

TANZANIA / JUDGMENT

Asha Ulimwengu v Hawa Hamisi Yasini

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THE JUDICIARY OF TANZANIA IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA AT
KIGOMA LAND APPEAL NO. 000008274 OF 2024 ASHA ULIMWENGU AND 2
OTHERS COMPLAINANT / APPELLANT / APPLICANT / PLAINTIFF VERSUS
HAWA HAMISI YASINI RESPONDENT / DEFENDANT

JUDGMENT

J. NKWABI, J, Date: 29 & 29/10/2024 The appellants were sued by the respondent in the District Land and Housing Tribunal for Kigoma over a house. The respondent claimed that the house is the property of the late Ulimwengu Mohamed Mayoko. Before the trial tribunal the respondent proved that she is administratrix of the estate of the deceased Ulimwengu Mohamed Mayoko as she was appointed by a primary court. Upon hearing the land application before it, the trial tribunal found in favour of the respondent and declared that the disputed piece of land is the property of the deceased Ulimwengu Mohamed Mayoko, thus it is part of the estate of the deceased. That was one of the reliefs issued by the trial tribunal in favour of the respondent. The appellants are unhappy with the decree of the trial tribunal. They have launched this appeal assailing it with the grounds that:

1. That, the trial district land and housing tribunal for Kigoma grossly erred in law and fact when it decided that the respondent continue with administration by either to sell or lease the house in the suit plot despite the fact that the 3 heirs out of one still young and dependents and are living in the house in the suit plot to be administered by the respondent whereas the respondent has one child left by the said late Ulimwengu Mohamed Mayoko.
2. That, could the district land and housing tribunal for Kigoma consider that the respondent was given her sumni i.e. T.sh 177,000/=, a TV, deck and Kingámuzi from the estate of her late Ulimwengu Mohamed Mayoko by the family of the said late Ulimwengu Mohamed Mayoko the same would have not decided in favour of the respondent by giving her a chance to sell the said plot and house therein which the remained 3 heirs of the deceased depend on their residence for living.
3. That, could the chairperson of the district land and housing tribunal for Kigoma consider that the respondent has been married to another husband and has one room from the house in the suit plot that was already distributed by the deceased's family and that three rooms

were distributed to 3 heirs namely Asha Ulimwengu, Mohamed Ulimwengu and Hamimu Ulimwengu who were born by the 2nd appellant hence the Page. 1 district land and housing tribunal could not have decided by offering a chance to the respondent to sell the suit house as the three heirs are minors and dependents to their mother (2nd appellant). Banking on the above grounds of appeal, the appellants are praying for the reliefs I emulate:

1. This appeal be allowed with costs.
2. The decision of the district land and housing tribunal for Kigoma be reversed and be set aside.
3. An order that the suit plot and a house therein located at Buronge which is the estate of the late Ulimwengu Mohamed Mayoko subject to administration by the respondent should not be sold by the respondent, the 3 rooms be resided by the left three heirs namely Asha Ulimwengu, Mohamed Ulimwengu and Hamimu Ulimwengu and the remained one room be distributed to the 4th heir Asia Ulimwengu (The respondent's child). The appeal was heard by way of oral submissions. The appellants prosecuted the appeal in person, unrepresented. The respondent had the services of Mr. Eliutha Kiviyiro, learned counsel. In her oral submission in chief, the 1st Appellant stated that they filed this appeal because the trial tribunal erred in law and fact by permitting the administrator to sell the house. She was as clear as eggs is eggs that they resist the sale of the house. In her submission in chief too, the 2nd Appellant also insisted that the respondent wants to sell the properties of the estate while there are children, and questioned where will they go to live. The 2nd appellant pressed that the respondent is married, thus she prayed for justice. Responding to the addresses made by the appellants, Mr. Kiviyiro, learned counsel for the respondent maintained that, the grounds of appeal are unmerited. He pointed out that the respondent is not challenged as to her capacity as administratrix of the estate and added that she is doing her duties as administratrix of the estate. Mr. Kiviyiro further held the view that, on the claim about sumni, that there is a witness who said is the elder of the deceased and proved that the respondent is the administratrix of the estate. That he was the former administrator of the estate and was distributing the amount obtained from rent. He refuted the 2nd ground of appeal. Page. 2 Regarding the 3rd ground of appeal being unmerited, Mr. Kiviyiro underscored that concerning allegations of selling the house, the respondent was doing her obligations as administratrix of the estate. He supported the findings of the district land and housing tribunal by saying that the trial tribunal decided on the matter correctly, so, the ground of appeal is unmerited. He pressed that the respondent cannot return the certificate of occupancy because this is not a probate case or appeal. He rested his submissions by praying the appeal be dismissed without costs as the parties are relatives. In rejoinder submission, the 1st appellant informed this Court that they have ever objected the respondent from being administrator. She added that the respondent's sumni has already been given to her. The 2nd appellant held similar sentiments against the respondent saying that she objected the respondent to be administratrix of the estate and beefed up that there was no any proposition of the administratrix. She made it clear to this Court that the house

