Alais John Kuluo Lekuluwo (*as the administrator of the estate of the late John Nepapa Kuluo John Lekuluwo*). She contended that the respondent (who is the appellant to this Court) filed the amended application and the matter proceeded. She prayed the court to find that suit was between the administrator and Anna.

In his short rejoinder, Mr. Mwale submitted that, the proceedings were a nullity as after the tribunal ordered the amendments, the respondent were not re-summoned to testify.

There is no dispute that a person has no locus standi to sue in his individual capacity to claim the deceased's property. See **William Sulus vs Joseph Samson Wajanga** (supra) and **Abdulatif Mohamed Hamis vs Mehboob Yusuf Othman & Another** (Civil Revision 6 of 2017) [2018] TZCA 25 (24 July 2018). The issue is whether the respondent sued in his

own capacity. Looking at the proceedings, it is self-evident that the respondent had instituted the suit in his own name although he was already the administrator of his late father's estate. The records bears testimony further that, after the appellant's advocate raised the preliminary objection as to the competence of the respondent act of (the applicant before the tribunal) instituting the case in his own capacity, the tribunal allowed the respondent to amend the application. The tribunal ordered the respondent to amend the application on 24.9.2021.

On further scrutiny of the proceedings, I came across the amended application, which the respondent filed on 28.9.2021. The appellant did not file the written statement of defence to the amended application. The appellant's advocate on receipt of the amended application, prayed to proceed with his defence. The appellant's advocate contended that the proceedings and the judgment were all a nullity as after filing the amended application, the respondent did not testify.

I find it settled that, the suit or the application is competent as the respondent is suing the administrator of his later father's estate and not in his own capacity to claim his late father's property. As to the contention, that the respondent did not re-appear to testify after the amendment, it is an error, which is not fatal. It did not occasion any injustice. The respondent's

witnesses testified before the amendment and the appellant's advocate cross-examined them. I do not find any irregularity which may occasion any injustice. In addition, it should not escape our mind that the amendment was in respect of the title to the application. The amendment was not substantive, which may have been reason for the appellant not to bother to file the amended written statement of defence to the amended application filed on 28.9.2021.

I shall not be altered the decision of the tribunal because of the irregularity or omission in the proceedings committed during the hearing unless the irregularity or omission occasioned failure of justice. I am fortified in my position by section of 45 of the Land Disputes Courts Act, [Cap.212 R.E. 2019], which stipulates that-

> ***"45. No decision or order of a Ward Tribunal or District Land and Housing Tribunal shall be reversed*** *or altered on appeal or revision on account of any* ***error, omission or irregularity in the proceedings before or during the hearing*** *or in such decision or order or on account of the improper admission or rejection of any evidence unless such error, omission or irregularity or improper admission or rejection of evidence has in fact occasioned a failure of justice." (Emphasis added)*

I now proceed to determine the appeal on merit. As pointed above the appellant raised 12 grounds of appeal. The grounds of appeal raised the following issues-

1) Did the tribunal properly evaluate the evidence on record or its judgment is based on speculative ideas?
2) Did the tribunal consider the contradictions regarding the number of rooms between Pw3 Tulito and Dw3 Paulo?
3) Was there evidence to prove that rent was paid in kind?
4) Was there evidence to decide in favour of the respondent?
5) Was the tribunal justified to determine matrimonial matters?
6) Did the tribunal fail to consider the evidence of Dw3 as result decided in respondent's favour?
7) Could the respondent obtain any effective remedy against the appellant who was not the administratrix of her late husband?

The appeal was heard by way of written submissions. I will refer to the submissions as when replying to the issues raised. I opted to begin with the last issue which raises the legal issue.

Could the respondent obtain any effective remedy against the appellant who was not the administratrix of her late husband?

