

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

**LAND APPEAL NO. 61 OF 2013**

*(Originating from the decision of the District Land and Housing Tribunal of  
Kinondoni at Kinondoni in Land Application No. 173 of 2006)*

**HASSAN ALLY MFAUME ..... APPELLANT**

**VERSUS**

**SALEHE HAMADI ..... 1<sup>ST</sup> RESPONDENT**

**MOHAMED HAMADI ..... 2<sup>ND</sup> RESPONDENT**

*Date of last Order: 07/06/2022*

*Date of Judgment: 12/08/2022*

**JUDGMENT.**

**I. ARUFANI, J**

This appeal is against the decision of the District Land and Housing Tribunal for Kinondoni at Kinondoni (hereinafter referred as the tribunal) delivered in Land Application No. 173 of 2006. The appellant was dissatisfied by the decision of the tribunal which ordered the house which each party was claiming is his property is a family property hence the same be sold and the proceeds obtained therefrom be shared among the parties. The appellant decided to appeal to this court basing on the following grounds:

- 1. That the trial tribunal erred in law and in fact in evaluating the evidence before it and thereby making irrational and illegal judgment.*
- 2. That the trial tribunal erred both in law and fact by holding that neither party is a bona fide owner of the suit premises situated on Plot No. 715, Kninondoni Hananasifu, Dar es Salaam.*
- 3. That the trial tribunal erred both in law and fact by its order that the house should be sold and the proceeds of sale be shared among the parties without giving reasonable grounds on that finding to justify such share.*
- 4. That the trial tribunal erred in law and in fact by relaying on contradictory evidence thus disregarding the undisputed evidence tendered in court.*
- 5. That the trial tribunal erred in law and in fact by its failure to recognize the letters of administration and judgment of the estate of Halma d/o Ally that were issued to the appellant by the Primary Court of Magomeni, that clearly resolved the dispute regarding the ownership of the suit premises in Mirathi No. 265 of 2003, thus attempting to resolve the matter which is res judicata.*

The appellant prays the appeal be allowed, the respondents and their assignees be evicted from the suit premises, permanent injunction to restrain the respondents, workers, assignees or bona fide representatives from entering into the suit premises prior written submission from the appellant, costs of the appeal to follow the event and any other relief the

court may deem just to grant. While the appellant was represented in the matter by Mr. Issack Rutashobya, learned advocate, the respondents appeared in the court unrepresented. By consent of the parties the appeal was argued by way of written submission.

The counsel for the appellant argued in relation to the first ground of appeal that, the Chairman of the tribunal failed to evaluate the evidence presented by the appellant and arrived to an irrational judgment. He argued that, the appellant presented before the tribunal oral evidence and letters of administration issued by Magomeni Primary Court in Probate and Administration Cause No. 265 of 2003. He stated the said letters of administration appointed the appellant to administer the estate of the late Halima Ally who was mother of the appellant who died in 2001 and left the house in dispute located at Plot No. 715, Kinondoni Hananasifu, Dar es Salaam to the appellant as a sole beneficiary.

He went on arguing that, the ownership of the house in dispute was verified by the Ward Executive Officer and Street Government Chairman through the letters addressed to Magomeni Primary Court. He stated the evidence of DW2 shows the father of the respondents was living at Kinondoni and the owner of the house in dispute was the late Halima Ally. He submitted that, the tribunal failed to evaluate the evidence presented

before it as it ignored substantial and undisputed testimony of the appellant and arrived to an irrational and unfounded decision.

He argued the second and third grounds of appeal jointly and repeated what he argued in the first ground of appeal that, the appellant is the sole beneficiary of the estate of his late mother. He referred the court to Order XX Rule 4 of the Civil Procedure Code, Cap 33 R.E 2019 which states what should be contained in a judgment of the court. He stated the judgment of the tribunal was given without reason and the basis to justify such decision. He stated the judgment is unreasonable as neither party was declared owner of the suit property and stated the judgment of the tribunal is violating the above cited provision of the law.

He also referred the court to Rule 5 of Order XX of the Civil Procedure Code which states where issues have been framed in a suit, the court is required to make its finding and decision in respect of the framed issues. He submitted that, although the tribunal framed three issues to be determined in the matter it decided only two issues and neglected to deal with the second issue. He stated that prejudiced the appellant's right to fair trial.

