

TANZANIA / JUDGMENT

Ruling MWAJUMA Misc Civil Application No

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IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA IN THE SUB-REGISTRY OF MWANZA
AT MWANZA MISC. CIVIL APPLICATION NO. 25927 OF 2024 (Arising from Civil Case No. 25765 of
2024) MWAJUMA ABDALLAH NG'WALLAH APPLICANT VERSUS KEVIN
MUTATINA 1st RESPONDENT KAMANI J.I MEDICAL CENTER
..... 2nd RESPONDENT S.L ISANGI AUCTION MART & COURT BROKER
..... 3RD RESPONDENT

RULING

24th October & 15th November, 2024 CHUMA, J. The applicant preferred this application under a certificate of urgency. She is seeking the indulgence of this court to maintain status the status quo of the suit property located at plot No. 47 Block 'R' City Centre Area. To comprehend the point of preliminary objection I will state the background of this matter. Upon the demise of the late Athuman Bashir, the applicant herein was appointed to be an administratrix of his estates through Probate Cause No. 34/1993 on 3/9/2019 by the Mwanza Urban Primary Court (the trial Court). One of the properties to be administered by her was the suit property. After 26 years of endless administration, her appointment was revoked and the 1st applicant was appointed to administer the estates on 17/7/2019. Nine heirs including the applicant 1 herein applied before the trial court for revocation of the 1st respondent. The trial court by Ruling dated 27/11/2020 dismissed the application and ordered the 1st respondent to accomplish his administration duties. Being aggrieved the said nine heirs unsuccessfully appealed before Nyamagana District Court through Pc Probate Appeal No. 23 of 2020. Again, they appealed to this court vide PC Civil Appeal No. 86 of 2022. This court dismissed the appeal for want of prosecution after the appellants played a lot of delaying tactics. The 9 heirs knocked on the doors of the Court of Appeal and unsuccessfully applied for a Certificate on point of law before this court vide Misc. Civil Application No. 98 of 2023. After the dismissal of the appeal and an application for the certificate on point of law by this court, the suit property was valued by a Valuer from Mwanza City Counsel and approved by the Chief Valuer at the tune of Tshs. 504,000,000/= on 14/12/2023. The 1st respondent disposed of the suit property to Kamani J.I Medical Centre Company Limited at Tshs. 1,108,500,000/=. The trial court on 5/4/2024 made an order concerning the proceeds of the sale of the suit land. Twelve heirs out of 22 agreed to take their share and the remaining Tshs. 791,785,714.93/- were ordered to

be kept at the Bank of Tanzania Mirathi Account. I have also noted that the 2 applicant is entitled to a share of Tshs. 158,357,142.86/- out of Tshs. 791,785,714.93/- kept in the account. I have also noted that, Kamani J. I Medical Centre Company Limited was issued with a certificate of Title No. 114498 over the suit property dated 16/8/2024. Again, two heirs out of nine including the applicant herein filed Misc. Civil Application No. 6902 of 2024 before this court praying for an extension of time to set aside the dismissal order of PC Civil Appeal No. 85 of 2022. This court dismissed the application for being an abuse of court process. This court said on page 14 of the ruling that; “The present application is a continuation of a series of applications by the applicants all around the disputed property, which appears as a way of the applicant’s counsel trying to dilly-dally with the probate matter for the reasons known best for himself.” Again, two heirs who were not part of previous proceedings filed another application before the trial court praying to revoke the 1st respondent from his task as administrator. The trial court dismissed the application for being re-judicata on 16/08/2024. The trial court ordered the 1st respondent to close the probate file within 30 days. The 1st respondent complied with the said order and closed the file on 17/9/2024. 3 On the same date, the two heirs filed Civil Appeal No. 23139/2024 before the Nyamagana District Court. The said appeal awaits determination. The applicant made a wonderful U-turn. She had now filed Civil Case No. 25765 of 2024 claiming to be the lawful owner of the suit property. In the said suit she prays inter alia to nullify the sale between the 1st respondent and the 2nd respondent. In this application the applicant wants this court to maintain the status quo of the suit property after an attempt by the 3rd respondent to evict her from the suit property. The application was objected to by four points of preliminary objections which are subject to this Ruling;

