THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA SUB-REGISTRY

AT MBEYA

LAND APPEAL NO. 53 OF 2023

(From the District Land and Housing Tribunal for Mbeya at Mbeya in Land Application No. 127 of 2016)

HILDER GEORGE CHELELO.....APPELLANT

VERSUS

ADAM AMBELE KYANDO (Administrator of Estates of the Late Jane Chelelo Chilundikwa)**.....RESPONDENT**

JUDGMENT

Date of Last Order: 15/12/2023
Date of Judgment: 19/03/2024

NDUNGURU, J.

The appellant, Hilder George Chelelo is challenging the decision of the District Land and Housing Tribunal for Mbeya at Mbeya (the trial Tribunal) rendered in land application No. 127 of 2016. In that case the appellant sued Adam Ambele Kyando, as administrator of the estates of the late Jane Chelelo Chilundikwa (the respondent) for landed property namely, house in Plot No. 25 Block "J" JAKARANDA area in the City of Mbeya with Certificate Title No. 12509 MBYLR (hereinafter referred to as the suit premises).

In that case the appellant sued the respondent claiming that he had been disturbing her that the suit premises is forming estates of the late Jane Chelelo Chilundikwaa (henceforth the deceased) while the said deceased gave her the same premises as a gift before her death. The appellant thus, prayed before the trial Tribunal for declaration order that she is the lawful owner of the suit premises, the respondent be ordered to pay general damages, any other relief(s) the tribunal might deem fit to grant and costs.

In turn the respondent denied the claims, he averred that the suit property was owned by the deceased thus forming her estates. Further that the purported deed of gift retained by the appellant/applicant was questionable as it was thumbed while the deceased knew how to write and that the transfer of the title was also questionable.

Having heard evidence of both parties, the trial Tribunal found that the appellant failed to make her case, it held that the purported deed of gift and the transfer of ownership from the deceased's name into the appellant's name was dubious. It thus, ordered the suit premises to form estates of the deceased as prayed by the respondent. It also declared the transfer of title certificate from the deceased's name into the appellant a nullity.

Dissatisfied, the appellant is before this court with the instant appeal raising eight grounds of appeal as follows:

1. *The trial tribunal erred in law by pronouncing that the disputed house is under the administrator of the deceased while it has no jurisdiction over matters of probate and administration of estates.*
2. *That the trial tribunal erred in law and fact to challenge the wishes of the deceased to give as the gift the disputed land to the appellant in the consideration of natural love and affection.*
3. *That the trial tribunal erred in law and fact when ignored the deed of gift which was addressed to the appellant from the owner of the house.*
4. *That the trial tribunal erred in law and fact in raising unrealistic assumptions about the authenticity of the deed of gift.*
5. *That the trial tribunal erred in law and fact to declare that the house in dispute form part of the estate of the late Jenne Chilundikwa while that house belong to the appellant vide a gift deed of 01-01-2001.*
6. *That the trial tribunal erred in law and fact to hold that the deed of gift was forged while there is no any expert witness who testified about the legality of the document.*

7. *That the trial tribunal erred in law and fact when it failed to take into consideration the relevant issue raised during trial instead it raised new irrelevant issues in its judgment.*
8. *That the trial tribunal erred in pronouncing the judgment by basing on the opinion of one assessor.*

Basing on the foregone grounds of appeal she prayed for the judgment of the trial Tribunal to be quashed and set aside.

From the above complaints, the major issue for determination is whether the appeal is meritorious.

The appeal was argued by way of written submission. Ms. Cesilia Luhanga, learned advocate represented the appellant while Mr. James Kyando appeared for the respondent.

Supporting the appeal, on the 1st ground, Ms. Luhanga faulted the trial Tribunal for declaring suit premises to form the estates of the deceased. She argued that the trial Tribunal had no jurisdiction over probate and administration of estates. That, it is only a probate and administration court seized with jurisdiction which can entertain disputes over the estates of the deceased. To reinforce her submission, she cited the cases of **Mgeni Seif vs Mohamed Yahya Khalfani** Civil Application No. 1 of 2019 CAT Dar es Salaam, **Julius Joseph Mihayo vs Abel Ngeleja,** Land Appeal No. 21 of 2021 HCT.