He argued in relation to the fourth ground of appeal that, the trial court erred by relying on contradictory evidence. He stated that although DW1 testified the house belonged to their father but latter on he stated

the house was given to them by their father before his death which shows contradiction in his evidence. He argued further that, the evidence of DW1 is in contradiction with the evidence of DW2 who is the respondents' grandmother as she stated the house in dispute was the property of the late Halima Ally while DW1 said the house is the property of their late father.

He referred the court to sections 9 and 10 of the Civil Procedure Code which bars the issues that were previously determined by a competent court and involving the same parties to be reinstated in the court. He submitted that, the issue of ownership of the suit premises was determined and resolved in Probate Cause No. 265 of 2003 but the same issue was subject matter in Land Application No. 173 of 2006 of the tribunal which rendered the same *res judicata*. At the end he prayed the court to quash the decision of the tribunal and granted the prayers stated in the memorandum of appeal in favour of the appellant.

In their reply the respondents stated in relation to the first ground of appeal that, the same is devoid of merit and submitted that the tribunal properly evaluated the evidence adduced before it and reached to a fair decision. They stated that, appellant failed to tender evidence which would have shown he inherited house in dispute from his late mother. They argued that, being appointed administrator of estate does not mean

that the appellant was lawful owner of the house in dispute. To fortify their submission, they referred the court to section 110 of the Evidence Act, Cap 6 R.E 2019 which states whoever desires any court to give judgment as to any legal right on the existence of fact he asserts must prove that fact exist.

They stated it was the duty of the appellant to prove he was listed as the beneficiary of the estate of the late Halima Ally and to tender to the court an inventory in respect of the disputed property that would have shown he inherited the house in dispute from his late mother but he failed to do so. They referred the court to section 99 and 100 of the Probate and Administration Act which empowers the administrator to administer only and not to be beneficiary of the estate of a deceased. To fortify their submission, they referred the court to case of **Nasibu Shaban Mwinjaku V. Halima Idi Kidanga**, Misc. Land Appeal No. 35 of 2019 HC at DSM (unreported).

They argued in relation to the second and third ground of appeal that, the same is devoid of merit and reiterated what they submitted in the first ground of appeal. They emphasized that the appellant failed to prove is the lawful owner of the house in dispute. As for the fourth ground of appeal the respondents submitted that, there was no contradiction in their evidence. They submitted that, the appellant failed to prove he

inherited the house in dispute from his mother and argued that, the house in dispute was built by the brother of the appellant who was their father. They prayed the fourth ground of appeal to be dismissed as there is no contradiction in their evidence.

As for the fifth ground of appeal the respondents argued that, the same also is devoid of merit and submitted that, the house in dispute is the property of their late father Hamad Ally Mfaume and not otherwise. They stated the evidence of DW2 established their father had a house at Kinondoni Hananasifu Dar es Salaam and the appellant failed to prove he inherited the land from his late mother. He stated the appellant proved he was appointed administrator of the estate of his late mother and not that he inherited the house from his mother. Finally, they prayed the appeal be dismissed with costs.

In his rejoinder the counsel for the appellant reiterated what he stated in his submission in chief and added that the appellant presented sufficient evidence before the tribunal to establish the facts he alleged as required by section 110 of the Evidence Act. He stated that, it was the tribunal oversight that led to improper evaluation of the evidence before it. He stated that, section 99 of the Probate and Administration Act identifies the administrator as a legal person but does not preclude a beneficiary from inheriting the estate of the deceased. He stated the case

of **Nasibu Shaban Mwijaku** (supra) is distinguishable from the present case as it was determined basing on lack of locus standi while that is not an issue in the present case.

He argued in relation to the second and third grounds of appeal that, his ownership to the house in dispute does not emanate from being appointed administrator of estate of his late mother but from the fact that he is the sole survivor heir of the late Halima Ally. He argued that, the respondents' assertion that they were given the house in dispute by their late father is not supported by any evidence and it was not supported by evidence adduced by DW2. At the end he prayed the appeal be allowed and the decision of the tribunal be quashed.

Having carefully considered the rival submissions from both sides and after going through the record of the matter the court has found the grounds of appeal filed in this court and argued by the parties can be consolidated and determined in one issue of whether the tribunal erred in evaluating the evidence adduced before it and arrived to an irrational decision. In order to know the tribunal evaluated the evidence adduced before it properly and arrived to a correct or an irrational decision as argued by the counsel for the appellant, I will be guided by the issues which the tribunal was required to determined in the matter and the evidence adduced before the tribunal.



