

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPEAL NO. 184 OF 2021

(Arising from Appeal No. 16 of 2019 from the District Land and Housing

Tribunal for Temeke at Temeke, originating from Land Application

No.393/10/2018 from Toangoma Ward Tribunal)

FLORA ADAM MWAMAGEMO APPELLANT

VERSUS

EMMANUEL MAFTAHA TUNGARAZA RESPONDENT

JUDGMENT

Date of last order: 09.03.2022

Date of Judgment: 31.03.2022

A.Z.MGEYEKWA, J

This is the second appeal. At the centre of controversy between the parties to this appeal is a parcel of land which was part of the inheritance. The decision from which this appeal stems is the judgment of Toangoma Ward Tribunal in No.393/10 of 2018.

The material background facts to the dispute are not difficult to comprehend. They go thus: the appellant and the respondent are relatives whereas the respondent is the brother-in-law of the appellant. The respondent married the appellant's sister who passed away. The appellant once gifted her daughter a piece of a plot which is in dispute. The records reveal that the respondent was appointed to administer the estate of his late wife Feda Adam Mwamagemo by Mbagala Primary Court in Probate Cause No. 230 of 2016. A. Mwamagemo, the appellant's brother was a co-administrator of the estate of the Feda Adam Mwamagemo. The deceased's properties were identified and there were no any complaints until when the execution process of the said Probate Cause was effected. The appellant alleged that her property is illegally been included in the deceased estate.

The appellant lodged a land case at Toangoma Ward Tribunal whereas the Ward Tribunal determined the matter and part of the suit land which included the disputed properties was given to the appellant. Dissatisfied, the respondent lodged an appeal before Temeke District Land and Housing Tribunal whereas the appellate tribunal determined the matter and ruled out that the trial tribunal erred in law to determine the matter

which was a probate matter. Therefore, the trial tribunal decision was nullified.

Believing the decision of the District Land and Housing Tribunal for Temeke was not correct, the appellant lodged this second appeal on four grounds of complaint seeking to assail the decision of this appellate tribunal. The grounds are as follows:-

1. *That the Trial Tribunal Erred in Law and in Fact for non-considering the evidence of the Respondents ownership of the land.*
2. *That the Trial Tribunal erred in law and in fact for being bias.*
3. *That, the Trial Tribunal erred in law and in fact for mixing in the probate cause of Mbagala Primary Court and the real issue of land ownership.*
4. *That, the Tribunal erred in law and fact for holding decision of the Mbagala Primary Court on probate, while the issue appealed is the land issues originated from Ward Tribunal for Tuangoma two districts things and two matters of different jurisdiction.*

When the appeal was placed before me for hearing on 9th March, 2022, the appellant enlisted the legal service of Ms. Aaron Lasindamu, learned counsel, and the respondent enjoyed the legal service of Ms. Upendo Charles, learned counsel. Ms. Upendo urged this court to allow

the parties to argue the appeal by way of written submission. By the court's consent, the appeal was scheduled to be disposed of by the way of written submission whereby the appellant's counsel filed his submission in chief on 15th March, 2022. The respondent's Advocate filed her reply on 22nd March, 2022. The appellant's counsel waived his right to file his rejoinder.

Mr. Lesindamu started his onslaught by abandoning the first, second, and fourth grounds of appeal. On the third ground, he submitted that the trial tribunal erred in law and fact for holding the decision of Mbagala Primary Court on Probate while the issue appealed was a land issue originating from Toangoma Ward Tribunal. It was his view that these are two distinct things and two matters of a different jurisdiction.

Mr. Lesindamu stated that the law is settled when parties are in conflict on issues of land ownership, they are required to refer the matter to the court competent to determine the suit. He went on to submit that in the situation at hand, the appellant filed a suit at Toangoma Ward Tribunal which was a competent tribunal to determine the case, however, the appellate tribunal mixed up the issues of probate. To support his submission he referred this court to pages 6 and 8 of the appellate tribunal

judgment. To buttress his contention, he learned counsel for the appellant referred this court to sections 17 and 19 of the Land Disputes Courts Act Cap. 216 [R.E 2019] which states that:-

" 17 (1) Any person may, subject to section 61 of the Village Land Act and sections 11, 12, and 13 of the Ward Tribunals Act, Cap 2016 make a complaint to the Secretary of the Tribunal.

19. Appeals from Ward Tribunal a person aggrieved by an order or decision of the Ward Tribunal may appeal to the District Land and Housing Tribunal. (3) Where an appeal is made to the District Land and Housing Tribunal within the said period of forty days, or any extension of time granted, the District Land and Housing Tribunal shall hear and determine the appeal."

The learned counsel for the appellant continued to submit that the tribunal has a duty to determine land matter only. He argued that the appellate tribunal determined the matter of probate and not the appeal which was lodged by the appellant. He added that the appellate tribunal was competent to determine the matter and not the District Court as opined by the appellate tribunal. He further submitted that the Primary Court determined only the probate case by appointing the administrator of

the estate of the deceased. Mr. Lesindamu contended that the competent court to determine the issue of land which was between the parties was the tribunals. He claimed that the appellate tribunal based its decision on his own wisdom without citing any provision, as a result, the right of the appellant was not determined.

With respect to the third ground of appeal, the appellant's Advocate beckoned upon this court to quash and set aside the decision of the appellate tribunal and allow the appeal.