The appellant's advocate submitted that the tribunal ought to have dismissed the application after it realized that the appellant was not the administratrix of the late Padre Moses Sangale for *lack locus standi*. To support his contention, he cited section 100 of the Probate and Administration of Estate Act, [Cap. 352 R.E. 2002 now 2019]. He also cited the cases of **William Sulus vs Joseph Samson Wajanga** (supra), **Omary Yusuph (Legal Representative of the late Yusuph Haji) vs Albert Munuo** (Civil Appeal 82 of 2021) and **Swale Juma Sangawe (As the administrator of the Estate of the late Juma Swallehe Sangawe) v. Halima Swalehe Sangawe** (unreported).

The respondent's advocate refuted the contention that the suit premises was part of the estate of the late Father Moses Oledoni. He added that since the suit house was part of the estate of the late Father Moses Oledoni, it would not be defended through the administrator/ administratrix of the deceased's estate.

I reviewed the all cases the appellant's advocate cited to me. They have one thing in common, a person who instituted the suit did so in his

individual capacity instead of the capacity of the capacity of a legal representative of the deceased's estate.

In **Omary Yusuph (Legal Representative of the late Yusuph Haji vs Albert Munuo** the Court of Appeal held that, "it is a settled principle of law that for a person to institute a suit he or she must have **locus standi** and this was emphasized by the High Court in the case of **Lujuna Shubi Ballonzi, Senior v. Registered Trustees of Chama Cha Mapinduzi** [1996] TLR 203 (HC) where it was stated that: "*Locus standi is governed by Common Law, according to which a person bringing a matter to court should be able to show that his rights or interest has been breached or interfered with" Apart from fully subscribing to the cited decision, it is our considered view that the existence of legal rights is an indispensable pre-requisite of initiating any proceedings in a court of law. In this particular case, since Yusuph Haji had passed away, according to the law it is only the lawful appointed legal representative of the deceased who can sue or be sued for or on behalf of the deceased which is stipulated under the provisions of section 71 of the Probate and Administration Act [CAP 352 R.E.2002] gives the following direction as it stipulates as follow...*"

In **Swalehe Juma Sangawe & Another vs Halima Swalehe Sangawe** (Civil Appeal 82 of 2021) [2022] TZCA 595 (4 October 2022), the

Court of Appeal insisted that "...above provision gives legal standing to sue or being sued, for or on behalf of an estate of a deceased person, to an executor or administrator of a deceased's estate - see also **Omary Yusuph v. Albert Munuo**, Civil Appeal No. 12 of 2018 (unreported). In the instant case, the respondent conceded that she was not an administrator of the deceased's estate and that nobody had ever been appointed to administer the estate. In our view, it is **only an administrator of the deceased's estate, once appointed, who could sue on the cause of action as** presented by the respondent against the alleged interlopers."

It is evident that the Court of Appeal in the above cases was called upon to consider whether a person who is not a legal representative of the deceased may institute a suit. Thus, the Court of Appeal did not consider whether a person who is not an administrator of the deceased's estate may be sued. They are to a limited extent distinguishable as the issue in the present case, is whether it was proper for the respondent to sue the appellant who was not the legal presentative of the late Father Moses.

I will not fall in the respondent's trap to rush to hold that the disputed land is not the property of the Father Moses, hence, there was no legal duty to sue the late Father Moses's representative. The appellant alleged that the disputed land belonged her and also to the late Father Moses, her husband.

She gave evidence that the suit land belonged to her. She deposed that she built the house and lived there with her husband. She testified that *"...I built it and one time we used it [as] a guest house. I built the house with my late husband Moses Sangale Olodonjilalo."* The appellant's evidence that she owned the suit house jointly with her husband. It was therefore proper to sue her.