In reply, regarding the 1st ground of appeal, Mr. Kyando supported the decision of the trial Tribunal. He argued that the appellant's counsel argument is an afterthought. He reasoned that the appellant was the one who instituted the application after being revoked by the Primary Court in administration cause No. 119 of 2003 in which she sought with the view of apportioning herself the suit premises. Also, that the application, the subject of this appeal was instituted in the trial Tribunal by the appellant having knowledge that in administration cause No. 119 of 2003 she was ordered to handle the disputed premises to the appointed administrator of the deceased estates. Thus, that the suit could not be pressed back to the probate and administration court while the appellant did not claim to have acquired it through administration process.

Rejoining to this very ground, Ms. Luhanga averred that Mr. Kyando contention intends to mislead this court and lead to miscarriage of justice, so insisted that dispute over estate of the deceased, it is probate and administration court which is clothed with jurisdiction.

At this juncture, the issue to be resolved is whether the trial Tribunal had jurisdiction to entertain the case. It is worthy to not at the outset that, the appellant instituted the application which is the subject of this appeal as the owner of the suit premises claiming that she

acquired from the deceased as a gift. The appellant thus did not claim the suit premises under the prosses of inheritance. But the respondent was sued under his capacity of administrator of the estates of the deceased.

In the given facts, the question arises, which court between the probate and administration court that the Primary Court of Mbeya District at Urban which granted letters of administration to the respondent and the trial Tribunal had jurisdiction over the matter.

The basis for determination of this issue is the Court of Appeal of Tanzania decision in the case of **Mgeni Sefue vs Mohamed Yahya Khalfani** (supra) where it was essentially held that where there are competing claims over deceased person's estate, only a probate and administration court can explain how the deceased person's estates passed on to a beneficiary or a *bona fide* purchaser of the estate for value.

By that holding, it is clear that when the dispute over the estate of the deceased involves beneficiary of the estates or a purchaser of the estate then a probate and administration court has jurisdiction to determine and explain on the dispute.

Again, worthy to note in the **Mgeni Sefue case** is, the issue which led to the holding of the Court was purely administration of

estates as there was dispute whether administrators had been appointed and if were the ones who sold the disputed premises.

In the case at hand, however, the appellant claimed to have been given the suit premises by the deceased before she passed on. And the appellant sued the respondent urging the trial Tribunal to decide on the ownership of the suit premises.

Moreover, it appears that the appellant had previously delt with the suit premises as administrator. But, she was later on revoked and she did not challenge the revocation order. Instead, she filed the application in the trial Tribunal seeking to be declared as lawful owner of the suit premises claiming to have acquired it by deed of gift. This case, therefore, is not a dispute over the estates of the deceased *per se*, rather ownership between the appellant who claims to own the suit premises by way of gift from the deceased and the administrator of the deceased's estate.

In the circumstances, nothing had to be determined by the probate and administration court. As the result, the trial Tribunal committed no error when it entertained the matter since it is the court with competent jurisdiction to resolve dispute over interest on land as per the Land Act, Cap. 113 R.E 2019, the Village Land Act, Cap.114 R.E

2019 and the Land Disputes Courts Act, Cap. 216 R.E 2019. The pertinent ground of appeal is thus dismissed.

Now, reverting to the other grounds of appeal. Ms. Luhanga combined the 2nd and 3rd grounds and argued them together that, the trial Tribunal challenged the deed of gift without considering the evidence on record and without assigning reasons. She was also of the view that the trial Tribunal failed to consider the evidence of the witness who witnessed the deed of gift.

On the 4th ground of appeal, the submission essentially related to the arguments in the 2nd and 3rd grounds. She contended that the trial tribunal raised unrealistic assumption over the authenticity of the deed of gift. According to her the trial Tribunal would have taken into consideration of section 99 (1) of the Evidence Act, Cap. 6 R.E 2022. Also that, trial Tribunal is not seized with criminal jurisdiction since determining the issue of forgery of the deed of gift was as good as entertaining criminal case which is not powers vested to it under the Land Disputes Court Act, Cap. 216 RE 2019.

On the 5th ground, Ms Luhanga faulted the trial Tribunal for failure to consider the deed of gift which the appellant adduced instead relied on the evidence of the respondent who testified that the appellant was revoked from administration of the estates of the deceased. That, it

would have noted that the revocation had nothing to do with deed of gift as the appellant was not part to the estates.

