

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

LAND CASE NO. 111 OF 2022

LUCY THOMAS KIMARO PLAINTIFF

VERSUS

LILIAN SOPHIA KIMARO 1ST DEFENDANT

STANBIC BANK TANZANIA LTD 2ND DEFENDANT

Date of last Order: 15/11/2022

Date of Ruling: 13/12/2022

RULING

I. ARUFANI, J

The plaintiff filed in this court the present suit against the defendants praying the court to order as follows; transfer of the suit property by Thomas Sifuel Kimaro (hereinafter referred as the deceased) to the first defendant and the subsequent mortgaging the suit property to the second defendant by the first defendant was unlawful. She is also praying the court to order the suit property is still part of the estate of the deceased and it should be handed over to the beneficiaries of the deceased. In addition to that she is praying the court to issue permanent injunction to restrain the defendants from dealing or interfering with the suit property plus general damages and costs of the suit.

When the matter came for mention on 4th July, 2022, Mr. Waziri Mchome, learned counsel representing the second defendant in the matter raised a point of preliminary objection that, pursuant to what is averred at paragraph 9 of the plaint, the plaintiff has no locus standi to institute the instant suit in the court.

When the matter came for hearing the counsel for the parties on the stated point of preliminary objection the plaintiff was represented by Mr. Yohana Ayall, learned advocate and while the first defendant was represented by Ms. Ritha Chihoma, learned advocate, the second defendant was represented by Mr. Waziri Mchome, learned advocate. The court ordered the counsel for the parties to address the above stated point of preliminary objection by way of written submission.

In his submission in support of the point of preliminary objection the counsel for the second defendant interchanged the defendants because while in the plaint the first defendant is Lilian Sophia Kimaro and Stanbic Bank Tanzania Limited is the second defendant, the counsel for the second defendant rearranged them in way which shows the Stanbic Bank Tanzania Limited is the first defendant and Lilian Sophia Kimaro is the second defendant. Since under normal circumstances arrangement of parties in a suit followed the way, they are brought in the plaint, I will

take arrangement of parties in the present suit as appearing in the plaint and refer them as such.

The counsel for the second defendant argued in support of the point of preliminary objection that, the point of lack of locus standi on the part of the plaintiff is based on what the plaintiff averred at paragraph 9 of the plaint that; in her capacity as administratrix of the estate of the late Thomas Sifuel Kimaro, she distributed to the beneficiaries of the deceased the properties forming part of his estate including the suit property. He stated in his submission that, the points need to be addressed here is whether the plaintiff who alleges that she distributed the deceased's properties including the suit property to the beneficiaries of the deceased, is still an administratrix of the estate of the deceased and she can sue on that property.

She stated in alternative that, if the plaintiff did not sue in her capacity as the administratrix of the deceased's estate but just as a widow and a person alleges that she has interest in the suit property the issue is whether she has legal interest in the suit property which can entitle her to file the present suit in the court. He stated another issue is whether in the absence of a person speaking on behalf of the deceased the suit against the person to whom the suit property was transferred and the

second defendant to whom the suit property was mortgaged is maintainable.

He argued in relation to the first issue of the plaintiff to sue as the administratrix of the estate of the deceased that, as the plaintiff averred at paragraph 9 of the plaint that in her capacity as administratrix of estate of the deceased she distributed to the beneficiaries of the deceased the properties of the deceased including the suit property it is clear admission that the suit property belongs to the deceased in exclusion of any other person including the plaintiff herself.

He argued that, if the suit property was being owned jointly by the deceased and the plaintiff, then upon death of the plaintiff's husband it would have vested to the plaintiff. He submitted that the certificate of title is self-explanatory that the suit property was the property of the deceased. He went on arguing that, as the plaintiff stated she filed a document in court on 8th February, 2017 indicating how she distributed the estate of the deceased she ceased to be an administratrix of the estate of the deceased and she cannot have interest or suffer irreparable loss. He submitted the plaintiff cannot therefore have power to sue on the suit property.

