

**IN THE HIGH COURT OF TANZANIA**

**(LAND DIVISION)**

**AT DAR ES SALAAM**

**LAND CASE NO 02 OF 2023**

**LEON ISAAC KWAGILWA ..... 1<sup>ST</sup> PLAINTIFF**

**JUDITH ISAAC KWAGILWA ..... 2<sup>ND</sup> PLAINTIFF**

**ANNANATAL ISAAC KWAGILWA ..... 3<sup>RD</sup> PLAINTIFF**

**VERSUS**

**MARTHA ISAAC KWAGILWA (as the Administratrix**

**of the Estate of ISAAC Dunstan Kwagilwa) ..... 1<sup>ST</sup> DEFENDANT**

**KIBONG'OTO INVESTMENT CO. LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**STANBIC BANK (TANZANIA) LIMITED ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

Date of last Order: 27.02.2023

Date of Ruling: 03.03.2023

**A.Z. MGEYEKWA, J.**

At the centre of controversy between the Plaintiff and the three defendants the Plaintiffs claim against the Defendants that the 1<sup>st</sup> Defendant had no legal mandate to mortgage the property in dispute to 3<sup>rd</sup> Defendant in favour of a loan advanced to 2<sup>nd</sup> Defendant.

On 3<sup>rd</sup> January, 2023, the Plaintiff herein, instituted this suit against the Defendants seeking the following six reliefs as follows:-

- a) A declaration order that the 1<sup>st</sup> Defendant had no legal mandate to mortgage the property known as plot No. 166, Block 46, Kijitonyama Area, Kinondoni District, within Dar es salaam Region held under Title No. 186250/164 to the 3<sup>rd</sup> defendant.*
- b) A declaration order that the mortgage over property known as plot No. 166, Block 46, Kijitonyama Area, Kinondoni District, within Dar es salaam Region held under Title No. 186250/164 is null and void.*
- c) For an order that the 3<sup>rd</sup> defendant to immediately release the title deed of a right of occupancy of plot No. 166, Block 46, Kijitonyama Area, Kinondoni District, within Dar es salaam Region held under Title No. 186250/164v which is holding.*
- d) Defendants be ordered to pay the plaintiffs general damages at the rate assessed by this Honourable Court.*
- e) Costs of this suit.*
- f) Any other relief(s) that the Honourable Court deems fit to grant.*

The background of the saga appears that the 1<sup>st</sup> being appointed by the plaintiffs and confirmed by a competent court as an Administrator of the estates of their late Father Isaac Kwagilwa, guaranteed the suit property to secure the loan advanced to the 2<sup>nd</sup> defendant by the 3<sup>rd</sup> defendant, whereas the 2<sup>nd</sup> defendant has defaulted and the 3<sup>rd</sup> defendant is about

to sell the suit property to recover the loan advanced to the 2<sup>nd</sup> defendant as mortgage at the security of the suit property guaranteed by the 1<sup>st</sup> defendant.

The suit has encountered an impediment, coming by way of preliminary objections, raised by the counsel for the 3<sup>rd</sup> Defendant. The objections are to the effect that: -

1. *This suit is unmaintainable before this Honourable Court for lack of jurisdiction.*
2. *That the Plaintiffs have no cause of action against the 3<sup>rd</sup> Defendant.*

When the matter was called for hearing of the objections on 27<sup>th</sup> February, 2023, the Plaintiff enjoyed the legal service of Emmanuel Warson, learned counsel whereas the 1<sup>st</sup> Defendant had the legal service of Mr. Jonathan Kessy, learned counsel the 2<sup>nd</sup> Defendant had the legal service of Mr. Amri Mshana, learned counsel and the 3<sup>rd</sup> Defendant had the legal service of Mr. Michael and Esther, learned counsels.

As the practice of the Court, I had to determine the preliminary objection first before going into the merits or demerits of the suit.

Ms. Esther, counsel for the 3<sup>rd</sup> Defendant was the first one to kick the ball rolling. She contended that this court has no jurisdiction to determine this matter. The learned counsel for the 3<sup>rd</sup> Defendant stated that this Court

is vested with the power to determine land matters only. To support her submission she cited section 167 of the Land Act, Cap.113 [R.E. 2019] and section 37 (1) of the Land Disputes Court Act, Cap.216 [R.E.2019]. She further contended that the wording of paragraph 5 of the Plaint reveals that this is not a land matter, but a probate case. To buttress her submission she cited the cases of **Sekunda Mbwambo v Rose Ramadhani** (2004) TLR 439 and **Salama Ismail Hanya (as administratrix of the Estate of the late Ismail Omary Hanya & another v Tunu Ismail Hanya (as administratrix of the Estate of the late Ismail Omary Hanya & 2 others**, Land Appeal No. 88 of 2020.

