

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO. 88 OF 2020

(Appeal arising from the decision of the District Land and Housing Tribunal for Kinondoni at Mwananyamala, in Application No. 310 of 2019, Hon.R.L. CHENYA - Chairperson dated on 27th May, 2020.)

1.SALAMA ISMAIL HANYA (as the Administratrix of the Estates of the late

ISMAIL OMARY HANYA.....1ST APPELLANT

2. SAID ISMAIL HANYA.....2ND APPELLANT

VERSUS

1. TUNU ISMAIL HANYA as the Administratrix of the Estates of the late ISMAIL

OMARY HANYA.....1ST RESPONDENT

2. MASOUD ISMAIL HANYA as the Administrator of the Estates of the late

ISMAIL OMARY HANYA.....2ND RESPONDENT

3. LILIAN WILLIAM MUSHI.....3RD RESPONDENT

JUDGMENT

Date of Last Order: 04/10/2021

Date of Judgment: 27/10/2021

A.MSAFIRI, J:

On 29th May, 2020 the appellants filed the memorandum of appeal through the learned Advocate Hardson Mchau after being aggrieved by the decision of the District Land and Housing Tribunal for Kinondoni at Mwananyamala in Application No. 310 of 2019 delivered by Hon. R.L.

Chenya (Chairperson) on 27th May 2020. The Memorandum of Appeal has two grounds of appeal as here under:-

- 1. That, Hon. Chairperson erred in law and facts in his ruling that, the Honourable Tribunal has no jurisdiction to hear and determine the land dispute which the sale was blessed by another court of law.*
- 2. That, Hon. Chairperson erred in law and facts in his ruling that, the second appellant being the heir has no locus standi to sue claiming the deceased estate.*

The appellants prayed for the appeal to be allowed with costs, the decision of the District Land and Housing Tribunal at Kinondoni to be quashed, and the matter to be heard on merit.

The brief background of this matter is that the appellants filed an Application No. 310 of 2019 before the District Land and Housing Tribunal for Kinondoni, among others praying for judgment and decree that, the sale agreement of the disputed plot No. 624 Block B Sinza, Kinondoni Municipality between the 1st, 2nd and 3rd respondents was illegal and unlawful abinitio, and that the Hon. Tribunal be pleased to declare the disputed plot to be the lawful property of the late Ismail Omary Hanya.

On the date of the hearing of the Application, the respondents raised two preliminary objections that, (i) the trial Tribunal has no jurisdiction to entertain the Application and, (ii) the 2nd applicant has no legal capacity to sue as the applicant in this application. After hearing of both parties, the trial Tribunal sustained both objections and dismissed the Application.

Aggrieved, the applicants has filed this appeal challenging that decision of the trial Tribunal.

On the 23rd August 2021, this Court granted an order to dispose the appeal by way of written submissions. In addition, the Court made an ex-parte order against the 1st and 2nd respondents having been served twice and failed to appear and were served by way of substituted service through Mwananchi Newspaper on 13/8/2021.

Mr. Mchau, representing the appellants, submitted on the first ground of appeal that before the trial Tribunal, the appellants claims were a land dispute as the subject matter of the Application was on the legality of the sale agreement in respect of the House located at Plot No. 624, Block "B" Sinza, Kinondoni Municipality. That the trial Tribunal has exclusive jurisdiction to hear and determine the disputes between the parties as provided under section 167(1) (c) of the Land Act, Cap 113 R.E. 2019, whereby this provision provide for the power of the trial Tribunal to hear and determine "all matters concerning land." He pointed further that the general jurisdiction of the trial Tribunal is clearly stipulated under section 33 (10 (a) and (b) of the Land Disputes Courts Act, Cap 216, R.E 2019.

Mr. Mchau submitted further that the test for determining whether the Tribunal has jurisdiction or not, the same has to look on the pleaded facts in full and reliefs claimed and its relation to the cause of action. That, in the Application, the cause of action arose on the disputed plot and the relief claimed are within jurisdiction of the trial Tribunal. He cited the case of **Charles Rick Mulaki vs. William Jackson Magero**, Civil Appeal No. 69 of 2017, HC at Mwanza (unreported).

On the second ground, Mr. Mchau submitted that, there is no dispute that the 2nd respondent is among the heirs of the estate of the late Ismail Omary Hanya, so he has capacity to sue on the property of the deceased, and also has legal right to protect the rights over the property of his late father. To cement his argument he cited the case of **Maulid Makame Ali vs. Kesi Khamis Vuai**, Civil Appeal No. 100 of 2004, CAT at Zanzibar (unreported).

In reply, Mr. Mgare for the 3rd respondent submitted that, as to 1st ground of appeal, he disagreed with the submission by the appellants' counsel that the pleadings and the reliefs sought are within the jurisdiction of the Court. He avers that in the trial Tribunal, the appellants challenged a sale of the disputed house which formed part of the estate of the late Ismail Omary Hanya. That the 1st appellant, 1st and 2nd respondents were jointly appointed as administrators of the deceased estate via Mirathi No. 379/2012 by Magomeni Primary Court. And that, in their capacity as administrators the 1st and 2nd respondents sold the disputed house to the 3rd respondent without involving the 1st appellant and other beneficiaries of the deceased. He pointed that, from the facts and pleadings of the appellants, they were challenging the sale executed by the administrators of the deceased estate.

Mr. Mgare was of the view that as per section 18 (1) (a) (i) of the Magistrates' Courts Act, Cap 11 R.E. 2019, the challenge of sale of the deceased property done by the administrators while administering the estate of the deceased who is a Moslem is dealt with the Primary Court which appointed the administrators of the estate.

