

TANZANIA / JUDGMENT

CIVIL NO 89 OF 2024 sinda

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA TEMEKE SUB-REGISTRY (ONE STOP JUDICIAL CENTRE) AT TEMEKE CIVIL APPEAL NO. 89 OF 2024 (Appeal from the decision of District Court of Kinondoni in Civil Application No. 246 of 2022) SAKINA HUSSEIN SINDA (As 1st Administratrix of the Estate of of late SINDA HUSSEIN SINDA)..... APPELLANT VERSUS NURU OMARY SINDA (As the 2nd Administratrix of the Estate of the Estate of late SINDA HUSSEIN SINDA)..... 1st RESPONDENT NAKI HUSSEIN SINDA..... 2nd RESPONDENT NEEMA HUSSEIN SINDA..... 3rd RESPONDENT AZIZI HUSSEIN SINDA..... 4th RESPONDENT SAID HUSSEIN SINDA..... 5th RESPONDENT

JUDGMENT

18th June 8130th July, 2024 BARTH Y, J.: This matter involves the estate of Sinda Hussein Sinda, who died intestate. As a result, Sakina Hussein Sinda and Nuru Omary Sinda (the appellant and the first respondent, respectively) were appointed as the i administratrices of the deceased's estate by the District Court of Kinondoni (the trial court) via Probate and Administration Cause No. 1 of 2020. The appellant is the daughter of the deceased, while the first respondent is the deceased's wife. The other respondents are the children born to the first respondent. The appellant filed an inventory and account of the estate before the trial court, which was contested by the respondents. This led to the filing of Miscellaneous Civil Application No. 246 of 2022, challenging the inclusion of a house located on Upendo Street, Saranga Ward, Ubungo District, Dar es Salaam, as part of the deceased's estate. Upon hearing the matter, the trial court ruled that the house was registered in the name of the first respondent and, therefore, should be excluded from the estate of the deceased. The appellant, aggrieved by the decision of the District Court of Kinondoni, appealed to this court. Initially, she advanced two grounds of appeal, later adding more grounds to total five, as follows;

1. The honourable magistrate erred in law to proceed to entertain the application which was filed contrary to the Rule 5 of the Rules of Probate and Administration of Estate Rules. 2

2. The honourable magistrate erred in law and fact to entertain the matter which has no jurisdiction to entertain.
3. The honourable magistrate erred in law and fact to decide in favour of the applicants basing on the evidence which is not available on records.
4. The honourable magistrate erred in law and fact to entertain the application supported by defective affidavit affirmed by a stranger who is not the party to the suit.
5. The honourable magistrate erred in law and fact to decide the case in favour of the applicants basing on the irrelevant exhibits. The appellant prayed to this court to reverse, quash, and set aside the decision of the court on Civil Application No. 246 of 2022, the inventory and account of the estate filed, and any other relief this court may deem fit and just to grant. The appellant appeared in person, while the respondents were represented by Mr. Johnstone Fulgence. The hearing was conducted through written submissions, with timely filings from both parties, except for the appellant's rejoinder submission. In the first ground of appeal, the appellant argued that the trial magistrate heard the matter contrary to Rule 5 of the Rules of Probate and Administration of Estate. She asserted that this rule requires every 3 proceeding to be titled "Probate and Administration" with the court's name and the distinctive case number for all subsequent proceedings. She claimed that Application No. 246 of 2022, filed to challenge the inventory and accounts of the estate in Probate and Administration Cause No. 1 of 2020, violated this requirement. For the second ground, the appellant argued that the court entertained the matter without jurisdiction, citing sections 68(a) and 95 of the Civil Procedure Code Cap 33 R.E. 2019, and sections 65 and 107(5) of the Probate and Administration of Estate Act. She emphasized that probate courts cannot determine land issues and referenced section 3(1) of the Court (Land Dispute Settlement) Cap 216 R.E. 2019. The appellant further contended that the District Court of Kinondoni lacked jurisdiction over the land issue, citing Bagamoyo District Court vs. AS Neremco Construction and Another, Civil Appeal No. 106 of 2008, Court of Appeal at Dar es Salaam. For the third ground, the appellant claimed that the trial court relied on evidence not in the records, specifically annexures showing the residential license under the first applicant's name, while it was actually under Nuru Sinda Omary's name. ^{rxw 4} In the fourth ground, the appellant argued that the trial court used a defective affidavit affirmed by non-parties to the suit, noting that the trial court's decision only recognized the first applicant as the owner. For the fifth ground, the appellant faulted the trial court for relying on an irrelevant exhibit stating that Nuru Omary Sinda was the owner without any deed of gift presented as proof. She cited Hamis Sultan Mwinyigoha vs, Zainabu Sultan Mwinyigoha, Civil Appeal No. 447 of 2020, Court of Appeal, which requires three elements and proof on the balance of probabilities for a deed of gift to be legally valid. The appellant maintained that the house belonged to Sinda Hussein Sinda and claimed that the respondents were trying to take it without proper proof. Therefore, she prayed for the court to approve the inventory and account of estates filed before the trial court. The respondents, represented by Mr. Fulgence, argued that not all probate matters must bear the same number and be