Submitting on the 2<sup>nd</sup> limb of objection, Ms. Esther argued that the Plaintiff has not indicated any cause of action against the 3<sup>rd</sup> Defendant. Supporting her submission she referred this Court to Order VII Rule 1 (1) (e) of the Civil Procedure Code Cap. 33 [R.E 2019]. To bolster her submission she cited the case of **Mashado Game Fishing Lodge Ltd & 2 others v Board of Trustees of Tanganyika National Parks (t/a TANAPA)**, (2002) TLR 319. Therefore, in her view, the Plaintiff failed to disclose the cause of action against the 3<sup>rd</sup> Defendant renders the instant suit incompetent against the 3<sup>rd</sup> Defendant, thus, she urged this Court to dismiss the suit with cost.

She further added that the act of the Administrator can only be challenged in Probate Courts not Land Courts like the one at hand.

To add up, in support of the objections, Mr. Michael forcefully argued that this Court has no jurisdiction to determine the matter at hand for the main reason that both Plaintiffs are purported to be fathered by Kajilwa and the 1<sup>st</sup> Defendant was appointed to administer the estate of their late father and she did not file final account and the Plaintiffs became aware after the 3<sup>rd</sup> Defendant issued a default notice to the 2<sup>nd</sup> defendant since the suit property was used as a collateral in securing a loan in 2017.

Mr. Michael went on to argue that in paragraph 14, the Plaintiffs allegation are related to a mortgage which is related to probate, therefore it was his submission that the matter is pure a point of law and questions the administration of the 1<sup>st</sup> Defendant. To support his submission he referred this Court to the Probate and Administration of the estate Act specifically sections 1 (1) and 101 whereas the Act gives power to the administrator to administering the property of the estate including mortgaging. He insisted that whoever challenges the conduct of the administrator is supposed to raise his claims before the proper court. Ending, he stressed that the matter before this court is improper thus he urged this Court to dismiss it with costs.

In reply, Mr. Nason, learned counsel for the 3<sup>rd</sup> Defendant contended that this Court is not clothed with jurisdiction to determine the matter at hand. He stated that the Court is required to look at the facts and reliefs prayed in order to determine whether it is clothed with jurisdiction to determine the matter at hand. He submitted that reading paragraph 5 establishes the claims of the Plaintiff and reveals that the Plaintiffs are challenging the validity of the mortgage. Mr. Nasorn stated that looking at the reliefs and prayers, the Plaintiffs are moving this court to declare the mortgage null and void. He stated that in paragraph 13, the Plaintiffs are stating that the owner of the suit land passed away and the 1<sup>st</sup> Defendant was appointed. He stated that it is upon this Court to inquire who instituted the said mortgage. In his view, a mortgage never ceased to be a land matter. To support his submission he cited the case of **Musa Makweta Musa v Faraja Credit Finance**, Civil Appeal No. 08 of 2021. It was his view that this suit is a pure land case hence this Court has jurisdiction to determine it.

Regarding the second limb of the objection, the learned counsel for the Plaintiff contended that the cause of action against the 3<sup>rd</sup> Defendant was pleaded under paragraphs 13 and 14, however, that the act of the 3<sup>rd</sup> defendant holding the title to the suit property touches the ownership of the suit property directly.

In conclusion, the learned counsel for the Plaintiffs beckoned upon this Court to overrule the objections with costs.

In their rejoinder, the learned counsel for the Defendants reiterated what was submitted in chief and further added that matters of the estate cannot be challenged in land cases.

Before I get to the substance of the preliminary objection, when I was composing the Ruling of this Court I noted a point of law. I called the parties to address me on the issue, whether the Plaintiffs have *locus standi* to institute the instant suit at hand.

Mr. Emmanuel submitted to the effect that the Plaintiffs have *locus standi* to lodge the instant suit. He stated that the Plaintiffs are heirs of the late Isaac Dustan Kwagilwa's properties and have an interest in the estate of their late father. Hence the mortgaged property which was mortgaged by the 1<sup>st</sup> Defendant was improper because the 1<sup>st</sup> Defendant was not registered thus, she had no legal power to mortgage the same.

Mr. Michael submitted that the Plaintiffs have no *locus standi* to bring the instant action against the Defendants. He went on to submit that the subject matter is related to the property of the late Isaac Dustan Kwagilwa and Martha Isaac Kwagilwa was appointed to administer the estate of the late Dustan Kwagilwa. He added that the 1<sup>st</sup> Defendant is the one who has the power to sue and being sued. He stressed that the Plaintiffs have

no right to file the instant suit because they cannot step into the shoes of the administrator of the estate even if the procedure of mortgaging the property was not adhered to.

Ms. Esther added that section 71 of the Probate Administration Act stipulates who cannot act on the probate.

Reverting to the raised objections, I have digested the learned counsels' for the Plaintiff and 3<sup>rd</sup> Defendant submissions for and against the preliminary objections and the pleadings before me, I proceed to determine the preliminary objections raised by the 3<sup>rd</sup> Defendant's learned counsels. In determining the first objection, whether the High Court (Land Division) is clothed with jurisdiction to determine the instant suit. I should start by emphasizing that, the issue of jurisdiction is fundamental and the root of the case. If the court will proceed and determine the matter without the required jurisdiction the entire proceedings will be declared, "*null and void ab initio*".

