IN THE HIGH COURT OF TANZANIA

(MWANZA REGISTRY)

AT MWANZA

LAND CASE NO. 48 OF 2014

ATHUMANI ALLY NYABANGE .....THE PLAINTIFF

VERSUS

MAGORI ALLY NYABANGE ..... 1ST DEFENDANT

ROSE @ TANNA ALLY NYABANGE ...2ND DEFENDANT

MAIGE, J

JUDGMENT

The dispute at hand revolves around four landed properties located within the municipality of Musoma. These properties which initially belonged to the late ALLY WARIOBA NYABANGE ("the deceased"), consist of houses at plot no. 64 Block C Kawawa Street ("suit property no. 1"), plot 34 Block C Msikiti Street ("suit property no. 2"), Plot No. 233 Block D Msikiti Street ("suit property no. 3"). Included in the dispute is also a farm measuring 8 acres situate at Bweri Area ("suit property no. 4"),.

Essentially, the suit is based on judgments. This is clearly reflected in the pleadings and evidence as well. The plaintiff has put heavy reliance on the judgment of the High Court of Tanzania, Mwanza Registry in Probate and Administration cause No. 03 of 2001 dated 05.08.2014 (**exhibit P-1**) and a judgment of the District Court of Musoma in Civil Case No. 22 of 2008 dated 31.10. 2012 (**exhibit P-2**). The existence of the two judgments, it seems to me, is not in dispute but the relevancy and effects of the same in the instant case. In addition, the plaintiff by himself as (PW-1) and other witnesses HAMIS BUGINGO SHAABAN (PW-2), ASHURA PETRO (PW-3), MAPESA JUMA SAID (PW-4) and MARJAN JUMA (PW-5) has adduced some oral evidence to supplement the evidence in the two judgments.

In the Joint Written Statement of Defense much as it was in their evidence, the defendants have denied the assertion that the suit properties form part of the estate of the late Ally Warioba Nyabange. Much as they admit his original ownership of the same, it is their contention that the suit properties had been transferred by the deceased to his descendants, including themselves, before his expiry. The defendants testified in Court as **DW-1** and **DW-2** to defend the case. **DW-1** produced a letter of offer of the **suit property no. 1** which was received as **D-1**. On top of that, the defendants produced MASAJI MWITA CHACHA (DW-3) and KEFA SAMWELI (PW-4). **DW-3** tendered a letter of offer of the **suit property no. 2** which was admitted as **D-2**.

Three issues were framed during the Final Pretrial Conference. **First**, whether the suit properties form part of the estate of the late Ally Warioba Nyabange. **Two**, if so, what are the rights of the parties. **Three**, to what reliefs are the parties entitled to.

In the conduct of the case, the plaintiff was represented by Mr. Mbuna, learned advocate while Mr. Magongo, learned senior advocate, represented the defendants. After the trial, the counsel addressed me generally by way of written submissions. I am indebted to both counsel for their very impressive submissions.

Before I put my leg on the issues framed, I find it necessary to address some legal issues which have been raised in the written submissions. The issues in essence pertain to the relevancy and effect of the two previous judgments in the instant suit. Mr. Magongo much as he concedes that a judgment of a competent court can be conclusive in a subsequent civil proceedings of the similar nature, he is of the view that both the judgments are not relevant in the instant case. His first reason is that the second defendant has never been privy to both the two judgments. In the second place, he submits that the judgment in exhibit **P-1** did not make any determination as to the ownership of the suit property. Finally, he submits that the judgment in exhibit **P-2** cannot be conclusive because the Musoma District Court was not a competent court within the meaning of sections 42 and 43 of the Evidence Act read together with section 9 of the Civil procedure Code Act. The reason being that the said court did not have the necessary jurisdiction to try land dispute.

