

TANZANIA / JUDGMENT

yusuf kassim yusuf mohamed mafanya vs mohamed eidha awadh 5 others 2022 tzhclandd 12393 26 september 2022

COURT
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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (LAND DIVISION) AT PAR ES
SALAAM MISC. LAND APPLICATION NO. 459 OF 2022 YUSUF KASSIM YUSUF (MOHAMED
MAFANYA)..... APPLICANT VERSUS MOHAMED EIDHA
AWADH..... 1st RESPONDENT MWANAHAMISI KASSIM
YUSUF..... 2nd RESPONDENT MWANAHAMISI KASSIM YUSUF
(ADMINISTRATRIX OF THE ESTATE OF THE LATE HAMIS KASSIM YUSUF)..... 3rd
RESPONDENT HALIMA KASSIM YUSUF..... ..4th RESPONDENT FATUMA
KASSIM YUSUF..... 5th RESPONDENT RAMADHANI KASSIM
YUSUF..... 6th RESPONDENT

RULING

Date of order: 20.09.2022 Date of Ruling: 26.09.2022 KADILU, J. This is an application for the appointment of one Maulidi Mohamed Mafanya as a Next Friend of Yusuf Kassim Yusuf who is alleged to be a person of unsound mind. The applicant has applied to this Court to be appointed to administer and protect the rights of Yusuf Kassim Yusuf on the ground that Yusuf has been suffering from abrupt behavioural changes, as he significantly shows loss of ability to make rational decisions, to control his own behaviour and recognize the meaning of his actions. As gathered from the affidavit of the applicant, Yusuf started suffering from the mental disease on August, 2013 whereby after being taken to Muhimbili National Hospital, he was diagnosed to have psychiatric mental disability and adjudged a person of unsound mind (copy of medical report appended as annexure "A-1"). The Applicant averred that on 20th March 2014, the late Hamis Kassim Yusuf, 2nd Respondent, 4th Respondent, 5th Respondent and 6th Respondent entered into a contract of sale with the 1st Respondent engaging Yusuf Kassim Yusuf as one of the vendors of land plot No. 9, Block 14, located at Kariakoo Area, Ilala Municipality in Dar es Salaam, while he was of unsound mind (copy of sale agreement annexed as annexure "A-2"). It was further stated that on 15th August 2018, the late Hamis Kassim Yusuf, 2nd Respondent, 4th Respondent, 5th Respondent and 6th Respondent instituted Land Case No. 105 of 2018 engaging Yusuf as the 6th Plaintiff, while he was of unsound mind at the time of the institution of the said case. In that case, the 2 Plaintiffs (now Respondents) were claiming that the 1st Respondent

breached a contract of sale of land plot No. 9, Block 14, located at Kariakoo Area, Ilala Municipality in Dar es Salaam. The said Land case was settled out of Court with the 1st Respondent on 18th October 2018 by the late Hamis Kassim Yusuf, 2nd Respondent, 4th Respondent, 5th Respondent and 6th Respondent while engaging Yusuf Kassim as one of the Plaintiffs who negotiated settlement and executed settlement deed, while he was of unsound mind at the time of execution of the settlement deed. The deed of settlement was filed in Court and the Court entered decree to that effect (copy of the Court Decree annexed as During the hearing, the Applicant was represented by Mr. Yona Habiye (Advocate), 1st Respondent was represented by Dr. Rugemeleza Nshala (Advocate) while the 2nd, 3rd, 4th, 5th and 6th Respondents enjoyed the service of Mr. Khalid Sudi Lwebangila (Advocate). Before the hearing of the application could proceed, I directed Advocates for the parties to address the Court on whether or not it has power to appoint a Next Friend in an application filed to the High Court (Land Division) without any Land case linked to the application. Mr. Yona was the first to submit and he started by elaborating the general powers of the High Court. He said, powers of the High Court are stipulated 3 under Article 108 of the Constitution of the United Republic of Tanzania [Cap. 2 R. E 2002]. Mr. Yohana elaborated that s. 5 of the Judicature and Application of Laws Act [Cap. 358 R.E. 2019] provides for powers of Judges of the High Court whereas the High Court (Land Division) is empowered under s. 167 (1)

