

TANZANIA / JUDGMENT

said mpambije kamaga another vs nyamende swetu fundikira others 2023 tzca 17746 6 october 2023

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THE COURT OF APPEAL OF TANZANIA AT TABORA CIVIL APPEAL NO. 430 of 2022 (CORAM: MKUYE. J.A., GALEBA. J.A.. And MASOUD. J.A^ SAID MPAMBIJE KAMAGA..... 1st APPELLANT FUNGULIA SWETU FUNDIKIRA..... 2nd APPELLANT VERSUS NYAMENDE SWETU FUNDIKIRA..... 1st RESPONDENT ZAINAB SWETU FUNDIKIRA.....2nd RESPONDENT ABASI SWETU FUNDIKIRA..... 3rd RESPONDENT KIYUNGI SWETU FUNDIKIRA.....4th RESPONDENT (Administrators and administratrix of the estate of the late Sweta Nsimba Fundikira) (Appeal from the Judgment of the High Court of Tanzania at Tabora) (Rumanyika, J.l Dated 6th day of June, 2016 in Civil Case No. 17 of 2015 JUDGMENT OF THE COURT 21st September & 6th October, 2023 MASOUD. 3,A,: This appeal is against the judgment and decree of the High Court of Tanzania at Tabora dated 6th June, 2016 in Land Case No. 17 of 2015 which was decided in favour of the respondents herein. The appellants i were the second and first defendants in the proceedings at the trial court while the respondents were the plaintiffs. The second appellant and the respondents are brothers and sisters. Their father was the late Swetu Nsimba Fundikira (the deceased), who died on 27th December, 1992 leaving behind a house situated on Plot No. 16 High Density, Salimin Street, within Tabora Municipality (hereinafter the suit house). As the deceased had four wives, the second appellant and the same do not share the different mother. The respondents' allegation at the trial court was that the second appellant, who was previously the administratrix of the estate of the deceased, fraudulently sold the suit house to the first appellant on 9th September, 2014 without prior consent and involvement of the heirs at a purchase price of TZS. 80,000,000.00. The sale was affected on 16th June, 2014 by the second appellant despite the fact that there were heirs who were not interested in disposition of the suit house, and notwithstanding the caveat that was lodged by one of the heirs. Consequent to the sale of the suit house, the respondents successfully applied for revocation of letters of administration granted to the second appellant and were subsequently appointed as co-administrators/ administratrixes of the estate of the deceased on 11th February, 2015. On their part, the appellants disputed the allegations in the suit, saying that

there was no any kind of fraud committed by them in the disposition of the suit house. The trial court when deciding the matter before it, raised four issues. They were; first, whether the sale agreement between the 1st and the 2nd appellants was legal; second, whether the plaintiffs consented to it; third, whether consent of the plaintiffs (respondents herein) to the sale agreement was mandatory; and fourth, any other reliefs and costs of the suit. The trial court found that consent of the plaintiffs as heirs of the estate of the deceased was mandatory in the disposition of the suit house. Consequently, it was satisfied that before selling the suit house, the second appellant did not seek consent of the heirs. Therefore, the omission to obtain consent from the heirs, in the finding of the trial court rendered the sale agreement illegal. It therefore, among other things, declared the respondents herein as the co-owners of the suit house; and nullified the sale of the suit house as it was satisfied that it was null and void ab initio. Aggrieved by the said judgment and decree, the appellants have decided to appeal before this Court on the following grounds; One, it was erroneous to hold that the sale agreement, exhibit D.2 was illegal; two, it was erroneous to hold that the respondents' consent for the disposition 3 of estate was mandatory; three, it was erroneous to hold that the first appellant was neither a prudent nor bonafide purchaser; four, based on the circumstances of the case and the evidence on the record, it was erroneous to order the second appellant to refund the purchaser and the first appellant to surrender rental charges to the respondents. At the hearing of the appeal, both parties were ably represented. While the appellants were represented by Mr. Kamaliza Kamoga Kayaga, learned Advocate, the respondents were represented by Mr. Emmanuel Musyani, learned advocate. The learned counsel from both sides had earlier on filed written submissions in support and in opposition of the appeal, respectively, and they fully adopted them at the hearing. From the proceedings in this Court and the court below the following matters are not in dispute between the parties. That the suit house was part of the estate of the deceased who died on 27th December, 1992. That the second appellant was appointed as an administratrix of the deceased's estate on 3rd January, 2008. That when the disposition of the suit house was effected by the second appellant on 9th September, 2014, she was still the lawful administratrix of the said estate and disposed of the house as such. That the second appellant was removed from her position as the administratrix of the said estate, following revocation by the respondents, which was successfully sought, and subsequently thereafter, the respondents were appointed as co-administrators of the said estate on 11th February, 2015. Going through the rival submissions by both counsel, and the record of proceedings in the trial court from page 16 up to page 275 of the record of appeal in the light of the above grounds of appeal, there are only two main issues for determination. The first issue is whether the administrator/ administratrix of the estate of a deceased person is required to seek consent of the heirs/ beneficiaries when administering the estate of the deceased. In other words, and with particular reference to this appeal, whether the second appellant, when she sold the suit house to the first appellant as an administratrix of the estate of the deceased, was required to obtain the consent of the heirs of the deceased estate who included the respondents. And the other issue is whether the sale agreement (Exhibit D2) was illegal. It is noteworthy, however, that the pleading by the respondents at the trial court were hinged on the allegation of fraudulent acts by the appellants in relation to the sale agreement and the disposition of the suit house. Mr. Kayaga's submission was both detailed and focused. His