had been distributed to heirs each with his/her room. She stressed that the respondent is the one who chased away the tenants by issuing a notice of 14 days to vacate. After hearing the appeal, I adjourned the same for writing a judgment. When I was writing the judgment is when I entertained a doubt as to whether the trial tribunal had the requisite jurisdiction to entertain the application before it. That doubt of mine emanated from the application how it was couched in respect of the cause of action, prayers, issues framed, judgment delivered together with the reliefs granted, further it came from the grounds of appeal and the reliefs sought in this appeal. I adjourned delivery of judgment and called upon the parties to address me. In their addresses, they conceded that the trial tribunal entertained the matter while it was not clothed with the mandatory jurisdiction to entertain it. I accede to the views which have been just stated by the parties that the trial tribunal had no jurisdiction to entertain the land application. Admittedly, looking at the grounds of appeal, they are complaints against the administration of the estate of the late Ulimwengu Mohamed Mayoko. This is not a probate and administration cause as contended by Mr. Kiviyoro. In a probate and administration cause, the court would normally look at the suitability of the administrator of the estate and not determine who is the lawful owner of the estate. That is the position in Michael Ngoti v. Mariam Kimaro, Civil Appeal No. 7 of 2003 (PC) Moshi registry, Rutakangwa, J., as he then was, categorically stated that: “....in a probate matter ... court should confine itself to the suitability of a person to administer the estate ...” The above stand view of the High Court was stressed in Mariam Juma v. Tabea Robert Makange [2016] T.L.R. 517 CAT it was underscored that: “In fact, the trial court was supposed to determine one crucial issue, that is, to appoint an administrator who will diligently and faithfully administer the estate of the late Robert Makange. This was to be done after making a Page. 3 decision on the caveat opposing the application. ... “The High Court Judge did not have any mandate to determine who should be a beneficiary from the deceased’s estate. This role was to be played by the Administrator of the deceased’s estate.” But this case, definitely, is not about a land dispute. One can gauge that from the prayers (reliefs) the respondent sought for in the trial tribunal which are:

1. Wajibu maombi waamuliwe kutoka kwenye nyumba yenye mgogoro.
2. Hamli ya kuwa msimamizi wa mirathi ateleze majukumu yake kama alivyo elekezwa na mahakama.
3. Nafuu nyingine ambayo Baraza ili litaona inafaa kutoa. Is that all? The answer is an emphatic NO. Indeed, had the parties and the Court paid attention to paragraph 8 in total, they would have appreciated that the controversy between the parties was a probate and administration dispute. It should be remembered that parties and the court are bound by their pleadings as per Maria Amandus Kavishe v. Norah Waziri Mzeru & Another, Civil Appeal No. 365 of 2019, CAT, it was underscored that: “We also feel compelled, at this point, to restate the time-honoured principle of law that parties are bound by their own pleadings and they cannot be allowed to raise a different matter without amendments being properly made. That, no party should be allowed to depart from his pleadings thereby changing his