- (b) of the Land Act [Cap. 113 R.E. 2019], s. 62 (2) (b) of the Village Land Act [Cap. 114 R. E 2019] and s. 3 (2) (d) of the Land Disputes Courts Act [Cap. 216 R.E. 2019] to determine land disputes. He did not however, explain what a 'land dispute' is. The learned Advocate referred this Court to s. 19 of the Written Laws (Miscellaneous Amendments) Act No. 2 of 2010 which amended s. 2 of the Land Disputes Courts Act by deleting the term "High Court Land Division" and substituting for it, "the High Court of Tanzania established under Article 108 of the Constitution of the United Republic of Tanzania." He argued that by virtue of that amendment, being the Land Division does not take away the general powers of the High Court. Therefore, the High Court (Land Division) has power to adjudicate on general matters without regard to the specialization. The learned Advocate submitted further that, appointment of a Next Friend is one of such general matters for which the High Court (Land Division) has 4 jurisdiction to entertain and determine. He invited me to read the case of NBC v National Chicks Corporation Ltd & Others, Civil Appeal No. 129 of 2015 (unreported) where the Court of Appeal held that designation by the Chief Justice as a specialized Court for adjudicating certain matters does not abrogate that Court's general mandate as stipulated in the Constitution and Judicature and Application of Laws Act as part of the High Court. Dr. Rugemeleza Nshala (Advocate) on his part submitted that the application for appointment of a Next Friend is neither a land matter nor a suit and that, it does not belong to the High Court (Land Division). He referred this Court to
- s. 137 (1) of the Land Disputes Courts Act [Cap. 216 R.E. 2019] which provides the jurisdiction of the High Court (Land Division). He explained that jurisdiction of the High Court (Land Division) is confined to the proceedings for the recovery of possession of immovable property, proceedings under the Tanzania Investment Act, the Land Act and the Land

Acquisition Act in respect of proceedings involving the Government, Public Corporations and such other proceedings relating to land under any written law in respect of which jurisdiction is not limited to any particular court or tribunal. Dr. Nshala contended that the case of NBC v National Chicks Corporation Ltd 5 cited by Mr. Yona is not applicable in the prevailing circumstances because in that case, the value of property in dispute was clear. The application before this Court being for appointment of a Next Friend, is not capable of being quantified. Moreover, there is no suit pending in this Court in respect of this application which could be used to ascertain pecuniary jurisdiction of the Court and justify the application. He referred this Court to the case of Petrofuel (T) Ltd & Another v Educational Books Publishers Ltd & Others, Land Case No. 54 of 2016, High Court of Tanzania (Dar es Salaam District Registry) at Dar es Salaam (unreported) where it was stated that, a land case must comply with the provisions of s. 37 of the Land Disputes Courts Act otherwise, the Court cannot be said to be seized with jurisdiction. He also referred to a case of Educational Books Publishers v Hasham Kassam & Others, Land Case No. 56 of 2016, High Court of Tanzania (Dar es Salaam District Registry) at Dar es Salaam (unreported). In that case, the Court ruled that stating the value of the subject matter is crucial as that is where courts derive jurisdiction to adjudicate and determine matters before them. It is therefore a primary duty of every court to satisfy itself that is vested with the requisite jurisdiction to determine the suit before it. 6 Dr. Nshala said these cases show the importance of establishing that the application before this Court is a land matter and the value of the subject matter is clearly stated. He pointed out that the two aspects are missing in the present application and this Court has no jurisdiction to entertain it. He then concluded that issues relating to legal disability are taken care by other appropriate courts not this Court which is specific for land matters. According to him, there is no course of action against the Respondents in this application, hence it should be dismissed because the Applicant has not withdrawn it earlier. Mr. Khalid Sudi (Advocate) submitted briefly on the essence of jurisdiction to the Court. He explained that jurisdiction of any court is a creature of the law and it cannot be assumed in any case. The purpose of establishing special divisions is to speed up the disposal of matters within jurisdiction of such divisions. Since the present application does not fall within jurisdiction of this Court, it is proper to advise the Applicant to take the matter to the appropriate court or to withdraw. In rejoinder, Mr. Yona (Advocate) insisted that the application is properly before the Court and he prayed it to be granted. He stated in alternative that, if the Court finds itself lacking jurisdiction to determine the application, it should not throw it out. He relied on the case of NBC {supra} in which the Court of 7 Appeal stated that litigants should be advised to lodge in other registries matters not specifically assigned to a particular Division so as to ensure that the purpose for which the Divisions are established is not paralyzed. In the event a case not of the division's specialization is instituted in any of the divisions, the parties should not be thrown out in the pretext of lack of jurisdiction. Instead, parties should either be advised to withdraw and file the same in another court competent to try it; or such a case should be heard to its conclusion. Having grasped the nature of application before me and submissions by the learned Advocates, I proceed to determine whether the High Court (Land Division) has