titled "Probate and Administration Cause." He contended that subsequent matters under Rule 5(2) of the Probate Rules do not include fresh applications and that special forms entail different subsequent applications. He opined that the appellant had misconceived the law, making the first ground devoid of merit. Regarding the second ground, Mr. Fulgence stated that the appellant was required to file the inventory and true account of the estate for inspection by beneficiaries, per Rules 107(l)(5) and 108 of the Probate Rules. He explained that the appellant included the house of Kimara Temboni in the estate of the deceased, and when ordered by the court to remove it, she declined, necessitating a separate application. He argued that the court had inherent powers under section 95 of the Civil Procedure Code to challenge the inventory that included property not belonging to the deceased. He maintained that the matter before the trial court was not a land issue but a challenge to the inventory, making the appellant's cited laws and cases irrelevant. On the third ground, Mr. Fulgence contended that the record submitted before the trial court was from the local street government, not a residential permit. He added that the trial court ruled the property belonged to the first respondent because she was the guardian of her children, the other respondents. Regarding the fourth ground, Mr. Fulgence argued that the affidavit filed was not defective and that the appellant should have challenged it before the trial court by way of a preliminary objection. 6 For the fifth ground, he stated that the first respondent had acquired the house from her mother and later developed it. He argued that the deceased being the husband of the first respondent did not entitle him to ownership of the house. Therefore, he prayed for the court to dismiss the appeal for lack of merit. Since the appellant did not file her rejoinder submission, I will proceed to determine the grounds of appeal raised. After considering the arguments presented by both sides, I will first address the second ground of appeal, where the appellant contends that the trial court erred in determining the land issue without having jurisdiction. The key issue here is whether the probate court has the jurisdiction to hear and decide land matters. The appellant referred to section 3(1) of the Court (Land Dispute Settlement) Cap 216 R.E. 2019, which outlines the tribunals and courts that have jurisdiction over land matters, explicitly excluding probate courts. This statutory provision establishes that land disputes are typically outside the purview of probate courts. Contrarily, Mr. Fulgence argued that the respondents were not raising a direct land dispute but were challenging the inclusion of the Temboni house in the deceased's estate inventory filed by the appellant. The trial 7 court had ordered the appellant to remove the house from the estate inventory, necessitating an application to allow the parties to present evidence under oath regarding the ownership of the said house. On this ground, the appellant questions the trial court's jurisdiction in determining land matters within a probate case. It is important to note that jurisdictional issues can be raised at any stage of the case, including on appeal, as affirmed in *Tanzania Revenue Authority vs. Tango Transport Company Ltd* (Civil Appeal No. 84 of 2009) [2016] TZCA 84. In probate matters involving land disputes, the court does not directly determine land ownership. Instead, it considers who is the owner based on the titles presented before the court. This principle was upheld in *Amina Maulid Ambali & 2 Others vs. Ramadhani Juma*, Civil Appeal No. 35 of 2019, where the Court of Appeal at Mwanza held that; "In our considered view, when two

