

**IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY
AT MWANZA**

LAND APPEAL NO. 27 OF 2021

(Arising from Judgment of the District Land AND Housing Tribunal for Mwanza at Mwanza
Land Application No. 673 of 2017)

DANIEL DAUD.....APPELALANT

VERSUS

**ABEL KARANI (administrator of Estate
of the Late DAUDI DALUNGI.....RESPONDENT**

JUDGMENT

*Last Order: 27.09.2022
Judgement Date: 05.10.2022*

MASSAM, J.

This appeal arises from Judgment and decree from District Land and Housing Tribunal for Mwanza at Mwanza, in Land Application No. 673 of 2017, dated on 9th April, 2021 before Hon. S. M. Mayeye, Chairman. In that case, the Respondent, who is the administrator of the estate of the late Daudi Dalungi sued the appellant for owning four houses of deceased and build a guest house without consent of his heirs. So, he sued the appellant in order to return the properties to the deceased family. He prayed to the Tribunal to order the administrator to collect and distribute properties of the estate of the deceased to the heirs. Also, he prays for the tribunal to



order the appellant to vacate on the disputed land. Also, the appellant to pay respondent Tshs. 2,000,000/= as costs and disturbance for the loss he got, costs of the case and other reliefs the court will deem fit to grant. At the end of the trial the tribunal allow the prayer and orders prayed by the respondent, that four houses are among the deceased properties which was required to be distributed to all heirs of the deceased, and appellant was ordered to demolish the said guest house which he built on the plot of the deceased. Lastly the tribunal ordered that the plot No. 111 block "A" situated to Hungumalwa, Kwimba District Mwanza with the name of the appellant to be cancelled.

Being aggrieved the appellant lodged the present appeal based on four [4] grounds of appeal as depicted from the petition of Appeal as follows :-

1. That, the Honourable chairman erred both in law and fact in holding that the land in dispute belongs to the Respondent without considering the prior arrangements between the Appellant herein, clan members and the respondent, the arrangements which was latter blessed by the Primary Court Buyogo in respect of an Application for probate and Administration of Estates number 3 of 20211.
2. That, the Honourable chairman erred in law and fact for failure to consider that the clan arrangements between the Appellant and the respondent inclusive, was the one



resulted into the registration of the appellant as the legal owner during land survey by the District Council for Kwimba.

3. That, the Honourable chairman erred in law and fact for ordering vacant possession of the suit land without considering the bonafide improvements effected by the appellant thereon.
4. That, the Honourable chairman erred in law and fact deciding in favour of the respondent without considering evidences on record including documentary evidence to that effect.

When the appeal was called for hearing, Mr. Steven Mhoja advocate appeared for the appellant, whilst Mr. James Njelwa advocate appeared for respondent, this appeal was urged orally.

In arguing of his appeal, he submitted that, his appeal has five grounds of appeal and he will urge ground number 1 and 5 and abandon ground number 2,3, and 4. In submitting ground number 5, which deals with jurisdiction, he submitted that, in the court records the tribunal had no jurisdiction to entertain the prayer prayed. In the prayer number one, the respondent prayed the tribunal to see that, the act of the appellant to refuse to distribute the deceased properties was against the law. The tribunal determined the reliefs and give orders which he did not have jurisdiction by ordering respondent [as administrator of the estate of



decease estate] to collect and distribute the deceased properties to the heirs as reflected for on page number 3 of the tribunal decree. So, the tribunal did divide the deceased properties, the jurisdiction which it does not have. Referring to Section 3[1] of the Land Disputes court Act directs that the tribunal had power to deal with issues concerning with ownership only, that was also as per Section 167 of the Land Act, and section 62 of the village land Act, that the Tribunal cannot deal with the issue of Probate as it did.