main argument was that there is no requirement for an administrator of estate 5 to seek consent of the heirs when he exercises his powers as an administrator of the estate. In so doing, Mr. Kayaga was of the position that when the second appellant sold the suit house to the first appellant, she did so in her capacity as the administratrix of the estate of the deceased. She was not bound to obtain consent from the respondents as heirs of the estate or any other heir. As to revocation of the letters of administration granted to the second appellant, his submission was that when the second appellant's appointment was revoked and the respondents were appointed as co-administrators on 11th February, 2015, the suit house had already been sold on 9th September, 2014 by the second appellant acting in her capacity as the administratrix. The sale was therefore, validly, concluded. He relied on two authorities of this Court in support of his submission. The first authority was the case of Mohamed Hassani v. Mayasa Mzee and Mwanahawa Mzee [1994] T.L.R. 225, in which this Court, when confronted with similar issue as the one we are facing in this appeal, held that the administrator is not legally required to obtain consent of all the heirs before disposing of property or sale of a house. The second authority was the case of Dativa Nanga v. Jibu Group Company Limited and Another, Civil Appeal No. 324 of 2020 6 which relates to Mr. Kayaga's argument that by the time the second appellant's appointment was revoked, she had already sold the suit house to the first appellant and distributed the proceeds of heirs who were entitled to share the proceeds. In this case, revocation of the administrator happened when a property in dispute had already been sold. Dealing with such situation, the Court held that the court had nothing to revoke as the proceeds has already been distributed. In relation to the principle in Dativa Nanga (supra), Mr. Kayaga referred us to Exhibit D3 from pages 240 - 242 of the record of appeal to show how the proceeds of sale were distributed to fortify the relevance and applicability of the principle in the appeal at hand. Mr. Kayaga clarified that the sale proceeds were distributed to and shared by the rightful heirs who did not benefit from proceeds of rent collection. Despite the distribution, the second appellant could not prepare and file inventory as her appointment was subsequently revoked. To further bring home his argument in relation to the authority in Dativa Nanga (supra), Mr. Kayaga led us to some more authorities. He cited the decision of this Court in Ahmed Mohamed Al Laamar v. Fatuma Bakari and Another, Civil Appeal No. 71 of 2012 (unreported) which underlined the principle that where an executor has already discharged his duties of executing the will, whether honestly or otherwise, and had already exhibited the inventory and accounts, there was no granted probate which could have been revoked or annulled. In this case, the Court held that the administrator has powers to sell property of the estate without consent of the heirs as long as he acts in good faith. Having relied on the above authority, Mr. Kayaga went ahead to fault the trial court's findings that nullified the sale of the suit house to the first appellant. Having submitted on the principles obtaining in the above cited authorities as they relate to the circumstances of the instant appeal and the issues at stake, Mr. Kayaga addressed us to the status of the first appellant as regards to the disposition of the suit house. He submitted that since the first appellant was a lawful and bonafide purchaser, it was not proper for the trial court to order refund by the second appellant of the money already distributed to the heirs, on the reason of absence of heirs' consent which is not a requirement of the law. He urged us to take inspiration from rule 9 (2) (a) of the Primary Courts (Administration of Estates) Rules, GN 49 of 1971 which provides that: "(2). Where

