

THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
MBEYA SUB-REGISTRY
AT MBEYA
LAND APPEAL NO. 26 OF 2023

*(Arising from the District Land and Housing Tribunal for Mbeya at Mbeya in Land
Application No. 185 of 2019)*

MARIAM JONATHAN MWAISANGO.....APPELLANT

VERSUS

JUDITH KABAGA.....RESPONDENT

JUDGMENT

Date of Last Order: 15/12/2023

Date of Judgment: 21/03/2024

NDUNGURU, J.

MARIAM JONATHAN MWAISANGO, the appellant herein was the applicant before the District Land and Housing Tribunal for Mbeya at Mbeya (the trial Tribunal) in the land application No. 185 of 2019 which she instituted against the respondent, JUDITH KABAGA for a landed property situated at Mwakibete – Sae within the City of Mbeya with estimated value of Tanzania Shillings 50,000,000/= (fifty million shillings) (hereinafter to be referred as the suit property).

Facts leading to this appeal as gathered from the pleadings and evidence adduced before the trial Tribunal are that; the applicant/appellant is only daughter of the late Jonathan Bernad Mwaisango who died on 22/09/2006 (henceforth the deceased). It was alleged that the deceased leaved with the respondent as concubine following the death of the appellant's mother. That after the death of the deceased, one Berno Mwaisango was appointed as administrator of the estate of the deceased by the Primary Court of Mbeya District at Urban. It was testified that the family meeting agreed with the administrator and confirmed by the Primary Court for that the suit property be distributed to the appellant. Then that when the administrator claimed vacant possession of the respondent with the view of distributing the suit property to the appellant, the respondent refused and claimed to be rightful owner of the same suit property. Following that refusal the appellant instituted the application before the trial Tribunal praying for a declaration order that she is a lawful owner of the suit property and for order of vacant possession of the respondent, costs of the suit and any other relief the trial Tribunal might found fit to grant.

In turn, the respondent maintained that the suit property is her own as she acquired it jointly with the deceased because they lived

together as wife and husband hence acquired status of spouses. The respondent also maintained that the administrator had failed to separate deceased's property from matrimonial property she thus, challenged the action of the administrator to request for vacant possession of the respondent. She also stated in her evidence that the suit property had never been distributed as alleged by the appellant since the administrator was ordered by the Primary Court to distribute it and file a report on the distribution but never did so.

Having heard evidence of both sides, the trial Tribunal found that the appellant has failed to substantiate her claims. It observed that the suit property is not the appellant's property until when administration process has been completed according to law. At the end result, however, the trial Tribunal dismissed the application.

Dissatisfied with the decision, the appellant has instituted the instant appeal. In the memorandum of appeal, she raised six grounds of appeal and later on Mr. Ngumbi, learned advocate representing the appellant was granted leave to file supplementary grounds of appeal. Nonetheless, for reasons to be apparent in this judgment I will not reproduce the grounds here.

At the hearing of the appeal which was disposed of by way of written submissions, advocate Ngumbi represented the appellant while the respondent appeared unrepresented.

In the course of arguing in support of the appeal Mr. Ngumbi raised a legal concern about the jurisdiction of the trial Tribunal though he noted to have not introduced it earlier in the grounds of appeal. He reasoned that point of law can be raised at any stage, substantiated his reasoning with the case of **Richard Julius Rukambura vs. Issack Ntwa Mwakanjila & another** [2007] TLR 91.

Mr. Ngumbi argued that the trial Tribunal had no jurisdiction to entertain the case where the applicant claimed the suit property which formed estates of the deceased. According to him there were pleadings on that effect that a settled law is, when there is dispute of ownership over the deceased property the power to resolve it is vested on the probate and administration court. He buttressed his argument with the case of **Monica Nyamakere Jigamba vs Mugeta Bwire Bhakome & another**, Civil Application No. 199 of 2019 CAT (unreported) and **Mgeni Sefue vs Mahamed Yahaya Khalfani**, Civil Appeal No. 1 of 2009 CAT (unreported) basing on that aspect he prayed for the appeal

to be allowed, proceedings and judgment be nullified. He also prayed for costs.

Responding to the issue of jurisdiction, since the respondent was unrepresented she made a contention that the complaint of jurisdiction is due to the negligence of the administrator for failure to complete the administration process and the appellant rushed to file the application in the trial Tribunal while she had knowledge of the incomplete administration process. Therefore, that, it was proper for the trial Tribunal to determine the matter since it was filed thereat.

In his rejoinder submissions on the subject, Mr. Ngumbi thanked the respondent for acknowledging that there is a pending process for administration of estates of the deceased and that the matter at the trial Tribunal was prematurely filed. He thus, insisted his previous prayer.

On the foregone submissions by the parties and having gone through the record, the pertinent issue for consideration at this juncture is whether the trial Tribunal had jurisdiction.