In his rebuttal submissions on this legal aspect, Mr. Muna, learned advocate, was of the humble opinion that the judgment in exhibit **P-1** determines the issue of ownership of the **suit properties** in as much as they were declared as listed properties which would be administered by the plaintiff. He insisted that as the listed properties were the subjects in Probate and Administration Cause No. 03 of 2001, the defendants would have objected to the listed properties if at all they were not part of the deceased estate. As regards the

judgment in exhibit **P-2**, the counsel submitted that the issue is misplaced as it ought to have been dealt with by way of appeal.

I will decide first on the relevancy of the judgment in exhibits **P-1** and **P-2** in relation to section 42 of the Evidence Act. The section reads as follows: "*The existence of any judgment, order or decree which by law prevents any court from taking cognizance of a suit or holding a trial is a relevant fact when the question is whether such court ought to take cognizance of such suit or hold such trial*'.

The above provision, as I understand it, provides for a general rule as to estopel by judgments (records). Subject to some limitations, the rule applies to both criminal and civil judgments. In civil matters, the provision should be read together with section 9 of the Civil Procedure Code Act which provides for the rule of *res-judicta*. The later rule provides for conclusiveness of a previous decision of a competent court as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same time. Under the provisions just referred, evidence consisting of judgments, order or decree is relevant in proving a similar factual issue in a subsequent proceeding. Section 43 is more specific to a judgment arising from probate and administration of the deceased estates, among others.

Mr. Magongo has urged me not to rely on the judgment in exhibit **P-1** because it does not specifically mention any of the suit properties. It is his opinion that ownership of the suit properties was not determined in exhibit **P-1**. Mr. Muna contends that since in exhibit **P-1** it was held that the properties listed by the plaintiff are subject to administration by him, the issues of ownership of the suit properties

was determined in the said judgment. With respect, Mr. Magongo is right on this aspect. I have carefully read the judgment in exhibit **P-1**. I find nowhere the **suit properties** or part thereof is specifically mentioned. Much as the judgment in exhibit **P-1** makes reference to "listed properties", there is no specific pronouncement therein to the effect that the listed properties were the properties of the **deceased**. The expression "properties which are subject to the administration" in exhibit **P-1** cannot, in my view, be construed to mean that the probate court has conclusively determined that the listed properties were the properties of the **deceased**. After all, the listed properties have neither been pleaded nor adduced in evidence. Neither was the proceeding in Probate and Administration Cause No. 03 of 2001 brought to the attention of this Court. For those reasons therefore, I will hold that the judgment in exhibit **P-1** cannot be used to determine the complicated issue of ownership of the suit properties in the instant case.

Let me examine the relevancy of the judgment in exhibit **P-2**. It was contended for the defendants that, the judgment in exhibit **P-2** cannot be conclusive in the current case because it was not made by a court of competent jurisdiction. It was amplified that since the dispute at the District Court was a land dispute within the Land Act, the said court was not vested with the requisite jurisdiction. Much can be said about that. Nevertheless, the problem which I am facing here, is whether the first defendant is entitled, at this stage, to raise an issue of competency of the trial court while he has not exhausted the available remedies to deal with it. I have posed this question in relation to the first defendant because the judgment in exhibit **P-2** determines ownership of the **suit property number one** unto which the first defendant claims exclusive right. In answering this question, I find it necessary to seek an inspiration from the learned author H.W.R. WADE in his Administrative Law (18th edition)1999, Oxford

University Press, at page 603, where he makes the following useful remarks on this aspect:

> ***However null and void a decision may be, there is no means by which its nullity can be established except by asking the court to say so".***

I take it to be the law that, where a party to a subsequent proceeding was privy to a previous judgment, he cannot, in the subsequent proceeding, avoid its effect for the reason that it was a nullity. He has to use the appropriate available forums to ask for a formal nullification of a nullity decision.

In this case, the first defendant was a party to the judgment in exhibit **P-2**. He was present when the decision was being pronounced. The law gives him an automatic right to appeal to the High Court in the event that he is aggrieved. I understand that a judgment of a subordinate court does not become *res-judicata* where there is a pending appeal against it. The conclusiveness of the judgment would depend on the result of the appeal.