He went on arguing that, if it will be said the plaintiff is still administratrix of the estate of the deceased, she cannot defend the suit

because her power as the administratrix is limited to cause of action which survived the deceased and this is not one of them. To support his argument, he referred the court to the case of **Marwa Haruni Chacha V. North Mara Gold Mine Limited**, Land Case No. No. 8 of 2013, HC at Mwanza where it was stated inter alia that, by virtue of being administrator of the estate of the deceased, the plaintiff had no capacity to question or challenge any transaction which was performed by the deceased during his livelihood.

He stated that, as the plaintiff is the administratrix of the estate of the deceased she cannot complain that her consent was not obtained in the transfer of the suit property because upon being appointed administratrix of the estate of the deceased she stepped into the shoes of the deceased. He said the complaint by the plaintiff is as if the deceased is complaining against himself for what he did. He supported his argument with the case of **Maria Ernest Biginagwe (widow) and Another V. North Marwa Gold Mine Limited**, Land Case No. 52 of 2017, HC at Mwanza (unreported).

He submitted that, as the plaintiff was appointed administratrix of the estate of the deceased she stepped into the shoes of the deceased and is deemed to be the one transferred the suit property to the first defendant when he was still alive. The plaintiff cannot now claim that she

can sue on the transfer done by the deceased because that will be as if she is suing herself. He fortified his submission with the case of **Zaria Omari** (as the administrator of the estate of **Mkandwa Hamisi**) **V. Hamisi Mkandwa**, Land Case No. 110 of 2018, HC Land Division at DSM (unreported) where it was stated that, the question would instead be if the defendant could be the plaintiff as the administrator of the estate and sue himself in his capacity as the person who claims ownership from the deceased.

He stated in relation to the issue of the plaintiff suing in her personal capacity that, the way the plaint was drafted shows the plaintiff is suing in her personal capacity. He stated the question is whether the plaintiff not being among the persons to whom the suit property was distributed she cannot have interest which can legally entitle her to institute a suit over the suit property. He referred the court to the case of **Constantine B. Assenga V. Elizabeth Peter & Another**, Civil Appeal No. 70 Of 2019, CAT at DSM (unreported) where an interest which can entitle one to be joined in a case was defined.

The counsel for the second defendant argued that, if it will be assumed the properties distributed to the heirs of the deceased included the suit property the plaintiff does not remain with any direct or legal interest in the properties, she distributed which can entitle her to file the

present suit in the court. He stated in other words, the plaintiff does not have locus standi to file the present suit in the court. He referred the court to several cases including the cases of **Lujuna Shubi Balonzi, Senior V. The Registered Trustees of Chama cha Mapinduzi**, [1996] TLR 203 at page 208 and **Khan Said Aljabry V. Nevumba Salum Mhando**, Miscellaneous Land Appeal No. 81 of 2021, HC Land Division at DSM (unreported) where the term locus standi was defined.

He finalized his submission by stating that, the present suit was filed in the court by the plaintiff who has no locus standi. He stated as the issue of locus standi is a jurisdictional issue the court lacks jurisdiction to entertain the suit. At the end he prays the court to strike out the plaintiff's suit and the second defendant be awarded costs of the suit.

In reply the counsel for the first defendant submitted that, there is a misconception on powers of administrator in relation to the estate of the deceased. She argued that, until the probate proceedings have been closed or the property formally transferred to the beneficiaries the administrator of estate of the deceased is clothed with powers to deal with estate of the deceased or particular property in the estate of the deceased. She stated that, under Rule 1 of Order XXX of the Civil Procedure Code, Cap 33 R.E 2019 where there is a contention between the persons beneficially interested in such property and a third person the

administrator should represent the persons so interested. She stated it is not necessary to make the beneficiaries parties to the suit unless the court thinks fit to order them to be joined as parties in the suit.

She submitted that, the powers of the administrator in relation to a property of the deceased which is beneficial to the heirs does not end once the distribution is lodged in the court but until when the property is officially transferred to the beneficiaries. She stated that, before the transfer of the property to the beneficiaries the administrator will be regarded as the legal personal representative of the deceased in respect of the deceased's property with full power over it.