The first issue framed by the tribunal for determination in the matter was who is the lawful owner of the suit premises. The second issue was whether there had been any eviction order against the respondents and the last issue was reliefs. The court has found while the appellant stated in his testimony and his counsel submitted the appellant is the lawful owner of the house in dispute as he inherited the same from his late mother namely Halima Ally who died in 2001 and left him as her sole surviving heir, the first respondent stated the house in dispute is their lawful property given to them by their late father, Hamad Ally Mfaume before his death. The question to determine here is whether the house was the property of the mother of the appellant namely the late Halima Ally or was the property of the father of the respondents namely the late Hamad Ally Mfaume and he gave the same to the respondents.

The court has found that, although the appellant stated in his evidence the house was the property of his late mother but he didn't say how his late mother acquired the said house. The appellant did not say in his testimony whether his late mother inherited the house from her aunt or she constructed the same. The court has found it is true as argued by the counsel for the appellant that, Shani Mfaume (DW2) who was the appellant's aunt and the respondents' grandmother stated in her testimony that the house in dispute was the property of the late Halima

Ally who was the mother of the appellant. However, when DW2 was cross examined by the appellant she said Hamad Ally was living at Kinondoni and she do not know how he acquired the house he was living. She said what she knows is that the land at Kinondoni was the property of Halima Ally who was the appellant's mother and she inherited the same from her aunt.

When she was asked by Ms. Mafuru, the tribunal's assessor she said the mother of the appellant was living in a small hut at that area and she do not know if she distributed that land to her children. The court has taken the children of the late Halima Ally were the appellant and the father of the respondents as it was not stated anywhere in the evidence adduced before the tribunal if the late Halima Ally had other children. The court has also found the appellant said in his testimony that her mother had two houses and the respondents were living in one of the houses with their grandmother who is the mother of the appellant until when she died.

The analysis of the evidence adduced by DW2 makes the court to come to the view that, although DW2 said in her evidence in chief that the house was the property of the mother of the appellant and not father of the respondents but her evidence was not clear about the house she was referring to. It was not clear whether she was referring to the small hut she said the mother of the appellant, the late Halima Ally was living

or she was referring to the house in dispute which the first respondent states it was built by their father and he was involved in its construction.

The court has found the first respondent said they were involved in the construction of the house in dispute by their father and said they were living in the said house in dispute with their grandmother until when their grandmother died. The court has found the appellant did not state how the house in dispute where the respondents were living with their grandmother who was the mother of the appellant was acquired or constructed by his late mother. The court has also found the appellant said his late mother had two houses at the same area and he is using one of the houses and another one is the house which is being used by the respondents and their grandmother which is in dispute. The court has found that, to say the appellant is the lawful owner of the house in dispute on the ground that he inherited the same from his late mother before establishing the house in dispute is part of estate of her late mother is to the view of this court not proper.

The court has found the appellant was required to adduce sufficient evidence to establish he is the lawful owner of the house in dispute and he inherited the same from his late mother as required by section 110 of the Evidence Act cited by the respondents in their submission. The court has found as the respondents stated without being disputed by the

appellant that they are in possession of the house in dispute the appellant was required as provided under section 119 of the Evidence Act to establish his ownership to the house in dispute. The cited provision of the law states as follows: -

*"When the question is whether any person is owner of anything to which he is shown to be in possession, the burden of proving that he is not the owner is on the person who asserts that he is not the owner."*

To the view of this court the evidence of the respondents that they are the lawful owner of the house in dispute as it was built by their late father and given to them by their late father before meeting his death was heavier than that of the appellant who stated he inherited the house in dispute from his late mother without establishing how his late mother acquired the said house. The court has found the counsel for the appellant argued the tribunal failed to recognize the letters of administration of estate of the appellant's late mother issued by Magomeni Primary Court in Probate and Administration Cause No. 265 of 2003 and erred in finding the ownership of the house in dispute had not been decided therein while the said issue was determined by the mentioned court.

The court has considered the stated argument but find that, although it is true that the said issue was considered in the said matter and stated

the respondents failed to prove the house in dispute was built by their late father but it cannot be said the issue of ownership of the house in dispute was properly determined in the mentioned primary court. The court has arrived to the stated finding after seeing jurisdiction of the mentioned primary court was just to appoint administrator of estate of the late mother of the appellant and not to determine who was the lawful owner of the house in dispute.