I have taken judicial notice that the respondent preferred H.C. Civil Appeal No. 39 of 2013. It was rejected by my sister judge Sumari for being time barred. In the circumstances, the first defendant cannot be heard faulting the validity of the judgment by way of a defense in a subsequent suit. As this would be tantamount to converting a defense in a civil suit into a cross appeal against a previous judgment. No doubt, such a trend is paradoxical in a number of ways. **First**, it would open a *bandora* box to the members of the public to

resist a court order for want of jurisdiction. **Two**, it would render the right to appeal against a nullity decision redundant. **Three** and more importantly is the fact that such approach would be unviable especially where a previous judgment sought to be applied is a judgment of a court of the same status or of a superior court.

I am aware of the trend in some jurisdictions of distinguishing between an error within jurisdiction and an error beyond jurisdiction. As for instance, the practice in India, as narrated by the learned author Mulla in his **Mulla the Code of Civil Procedure**, 16th edition, Volume 1 at page 177 is such that a decision by a court of incompetent jurisdiction is automatically null and void. In such a situation therefore, a judgment debtor may be at liberty to disobey a court decree for want of jurisdiction. This position, in my humble view, is irreconcilable with the social environment in Tanzania wherein the unwanted culture of the people taking laws in their hands is growing tremendously. I am afraid that if such practice is allowed , it may lead to disruption of peace. For, whether a court was competent to determine the matter will be subjected to prejudicial interpretation.

Although section 9 of the CPC clearly requires a previous judgment to be by a court of competent jurisdiction, I am scared that if the rule is literally construed, it may lead to absurdity as above pointed out. It is my respectful opinion therefore that, since first defendant had an automatic right to appeal against the judgment in exhibit **P-1**, this Court sitting as a trial court cannot assume the jurisdiction of an appellate court and hold that the District Court lacked jurisdiction. Doing so, will render the right to appeal against a nullity judgment

meaningless. For those reasons therefore I will hold that the judgment in exhibit **P-2** is admissible in terms of section 42 of the Law of Evidence Act read together with section 9 of the **CPC**.

The above notwithstanding, I have noted from the heading of exhibit **P-2** that the subject of the judgment arose from HC Civil case no 24 of 2000 which was initially filed at the High Court Mwanza in 2000. Neither of the parties have addressed me on this issue. This would suggest that the suit at issue was transferred to the District Court from the High Court. I take judicial notice that the current land dispute mechanism which ousts the jurisdiction of ordinary courts was never in existence in 2000. Had the defendants properly prosecuted their appeal against the judgment in exhibit **P-2**, the appellate court would have made an enquiry into the competency of the District Court. It would have considered the relevancy or otherwise of the original H.C. Civil Case No. 24 of 200 in determining the jurisdiction of the District Court.

Having determined the relevancy or otherwise of the judgments in exhibits **P-1** and **P-2** in the instant appeal, it is high time that I deal with the framed issues. I will start with the first issue as to **whether the suit properties form part of the deceased estate of the late Ally Nyabange**. In the judgment in exhibit **P-2** upon which the plaintiff relies to establish ownership of the **suit properties**, out of the four landed properties constituting the **suit properties**, it is only the ownership of the **suit property no. 1** which was finally and conclusively determined. Mr. Magongo has submitted that since the **suit property no. 1** is registered, ownership thereof could not be proved without the title document being tendered. With deepest respect to the learned counsel, this argument has been misplaced for the simple reason that the issue of ownership of the said property

was finally and conclusively determined in the judgment in exhibit **P-2**. This argument would have been relevant in an appeal against the said judgment. It may perhaps be pertinent to observe that; just as in the instant suit, in the proceedings culminating into exhibit **P-2**, a letter of offer of the **suit property no. 1** in the name of the first defendant was exhibited. Yet, the presiding magistrate held, as a point of fact that the same forms part of the estate of the **deceased**. For foregoing reasons therefore, I will hold without hesitation that the plaintiff is the lawful owner of the **suit property no. 1** (plot 64 Block C Kawawa Street, within Musoma Municipality) in his capacity as the administrator of the deceased estate of the late **Ally Warioba Kabange**.