She added that, it should also be noted that, the administration of the deceased's properties ends with closure of the court file and not before and that can only be done once all the process regarding the deceased's estate has been concluded including transfer and registration of the properties to the beneficiaries. She submitted that, as at the moment the administration process of the deceased' estate has not been concluded the plaintiff could have come to the court and prosecute the case on behalf and or in the interest of the beneficiaries.

As for the issue of the plaintiff to sue on behalf of the deceased as she has stepped into the shoes of the deceased, she submitted that there is nowhere in the plaint indicated the plaintiff is suing the deceased. She

argued that paragraph 10 of the plaint shows the plaintiff is alleging the suit property was transferred to the first defendant and that remain as allegation until proven otherwise by the defendants in the proceedings before the court. She argued that, the cases of **Maria Ernest Biginagwe** and **Zaria Omari** cited in the submission of the counsel for the second defendant are distinguishable from the present case. She argued that, the question as to whether the plaintiff is suing on the shoes of the deceased will be an issue for determination in the proceedings before the court.

Coming to the issue of the locus standi of the plaintiff to institute the case before the court for lack of interest in the property the counsel for the first defendant stated that is a misconception. She stated the plaintiff's interest in the suit property is paramount because annexure LK3 to the plaint shows it is only the suit property identified as item 9 in the distribution of the estates of the deceased where the same is distributed to the children of the deceased alongside the plaintiff. She stated all other properties were distributed to the beneficiaries in isolation of other beneficiaries. She submitted that shows the plaintiff has interest in the suit property, hence she has the locus standi and rights to sue on the suit property.

In his reply to the submission by the counsel for the second defendant, the counsel for the plaintiff stated that, the plaintiff was a legal

wife to the deceased. He stated the plaintiff has now filed the instant suit in the court in her personal capacity as the legal wife of the deceased claiming for her interest against the first and second defendants in the suit property whose disposition was made without her consent. He stated the plaintiff believes the disposition is a nullity for lack of spousal consent and thus the property being matrimonial property and beneficiaries being the plaintiff's children had to agree on its development and not disposition. He stated under that circumstances the issue in the present matter is whether there was plaintiff's consent on the said disposition. He added that, as the plaintiff is suing in her capacity as a spouse of the deceased to prove the said consent the matter cannot be disposed of in the preliminary stage as it is a matter of evidence.

He stated the deceased couldn't bequeath what he did not have in law and the court is called upon to check if at all the dispositions were proper and if at all the plaintiff's locus standi should be weighed as against the facts pleaded. He referred the court to the case of **Lujuna Shubi Balonzi, Senior** (supra) where it was stated a person bringing the matter to court should be able to show that his right or interest has been breached or interfered with. He stated the plaintiff claims for breach of her right to consent on the disposition of the suit property as the

deceased's wife and denial of her rights to oversee and develop the suit property which is established as a matter of evidence.

He stated in the case of **Zaria Omari** (supra) there were two administrators who one of them who was the defendant was claiming is the owner of the property claimed to be the deceased's property. He stated the court ruled out that, since one of the administrators is rival, it cannot be said the remaining co-administrator cannot still attempt to rescue the property of the deceased. He argued that, as the plaintiff in the instant suit is a sole administratrix, she cannot sue herself as the defendant on the cause of action which arose prior to the appointment of being administratrix of estate of the deceased.

He stated the bone of contention here is whether there was spouse consent of the plaintiff in line with section 43 (2) of the Evidence Act, Cap 6 R.E 2019 and section 59 of the Law of Marriage Act, Cap 29 R.E 2019 for the deceased to dispose of the suit property to the first defendant and whether disposition of the same to the second defendant was lawful. He also referred the court to section 5 of the Civil Procedure Code and stated it mandated the plaintiff to sue in her capacity as an administratrix of estate of the deceased because the suit property could not be transferred to the intended heirs due to the encumbrance or caveat which is in illegal mortgage created by the first defendant to the second defendant.