Even if the land in question was part of the estate the late Father *Moses Sangale Olodonjilalo,* I would still hold that the appellant was properly sued. The appellant gave evidence that after her husband's death, she entered into a lease agreement with tenants. The lease agreements were admitted as Exhibit 4. They are between the appellant and her tenants. By section 16 of the Probate and Administration of Estate Act, the appellant was an executrix of her own wrong, for that reason it was proper to be sued. Section 16 of the the Probate and Administration of Estate Act, provides that-

> *16.* ***A person who intermeddles with the estate of the deceased or does any other act which belongs to the office of executor****, while there is no rightful executor or administrator in existence, thereby* ***makes himself an executor of his own wrong****:*
> *Provided that–*

(a) intermeddling with the goods of the deceased for the purpose of preserving them or providing for his funeral or for the immediate necessities of his family or property; or

(b) dealing in the ordinary course of business with goods of the deceased received from another; or

(c) action by an administrative officer under section 14 of the Administrator General (Powers and Functions) Act v;*

(d) action by a receiver appointed under section 10, does not make an executor of his own wrong.

The Court of Appeal in **Godebertha Lukanga vs CRDB Bank Ltd & Others** (Civil Appeal 25 of 2017) [2021] TZCA 72 (12 March 2021) defined the phrase "**executor of his own wrong**" by referring to Black's Law Dictionary, 9th Ed., as-

"A person who, without legal authority, takes on the responsibility to act as an executor or administrator of the deceased's property [usually] to the detriment of the estates beneficiaries or creditors."

I find that the respondent properly sued the appellant as an **executrix of her own wrong**". The appellant assumed the role of the executrix by *intermeddling* with the deceased's property by way of entering into lease agreements.

In addition, the Civil Procedure Code, [Cap. 33 R.E. 2019, recognizes a person who *intermeddles* with the deceased's estate as the that deceased's person's legal representative. Section 3 of the CPC stipulates that-

> *"legal representative" means a person who in law represents the estate of a deceased person, and* ***includes any person who intermeddles with the estate of the deceased*** *and where a party sue or is sued in a representative character, the person on whom the estate devolves on the death of the party so suing or sued; (Emphasis added)*

I am of the firm view that the respondent did properly sue the appellant as a person who intermeddled with the deceased property. She was thus, the right person to defend the deceased's property. For that reason, I hold that the respondent would obtain effective remedy against the appellant who was not the administratrix of her late husband because she was an **executrix of her own wrong** and a legal presentative of her late husband by ***intermeddling with her deceased's husband's estate***.

Was the tribunal justified to determine matrimonial matters?

The appellant's advocate argued vehemently that the tribunal had no mandate to determine the issue whether the parties were duly married in accordance with the provisions of the law. He contended that section 160 of

the Law of Marriage Act, [Cap. 29 R.E. 2022] provides different kinds of marriage in Tanzania and the Jurisdiction of Courts to determine family or matrimonial disputes are provided under section 76 of the law, but the tribunal does not have jurisdiction.

He argued that the tribunal did not have jurisdiction to determine the issue whether parties were dully married or not and whether under certain Christian Norms, Padres are not supposed to marry or not, but the Law of Marriage Act does not invalidate or prohibits men not to marry because of their religious beliefs. He cited the case of this Court to support his contention that the tribunal had no jurisdiction to determine matrimonial matters.

The respondent's advocate replied that the tribunal did not decide o a family matter but it decided the issue of land ownership. He contended that the issues of land ownership and rent arrears are considered to be land matters and not family matters.

I wish state that the parties to this case who are Alais, the administrator of the estate of the late John Nepapa Kuluo John Lekuluwo and Anna, the appellant who alleged to be a wife of the late Father Moses Oledoni had no matrimonial dispute before the tribunal. It is wrong for the appellant's advocate to argue that the tribunal had no jurisdiction to

determine the issue whether parties were dully married or not. Further still, there was no issue before the tribunal as whether the parties were dully married or not, anything said by the tribunal must is an *obiter*. The dispute was who is the rightful owner between the late John Nepapa Kuluo John Lekuluwo and Anna, the appellant or her husband, the late Padre Moses.

