

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB-REGISTRY OF MWANZA
AT MWANZA**

(PC) CIVIL APPEAL NO. 48 OF 2022

(Arising from Civil appeal No. 21 of 2021 of Sengerema District Court and originating from Civil Case No. 55 of 2021 of Bupandwa Primary Court at Sengerema)

ISACK STEPHEN MGANGAAPPELLANT

VERSUS

JOYCE DEREFA MACHIMU

(Administratrix of the late Derefa Masanja Machimu's estate)RESPONDENT

JUDGMENT

26th July & 12th August, 2022

Kahyoza, J.:

This is very interesting case on the jurisdiction of the primary court on issues of land disputes revolving around inheritance. Joyce Derefa (Joyce) was appointed to administrate the estate of the late Derefa Masanja Machimu. Derefa Masanja Machimu died intestate in 1980. Joyce applied and the primary court appointed her the administratrix of the estate of the late Derefa Masanja Machimu on the 29.6.2021. Isack's contention is that his father Stephano Mganga purchased the disputed land from John Machimu, the late Derefa Masanja Machimu's son.

Following her appointment, Joyce instituted a civil suit in the primary court claiming 20 acres of land from Lucia Stephen Mganga, Chausiku

Mganga, Tabu Mganga and Isack Mganga. All four respondents were served and they at least once or twice entered appearance save for Tabu Mganga. Tabu Mganga did not enter appearance. Lucia Stephano represented her (Tabu Mganga). Despite being informed and having entered appearance, Lucia Stephen Mganga, Chausiku Mganga and Tabu Mganga did not testify.

The primary Court found in favour of Joyce. Isack Stephen Mganga (Isack) appealed to the district court contending among other grounds of appeal that, the primary court had no jurisdiction. The district Court found that the Primary Court had Jurisdiction, hence Joyce emerged successful.

Aggrieved still, Isack appealed to this Court raising one ground of appeal that, the first appellate tribunal and trial court erred in law and facts in determining the disputes as they had no jurisdiction basing on the facts that the dispute was purely based on land ownership.

The respondent filed reply to the petition of appeal contending that the trial court had jurisdiction.

At the hearing, the appellant's advocate did not enter appearance. The Court decided instead of dismissing the appeal, to proceed "*ex-parte*" because the appeal was based on the issue of jurisdiction. I invited the respondent, who was present to counter the ground of appeal. Joyce, the respondent had nothing to add.

There is only one issue that, is whether the trial court had jurisdiction to try the dispute.

There is no dispute that Joyce is administratrix of the estate of Derefa Masanja Machimu. It is not disputed also that Joyce instituted a suit claiming 20 acres of land as an administratrix against three persons, intruders to the deceased's land. Joyce was appointed to administrate the estate by the primary court. She had among other things the right to institute or defend proceedings on behalf of the estate. See item six (6) of the Fifth Schedule to the **Magistrates' Courts Act**, [Cap. 11 R.E. 2019]. It reads-

"An administrator may bring and defend proceedings on behalf of the estate"

Depending on the nature of the proceedings Joyce, the administratrix had, and has a right to sue and be sued on behalf of the estate of the deceased. It can be correctly said that an administrator or an administratrix steps into the shoes of the deceased person.

The Probate and Administration Act, [Cap. 358 R.E. 2002] has a similar provision stipulating powers of the administrator or administratrix of the deceased's estate. I know the Probate and Administration Act does not apply to matters originating from primary courts. I will refer to the Probate and

Administration Act for better understanding of powers of an administrator.

Section 100 of the Probate and Administration Act, states that-

*"An executor or administrator has the same power to sue in respect of all causes of action that survive the deceased and may exercise the same powers for the recovery of debts due to him **at the time of death, as the deceased had when living**".*

Borrowing a leaf from Section 100 of the Probate and Administration Act, it is clear that the administrator has the same powers and discharges same duties as the deceased had when he was still alive. Thus, in order to answer the issue whether the trial probate court had jurisdiction to decide the issue of land ownership we have to ask ourselves two questions; one, had the deceased been alive would he have instituted the current suit? If the answer is in affirmative, the second question would be, where would the deceased have instituted the suit? An affirmative answer to the first question implies that the cause of action is between the deceased or a person who has stepped into the deceased's shoes and another person. Then that case is not a probate and administration cause. It is a land case or a civil suit, depending on the nature of the claim.