In order to ascertain whether this is a land matter, I had to peruse the Plaintiff and its reliefs to find out whether the wrongdoing is related to land matter; the Plaintiff under paragraph 5 of the Plaintiff, the Plaintiffs stated that:-



*“That the Plaintiffs’ claims against the Defendants is that the 1<sup>st</sup> Defendant had no legal mandate to mortgage the property in dispute to 3<sup>rd</sup> defendant in favour of a loan advanced to 2<sup>nd</sup> defendant. Further, the said mortgage is void ab initio and has no interest in the estate of the late Isaac Dunstan Kwagilwa or its beneficiaries.”*

The above paragraph reveals that the plaintiffs are trying to challenge the validity of the mortgage. They are blaming the 1<sup>st</sup> Defendant for mortgaging the suit property while he had no any mandate. In determining the jurisdiction of a Court what is important is the nature of the center-piece of the controversy and the question to ask is *whether the nature of the dispute is a land matter*. See the cases of **Rashimi Mangaldas Taichura & Others v Lavender Villas Ltd & Others**, Commercial Case No. 197 of 2002, **Kusekwa Nyanza v. Christopher Mkangala**, Criminal Appeal No. 233 of 2016 CAT at Mwanza (unreported). In the case of **Rashimi Mangaldas Taichura** (supra), this Court held that: -

*“... provided that the transaction involving selling and buying, whether for profit or for any other reason, even if it be a sole transaction, is commercial... **What is important is the nature of the center-piece of the controversy...**” [Emphasis added].*

Applying the above authority, in the matter at hand, the centre-piece is whether the 1<sup>st</sup> Defendant had a legal mandate to mortgage the property

of the late Isaac Dunstan Kwagilwa. I am in accord with the learned counsels for the Defendant that the Land Act, No. 4 of 1999 invests exclusive jurisdiction of determination of land disputes to the Land Division of the High Court. Section 167 of the Land Act, No. 4 of 1999 is very clear on this and the Act.

Moreover, this Court's exclusive jurisdiction has been abrogated by section 167 (1) of the Land Act No. 04 of 1999. This Act, indeed, has uplifted the exclusive jurisdiction of the Land Division of the High Court on disputes over land matters.

I have examined closely the Plaint and exhibit K2, it is clear that the registered occupier and tenure of the suit property is Martha Isaac Kwagilwa (as a legal personal representative of Isaac Dunstan Kwagilwa (deceased)). The Plaintiffs are claiming that they are beneficiaries of the estate of their late father. Looking at the reliefs prayed the Plaintiffs are praying for a declaration order that the 3<sup>rd</sup> Defendant had no legal mandate to mortgage the suit property. In my view, their claims are referring to the power of an administratrix. The issue of whether the 1<sup>st</sup> Defendant who is the administratrix of the estate of their late father is a matter of probate the same must be resolved first before filing a suit which is related to land matters.

So, what is to be looked upon in determining the jurisdiction of the Court is the prima facie intention of the parties to the power of the administration. It is worth noting that the first prayer is to be determined by the probate court which appointed the 1<sup>st</sup> Defendant to administer the estate of the late Dunstan Kwagilwa before determining the issue of the mortgaged property.

In addition, it is my considered view that, in order for the Plaintiffs to pray for this order they must establish if they have *locus standi* to lodge the instant suit. I am saying so because the person who is in possession of the suit property is the 1<sup>st</sup> Defendant as an administratrix of the estate. Therefore, the Plaintiffs cannot urge this Court to nullify the mortgage while they have no *locus standi* to file the instant suit.

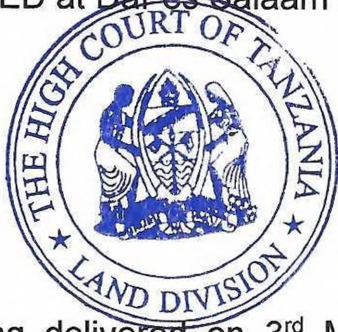
Therefore, based on the above findings, I am convinced that the dispute is not related to the land matter. Therefore, I differ with Mr. Emmanuel's submission that the Plaintiffs have *locus standi* to institute the instant suit.

In the end result, I see nothing which would give jurisdiction to this Court to entertain this suit. Under the circumstances, I find the 1<sup>st</sup> limb of objection raised by the 3<sup>rd</sup> Defendant's counsel's contention on the first preliminary objection meritorious. I will therefore detain myself in evaluating and analyzing the second objection doing so will be an academic exercise.

Based on the third Defendants' counsel attendance on record, the Plaintiffs will pay half the costs of the case taxable by the Taxing Master.

Order accordingly.

DATED at Dar es Salaam this 3<sup>rd</sup> March, 2023.



  
A.Z.MGEYEKWA

**JUDGE**

03.03.2023

Ruling delivered on 3<sup>rd</sup> March, 2023 in the presence Mr. Emmanuel Narson, learned counsel for the Plaintiffs, Mr. Jonathan, counsel for the 1<sup>st</sup> respondent and Mr. Michael Chahe and Ms. Esther Payo, learned counsels for the 3<sup>rd</sup> Defendant.



  
A.Z.MGEYEKWA

**JUDGE**

03.03.2023