

**IN THE HIGH COURT OF TANZANIA**

**(LAND DIVISION)**

**AT DAR ES SALAAM**

**LAND CASE NO. 192 OF 2022**

**ANTHONY DAVID MTAVANGU** (Legal personal representative of Eva David Mtavangu (deceased)).....**PLAINTIFF**

**VERSUS**

**JOHN SELEMANI MUSSA**.....**DEFENDANT**

**ALLEN MOLLEL** (Legal personal representative of Eva David Mtavangu (deceased)).....**NECESSARY PARTY**

*Date of last order: 05/12/2022*

*Date of ruling: 13/12/2022*

**RULING**

**A. MSAFIRI, J.**

The present suit was lodged by the above named plaintiff on 10<sup>th</sup> August 2022 against the defendant and the necessary party for declaration that the whole of the landed property on Plot No. 258 & 260 Block "C" Boko Dar es Salaam City, Certificate of Title No. 57424 (the disputed property) is the property of the deceased namely Eva David Kasemwa who is also known as Eva David Mtavangu, the deceased.

*Alle*

On lodging their respective written statements of defence the defendant and the necessary party disputed the plaintiff's claims and each raised preliminary objections on points of law as follows; The necessary party raised two preliminary objections to the effect that;

- 1. This Honorable Court has no jurisdiction to entertain the suit.*
- 2. The suit has been prematurely filed in this Honorable Court.*

On the other hand, the defendant raised three preliminary objections to the effect that;

- 1. This Honorable Court has no jurisdiction to entertain the matter.*
- 2. The plaintiff has no cause of action against the defendant.*
- 3. The plaintiff has no locus standi.*

I ordered the preliminary objections to be disposed of by way of written submissions whereas Mr. Imam Daffa, learned advocate represented the plaintiff, Mr. Abraham Senguji, learned advocate represented the defendant while Ms. Nakiete Msuya appeared for the necessary party.

I propose to start first with determination of the question of jurisdiction of this court to try the matter. As both the defendant and the necessary

*Adls.*

party have each raised the question of jurisdiction and each lodged written submissions to support the same I will determine jointly the said objections.

The defendant and the necessary party were of the view that this Court lacks jurisdiction to entertain the present matter basing on the decision of the Court of Appeal in **Mgeni Seif v Mohamed Yahaya Khalfan**, Civil Application No. 1 of 2009 (unreported) in which it was observed that;

*"It seems to us where there are competing claims between the applicant and the respondent over the deceased person's estate, in the circumstances, only a probate and administration court can explain how the deceased person's estate passed on to a beneficiary or a bona fide purchaser of the estate for value.*

It was submitted that there is a Probate and Administration Cause No. 76 of 2016 which was filed at the High Court of Tanzania Dar es Salaam District Registry and the same is still pending. Since the administrators of the deceased's estate have not yet filed inventory as well as accounts of the estate and the court has not yet approved them, the matter is therefore still in the hands of the probate and administration court. The decision of this

*Adls.*

court in **Carolina Hopkin v Wilbroad Kapufi Probate**, Appeal No. 3 of 2019 (unreported) was referred and it was observed that where there is a dispute over the estate of the deceased only the probate and administration court is seized of the matter and can decide on the ownership.

The defendant and the necessary party therefore prayed for this suit to be dismissed with costs.

On reply the plaintiff has submitted at length on the question of jurisdiction of this court. The plaintiff maintained that as the inventory is yet to be filed this court has jurisdiction to entertain the present matter. The court would have lacked jurisdiction if the inventory had already been filed as it was the position in the case of **Mgeni Seif v Mohamed Yahaya Khalfan** (supra).

The plaintiff submitted that the question of ownership of the disputed property between the deceased and the defendant must be resolved first before being listed in the inventory to be filed before the probate court. He submitted that the probate court does not have powers to resolve the issue of ownership between the deceased and the defendant. Hence the

*Adls -*

authorities referred by the defendant and the necessary party are inapplicable to the matter at hand.