1. This Court has no jurisdiction to determine issues of ownership of the property which belonged to the deceased person.
2. That this matter be dismissed with Cost for being overtaken by events as the subject matter is already disposed of and transferred without any stay to another entity known as KAMANI J. I MEDICAL CENTER COMPANY who possess a title deed.
3. That the 1st Respondent is improperly pleaded as his duties as an administrator of the property in this matter is already discharged and the probate file closed.
4. That the 2nd Respondent is wrongly sued because the owner of the property in dispute is a corporate legal entity. 4 I ordered the points of preliminary objection to be argued first. Mr. Chrispine Myeke learned Advocate represented the applicant whereas the respondents were represented by Advocate Kelvin Mutatina. About the first point of Preliminary Objection, Mr. Mutatina submitted that this court has no jurisdiction to determine this application. According to paragraph 2 of the affidavit, the applicant raised the issue of property ownership. In the case of Mgeni Seif V Mohamed Yahaya Khalfani Civil Application No.1 of 2009 on page 14, it was held that, in case of a dispute on the ownership of the deceased estate it is only the probate and administration court that seized power to determine the matter. That, the applicant was the one who lodged probate Cause No. 34 1993. That, for all period she never raised ownership of the disputed property. On the second point, he

submitted that the application is overtaken by events as the disputed property has been sold and transferred without any stay to another entity known as Kamani J.I. Medical Center Company Limited who possess a title deed. That, according to Rule 85 of Magistrates Courts Act (Civil Procedure in Primary Courts) Rules, GN No. 310 of 1964 which provides that whoever has an objection to the sale of immovable property tainted with fraud or irregularity to take cause 5 within 30 days. This position was stated in the cases of Abasi Iddi Semauya and another V Ramadhan Mohamed PC Civil Appeal No. 3 of 2023 on page 7; Felix Emmanuel Mkongwa V Andrew Kimwaga Civil Application No.249 of 2016 on page 7; and Said Mpambije Kamaga and another V Nyamende Swetu Fundikira and three others Civil Appeal No.430 of 2022 on pages 17 to 18. He submitted further that the applicant had a chance to take steps before the suit property was sold under section 78(5) of the Land Registration Act Cap 334 by caveat or section 32 of the Registration of Documents Act, Cap 117 but nothing was done until the title passes to a bonafide purchaser. That, the probate file was closed since 17/9/2024 and the administrator has been discharged with the administration duties. In respect of the third point of preliminary objection, Mr. Mutatina was of the view that the first response was improperly pleaded as his duties as an administrator had been discharged and the probate file had been closed. In the case of Miraji Salimu Nyangasa V Ramadhani Omary Sewando Civil Appeal No. 686 of 2023 on page 33, the court held that once the file is closed the same can not be reopened again save for review. 6 On the last point, it was submitted that the second respondent was wrongly sued because the owner of the property in dispute according to paragraph 11 of the applicant's affidavit, is a corporate legal entity called Kamani J. I Medical Center Company Limited. That, had the applicant made thorough research she could have noticed who the owner is. He referred the case of Change Tanzania Limited V Registrar Business Registration and Licencing Agency Civil Appeal No. 3 of 2021 on page 13; and Fort Hall Bakery Supply Company Limited V Fredrick Muigai [1959] EA 474 to the effect that, the non-existent person can not sue or be sued. He prayed for the application to be dismissed application with cost. Mr. Myeke submitted in reply that, all points raised are not points of law they ought not to be raised on Misc Application but rather in the main suit. Nevertheless, he submitted on the first point that, the instant application is for status quo maintenance and not an ownership dispute. That, what is stated in paragraph 2 of the affidavit is detailed in Civil Case No. 25765/2024 seeking ownership declaration. That, since the probate file has been closed, the remedy is to institute a fresh suit as per the law under Order XXI Rule 62 of the Civil Procedure Code, Cap 33. On the second point, he was of the view that the cited cases by Mr Mutatina are 7 on stay of execution. He subscribes to the legal position that, you cannot seek for stay once the property has been sold, the only remedy is to maintain the status quo. Concerning the third point on improper impleading the first respondent, submitted that, he was not sued as an administrator of the deceased estate but rather under his capacity. That, a former administrator of the estate can be sued for misconduct done in the course of his/her duties including disposing the property not belonging to the estate. That, the last point is not on point of law and it ought to have been raised in the main case. That, according to Order I Rule 9 of the CPC provides that non-joinder of parties is not fatal in such a way of