jurisdiction to appoint a Next Friend to administer and protect the rights of a person of unsound mind. I should start by emphasizing that, the issue of jurisdiction is fundamental and a root of the case. If the court will proceed and determine the matter without the requisite jurisdiction, the entire proceedings will be declared a nullity. There are numerous authorities to this effect and they include, the case of NBC v National Chicks Corporation Ltd & Others {supra}, Tanzania Revenue Authority v Tango Transport Company Ltd, Civil Appeal No. 84 of 2009 (unreported), Tanzania - China Friendship Textile Co. Ltd. v Our Lady of the Usambara Sisters, [2006] 8 TLR 70 and Mwanachi Communications Ltd & Others v Joshua K. Kajula & Others, Civil Appeal No. 126/01 of 2016 (unreported). In order to ascertain whether this Court has jurisdiction to deal with this application, it should be ascertained that the application concerns a land matter. The learned Counsel for both the Applicant and Respondents referred to the term "land matter," but none of them stated its meaning. A land case which is synonymous with land matter was defined in the case of Musa Makweta Musa v Faraja Credit Finance, Civil Appeal No. 08 of 2021, High Court of Tanzania at Iringa at pg. 10, where the Court defined a land case to cover: —(i) A dispute over ownership of land in its strict sense as defined in s. 2 of the Land Act, (ii) Leases as covered under Part IX of the Land Act, (iii) Mortgages and Security as covered under Part X of the Land Act, and (iv) Easements and analogous rights as covered under Part XI of the Land Act. The definition of land dispute or land matter as elaborated in the case above does not relate expressly or by any implication to the appointment of a Next Friend of a person of unsound mind. The application brought before this Court was brought by way of chamber summons supported with affidavit as required by the Civil Procedure Code [Cap. 33 R.E. 2019]. As rightly stated by the learned Counsel for the 1st Respondent, persons of unsound mind are dealt with in accordance with the provisions of the Mental Diseases Act [Cap. 98 R.E 2002] which provides for inter alia, the management and administration of the estates of persons incapable of managing their affairs. S. 3 of the Mental Diseases Act provides that the court having jurisdiction in lunacy is the District Court. Under s. 8 of the Act, District Courts are empowered to conduct inquiries into unsoundness of minds of persons brought before the court and alleged to be of unsound mind. It provides: "Whenever any person is brought before the court under the provisions of sections 5, 6, or 7, the court shall examine that person, and if it thinks that there are grounds for proceeding further, shall cause him to be examined by a medical officer, and shall make any other inquiries which it thinks fit..." Further, s. 23 (c) of the same Act provides for the provisions of management and administration to a person who is proved to the satisfaction of the court that is of unsound mind and incapable of managing his affairs. Under that Act, 10 the management and administration of the estate of a person with unsound mind can be made by any friend, a relative or any person in whose care or charge that person is cared for/detained. It is undisputed that the High Court enjoys inherent jurisdiction under s. 95 of the CPC. Further, s. 7 (1) of the CPC confers jurisdiction to the High Court to try all suits of a civil nature except suits which their cognizance is either expressly or impliedly barred. I am mindful of the fact that there is no law expressly barring the High Court (Land Division) from granting applications for appointment of a Next Friend, but in my opinion, the circumstances of the

application at hand suggest that jurisdiction of the court is impliedly excluded. This is so because the application before this Court is not a suit as envisaged under s. 7 (1) of the CPC. As observed by Lord Russel in *Hansraj Gupta v. Dehra Dun-Mussoorie Electric Tramway Co. Ltd.*, [1933] AIR PC 63, suit is a judicial proceeding, but not every such proceeding can be termed a suit. Suit is a civil proceeding instituted by the presentation of a plaint, a factor which distinguishes a suit from an appeal or application. In the current case, there is no suit in respect of which the application was filed. The argument by the Counsel for the applicant is that the High Court (Land Division) has general powers to adjudicate all matters regardless of 11 specialization. With due respect, the view taken by the learned Counsel if executed, will have the effect of taking away the whole purpose of establishing special divisions of the High Court. I am therefore inclined to agree with argument by the Counsel for the Respondents and authorities analysed herein that, the High Court (Land Division) has no jurisdiction to determine the present application since it is not a land matter and there is no land case pending in this Court to justify the application at hand. The fact that Yusuf Kassim Yusuf was engaged into a sale of a landed property while of unsound mind alone cannot make the matter a land case to confer jurisdiction to the High Court (Land Division). Submission by the learned Counsel for the Applicant that in the event the Court finds itself lacking jurisdiction he should be advised to withdraw the application instead of throwing it out, has not been successful. The learned Counsel was aware of the position of the law as he was the one who generously shared the authorities stating the said position, but he did not withdraw the application. Being an officer of the Court, he discharged his professional duty of assisting the Court to arrive at a fair decision. That said, I dismiss the application. No order as to the costs. 12 f/&y kadilu, m. J. g WWS> * JUDGE 26.9.2022 Ruling delivered on 26th September, 2022 in the presence of Mr, learned Advocate for the Applicant, Dr..., learned Advocate for the 1st Respondent and Mr. ..., learned Advocate for 2nd, 3rd, 4th, 5th and 6th Respondents. 13

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