And if the answer was negative, it would have implied that dispute was a struggle among heirs to inherit the deceased's estate, which has to be determined by the probate court.

Before I ask myself the question in the present case, let me recapitulate facts of this case and the decision of the district court. Joyce instituted a suit before the primary court claiming ownership of land. The District Court was aware of the legal position that law provided under section 3 of the Land Disputes Courts Act, [Cap. 216 R.E. 2019], section 167 of the Land Act [Cap.113 R.E. 2019], and section 62 the Village Land Act, [Cap. 114 R.E. 2019], precluding primary courts to entertain land matters. That notwithstanding, the district court found that the primary court has jurisdiction as the land dispute in question as it related to deceased's estate. The District Court stated;-

*"Never the less, it is the legal position developed by courts of authority and now cherished that when the land in question is related to deceased estate, only the Probate Court is vested with jurisdiction to entertain such matter. In the case of **Kigozi Aman Kigozi Vs Ibrahim Seleman & 5 others**, Land Appeal No. 2 of 2019 (HC) where it was held that-*

It is the probate Court which is vested with power to determine whether a disputed property belongs to the deceased person or not through the probate cause by way of petition for letters of administration and objection thereof, if any."

The district court also cited the case of **Mgeni Seif V. Mohamed Yahaya Khalfani** Civil Application No. 01 of 2009 (CAT) quoted in **Malietha's** case supra the court provided;-

"The ratio decided of that holding is at page 8 of the judgment where the Court of Appeal had this to say;- "it seems to us that there are competing claims between the applicant and the respondent over deceased person's estate. In the circumstances, only a probate and administration court can explain how the deceased person's estate passed on to a beneficiary or a "bona fide" purchaser or the estate for value. In other words, a person claiming any interest in the estate of the deceased must trace the root of title back to a letter of administration, where the deceased died intestate or probate, where the deceased passed away testate".

"Having considered the above authorities, I find the 1st ground baseless as both parties, the appellant and respondent as well, alleged the land in dispute belonged to their deceased fathers the fact which blessed and bestowed full powers to the Trial Court to deal with the case. The outcome would be otherwise if the probate cases had been total closed, then, subsequent land disputes would properly be resolved in the Land Tribunal. It is my conclusion that the 1st ground is unmeritorious, the same dismissed".

I had an opportunity to read facts in **Mgeni Seif's** case. It is true that the dispute in that case was ownership of land. The issue **Mgeni Seif's** case was who is the rightful successor of the estate of the deceased **Ibrahim**

Athuman Ngude. Ibrahim Athuman Ngude died intestate. This is what the Court of Appeal stated-

"In order to understand the substance of the competing claims over the disputed house between the applicant, and the respondent, we took the trouble of reconstructing the chain of events and salient court decisions leading up to this application for revision. Ultimately, we found that the bone of contention is in essence, who the rightful successor is, to the estate of the deceased Ibrahim Athumani Ngude who died intestate way back in 1952.

On one hand of the dispute the applicant claims that he purchased the house from the two administrators of the estate of the deceased, Jumanne Ngude and Mohamed Ngude.

In **Mgeni Seif's** case, Mgeni Seif's claim was that he bought the disputed land from one of the administrators of the deceased's estate and Mohamed Yahaya Khalfan, the respondent argued that he bought the house from the deceased's son, one, Abdullah Ibrahim Ngude. The Court of Appeal observed that-

" As we already pointed out at the beginning of this judgment, the dispute over the estate of the deceased Ibrahim Athuman Ngude can only be sorted out by a probate and administration court, in this case, the Primary Court of Kariakoo in Probate and Administration Cause No. 15 of 1985.

.....As we have said earlier, where there is a dispute over the estate of the deceased, only the probate and administration court seized of the matter can decide on the ownership. Our decision to intervene by way of revision is fortified by a recent decision of the Court directing what should be done where beneficiaries to an estate of the deceased apply for letters of administration in two different courts”.

It is clear that, the dispute in **Mgeni Seif’s** case, was heirs of the deceased Abraham Athuman Ngude and those who litigated under the same title. No party in **Mgeni Seif’s**, case was litigating on behalf of the estate of Abraham Athuman Ngude.