vitiating proceedings. The court has power under Order I Rule 10 (2) of CPC to remove a party improperly pleaded and order a proper name to be added. That, there was a caveat but since proving it requires evidence, this stage is not appropriate. Sections 67 and 68 of Land Registration Act Cap 334 do not recognize a sale done by an administrator of the estate without first making disposition of the property to the name of the administrator. 8 In rejoinder, it was submitted that, an assertion that when the probate is closed the only remedy is to file a fresh case, is misplaced because its remedy is so apparent as per the recent case of *Miraji Salimu*(supra) on page 33. That, the remedy of removing the improperly pleaded party is not an automatic, it is subject to admission and prayer for the court to strike out the same. I have dispassionately considered the submissions of the parties for and against the raised preliminary objection; for Coherence, I will start with the 1st and 3rd points of preliminary objection because they need not detain me for long. In this application, as I have said herein, the applicant is moving this court to maintain the status quo of the suit property pending the determination of the main suit. Therefore, the issue of ownership of the suit property is not part of this application it is part and parcel of the pending main suit. Moreover, as appears in the application and the counter affidavit, the 1st respondent is not sued in his capacity as administrator of the estates of the deceased. He is accordingly sued on his capacity therefore the 1st and 3rd points of preliminary objections lack merit. On the second point of preliminary, Mr. Mutatina is of the view that the application is overtaken by the event as the disputed property has 9 been sold and transferred without any stay to another entity known as Kamani J.I. Medical Center Company Limited. Having carefully read the authorities supplied by Mr. Mutatina, I am of the view that, the position stated in the case of *Abasi Iddi Semauya* and another V *Ramadhan Mohamed*; *Felix Emmanuel Mkongwa* V *Andrew Kimwaga* and *Said Mpambije Kamaga* and another V *Nyamende Swetu Fundikira* and three others (supra) is distinguishable to this matter at hand. It was correctly argued by Mr. Muyeke that, these cases were in respect of stay of execution. In this matter, the suit property was disposed of by an administrator of the estate not by execution order. By this application, the applicant according to the certificate of urgency wants the status of the applicant who stays at the suit property to be maintained. The 2nd point of preliminary objection thus lacks merit. Coming to the 4th point of preliminary objection, I am in agreement with Mr. Mutatina that the 2nd respondent was wrongly included in this application. I also agree that a thorough search by the applicant would have revealed that the suit property was transferred not to the 2nd respondent but to Kamani J. I Medical Centre Company Limited as shown by the certificate of Title No. 114498 over the suit property dated 10 16/8/2024 (annextures FA-02 to the Counter affidavit). Indeed, abundant caution does no harm abundans cautela non nocet That being the case, the applicant wants this court to make an order against a person who is not privy to this proceeding. According to section 15 (2) of the Companies Act No. 12 of 2002, upon registration, a Company becomes a legal entity capable of suing or being sued. In the case of *Joseph Magombi vs. Tanzania National Parks (TANAPA)*, Civil Appeal No. 114 of 2016 (unreported); the Court of Appeal had the following to say; “Like human beings, companies have names and they are identified by their registered names. The companies with

registered names fall in the second category of legal persons...therefore it is certainly correct that the Tanzania National Parks (TANAPA) is not a legal person in that sense. The creature of statute, capable of suing and being sued in this instance is the ‘Trustees of Tanzania National Parks’...” Likewise, in the instant matter, my hands are tied to issue any order against Kamani J. I Medical Centre Company Limited. Mr. Muyeke was of the view that, this point of preliminary objection ought to have been raised in the main case. Further, according to Order I Rule 9 of the 11 CPC, non-joinder of parties is not fatal in such a way as vitiating proceedings. The court has power under Order I Rule 10 (2) of CPC to remove a party improperly joined and to order a proper party to be added. For ease of reference, I will quote order I rule 9 of the CPC; it reads;

9. A suit shall not be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the right and interests of the parties actually before it.” (bolding rendered for emphasis) I distance myself from the stance of Mr. Myeke because this is not a suit but an application. I join hands with Mr. Mutatina that, at least the applicant at the earliest stage of this proceedings would have properly moved this court to amend her application but no prayer was made even in his submissions. The third point of preliminary objection is therefore sustainable. In the premise, this application is incompetent for seeking an order against a party who is not privy to the application. I therefore proceed to struck it out with costs. It is so ordered. 12 DATED at MWANZA this 15th day of November 2024. W. M. CHUMA JUDGE 13 The ruling delivered before Mr. Mulumbe advocate holding brief of Mr. Myeke advocate for the applicant and Mr. Kelvin advocate for the respondents this 15th day of November 2024. W.M.CHUMA JUDGE 14

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