The act of tribunal to deal with division of deceased property was purely probate matter which is dealt with other courts, as provided in section 3-6 of the Probate and Administration Act which provides for the court which has jurisdiction to entertain Probate matter. Also, section 18 of Magistrate Court Act Cap 11 RE: 2019 gave jurisdiction of which court is to deal with customary and Islamic law. He added by saying that the issue of jurisdiction is a fundamental so the matter entertained in wrong court make the whole proceedings to be nullity. Insisting, he cited the case of **Shabir Tayabar Essaji vs. Farida Semfondini Esaji**, Civil Appeal No.180/2017 which was held that jurisdiction is a fundamental principle in determining the matter as the matter which is decided by the court which does not have jurisdiction is nullity. So, in this present case, he submitted that the tribunal entertained a Probate case which does not



have jurisdiction, and therefore, he pray this court to quash all proceedings.

Submitting on the ground number 1, he said that the tribunal erred in holding that the disputed land belongs to the respondent without considering the prior arrangement between appellant and clan members and respondent which was later blessed by the Primary Court of Buyogo. He added by submitting that, the clan members blessed the appellant to develop that land, so in case of any misunderstanding they were supposed to return to Buyogo Primary Court which has once dealt with the matter and not to file to another court. So, if the parties have interest in that probate, they were supposed to file it to the probate court. Lastly, he prays this court to quash all proceedings, and set aside all orders and order costs to this case.

Responding to the raised ground of appeal, Mr. James Njelwa advocate for respondent submitted that, in replying to the 1st ground of appeal that the tribunal erred by not considering arrangement which was done by parties with clan members, he said that the tribunal was right as per the evidence testified to the tribunal. He conceded that no witness was brought to prove that there was the said clan arrangement, but this fact are new facts which were brought in this level. Also, the issue of Probate case at Buyogo Primary court, was not discussed in the Tribunal



so it was also a new issue in this court. It is no doubt that the respondent was appointed to be an administrator of the Estate of Daudi Dulungi and that appointment was not contested, also there was no prove that, there was a clan meeting that seat and decide. Referring this court to the case of **Japan International Cooperation Agency [JICA] vs. Khake Co. Ltd** [2006] TLR page 343 CAT, he supports his argument that the court cannot rely in any document which was not tendered to the court as per Order 13 Rule 7[1] of the Civil Procedure Code, Cap. 33 RE: 2019, Also in the case of **Princess Nadia 1998 Ltd vs. Remency Shikusiry Tarimo and 2 others** Civil Appeal No. 242/2018, also referred the case of **Japan International** (Supra). He insisted that, the trial was not erred as no proof was brought before it.

In replying to the ground number 5, that tribunal had no jurisdiction as it dealt with Probate issue, he concedes that the tribunal dealt with relief number two which has no jurisdiction. He avers that, the relief that the administrator to be ordered to collect and distribute the properties of estate of the deceased was not proper. He admitted that the said prayer was not right, as the matter before the District Land and Housing Tribunal was a land dispute and not Probate issue. He added that all five reliefs dealt with land, especially relief number 3, which they pray the tribunal to order eviction to the houses which were situated at Imalanguzo, in



support of section 3[1] of Land Dispute Court Act, and section 167 of Land Act and section 62 of Village Land Act defined what is land dispute. So, the Land and Housing Tribunal, had jurisdiction to deal with that dispute as elaborated in the case of **Olam Tanzania Limited and others vs. Selemani S. Selemani**, consolidated Civil Revision number 2,3,4,5, and 6 of 2010 in page 16 of that judgment, the court of appeal defines land dispute to be any case where a person complain of and aggrieved by an action of another person's or is complained of against an official. Referring to section 2 of the Land Dispute Court Act, cap 216 RE 2019 the administrator did complain the appellant to be in the land which was not his, so that was land dispute.

Again, he said that it was not right for the appellant to submit that the tribunal did distribute deceased properties, as in this case the tribunal was dealing with only one property which is the house, it did not deal with other properties. Referring to the case of **Shabir Tayaban** (supra) which rule out that the court had no jurisdiction, in his opinion he avers that the mentioned case was distinguishable with the present case, as the Tribunal had jurisdiction, so he prays this appeal to be dismissed as it has no merit.