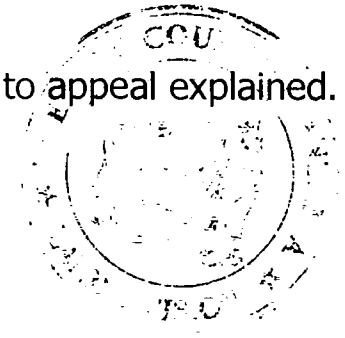
As regard the **suit properties nos. 2, 3 and 4**, I find no cogent evidence on the record to support the assertion that they belonged to **deceased**. The plaintiff himself who testified as **PW-1** apart from relying of the judgments in exhibits **P-1** and **P-2**, did not adduce any independent evidence to suggest that the said properties form part of the estate of the **deceased.** It has to be noted that the **suit property no. 2** (Plot No. 64 Block C, Msikiti Street) and the **suit property no. 3** (Plot No. 233 Block D Msikiti Street) are both surveyed properties. I do not think that ownership of a surveyed piece of land can be proved by mere oral evidence. Besides, the defendants have, through **PW-3** produced a letter of offer on the **suit property no. 2** which was exhibited as **D-2**. It indicates that it belongs DW-3's late mother Amina Ally Nyabanga. This being a written evidence, it cannot, under the parol rule of evidence, be contradicted by the mere oral evidence of plaintiff and his witnesses. I will thus hold that the plaintiff has failed to establish ownership on the suit properties at 34 Block C, Msikiti Street and Plot No. 233 Block D Msikiti Street

On the alleged farm of 8 acres, the plaintiff has failed to adduce sufficient evidence that the said farm really exist and that it forms part of the estate of the **deceased**. Of the plaintiff witnesses, it is only **PW-4** and **PW-5** who addressed the issue of ownership of the alleged farm. Nevertheless, their evidence was very vague. Far from saying that the **deceased** had a farm at Bweri, they did not give description of the said farm. Even the size of the farm is not mentioned. In my opinion therefore, there is not evidential factual materials on the basis of which I can determine existence or non-existence of the farm at Bweri, leave alone ownership of the same.

Let me now determine the last two issue as to the entitlements of the parties. I understand that the defendants have not raised any counter claim as to be entitled to substantive relief. I will therefore determine the last two issues in connection to the suit by the plaintiff. In the first place, the plaintiff have asked for vacant possession of the suit properties. Since I have established that the plaintiff has failed to prove ownership of the suit properties save for the property at Plot No. 64 Block C, Kawawa Street, within Musoma Municipality, I will as I hereby do, give the plaintiff an order of vacant possession of the property at Plot No. 64 Block C, Kawawa Street within the Musoma Municipality as against the defendant and each of them. The plaintiff has asked for a perpetual injunction restraining the defendants and/ or their agents and servants from collecting rent from the suit property. For the same reason assigned in relation to the first prayer, I will, as I hereby do, restrain permanently and perpetually the defendants and each of them together with their agents, servants or otherwise from collecting rent on the property at Plot No. 64 Block C Kawawa Street, Musoma Municipality. The plaintiff has asked for payment of all rents which the defendants have collected from the

suit properties. I will not grant this prayer because the plaintiff has not adduced evidence to prove that the defendants or either of them had been collecting rent from the property at plot number 64 Block C, Kawawa Street. The plaintiff has asked for costs of prosecuting the case. It is hereby granted.

It is so ordered.



Right to appeal explained.

MAIGE.I

JUDGE

20/02/2017