persons have competing interests in a landed property, the person with a certificate thereof will always be taken to be a lawful owner unless it is proved that the certificate was not lawfully obtained". [Emphasis is supplied]. In addition, the provisions of Section 35 of the Land Registration Act, Cap 334 R.E. 2019, clearly state that the owner of landed property must possess a certificate of title. Section 40 of the same Act indicates that the certificate of title will serve as evidence of ownership. For clarity, I will reproduce Section 40 which states; "A certificate of title shall be admissible as evidence of the several matters therein contained." Based on this precedent, proof of ownership is determined by the presence of a certificate of title, as stated in Section 35 of the Land Registration Act, Cap 334 R.E. 2019. Section 40 of the same Act further indicates that the certificate of title serves as evidence of ownership. Therefore, when clear title evidence is available, the probate court can make a decision regarding the inclusion of the property in the estate. To address the objection regarding the inventory, which allegedly included property not part of the deceased's estate, the probate court had to examine the evidence and exhibits tendered. Thus, it cannot be said that the court usurped the jurisdiction of the land court. Given that documents indicated the house did not bear the name of the deceased, it was appropriate to order the removal of the house from the inventory and accounts of the estate filed before the court. However, the trial court did not provide further directives on the way forward. Thus, this ground has partly succeeded. 9 Turning to the fourth ground of appeal, the appellant argued that the trial court erred in basing its decision on a defective affidavit, which was affirmed by parties who were not the owners. Mr. Fulgence contended that the appellant should have raised a preliminary objection at the trial stage, not during the appeal. I must agree with Mr. Fulgence that the appellant had the opportunity to raise the preliminary objection regarding the defective affidavit before the trial court but did not. The appellant argued that the affidavit filed before the trial court was defective because it was affirmed by five applicants (the respondents), whereas the trial court's decision determined the house to be owned by the first respondent only. Despite the issue of the defective affidavit not being formally raised before the trial court, it is essential for the court to consider the principles governing affidavits to determine whether the respondents' affidavit was fatally defective. The essential ingredients for a valid affidavit were reinforced in *Lisa E. Peter vs. Al-hushoom Investment* (Civil Application No. 147 of 2016), Court of Appeal at Dar es Salaam [2016] TZCA 902, quoting with approval *Director of Public Prosecutions vs. Dodoli Kapufi & Another* (Criminal Application No. 11 of 2008), Court of Appeal at Dar es Salaam.

[2011] TZCA 46. The court considered the essential ingredients of an affidavit to be the following;

- (i) the statement or declaration of facts, etc, by the deponent; (ii) a verification clause (Hi) a jurat and; (iv) the signatures of the deponent and the person who in law is authorized either to administer the oath or to accept the affirmation. In the case at hand, the affidavit is challenged on the basis that it was affirmed by multiple applicants, whereas the trial court found ownership of the house to be with the first respondent only. While the appellant had the right to raise a preliminary objection during the trial, failing to do so does not negate the necessity to ensure affidavits meet legal standards. Upon examining the affidavit, it is crucial

to assess whether it adheres to the aforementioned principles. If it fails to meet these essential requirements, it could be deemed defective and affect the validity of the trial court's decision. However, it is noted that the affidavit has met all required elements of a valid affidavit. This ground is therefore devoid of merit and is dismissed. 11 Turning to the first ground of appeal, the appellant faults the trial court for entertaining an application filed contrary to Rule 5 of the Rules of Probate and Administration of Estate. The appellant argued that every proceeding should be titled "Probate and Administration," including the name of the court and the distinctive case number, and that all subsequent proceedings should bear the same number. Conversely, Mr. Fulgence contended that this provision did not intend to include other applications, as there are distinctive forms to be applied. Regarding this ground, the provisions of Rule 5(2) of the Probate Rules state that; 5 (2) The first proceeding in every matter shall have a distinctive number assigned to it by the Registrar, and all subsequent proceedings in the same matter shall bear the same number. Considering the purpose behind Rule 5 of the Rules of Probate and Administration of Estate, it is intended to maintain continuity in the matter and allow the determination of subsequent proceedings by the same trial judge or district delegate. However, since cases are now recorded electronically rather than in hard copy registers, the rule cannot be easily applied and may require amendment to suit the current system. — 12 Applications challenging the inventory and account of an estate are typically handled within the same file as the probate matter. However, the Probate and Administration of Estate Act and its Rules are silent on how an interested person, after reviewing the inventory and accounts of the estate filed under Section 107(5) of the Probate and Administration of Estate Act and Rules 106 and 107 of the Probate Rules, may appear and challenge the same before the court. In situations where the application has been filed and the subsequent proceeding does not bear the same number, the practice of the court has been to consolidate the two matters. This approach was supported in the case of *Musiba Reni Jiqabha vs. Muqeta Bwire Bhakome* (Probate & Administration Cause 41 of 2016), *One Stop Judicial Center Temeke* [2022] TZHC 119 (7 February 2022), where the court held that; "Be as it may, since issues involved in the two cases are intertwined, for convenience and clarity purpose, I decided to consolidate them and prepare a single ruling." By consolidating cases, the court ensures that all relevant issues are addressed collectively, thereby maintaining consistency and continuity throughout the proceedings. Although there was an error in registering the application as a separate matter, this procedural mistake did not prejudice 13 the parties involved. Consequently, this ground is dismissed as lacking merit. Grounds three and five will be consolidated into a single issue: whether the honorable magistrate erred in law and fact by ruling in favor of the applicants based on evidence not available in the official records and irrelevant exhibits. In addressing this issue, the appellant contends that the trial court made a legal error by relying on evidence not present in the official records. Specifically, the appellant argues that the residential license in question was actually issued to Nuru Sinda Omary, not the first applicant. Additionally, the appellant claims that the court relied on an irrelevant exhibit that incorrectly identified the property owner as Nuru Omary Sinda. In response, Mr. Fulgence asserts that the document in question was from the local street