On rejoinder it was submitted that the defendant never claimed half of the landed property as he was neither an administrator nor did he participate in the administration of the estate of the deceased. The dispute arose among the administrators in invoking the rules of distribution of the deceased's estate.

Before going to the merits or otherwise of the issue of jurisdiction of this court to try the present suit, I find it apposite to state briefly facts giving rise to the present suit. It is borne out of the record that the late Eva David Mtavangu (the deceased) acquired the disputed property sometimes in 2006 by way of inheritance from her father the late David Anthony Mtavangu.

The deceased developed the disputed property by erecting thereon a house. On 3<sup>rd</sup> September 2011 the deceased was married to the defendant. They lived in the house built by the deceased and they were blessed with one issue, however the marriage did not last longer as the deceased passed away sometimes in 2016. Following the passing of the deceased, the plaintiff who is the younger brother of the deceased and the necessary party who is

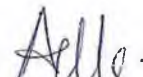
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the defendant's uncle were jointly appointed to administer the deceased's estate.

It is unfortunately that the administration of the deceased's estate was not smooth as the co-administrators failed to reach an agreement on how to administer the deceased's estate making it impossible to file inventory as well as statement of accounts.

From the record we are told that there are pending applications before the probate court which are Civil Application No. 52 of 2021 in which the necessary party is seeking for revocation of grant of letters of administration to the plaintiff as well as Civil Application No. 62 of 2021 in which the defendant is seeking for revocation of grant of letters of administration to both the plaintiff and the necessary party.

Now let me turn to address the issue of jurisdiction to try the present matter. I have keenly gone through the pleadings filed in the present suit. Paragraph 4 of the plaint reads that;

*4. That the plaintiff and the necessary party being the co-administrators of the estate of Eva David Mtavangu, deceased, were supposed to file this suit together as* 



plaintiffs **but due to the fact they don't have a common stand in the subject matter of the suit** the plaintiff has decided to file this suit alone and join the co-administrator as a necessary party. [Emphasis added].

Paragraph 9 of the plaint reads;

9. That the plaintiff and the necessary party were required, under the grant, to file inventory in respect of the estate of the deceased within six months from the date of the grant **but they could not file any as they could not reach agreement on the ownership of the house on Plot No. 258 & 260 Block "C" Boko Dar es Salaam City, Certificate of Title No. 57424 which is registered in the name of the deceased.** [emphasis added].

On the other hand, the paragraph 7 of the defendant's written statement of defence reads;

7. That the contents of paragraph 9 of the plaint are highly disputed and the plaintiff is put into strict proof thereof. It is

*Atts.*

*further stated that there is no evidence which reveals that there was dispute over ownership of the house but rather on the percentage contribution on the acquisition of the said house.*

Paragraph 4 of the necessary party's written statement of defence reads;

*4. That the contents of paragraph 6 of the plaint are admitted to the extent that the defendant contributed to the construction of the house on plots No. 258 and 260 Block "C" Boko Dar es Salaam city and the rest of facts are denied and the plaintiff is put into strict proof thereof. It is further stated that the defendant has never claimed ownership of half of the landed property on plots No. 258 and 260 Block "C" Boko Dar es Salaam.*

I have deliberately reproduced the relevant paragraphs of the pleadings in order to understand the nature of the dispute filed in this court. From the totality of the facts in this case there is no claim of ownership by the defendant over the disputed property. Rather the dispute arose following disagreement between the plaintiff and the necessary party who are co-

*Alle.*



administrators of the deceased's estate on how to administer the deceased's estates. The actual disagreement is that the plaintiff on one hand who is the deceased's younger brother wants the entire of the disputed property be included in the inventory to be filed in the probate court while the necessary party wants just half of it be included in the inventory.

It appears that there is sharp disagreement between the co-administrators and this is evidenced by paragraph 18 of the plaint which reads;

*18. That sequel to what is stated under paragraph 17 hereinabove the plaintiff states that since the necessary party is not in a legal authority to make decision or form opinion regarding the ownership of the landed property in Plot No. 258 & 260 Block "C" Boko Dar es Salaam City, his stand represents the stand of the defendant who is his uncle.*

It is borne out of the record that following such disagreement regarding the extent of the distribution of the disputed property the necessary party filed an inventory evidencing the distribution of the

*Alle-*

deceased's estate before the probate court (the High Court Dar es Salaam Registry) but the same was rejected for being one sided inventory instead of being filed by both co-administrators. This is per the ruling of that Court dated 22<sup>nd</sup> July 2022.