To put the test into practice, I will answer the first question using the facts in **Mgeni Seif’s**, case. The first question is, had **Abraham Athuman Ngude** been alive would he have sued or defended the suit? The answer is negative. Mgeni Seif claimed to owner of the suit land because he bought it from the administrators of Abraham Athuman Ngude’s estate. Had Abraham Athuman Ngude been alive there would have been no administrators to sell land to Mgeni Seif, hence, there would have been no dispute.

It is also on record that Mohamed Yahaya Athuman was a party in **Mgeni Seif’s**, case because he bought the disputed land from one of Abraham Athuman Ngude’s son. Abraham Athuman Ngude’s son sold the disputed land because his father (Abraham Athuman Ngude) passed away

intestate. Thus, had Abraham Athuman Ngude been alive Mohamed Yahaya Athuman would not have defended the proceedings in **Mgeni Seifu's** case. Consequently, the **Mgeni Seif's** case was a fight to inherit the land property between heirs and those litigating under their title. It was not a suit to protect the estate of Abraham Athuman Ngude.

Back to the facts of this case. I will answer the same question using the facts of this case. The first question is, had Derefa Masanja Machimu been alive would he have instituted the instant suit? Joyce claimed that land in question belonged to their father Derefa Masanja Machimu. After his death in 1970, her mother took over the supervision or the management role until 1989 when she died. She deposed that after the death of her mother, her brother John Derefa Machimu used to license people to cultivate the disputed land. Joyce states-

"Kaka yangu ndiye aliyekuwa anakodisha mashamba sijui alikodisha kwa muda gani?"

.....Tumetoka mwaka 1972 alibakia mama hadi alipofariki na baadaye kaka akawa anaangalia tangu miaka ya 1980".

On the party of Isack, the evidence depicted that Isack's father Stephano Mganga purchased the disputed land in 1991 from John Machimu. He deposed-

" Nijuavyo shamba ni la marehemu Stephano Mganga ambaye alinunua kwa ndugu John Machimu mnamo Novemba.1991...".

The facts showed that Isack's accrued title to the disputed land from John Machimu, one of the deceased's children. Thus, had Derefa Masanja Machimu been alive John Machimu would not have sold his father's land. For that reason, the current dispute would not have ensued. Isack claims interest in the estate by purchase for value from the deceased's son whereas Joyce claims as the administratrix. The facts in the instant case are like facts in **Mgeni Seif's** case.

In **Mgeni Seif's** case, Mgeni Seif alleged he bought the disputed land from the administrators of the deceased's estate. He traced title from the administrators of the deceased's estate. Mohamed Yahaya Khalfani traced his title from the deceased's son. He contended that he purchased the disputed land from deceased's son. The Court of Appeal found that the dispute in **Mgeni Seif's** case was inheritance or probate case. I also, find that the present case was a case between the administrator of the deceased's estate and the deceased's son to whom Isack traces his title.

I find that the probate and administration court had jurisdiction to determine the dispute. The dispute is a result of heirs or people interest in

the estate of the late Derefa Masanja Machimu to take long time to administrate the estate.

Having found that the probate and administration court had jurisdiction, the next question is whether Joyce was entitled to institute a civil suit or lodge a claim in the probate and administration cause file. This issue was not raised and argued. I will not answer the issue. I leave it for next time.

In the end, I find that the trial court had jurisdiction as the issue was inheritance of the disputed land and not who has a better title to the disputed land between Isack and Joyce. Consequently, I find the appeal without merit and proceed to dismiss it. I uphold the decision of the district court and the primary court.

I make no orders as to costs as I find the appeal so vital as it raised a pertinent legal question. I order each party to bear its own costs.

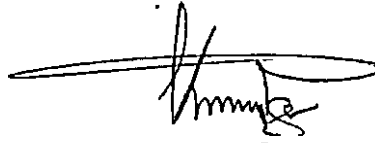
It is ordered accordingly.

Dated at Mwanza, this 12th day of August, 2022



J. R. Kahyoza
Judge

Court: Judgment delivered in the presence of the appellant's advocate, Mr. Stephano John and the respondent in person. B/C Jackline present.

A handwritten signature in black ink, appearing to read 'J. R. Kahyoza', with a long horizontal stroke extending to the left.

J. R. Kahyoza

Judge

12/08/2022