To the view of this court the issue of ownership of the house in dispute was supposed to be determined by a court with competent jurisdiction to determine ownership of the house in dispute and not by the mentioned primary court. The above view of this court is also getting support from the fact that the appellant was advised to institute a matter in a court with competent jurisdiction to determine the issue of ownership of the house in dispute that is why he filed the matter which is the genesis of this appeal in the tribunal. Under those circumstances the court has found it cannot be said the appellant was properly and lawfully declared lawful owner of the house in dispute by the mentioned primary court to the extent of making the matter determined by the tribunal to be res judicata as argued by the counsel for the appellant.

As for the argument that the evidence of DW1 and that of DW2 were in contradiction the court has failed to see any material contradiction in

the evidence of the said witnesses which would have established the claim of the appellant against the respondents. To the contrary the court has found if there is any contradiction which some of them have been stated hereinabove the same did not make the court to find the appellant is entitled to the claims he filed in the tribunal against the respondents.

The court has found the counsel for the appellant argued the tribunal dealt with only two issues out of three issues framed for determination in the matter and neglected to determine the second issue. He stated the tribunal barred the appellant from the right to address the matter and right to be heard hence prejudiced the appellant right to a fair hearing. The court has found there is nowhere in the record of the tribunal indicated the appellant was barred to address the court about the second issue framed for determination in the matter. To the contrary the court has found the appellant gave his evidence before the tribunal and he didn't state anywhere in his evidence if there has ever been any eviction order issued against the respondents by any court.

Although it is true that the tribunal did not say anything in its judgment in respect of the second issue framed for determination in the matter but there is nothing to show the appellant was barred to address the court about the stated issue. Further to that the court has found there is nothing in the whole proceedings of the case indicating there was a

dispute which was requiring the stated issue to be framed and determined in the matter. That being the position the court has failed to see any prejudice caused to the appellant by failure of the tribunal to determine the stated issue. Therefore, the argument by the counsel for the appellant which was based on Order XX Rules 4 and 5 of the Civil Procedure Code was raised in the matter without any necessity.

Coming to the finding of the tribunal that the house in dispute is a family house the court has found that; firstly, and as rightly argued by the counsel for the appellant the stated finding is not supported by any evidence adduced before the tribunal that the house in dispute was a family house. Secondly, the order that the house should be sold and the proceeds obtained therefrom should be shared by the parties in the matter was not prayed for by any party in the matter. Thirdly, the court has found even the appellant himself admitted in his testimony that the respondents were living with their grandmother in the house in dispute until when their grandmother died and up to now, they are still in occupation of the house in dispute.

The above stated circumstances caused the court to come to the view that, as the first respondent stated the house in dispute was built by their late father and they have been living in the said house from when their grandmother was alive to date the court has failed to see justification of

confirming the order of selling the house in dispute so that the proceeds can be shared by the parties. The court has also failed to see justification of giving an order of evicting the respondents from the house in dispute which they have said it was built by their father and given to them by their father before his death.

In the premises the court has found that, although it is in agreement with the appellant that the tribunal erred in ordering the house in dispute be sold and the proceeds to be obtained therefrom be shared by the parties but there is no sufficient evidence to establish there is justifiable reason for ordering the house to be sold and the proceeds to be shared by the parties in the matter. To the contrary the court has found the order of the tribunal for the house to be sold and the proceeds be shared by the parties is supposed to be quashed but the claim of the appellant that the respondent be evicted from the suit premises so that he can inherit the same as is the sole heir of his late mother cannot be sustained.

Consequently, the appeal of the appellant is partly allowed to extent stated herein above that the decision of the tribunal that the house be sold and proceeds be shared by the parties is accordingly quashed and set aside but the respondents are declared lawful owner of the house in dispute. The court has found that as the matter involves members from



the same family it is proper for the interest of justice to make no order as to costs in the matter. It is so ordered.

Dated at Dar es Salaam this 12<sup>th</sup> day of August, 2022



*I. Arufani*

I. Arufani

**JUDGE**

12/08/2022

**Court:**

Judgment delivered today 12<sup>th</sup> day of August, 2022 in the presence of the appellant and the first respondent in person but in the absence of the second respondent who is reported sick. Right of appeal to the Court of Appeal is fully explained.



*I. Arufani*

I. Arufani

**JUDGE**

12/08/2022