To start with, I concur with Mr. Ngumbi that a point of law, especially the one touching jurisdiction of a court can be raised at any stage of proceedings even in an appeal like the one under consideration

by any party or by the court *suo muto* as far the parties are availed with opportunity to address the court on that point. see, **Richard Julius Rukambura vs Issack Ntwa Mwakanjila & Another** (supra) and many others such as; **Tanzania Railways Corporation, Civil Applicatin No. 3 of 2004, CAT at Mwanza** (Unreported) and **Fanuel Mantiri Ng'unda v. Herman Mantiri Ng'unda and 20 others, Civil Appeal No. 8 of 1995, CAT** (unreported).

The complaint by Mr. Ngumbi is that the dispute at the trial Tribunal involved the estates of the deceased as the appellant claimed to have inherited the suit property through probate and administration process. The respondent does not dispute on that fact; however, she blames the administrator of the estates for not completing distributing of estates as the Primary Court ordered. The respondent also blames the appellant for filing the application in the trial tribunal while knowing that the administration process is pending in the Primary Court.

Conversely, it has been correctly argued by Mr. Ngumbi, when there is a dispute over ownership through inheritance between or among the heirs of the deceased estates or ownership by purchase of the estate from an administrator of the deceased estates. And when probate and administration of the estates process is incomplete, that is,

it is pending, then it is the probate and administration court in which the probate is pending can effectively resolve the dispute. That is the spirit of the CAT decision in the case of **Mgeni Sefue vs Mohamed Yahya Khalfani** (supra) where it was essentially held that where there are competing claims over deceased person's estate, only a probate and administration court can explain how the deceased person's estates passed on to a beneficiary or a *bona fide* purchaser of the estate for value.

Following from the above law, in relation to the matter at hand, common grounds are these; the suit property was owned by the deceased, the applicant presses her claim over the suit property through inheritance as she claims to have distributed the same by the administrator of the deceased estates. It is also on the record that the said administrator of the estates gave evidence as PW1 in the trial Tribunal. However, he did not state if he has distributed the property and the probate have been closed. I have also perused and read the file intensively where I have noticed some documents attached to the parties' pleadings. These are proceedings of the Primary Court of Mbeya Urban. They were unfortunately, not tendered as exhibits in the trial Tribunal. Nonetheless, for the nature of the issue under consideration,

and the documents being court's proceedings I have taken judicial notice under section 59 of the Evidence Act, Cap. 6 R.E 2022.

In these proceedings I noticed that there is probate and administration cause No. 26 of 2007 in which one Berno Mwaisango, who then came to testify as PW1 in the trial Tribunal was appointed as administrator of the estates of the deceased. After some process which are irrelevant to the matter at hand the said administrator returned to the Primary Court in 2018 with the view of reporting what transpired in the estates and the properties he collected for distribution. There, he was recorded to tell the Primary Court that the suit property was distributed to the appellant according to the deceased wishes. It appears the respondent was involved in the Primary Court, so, she objected the alleged deceased's wishes. The Primary Court upheld the objection of the respondent then on 12/06/2018 the administrator was ordered to re-distribute the estates and file inventory in the Primary Court. It also ordered all heirs to appear to confirm receiving the distribution. In fact, the administrator was availed with one month to accomplish the task.

Thereafter, there is no any other proceedings showing if the administrator adhered to the Primary Court order. That is therefore, the bases for the statement by the respondent that the administrator did not

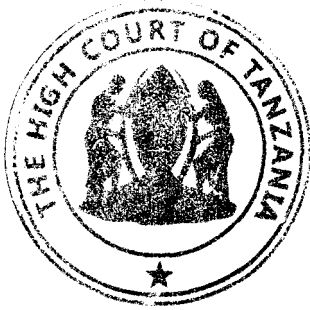
complete administration process. It is also my opinion that, incomplete probate and administration process was the reason for trial Tribunal to observe in the impugned decision that the appellant cannot claim the suit property until when the administration process is complete according to the law.

Now, since the appellant and the respondent are indicated in the proceedings of the Primary Court to be beneficiaries of the deceased estates. And since the two are confronting over the same estates which had never been closed notwithstanding, the order of the Primary Court. It is my conviction that any party between the beneficiary claiming to be owner of the suit property had to go back to the Primary Court seeking to know if the administrator had filed inventory and the administrator would have been a targeted party.

Owing to the discussion above, I find the trial Tribunal had no jurisdiction to entertain the appellant application. I thus, allow the appeal, nullify the proceedings and quash the judgment of the trial Tribunal in land application No. 185 of 2019. Parties are advised to go back to the Mbeya Urban Primary Court for it to summon Berno Mwaisango, administrator of the deceased's estates for him to adhere to the order made on 12/6/2018, or for any other probate and

administration procedure in accordance with relevant law. Being the matter touching probate and administration and considering the relationship of the parties, each shall bear her own costs.

It is so ordered.




D. B. NDUNGURU
JUDGE

21/03/2024