government and not a residential permit. He argues that the first respondent was considered the property owner due to her role as guardian of her children. Mr. Fulgence further contends that the first respondent inherited the house from her mother and developed it, and that the deceased husband did not have ownership rights to the property. 14 The trial court, in determining the application, focused on the issue: "whether the property located at House No. UB/SRG/UPD/JTH 084, Upendo Street, Saranga Ward, Ubungo District, Dar es Salaam, forms part of the deceased's estate." In resolving this issue, the trial court ruled as follows; Thus, from the above illustration, I find myself concurring with the Applicant's, that the said property shouldn't have been included in the deceased estate as done by the respondent. I hold so based on the ground that, evidence in the applicant's affidavit points out that the said property, indeed is registered under the 1st applicant's name and I find no evidence to the contrary. The court examined several documents related to the property in question to determine its ownership. Annexure SO, a letter from the Ubungo Municipal Council, identified the first respondent, Nuru Omary Sinda, as the property owner. In contrast, Annexure S4, a property tax demand notice from the Municipal Council of Kinondoni, listed the second respondent as the owner. Despite these inconsistencies, the trial court concluded that the property was registered under the first respondent's name. Additional evidence indicated that the first respondent had been servicing the property with loans she claimed to have taken out. 15 Meanwhile, the appellant argued that the house belonged to the deceased, Sinda Hussein Sinda, who had purchased it from Mzee Kilindo. However, the appellant failed to provide supporting documentation to substantiate this claim. Upon revising the evidence, it was apparent that the trial court misinterpreted the documents. The court erroneously concluded that the house was registered in the name of the first respondent, while also acknowledging the second respondent as the owner. Nonetheless, the court correctly determined that since the house was not registered in the deceased's name, it should not be included in the estate of Sinda Hussein Sinda. The central issue before the trial court was whether the house should be part of the deceased's estate. Given the appellant's failure to provide concrete proof of ownership, the trial court's decision to exclude the house from the deceased's estate was justified. Therefore, these grounds of appeal are dismissed as lacking merit. The appeal has partially succeeded concerning the second ground. The trial court's decision to remove the house from the inventory and accounts of the estate was correct but lacked further directives. In 16 exercising the revision jurisdiction granted under Section 44(l)(b) of the Magistrates' Courts Act, Cap 11 R.E. 2019,¹ revise and vacate the order of the District Court of Kinondoni in Application No. 246 of 2022. The determination that the first respondent was the owner of the estate was flawed. Given the unclear status of ownership of the property at Ubungo, the parties are encouraged to bring the matter before the appropriate authorities for a resolution. Accordingly, I order that the inventory and accounts of the estate be amended to exclude the Ubungo property until the ownership dispute is resolved by the proper tribunal. It is so ordered. Jar es Salaam this 30th day of July, 2024. >\G.N.BARTHY N j | JUDGE
Delivered in the presence of Ms. Bernadina Tayari, RMA and in the absence of the parties and their advocates. 17

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