

**IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM**

LAND APPEAL NO. 73 OF 2020

(From the decision of the District Land and Housing Tribunal for Ilala in Land Application No. 425 of 2016, Hon. L.R.Rugarabamu, Chairman dated 16th day of March 2020)

LUSIUS KAPUNGU (Suing as an Administrator of the estate of the late **EGLIBERT CHALLE KAPUNGU**) **APPELLANT**

VERSUS

CONRAD CHALLE KAPUNGU..... **RESPONDENT**

*Date of Last Order: 20/05/2021
Judgement date: 20/08/2021*

J U D G M E N T

MANGO, J.

The Appellant instituted Application No. 425 of 2016 before the District Land and Housing Tribunal for Ilala claiming ownership of a house located at Kipawa, Mogo Street, house No. ILA/KPW/MOGO 32/61. Brief facts provide that the house in dispute was the property of the late Englibert Chale Kapungu, the biological father of the Appellant and the Respondent. The Appellant claims that the suit premises forms part of the estate of the late Englibert Chale Kapungu, while the Respondent alleges that the house is his property as it was bequeathed to him by the late Englibert Chale Kapungu before his death. The Trial Tribunal held in favour of the Respondent. Aggrieved by the decision of the Trial Tribunal, the Appellant preferred this Appeal on three grounds of appeal which can be paraphrased as follows;

- 1. That the Hon. Trial Tribunal erred in law and in facts for entertaining a matter that originates from probate and administration cause in which the respondent did not object;**
- 2. That the Hon. Trial Chairman erred in law and fact for failure to consider Appellant's testimony and documentary evidence tendered during trial;**
- 3. That the Hon. Trial chairman erred in law and fact for failure to hold that the disputed land forms part of the estate of the late Englibert Challe Kapungu which is subject to distribution to all legal heirs of the deceased;**
- 4. That the Hon. Trial Chairman erred in law and in fact for failure to consider that the deed of transfer between the late Englibert Challe Kapungu and the Respondent is deemed to be a forged document.**

The Appellant was represented by Mr. Emmanuel Richard Mchibya, learned advocate while the Respondent was represented by Mr. Godian Anania Mugusi, learned advocate. On 29th March 2021, this Court ordered the Appeal to be argued by way of written submissions. Both Parties filed their submission within the schedule.

Submitting in support of the first ground of Appeal, counsel for the Appellant submitted that, it was wrong for the Trial Tribunal to rely on the deed of gift produced by the Respondent while the same was not used in challenging the Appellant's appointment as the administrator of the estate of the late Englibert Challe Kapungu. He submitted further that, the Respondent has never challenged the inclusion of the house as part of the estate of the late

Englibert Challe Kapungu. He is of the view that, as the Respondent did not contest inclusion of the house as part of the estate of the late Englibert Challe Kapungu, he is barred from claiming ownership over the suit land.

On the second ground of Appeal he argued that, the decision of Mbambabay Primary Court in Mirathi Na. 04/2016 and letters of administration issued to the Appellant provide for a sufficient proof that the suit premises forms part of the estate of the late Englibert Challe Kapungu. He submitted further that the Respondent failed to prosecute his caveat lodged during probate proceedings.

On the third ground of Appeal he submitted that the tribunal erred by failure to consider that the disputed land is part of the estate of the late Englibert Challe Kapungu. Thus, it should be subject to distribution to all legal heirs listed in the decision of Mbambabay Primary Court in Mirathi Na. 04/2016.

The Appellant raised a number of complaints regarding the manner the Respondent has squandered the estate of their late father. He submitted further that, the Respondent used the deed of gift to benefit himself from the deceased estate. I must state at the outset that, these complaints are not relevant in this appeal as they have nothing to do with the issue of ownership of the suit land which is the main issue in this appeal, The Appellant may lodge his claims before a proper forum.

The Appellant did not submit on the fourth ground of Appeal. He merely stated that, if forensic examination of the disputed deed of gift will be conducted, it will be proved to be a forged document. He also highlighted that, the deed of gift was not registered under section 62(2) of the Land Act, [Cap. 113 R.E 2019].

In his reply submission, learned counsel for the Respondent submitted that the decision to institute Land Application No. 425 of 2016 was made by the Appellant who instituted the Application before the District Land and Housing Tribunal for Ilala. The Respondent merely appeared before the tribunal and defended the Application. He wonders why the Appellant did not approach what he considers to be a correct forum to determine this dispute.

He argued further that, the suit property was not listed as part of the estate of the late Englibert Challe. And that, the caveat filed by the Respondent before Mbambabay Primary Court intended to object the appointment of the Appellant to be the administrator of their fathers' estate.