any grant of administration is revoked, 8

- (a) any payments already made bona fide to the administrator shall be a valid discharge to the person making it " Mr. Kayanga, thus, asked us to find that the sale agreement was valid and the respondents' consent was not a legal requirement. In the end, Mr. Kayaga prayed for the appeal to be allowed with costs. In reply, Mr. Musyani hinged his submission in reply to the principle that, every case has to be decided according to its own facts. He impliedly agreed that consent is not a requirement of the law for an administrator in disposition of a property which is part of the estate. He was, however, of the view that in the circumstances of the case before hand, the administratrix was required to seek consent of the heirs before the selling of the suit house. He cited the case of North Mara Gold Mine Limited
- v. Isaac Sultan, Civil Appeal No 458 of 2020 (unreported), where the Court restated the principle that every case must be decided upon its own peculiar facts. He did not show us where those circumstances were pleaded by the respondents' in their pleading at the trial court. With respect to the case of Mohamed Hassani (supra) cited by the appellant's counsel, Mr. Musyani said that it is distinguishable from the case before hand. Whereas there were in the cited case two opposing groups of heirs, in the case at hand there were none. According to him, 9 the respondents, in this case, were against the idea of selling the suit house as they were benefiting from rental collection. Therefore, the consent was, in the circumstances like this one, inevitable. Mr. Musyani went further in his submission to link the sale of the suit house by the second appellant contrary to the expectation of the respondents which according them, there was a consensus that the suit house should not be sold but should be kept as a source of revenue through collection of rentals. As such, it was his argument that given the fiduciary duty to the beneficiaries that the second appellant had, as the administratrix, prudence required her to seek the heirs' consent before selling the suit house. He relied on the case of Joseph Shumbusho v. Mary Grace Tigerwa and 2 Others, Civil Appeal No. 183 of 2016 (unreported) which discussed at length about the fiduciary duty imposed upon the grantee of probate or letters of administration in the performance of their duties. We were, however, not shown by the learned advocate where in the pleading before the trial court, the consensus or agreement by the heirs not to sell the suit house, if at all, was pleaded. In respect of the claim that the heirs were in agreement not to sell the suit house and therefore consent of the heirs was inevitable, the learned advocate for the respondents referred us to pages 177 and 181 10 of the record of appeal to support his argument in that regard. He further referred us to pages 183 and 184 of the record as to the objection raised by the heirs in respect of the sale of the suit house, and the fact that it was just a few heirs who benefited from the distribution of the proceeds of the sale of the house. Mr. Musiyani concluded his submission by urging us to find that there were no grounds of appeal raised which suffice to fault the trial judge's findings. Thus, he finalised his submission by contending that the first appellant has to be refunded his money by the second appellant and urging us to dismiss the appeal with costs. In his very brief rejoinder, Mr. Kayaga took us to pages 181, 182 and 183 of the record of appeal, in relation to his argument that the second appellant acted in good faith as she discharged her duties as the

administratrix. In doing so, he argued that the record shows at pages 181 and 182 how she transparently distributed the proceeds of sale to the rightful heirs described by the second appellant (DW1) as the little ones, who had not been benefitting from the rental collections from the suit house before. He referred us to the specific names, the corresponding amounts paid and the date on which the amounts were paid to the rightful heirs. li We have already set out the narrow issues that require our consideration and decision in this appeal. Both learned counsel have addressed the issues in their rival submissions. Looking at the trial court's judgment, it appears that the learned trial Judge was satisfied that the respondents proved their case against the appellants on the balance of probabilities. He was thus satisfied that the consent of the heirs was mandatory for the sale of the suit house which was part of the estate of the deceased. Having so found, he was satisfied also that the sale agreement was illegal as it was concluded without consent of the respondents who were among the heirs of the estate. With that finding, the trial Judge equally found that the sale agreement which was concluded without the consent of the heirs was illegal and void ab initio. Having on our part considered the rival submissions of both learned counsel and the authorities supplied, we agree with the learned counsel for the appellants that it was wrong for the trial Judge to hold that the consent of the beneficiaries or heirs to the sale agreement was mandatory. As we considered the submissions made by Mr. Musyani before us, we understood him as having no qualms with the position of law obtaining from the authorities referred to us. However, his argument is that in the circumstances of this case the consent of the heirs was inevitable for a sale of the suit house to be valid and legal. Very 12 unfortunately, we were not shown from the record of appeal before us the circumstances that support his line of argument and if so whether they were part of the respondents' pleading at the trial. On our part, we could not find any pleading to that effect, let alone the evidence. As if that is not enough, we have not been referred to any authority to support the argument. We say so because the authorities relied on in support of his argument have no bearing to the circumstances of the instant case. It is on record that the second appellant served as the administratrix of the deceased estate from 3rd January, 2008 when she was first appointed up to 11th February, 2015 when the respondents were appointed following revocation of the letter of administration of the estate granted to the second appellant. It follows that, by virtue of section 99 of the Probate and Administration Act, [Cap. 352 R.E. 2002] (the Act), the second appellant was from 3rd January, 2008 a personal legal representative of the deceased and stepped into the shoes of the deceased until her appointment was revoked. The said section provides as follows: "...the administrator, ... o f deceased person is his legal representative for all purposes\ and all the properties o f the deceased person vests in him as such..." Upon being granted with the letters of administration and during her tenure as the administratrix, the second appellant was vested with powers to, among other things, dispose of property of the estate she was administering by way of sale if, according to her, it was proper in the circumstances to do so. What was important was for the second appellant to act in accordance with the requirement of the law which required her to act in good faith at all times for the sole benefit and interest of the estate of the deceased and to the heirs - See Joseph Shumbusho (supra). We have thoroughly