And that, in terms of Rule 8 (f) of the Primary Courts (Administration of Estates) Rules, G.N 49 of 1971, any question relating to sale, partition, division or other disposal of the property and other assets of the deceased estate or distribution of the property and assets among the heirs or beneficiaries are triable by a Primary Court (Probate or appointing Court). He cited the cases of **Mohamed Kihago vs. Abbas Kihago** (1999) TLR 319 and **Kijakazi Mbegu and 5 others vs. Ramadhani Mbegu** (1999) TLR 175.

On 2nd ground of appeal, Mr. Mgare submitted that, under section 100 of the Probate and Administration of Estates Act, Cap 352 R.E. 2019, it is the administrator or executor of the deceased estate who has powers to sue in all causes of action survived the deceased. The 2nd appellant is a heir and not one of the administrators to the deceased estate so he has no locus standi to sue for and on behalf of the deceased. To cement his point, the counsel cited a case of **John Petro vs. Peter Chipaka** (PC) Civil Appeal No. 81 of 1996 (HC) at Mwanza (Unreported).

In rejoinder, the counsel for appellants reiterated his submission in chief and clarified that on the 1st ground, the appellants are challenging the reasons adduced by the trial Chairman on the first point of preliminary objection that, the trial Tribunal has no power to interfere orders made by other courts save for those from Ward Tribunal. This was out of preliminary objection raised by the respondents as there was no any order from other Court blessing the sale of the disputed plot.

Having considered the submissions from parties to the dispute, and the court records, the main issue here is whether the appeal has merit. In determination of the herein above issue, I will start with the 1st ground

of appeal that the Honourable Chairperson has no jurisdiction to hear and determine the land dispute which the sale was blessed by another court.

In his findings, the Honourable Chairman was of the view that, it was not in dispute that the applicants are challenging the legality of sale of the suit house to the 3rd respondent by the 1st and 2nd respondents. It was also not in dispute that the 1st applicant, 1st and 2nd respondents are administrators of the estate of Ismail Omary Hanya and the sale arrangements of the sale of the house in dispute were made by the Primary Court vide Mirathi No. 379/2012.

Basing on this findings, the Hon. Chairman decided that although the subject matter in this suit is over a house, but the sale the applicants are challenging was made by another court, the order which can not be overturned by the Tribunal.

Was the sale of the disputed house arranged/blessed by Magomeni Primary Court in the Probate Cause No.372/2012 as it was put by the Hon. Chairman? Although that is the position of the Hon. Chairman, i.e. the sale of the disputed house was blessed by the Order of the Probate Court, unfortunately, the contents of the Order or decision of Probate Cause No.372/2012 at Magomeni Primary Court are not part of the Court records. Nor did the Hon. Chairman took judicial notice of the proceedings of the said probate cause.

In his submission, the counsel for the 3rd respondents, stated that, the sale of the disputed house was executed by the 1st and 2nd respondents as administrators of the deceased estate while carrying their lawful duty of administering the deceased estate by selling the house and distributing the sale proceeds to the beneficiaries.

In their Application before the trial Tribunal, the applicants stated that (at paragraph V of the Amended Application);

" In the due courses of administering and succession the estates of the late Ismail Omary Hanya, the 1st and 2nd respondents without any justification and consent from all beneficiaries of the late Ismail Omary Hanya, colluded and sold the disputed premise to the 3rd respondent....."

From this, I have gathered that in the records, there is no proof that the sale of the disputed house was blessed/ordered by the Probate Court, but nevertheless, the sale was conducted by the respondents in the course of administering the estate of the deceased. What is at fault here is that, the administrators did that without consent from all beneficiaries of the deceased estate.

Having gathered that, the next question is whether the trial Tribunal have jurisdiction to hear and determine the matter which the dispute originates from the conducts of the administrator in administering the deceased estate.

In the case of **Mgeni Seif vs. Mohamed Yahaya Khalfani**, Civil Application No. 1/2009, CAT Dar es Salaam (Unreported) at page 8, the Court of Appeal had this to say;

*"It seems to us that there are competing claims between the applicant and the respondent over deceased person's estate. **In the circumstances, only a probate and administration Court can explain how the deceased person's estate passed on to***

beneficiary or a bonafide purchaser of the estate for value.....” (Emphasis mine).

Furthermore, in the case of **Malietha d/o Gabo vs. Adamu s/o Mtengu**, Misc. Land Appeal No. 21 of 2020 HC Kigoma (unreported), the court observed that; when the claim of ownership stemming from the right of inheritance or purchase for value arise while the probate and administration Court is still seized with the matter, meaning the administrator has not filed a final account and the court having not approved the same, the probate and administration court must determine whether title property passed through administration of the estate.

Basing on the above set principle I am of the view that since the illegality of sale of the disputed property emanates from the administration of the estate, where the two administrators has allegedly mismanaged the estate by selling the property listed in the deceased estate, and without the consent of their co-administrator, then the proper court to determine the matter is the probate and administration court. So, the first ground of appeal is answered in negative that the trial Tribunal had no jurisdiction to entertain the Application regarding the disputed house which emanates from probate cause.

On the 2nd ground that the Hon. Chairperson erred in holding that the second appellant has no locus standi to sue claiming the deceased estate, this need not take much of my time. It is trite law that it is the administrator or executor of the deceased estate who has powers to sue in all causes of action which survived the deceased. This is rightly laid down under section 100 of the Probate and Administration of the Estates

Act, Cap 352. I find no merit in this ground and I dismiss it. In the event, I find no reason to reverse the decision of the trial Tribunal. I therefore dismiss the appeal with costs.

It is so ordered.

Dated at Dar es Salaam this 27th October 2021


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A.MSAFIRI

JUDGE