On the second ground of appeal, he submitted that the Trial Tribunal considered evidence produced by all parties as reflected at page 6 of the Trial Tribunal judgement. According to him, the Appellant failed to prove his case as required by section 110(1) of the Evidence Act, [Cap. 6 R.E 2019].

On the third and fourth grounds of appeal, he submitted that, the allegations made by the Appellant regarding the deed of gift have no legal bases. In this, he argued that the Respondent did not prove the alleged forgery and other complaints against the Respondent. He insisted that the Trial Tribunal correctly held in favour of the Respondent.

In his brief rejoinder, the learned counsel for the Appellant reiterated his submission in chief.

I have considered submissions by both parties and Court Record. From the submission of both parties, it is not disputed that the appeal at hand originates from a land matter where parties contest ownership over the suit land. While the Appellant alleges that the suit land forms part of the estate of the late Englibert Challe Kapungu, the Respondent alleged that the suit house

is his property by virtue of the deed of gift drawn by the late Englibert Challe Kapungu before his death. In such circumstances, the first ground of Appeal stands to fail as the issue between parties to this appeal is not a probate matter, it is a land dispute. The law, Land Act and the Land Disputes Courts Act provides for Courts with Jurisdiction to determine Land disputes. Section 167(1) of the Land Act, [Cap.113 R.E 2019] and section 3(2) of the Land Disputes Courts Act, [Cap 216 R.E 2019] provide that, the courts that are vested with exclusive jurisdiction to hear and determine all disputes, actions and proceedings concerning land are the Court of Appeal, the High Court, the District Land and Housing Tribunal, Ward Tribunals and the Village Land Council. According to the cited provisions of law Primary Courts do not have jurisdiction to determine Land Disputes. The suit land can may be considered to form part of the estate of the late Englibert Challe Kapungu if it will be declared to be his property. Thus, the Trial Tribunal correctly entertained the matter as it is vested with jurisdiction to hear and determine land matters.

The second, third and fourth grounds of appeal concern evaluation of evidence adduced during trial. I am of a considered view that the Trial Tribunal considered and evaluated well evidence adduced by both parties during trial. The main issue before the tribunal was whether the disputed property is part of the estate of the late Eglibert Challe Kapungu or the Respondents property. The Appellant who was the Applicant before the tribunal alleged that the suit and is the property of the late Englibert Challe. As correctly submitted by the counsel for the Respondent, it was the duty of the Appellant to prove that the suit house is the property of the late Englibert Challe Kapungu. The Appellant did not tender any evidence to prove his allegations regarding ownership of the suit land. He considers the decision of Mbambabay Primary Court in Probate Cause No.4 of 2016 and minutes of the

clan meeting as evidence that the suit house is part of the estate of the late Englibert Challe Kapungu. He did not produce any evidence that made the alleged clan meeting to consider the suit house to be part of the estate of the late Englibert Challe Kapungu. Even the family members who allegedly consider the suit house to be part of the estate of the late Englibert Challe Kapungu were not summoned as witnesses.

Court record indicates that the Respondent tendered a deed of gift dated 12th April 2013 which indicates that the late Englibert Challe Kapungu bequeathed the suit house to the Respondent. He also had two witnesses who witnessed the execution of the deed of gift one of them being a magistrate who acted a Commissioner for oaths. The witnesses are Michael Makole and Cuthbert Danda Kande. The Appellant does not dispute that the said deed of gift was tendered before the tribunal as evidence. He disputes its genuineness alleging the same to be a forged document and he also challenges it for being not registered.

It is a well settled position of law that whoever allege must prove. The Appellant have never proved the alleged forgery on the deed of gift that transferred ownership of the suit land from the late Englibert to the Respondent. He merely alleges that the document was forged but he never took any action to prove that the document is indeed forged. It should be noted that, it was the duty of the Appellant and not the tribunal to prove the alleged forgery. In absence of such proof, the Trial Tribunal was correct to hold in favour of the Respondent.

On the issue of registration of transfer, evidence in record does not establish the suit land to have a registered title which could have required registration of its transfer. As there is no evidence that the house has a registered title,

this court finds the deed of gift to have transferred ownership of the suit land despite the fact that there is no proof that the deed of gift was registered. I hold so because, section 62(4) of the Land Act provides that the contents of section 62 of the Land Act shall not apply to or affect the operation of any contract for a disposition under the Land Act.

For those reasons I find no reason to differ with the decision of the Trial Tribunal. The Appeal is hereby dismissed for being unmeritorious. Given the fact that parties to this case are blood relatives, this court does not award costs.

Land Appeal No.73 of 2020 is hereby dismissed without costs.

Rights of Appeal Explained.



Z. D. MANGO
JUDGE
20/08/2021