case from which he originally pleaded. Furthermore, the court itself is as bound by the pleadings of the parties as they are themselves.” Again, looking at one of the pleadings, the written statement of defence, does not support the issues drawn by the trial tribunal. See paragraph 6 of the Written Statement of Defence where it is stated that: “... Migogoro inanzishwa na muombaji kwa tamaa zake kwani toka marehemu afariki nyumba iligawanywa kwa wote ... Paragraph 7 goes that: ... yaliyomo katika aya ya 8 (ix) yanapingwa kwani hakuna kikao chochote kilichokaa kujadili suala la nyumba ya marehemu kwani kila kitu kipo sawa ...” With the above stated, I do not see where did the learned chairperson got the issue which is, “Who is the lawful owner of the disputed piece of land.” Worse still the 2nd issue which is whether the applicants were legal heirs of the estate of the deceased, has nothing to do with a land case. Page. 4 In short, the learned chairperson decided on the issues which were not reflected in the pleadings and also not related to land matters. To put the decision into picture, she held that the disputed piece of land is the property of the deceased, which was indeed not an issue between the parties, there was nothing suggested as such in the application. It is the legal principle that no one, even the plaintiff is allowed to change the original cause of action. The trial tribunal had no power to change the cause of action. On this stance of mine, I seek refuge to Kavishe’s case (supra) and Farida Mbaraka & Another v. Domina Kagaruki, Civil Appeal No. 136 of 2006 CAT (unreported) it was held that: “Needless to say, the respondent is the dominus liti and she is the master of the suit. She cannot be compelled to litigate against someone she does not wish to implead and against whom she does not wish to claim any relief.” Because who is the owner of the piece of land was not in dispute, I should ask here, what then was the cause of action before the trial tribunal? With respect, it is whether the respondent was a suitable administratrix of the estate of the deceased. The above included the determination on whether the acts of the administrator to remove the tenants and threaten to sell the house, the estate of the deceased were legally justified, whether the amount of estate (sumni) distributed to the respondent was fair. Lastly, what reliefs are parties entitled. What I have said here is not far-fetched. It can be gleaned from the grounds of appeal as I have indicated above and the decision of the trial tribunal. The below quoted is what the learned tribunal chairperson without jurisdiction went on to hold: “... baraza linaona ni jukumu la msimamizi wa mirathi (mleta maombi) kuona namna bora ya kusimamia na kugawa mali za marehemu ikiwa ni kwa kuuza, kupangisha au warithi kuishi kwenye nyumba hiyo yenye mgogoro. Akiamua kuuza, msimamizi wa mirathi wala hahitaji ridhaa ya warithi/wanufaika ... Kwa kuwa mleta maombi ni msimamizi wa mirathi aliyeteuliwa kisheria na Mahakama basi ateleze majukumu yake bila woga kwa masahi ya warithi wa marehemu Ulimwengu Mohamed Mayoko.” Pertaining to this appeal, I take this opportunity to remind the courts below and tribunals that they should take the directive of the Court of Appeal of Tanzania seriously that the court or tribunal should advise parties to lodge a matter to a court or tribunal with the requisite jurisdiction to entertain the matter as stated in The National Bank of Commerce Ltd v. National Chicks Corporation Ltd & 4 Others, Civil Appeal No. 129 of 2015 (CAT) where it was stressed that: “There should be placed a mechanism which will ensure that litigants are appropriately advised to lodge ... instead, the parties should either be advised to

withdraw and file the same in another court competent to try it ...” Consequently, I find that the appeal should be partly allowed because the trial tribunal had no jurisdiction to entertain the matter before it. The proceedings and judgment of the trial tribunal are quashed. The decree of the Page. 5 trial tribunal is set aside. I order that each party shall bear their own costs because parties are relative. It is so ordered. Dated at KIGOMA ZONE this 29th of October 2024. J. . NKWABI, J JUDGE OF THE HIGH COURT Page. 6

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