scrutinised the record before us as we reflected on the pleadings. We could not find anything to fault the sale of the suit house which was effected by the second appellant before her letters of administration were revoked. Thus, the second appellant herein, was not under any legal obligation to seek consent from the heirs, as there is no law which demands the administrator to seek and obtain consent of the heirs when administering the deceased's estate - See, Mohamed Hassani (supra). Taking into account the circumstances of the case before hand where the heirs are from four different mothers and they were not in agreement to each other as is evident on the record, we are in agreement with Mr. Kayaga's argument that selling the suit house was in the best interest of 14 the heirs. In the case of Mohamed Hassani (supra) the Court when faced with the issue like in the case at hand, had this to say: "We think and are satisfied that in the circumstances of this case, selling the house and distributing the proceeds among the various contending heirs, was the only sensible option open to the administrator. The record shows that there are two hostile contending groups among the heirs of the late Mzee bin Risasi. The heirs are grouped according to their mothers. There is absolutely no way of reconciling the two groups. We are therefore satisfied that the decision to sell the suit house was not arbitrary, in fact it was in the best interests of the estate and all the heirs. With regard to the question whether consent of all the heirs should have been sought before selling the house, firstly, it was impossible to obtain such consent from the two hostile groups. Secondly, the administrator was not legally required to obtain such consent. "As this Court stated in Aziz Daud v Amin Ahmed Ally & Another, Civil Appeal No. 30 of 1990: "We cannot find in the evidence before the High Court that there was anything wrong with the sale of the house. Once an administrator of the estate was appointed then the house of the deceased owner of the property is changed in all documents and that of the administrator is substituted and it is left to his discretion to administer the estate in the best way, he can...." As the second appellant in her capacity as the administratrix of the estate of the deceased discovered that the respondents were collecting rent from the suit house and distributing it amongst themselves without consulting her, she had every right to take necessary steps in her capacity as an administratrix. Having also realized that there were other heirs whom she described as the little ones who were not benefiting from rent collection from the suit house as was very clear in her evidence on the record from page 181 to page 183 of the record of appeal, the second appellant thought that the best way was to sell the suit house and distribute the proceeds amongst the rightful heirs, particularly, those who had never before benefitted from the rental collection from the suit house. It is in this regard clear on the record that it was not disputed that the respondents were collecting the rents which they never accounted surrendered to the second appellant as the administratrix before her appointment was revoked. 16 In view of the settled position of the law as to who is mandated to administer or deal with the estate on behalf of the deceased, it suffices to say that the trial court erred when it ordered the first appellant to be refunded his money by the second appellant. As rightly submitted by Mr. Kayaga, where any grant of administration is revoked any payments already made bona fide to the administrator shall be a valid discharge to the person making it - See the case of Dativa Nanga (supra). We, in this respect, also drew

inspiration from rule 9 (2) (a) of the Primary Courts (Administration of Estates) Rules, GN 49 of 1971 which was referred to us by Mr. Kayaga. In the circumstances when revocation of the second appellant as an administratrix of the estate of the deceased occurred, she had already discharged her duty as the administratrix. Acting in her capacity as an administratrix, she sold the suit house to the first appellant as is evidenced by Exhibit D2. We do not see anything invalidating the sale agreement as despite being alleged in the plaint at pages 16 up to 22, the allegations of fraud on the part of the appellants were not on the record shown to have been established. It means that the transaction was completed as between the second appellant as administratrix and the first appellant. Accordingly, we find that the first appellant is indeed the bona fide purchaser, as nothing which has already come to an end can be put to an end or vacated - See, Ahmed Mohamed Al Laa Mar (supra). Henceforth, the validity of the sale agreement between the second and the first appellant cannot be questioned. We allow the appeal as we find merits in the grounds of appeal raised. We henceforth quash and set aside the judgment and decree of the High Court. Given the nature of the matter, we do not make any order as to costs. DATED at TABORA this 6th day of October, 2023. R. K. MKUYE JUSTICE OF APPEAL Z. N. GALEBA JUSTICE OF APPEAL B. S. MASOUD JUSTICE OF APPEAL The Judgment delivered this 6th day of October, 2023 in the presence of Mr. Kamaliza Kamoga Kayaga, learned counsel for the appellants also holding brief for Mr. Musyani Emmanuel, learned counsel for the respondents, is hereby certified as a true copy of the original.

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