He submitted that, the above fronted explanations show the plaintiff's locus standi in the present suit and established the court has jurisdiction to adjudicate the present suit and grant the reliefs sought by the plaintiff if they will be proved by evidence to the standard required by the law. He invited the court to find the plaintiff has a right to bring this suit before the court and hold the point raised by the counsel for the second defendant is misconceived and should be dismissed with costs to the second defendant.

In his rejoinder to the reply made by the counsel for the first defendant and by the counsel for the plaintiff the counsel for the second defendant emphasized and expounded what is argued and stated in their submission in chief. That being the position of the matter the court has found it is now a right time to see what is the bone of contention required to be determined in the matter by the court. The court has found as rightly argued by the counsel for the parties the major issue to determine in this matter is whether the plaintiff has locus standi to bring the instant matter to the court.

In determining the stated main issue, I will deal with sub issues proposed and argued by the counsel for the parties which are; (1) whether the plaintiff is still administratrix of the estate of the deceased and can sue on the suit property; (2) if the plaintiff did not sue in her capacity as

the administratrix of the deceased's estate but just as a widow and a person alleges that she has interest in the property then the issue is whether she has legal interest in the suit property that she distributed to the heirs of the deceased which can entitle her to file the present suit in the court and (3) whether in the absence of the person speaking on behalf of the deceased the suit against both defendants is maintainable.

Starting with the first issue which asks whether the plaintiff is still administratrix of the estate of the deceased and she can sue on the suit property the court has found the answer to the stated issue is definitely in affirmative that the plaintiff is still the administratrix of the estate of the deceased. The court has come to the stated finding after seeing there is nowhere in the pleadings filed in this court by the parties indicated the plaintiff's appointment to administer the estate of the deceased has ever been revoked or annulled by any court with competent jurisdiction to do so to establish the plaintiff is no longer administratrix of estate of the deceased.

The court has found that, as the appointment of the plaintiff to administer the estate of the deceased was made by Kariakoo Primary Court, the law governing her in administration of the estate of the deceased is the fifth schedule to the Magistrate's Courts Act, Cap 11 R.E 2019. That being the position of the matter the court has found item 11

of the mentioned law states categorically that the administrator of estate of a deceased is required to account for the administration of estate of the deceased after completion of the administration of the estate of the deceased. For clarity purpose the cited provision of the law states as follows: -

"After completing the administration of the estate and, if the primary court orders, at any other stage of the administration, the administrator shall account to the primary court for his administration."

The above quoted provision of the law is very clear that administration of estate of a deceased does not end after distribution of the assets of the deceased as argued by the counsel for the second defendant but after completing the administration of the estate and after complying with orders of the court if any and the administrator account to the court for his administration. There is nowhere stated in any law that administration of estate of a deceased ends at the time of filing a document exhibiting how the estate of the deceased was distributed to the heirs of the deceased as argued by the counsel for the second defendant.

To the view of this court and as rightly argued by the counsel for the first defendant, until when the deceased's estate is distributed and

formerly transferred and registered to the rightful heirs of the deceased and the administrator account to the court for his administration of estate and the administration proceedings is closed the administrator or administratrix of the estate of the deceased is still clothed with power to deal with the estate of the deceased. A mere fact that the administrator or administratrix has filed a document in court exhibiting how the estate of the deceased was distributed is not enough to establish his or her administration of the estate of the deceased has ceased.

Since there is nowhere in the pleadings filed in the court by the parties or submissions filed in the court by the counsel for the parties stated the probate proceedings upon which the plaintiff was appointed to administer the estate of the deceased has been closed and or her appointment has either been revoked or annulled the court has found the plaintiff is still administratrix of the estate of the deceased and she can file a suit in court to defend the property of the deceased and the person beneficially interested in the estate of the deceased. The stated view is getting support from Rule 1 of Order XXX of the Civil Procedure Code cited in the submission by the counsel for the first defendant which states as follows: -

"In all suits concerning property vested in a trustee, executor or administrator, where the contention is between the persons

beneficially interested in such property and a third person, the trustee, executor or administrator shall represent the persons so interested, and it shall not ordinarily be necessary to make them parties to the suit, but the court may, if it thinks fit, order them or any of them to be made parties."