Opposing the appellant, the learned counsel for the respondent began by narrating the history of the matter which I am not going to reproduce in this appeal. Ms. Upendo submitted that the appellate tribunal decision was sound and reasoned. She submitted that there is no dispute that the matter originated from the proceedings and judgment of Mbagala Primary Court in which the suit property forms part and parcel of the estate of the late Feda Adam Mwamagemo and the respondent and the biological brother of the appellant are administrators of the estate of the late Feda Mwamagemeo. She submitted that the respondent at Tuangoma Ward Tribunal stated that the Mbagala Primary Court included the said property

in the estate of Feda Adam. To bolster his submission he referred this court to proceedings of the trial tribunal.

Ms. Upendo continued to submit that it is clear from the above extract that there is already a judgment in respect of the same property which has never been challenged by any Court of competent jurisdiction. She valiantly submitted that the appellate tribunal was right to rule out that it is not possible to challenge property that has been declared by another court that forms part of the estate of the late Feda Adam Mwamagemo. Ms. Upendo went on to submit that the suit property is among the properties which came to the hands of the administrators. The learned counsel for the appellant said that the law is settled that all matters concerning estates must first be referred to appointing court so that the court may either solve the matter if it had jurisdiction to do so or direct the parties otherwise. To fortify her submission she referred this court to page 7 of the appellate tribunal judgment.

It was her further submission that the Ward Tribunal was wrong to proceed with the matter while the same had already been decided by the Primary Court. Insisting, Ms. Upendo argued that although the subject matter relates to land matter but the same was included in the estate of

the late Feda Adam Mwamegemo the decision which cannot be overturned by the tribunal since the contents of the decision is Probate No. 230 of 2016 at Mbagala Primary Court.

In conclusion, the learned counsel for the respondent urged this court to dismiss the appeal for lack of merit with costs.

After a careful perusal of the record of the case and the final submissions submitted by both parties, the central issue for determination is *whether the appellant had sufficient advanced reasons to warrant this court to overrule the findings of the District Land and Housing Tribunal for Temeke*. The circumstance of the case, facts, and evidence will lead this court to determine the matter before it.

The sole ground raised by the appellant is on whether the trial tribunal erred in law and fact for holding the decision of Mbagala Primary Court on Probate while the issue appealed was a land issue originating from Toangoma Ward Tribunal. In the instant appeal, the trial tribunal determined the dispute which was lodged by the appellant claiming ownership over a piece of land that was part of her late sister's estate. The respondent testified to the effect that the said property belongs to his late wife and the same was distributed by the deceased's relatives and no

one raised any objection. In her submission, the respondent's Advocate thinks that the appellate tribunal was correct to rule out that the suit property was part of a probate matter and not a land matter.

I had to revisit the pleadings before the lower tribunal to capture the gist of the dispute. In 2019, the appellant lodged a suit at the Ward Tribunal of Toangoma. In her testimony, she testified to the effect that she entered into a contract with her sister, she permitted her sister to construct 6 frames on her piece of land. However, her claims were mere words. There was no any contract between the appellant and her late sister tendered in court to verify her allegations. In the case of **Sekunda Mbwambo v Rose Ramadhani** [2004] TLR 439, it is stated that the court decision should not base on mere speculation.

Further, the records show that the suit property was among the properties of the late Feda Adam. The appellant did not dispute that in 2016, the respondent was appointed to administer the estate of her late wife Feda Adam Mwamagemo in Probate Cause No. 230 of 2016 at Mbagala Primary Court. And the deceased relatives identified the properties of the late Feda Adam and the appellant did not object. She had an opportunity to file an objection at the Primary Court against the

distribution of the late Feda Adam Mwamagemo properties. Therefore, raising her claims at the Ward Tribunal to me, I find that it was not proper since the appellant's claims are of probate in nature. Since her claims are related to her late sister's shares which was already been determined by the Primary Court of Mbagala whereas the said 6 frames were listed or included in the deceased estate as a party of the properties of her heirs.

In case the appellant was dissatisfied with the distribution of the late Feda Adam properties, she could lodge her complaints opposing the decision of the Primary Court contesting the distribution of the properties of the late Feda Adam, instead of filing a suit of ownership over a suit property which is purely related to probate matter. Therefore, I fully subscribe to the learned counsel for the respondent's submission that the appellant had no right to sue the respondent since the suit property was included in the probate of her late sister.

Likewise, I fully subscribe to the decision made by the District land and Housing Tribunal for Temeke that the appellant had no forum at the Ward Tribunal on a matter involving the distribution of properties of the late Feda Adam. The principle was well articulated by this Court in the case of **Hadiia Said Matika v Awesa Said Matika**, PC Civil Appeal No. 2/2016, HC

Mtwara and in the case of Mahamud Mohamed Babu and 2 others. Land Case No. 299 of 2007, my learned Brother, Hon. Mutungi, J held that:-

“This court is vested with exclusive jurisdiction on land matters but not with matters subject of probate intricacies.”

Applying the above holding, the same applies in the case at hand, where the matter in question originated from probate intricacies. Thus, in my considered view, this is an appeal that suffers from the wrong forum crunch that renders it utterly untenable.

That said and done, I hold that in instant appeal there are no extraordinary circumstances that require me to interfere with the District Land and Housing Tribunal for Temeke findings. Therefore, I proceed to dismiss the appeal without costs.

Order accordingly.

Dated at Dar es Salaam this date 31st March, 2021.



A.Z.MGEYEKWA

JUDGE

31.03.2021

Judgment delivered on 31st March, 2020 in the presence of Mr. Aaron Lesindamu, counsel for the appellant and Ms. Pendo Charles, counsel for the respondent.




A.Z. MGEYEKWA
JUDGE
31.03.2021

Right of Appeal fully explained.