Now going by the above account of events, the present suit was lodged in court following disagreement of the administrators of the deceased's estate on how the estate should be distributed. The probate matter is still pending in court and as I have said before there are pending applications to have plaintiff's appointment as an administrator be annulled by the necessary party while on the other the defendant intends to have both the necessary party and the plaintiff appointment as co-administrators annulled.

I am of the settled opinion this matter can be better dealt with by the probate court as there are matters which fall exclusively under its domain.

First it is on the issue of the disputed property. In the instant suit there is no dispute as to ownership of the disputed property rather a disagreement between the co-administrators regarding the extent of contribution made by the defendant and on how the disputed property is to be administered.

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This court derives its jurisdiction under Section 37 (1) of the Land Disputes Courts Act [CAP 216 R.E 2019] in which provides;

*37.-(1) Subject to the provisions of this Act, the High Court shall have and exercise original jurisdiction- (a) in proceedings for the recovery of possession of immovable property in which the value of the property exceeds three hundred million shillings;*

Hence the instant matter, looking at the nature of the claims, as I have stated before it is based on the extent of contribution made by defendant hence it is not for the recovery of an immovable property.

As correctly observed by my learned brother Hon. Justice Mugeta in the case of **Jacqueline Ntuyabaliwe Mengi & Another v Abdiel Reginald Mengi And Benjamin Abraham Mengi (Administrators of the Estate of The Late Reginald Abraham Mengi & Another** Civil Revision No. 1 of 2022 (unreported) that;

*"In this jurisdiction, a right to matrimonial properties which is in one spouse's name belongs to that party until when it is proved that the parties either intended to have*

*Acts-*

*community ownership of the properties or the other spouse proves his/her contribution in the acquisition of the property concerned. Therefore, when a spouse dies the surviving party cannot sue in a normal civil court or on matrimony rights for determination of his/her share in the property on ground of contribution in its acquisition”.*

Hence the question that comes is where such matter can be determined?

In the case of **Leticia Mtani Ihonde v Adventina Valentina Masonyi**, Civil Appeal No. 521 of 2021, Court of Appeal - Musoma (unreported). The Court of Appeal observed that;

*Where the husband has died, the surviving spouse cannot seek distribution of the matrimonial assets in a matrimonial cause, and any claim or perceived rights thereto must be sought in a probate and administration cause’.*

Although in the instant matter it is not the surviving spouse who has filed the present suit to claim his share in the matrimonial property, I am of the settled mind that the above situation in the two referred decisions can.

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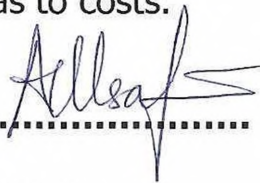
be safely extended to the instant matter because looking at pleadings filed in the instant matter this court is being moved to determine the extent of contribution of defendant being the surviving spouse in a matrimonial property.

Hence this court lacks jurisdiction to entertain the instant suit. The submissions of the parties in respect of the preliminary objection hinged on the issue of ownership but in the instant matter the circumstances are different as there is no question of ownership rather the extent of contribution made by the defendant on the disputed property. Hence be it that way it is only the probate court which is placed at better position to decide on the issue.

Secondly the dispute between the administrators can be resolved by the probate court. Similarly, as there are pending applications to have the administrators removed, determination of the said applications can have impact on the present suit if the plaintiff's appointment as an administrator is subsequently revoked, he will automatically loose *locus standi* to bring this suit. *Adls.*

Consequently, I sustain the first preliminary objection raised by both the defendant and the necessary party. There is no need for determining the other points of preliminary objection.

This suit is therefore struck out. Given the nature of the relationship of the parties I will not make an order as to costs.



**A. MSAFIRI,**

**JUDGE**

**13/12/2022**