From the wording of the above quoted provision of the law it is crystal clear that, an administrator of estate of a deceased is clothed with powers to defend the persons beneficially interested in the estate of the deceased until when the administration proceedings are closed. The court has found even if it will be taken that section 107 (1) and (2) of the Probate and Administration of Estate Act, Cap 352 R.E 2019 cited in the rejoinder submissions of the counsel for the second defendant is applicable in the matter at hand but there is nowhere stated after filing in the court a document to exhibit how the assets of the deceased have been applied or disposed of then the administrator ceases to have power of dealing with the estate of the deceased.

To the view of this court and as rightly argued by the counsel for the first defendant it is until when all disposition process of administering the deceased's properties is completed and the administration proceedings are closed after the administrator accounted for the same to the court is when the administrator or administratrix ceases to have

powers of dealing with the estate of the deceased or defend the persons beneficially interested in such estate. In the premises the court has found the plaintiff in the suit at hand is still an administratrix of the estate of the deceased and she can institute a suit in court to defend the property of the deceased or the persons beneficially interested in the estate of the deceased until when the administration proceedings are closed.

Coming to the second issue which asks whether the plaintiff has legal interest in the suit property which can entitle her to file the suit at hand in the court the court has found that, as appearing in the plaint filed in this court by the plaintiff and argued by the counsel for the parties in their written submission the plaintiff filed the instant suit in the court in her personal capacity and not as an administratrix of estate of the deceased.

The court has found the interest which can give a person locus standi to institute a suit in court is well defined in the case of **Lujuna Shubi Balonzi Senior**, (supra). cited in the submissions of the counsel for the parties where it was held a person bringing a matter to court should be able to show that his right or interest has been breached or interfered with. The stated locus standi has also been expounded in numerous cases which some of them are the cases of **Constantine B.**

Assenga and Khan Said Aljabry (supra) cited in the submission of the counsel for the second defendant.

In showing the plaintiff has locus standi to institute the present suit to the court in her personal capacity the counsel for the plaintiff stated in his submission that, the plaintiff filed the present suit in this court in her personal capacity as the legal wife of the deceased claiming for her interest against the defendants in the suit property. He stated the plaintiff has pleaded at paragraphs 10 and 11 of the plaint that, being the legal wife of the deceased who is alleged to have transferred the suit property to the first defendant, and the first defendant mortgaged the same to the second defendant did not consent to the stated transfer and mortgage of the suit property.

The court has considered the submission by the counsel for the second defendant that consent of the plaintiff was not required before the suit property being bequeathed to the first defendant as the certificate of title shows the suit property was the deceased's sole property and not a matrimonial property. The counsel for the second defendant argued further that, if the suit property was owned jointly by the deceased and the plaintiff then upon death of the plaintiff's husband it would have vested to the plaintiff but to the contrary it was listed as the deceased's property and distributed to the heirs of the deceased.

The court has been of the view that, the question as to whether the plaintiff's consent was supposed to be obtained before the suit property being bequeathed to the first defendant or not is not an issue which can be used to dispose of the suit at hand at this preliminary stage. It is an issue which need mature and detailed consideration after receiving evidence from the parties. It is not an issue which can be determined by merely basing on the submissions filed in the court by the counsel for the parties. In the stated circumstances the court has found the plaintiff being the deceased legal wife who is alleging transfer of the suit property to the first defendant was illegal as her right to consent to the stated transfer was violated shows the plaintiff has a locus standi to institute the suit in the court to claim for the state right.

The court has considered the submission by the counsel for the second defendant that the plaintiff has no locus standi to institute the present in the court because she has already distributed the suit property to the heirs of the deceased but failed to agree with the stated submission. The court has come to the stated finding after seeing that, although it is true that the plaintiff pleaded at paragraph 9 of the plaint that she has already distributed the assets of the deceased which includes the suit property to his heirs, but annexure LK3 shows still the plaintiff has some interest in the suit property.