In his rejoinder Mr. Steve Mhoja advocate for appellant submitted that the issue raised is whether the tribunal had jurisdiction to deal and order the administrator to collect and distribute the property of the estate



of deceased, so he prays these proceedings to be quashed and the order to be set aside as the tribunal had no jurisdiction.

I have given careful considered the argument for and against for both learned counsel the central issue for determination was **whether the trial court had jurisdiction to entertain the matter.**

This court found out that it is settled law that the court been the appellate court, has a duty to re-evaluate the evidence so as to come with the just decision. Also, in the issue of jurisdiction which was raised by the counsel for the appellant that the trial court entertain the issue of the Probate while it has no jurisdiction, under section 3[1] of the Land Disputes Court Act gives power to the Tribunal to deal with the issue of ownership only. In perusal of the trial tribunal records, and looking to the application which was brought to the tribunal the respondent prays for 6 [six] reliefs to the tribunal. In the second relief, the applicant prayed for the tribunal to order the respondent as an administrator, to collect and distribute properties of deceased to the heirs and on the 1st relief the applicant prays the order of the tribunal to declare that the act of the appellant to refuse to distribute the deceased property was against the law. The last relief which is number three, the applicant prays for the order of eviction to the appellant in the disputed land, and declare it to be the property of the deceased, in order to be collected and be under



the administration of respondent, this court found out that, the all mentioned reliefs were supposed to be dealt by the probate court which appointed the respondent as administrator as it had jurisdiction to deal with that reliefs, so the trial tribunal did entertain and grants the reliefs sought without having the jurisdiction.

This court is aware that it is settled that, jurisdiction of any court is basic it goes to the very root of the authority of the court to adjudicate upon cases of different nature. The question of jurisdiction is fundamental that courts must as a matter of practise on the face of it be certain and assured of their jurisdictional position at commencement of the trial, so it is risky and unsafe for the court to proceed on the assumption that the court has jurisdiction to adjudicate upon the case. In the case of **Shyam Thanki and others vs. New Place Hotel** [1972] HCD No. 92 it held that, all courts in Tanzania are created by statutes and their jurisdiction is purely statutory, it is elementary principle of law that parties cannot by consent give a court jurisdiction which it does not possess.

In determining whether the matter was probate or not, this court found out that, there is no doubt that the disputed land belongs to the late Daudi Dalungi, and there is no doubt that the disputed land is not yet distributed. Also, it is not disputed that the respondent was appointed as an administrator of the estate of the late Daudi Dalungi, so this shows



very clear that the land in dispute is still under the estate of the late Daudi Dalungi and the respondent being administrator has not yet performed his duties of distributing the same to the beneficiaries as per requirement of Rule 5 of the 5th schedule of Magistrates Court Act Cap 11 RE: 2019.

So, this court is of considered position that since the land in dispute is still under administration of the estate of the late Daudi Dalungi, and Probate Cause No. 3 of 2011 at Buyogo Primary Court yet to be concluded, the District Land and Housing Tribunal for Mwanza had no jurisdiction to entertain the matter. In **Mgeni Seif vs. Mohamed Yahya Khalfan** Civil Appeal No. 1 of 2009 [CAT] at Dare es salaam the court held that: -

"...when there is dispute over the estate of the deceased only probate and administration court seized of the matter can decide on the ownership"

So according to the above decision this present case was required to be dealt by Probate and Administration Court and not the District Land and Housing Tribunal as it did. According to the above reasons, I find this appeal has merit and it is hereby allowed. Consequently, the judgment and decree of the District Land and Housing Tribunal is quashed and set aside Orders respectively. The pending Probate Cause No. 3/2011 before Buyogo Primary Court should be concluded in accordance with the law



applicable. According to the nature of the case and relationship between parties to be relatives, I give no orders as to costs.

It is so ordered.

DATED at **MWANZA** this 5th day of October, 2022.




R.B. MASSAM
JUDGE
05/10/2022

COURT: Judgment delivered on 05th day of October 2022 in the absence of the appellant and in the presence of the respondent.


R.B. MASSAM
JUDGE
05/10/2022