I will not dwell on an issue the tribunal commented by way of passing. I am not convinced that the tribunal based its decision on that. I dismiss the fifth ground of appeal.

Was there evidence to decide in favour of the respondent?

The appellant's advocate submitted that the respondent did not prove that the existence of tenancy agreement. There was no evidence where the tenancy agreement between the respondent's late father and the appellant's husband commenced.

The respondent's advocate replied that the tenancy agreement was oral and commenced after the respondent's father had completed building the house. He concluded that the oral agreement was coming to an end in 2018.

I agree that there was no evidence to establish the tenancy agreement. The respondent's evidence that there was a such an agreement. However, I

found evidence on the balance of probability that the suit land belonged to the respondent's father. Alais (**Pw1**), the respondent gave evidence that the suit land was allocated to his father and tendered a letter of allocation from Terrat village government. The letter of allocation was signed by the chairperson and Michael Lukumay (**Pw2**), the secretary of Terrat village. Michael Lukumay (**Pw2**), was the secretary of Terrat village from 1985 to 1990. I had no reason to doubt Michael Lukumay (**Pw2**)'s credibility.
The appellant's advocate complained that the Tulito (**Pw3**) and Paulo (**Dw3**) gave contradictory evidence as to the number of the rooms. This complaint was baseless. It was not expected for witnesses of the adverse parties to give similar evidence.

I took time to consider the appellant's evidence on how she came into possession of the suit land. The appellant deposed that the suit land belonged to her and later she said it belonged to her and her husband. She did not explain how her husband acquired the suit land. She deposed that she was married in 1998. She deposed that she used her income to build the house. She borrowed money in 1999, 2000, 2001 and 2002 to build the house. The appellant's witness Paulo (Dw3) gave evidence that the disputed land was allocated to Fr. Moses in 1992 and he built the house in 1992. He testified during cross examination that-

"Nyumba ilijengwa mwaka 1992. Anna Shinini nilianza kumwona kwa mara ya kwanza 1998" literally meaning *"The disputed house was built in 1992. I saw Anna Shinini for the first time in 1998."*

The appellant's evidence contradicted her witness Paulo (**Dw3**) as to the date when the house was built. I also was of the view that the appellant's evidence was to be treated with great care. The appellant gave evidence that she had three children with her late husband and that her late husband saw birth certificates of her children. She deposed that the certificates were issued in 1998, 2001 and 2004. After the certificates exhibits D2 were shown to her, she deposed that the Register signed Emmanuel's certificates on 16.7.2025 and signed Ringoine's and Shuaka's certificates on 9.7.2015. She insisted that her husband who died in 2013 saw the certificates. Part of her testimony was that-

"Vyeti hivyo havikuandikishwa baada ya padre kufariki. Padri alikwisha kuviona hivyo vyeti. literally meaning *"the certificates were registered after the death of the Padre. The Padre saw the certificates."*

It is beyond dispute that Fr. Moses died in 2013 and the birth certificates were issued in 2015. It is beyond my imagination that the person who died in 2013 saw birth certificates issued in 2015. I am of the firm view

the appellant's credibility was at issue. I find the respondent more credible than the appellant who lied during the cross-examination.

In the end, like the trial tribunal, I find that the respondent established that the suit land belonged to his late father. The respondent's evidence on how his late father acquired the suit land was more credible that the appellant's evidence. The appellant and her witness, Paulo Ngoira (**Dw3**) gave contradictory evidence as to when the house was built, the appellant was unable to explain how her husband, the late Father Moses acquired the suit land. Consequently, I uphold the tribunal's judgment and dismiss the appeal in its entirety with costs.

I order accordingly.

Dated at **Babati** this 4th day of **March,** 2024.

J. R. Kahyoza, J.

Court: Judgment delivered in the virtual absence of the parties and their advocates as they connected to the virtual court but due power cut out, we could not link with the parties. B/C Fatina (RMA) present.

J. R. Kahyoza, J.
4/03/2024