Responding to those complaints in grounds 2, 3, 4 and 5, Mr. Kyando supported the decision of the trial Tribunal which ignored the deed of gift. He contended that the evidence adduced by the parties revealed that the deceased never bequeathed the suit property by way of gift instead it was shown that the appellant acquired it through probate and administration process of which was revoked.

Also, Mr. Kyando argued that had the deed of gift being valid, the appellant would have transferred ownership of the suit premises through that means, nonetheless, witness (SU4) testified that the transfer was effected by the appellant through administration processes. He went further arguing that since there was evidence from the respondent side that the deceased forwarded the original Certificate of Title with No.141 DLR to his brother at Makambako, then the allegation by the appellant about the deed of gift was not supported. In his view, the appellant would have been given a deed of gift and the Certificate of Title all together. Mr. Kyando was insistent that the trial Tribunal was justified to hold that the purported deed of gift was forged.

I have considered the submission of either side. They are contending on evaluation of evidence adduced in the trial Tribunal. In its

evaluation of evidence the trial Tribunal was resolving single issue of whether the applicant/appellant was given the suit premises by way of gift. In that regard, in resolving such factual issue, a guiding principle is that of whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist; section 110 (1) of the Evidence Act, Cap. 6 R.E 2022. Also, in civil cases the standard of proof is on the preponderance of probabilities.

The Court of Appeal of Tanzania had an opportunity to elaborate at to what proof preponderance of probabilities entail in the case **Ernest Sebastian Mbele vs Sebastian Sebastian Mbele & Others** (Civil Appeal 66 of 2019) [2021] TZCA 168 (4 May 2021) it said:

> *"Proof on a preponderance of probabilities was well explained by the Supreme Court of India, and we seek inspiration, in the case of* ***Narayan Ganesh Dastane v. Sucheta Nayaran Dastane*** *(1975) AIR (SC) 1534 that: - "The normal rule which governs civil proceedings is that a fact can be said to be established if it is proved by a preponderance of probabilities. This is for the reason that* ***...a fact is said to be proved when the court either***

believes it to exist or considers its existence so probable that a prudent man ought to act upon the supposition that it exists. *A prudent man faced with conflicting probabilities concerning a fact situation will act on the supposition that the fact exists, if on weighing the various probabilities he finds that the preponderance is in favour of the existence of the particular fact. As a prudent man so the court applies this test for finding whether a fact in issue can be said to be proved. The first step in this process is to fix the probabilities, the second to weigh them, though the two may often intermingle. The impossible is weeded out at the first stage, the improbable at the second. Within the wide range, of probabilities the court has often a difficult choice to make but it is this choice which ultimately determines where the preponderance of probabilities lies."*

Deducing from the above, I have now, to consider if the appellant managed to prove her case that she was given the suit premises by the deceased as a gift. And in doing so there is no possibility of leaving aside the deed of gift which is alleged to be an instrument used in the

said gift giving. I say so because the appellant has complained why the trial Tribunal challenged the deed of gift while it was not at issue.

The appellant gave as (SM4) that from her childhood she lived with the deceased as her mother. That on 1/1/2000 the deceased give the suit premises as a gift and she tendered the same as exhibit P1. That she continued using the suit property and in 2008 she made transfer from the deceased' name into her name.

The appellant had two witnesses Joseph Paul Mwambapa (PW1) and Joel Homel Mwakyusa (PW2). They testified that they are neighbours to the appellant and so to the deceased. That PW1 witnessed when the appellant was given the suit premises as gift. On his side PW2 said that he was called by the deceased and told that when she dies the suit premises should be the property of the appellant. Then that when he was away, he was phoned and told that the deceased has given the suit premises to the appellant as a gift at the office of Mbeya council.

Whether this piece of evidence proved that the appellant was given the suit premises as gift. I think not for the following reasons. One, there was evidence from the respondent's by (SU3) that before the death of the deceased she gave him original Certificate of Title to take it to one Zabron at Makambako as the deceased was scared by the

appellant's unfaithfulness. Two, the appellant told the trial Tribunal that she did not know if the deceased had relatives while when she was cross-examined she said she knew the deceased' relatives including the said Zabron and others like the respondent, SU2 and SU3.

Three, another disturbing fact is the appellant when she was seeking for transfer of the title from the deceased name to her. According to SM4 the appellant told the office of Registrar of Titles that the original title deed had lost and it was so published with the view of giving a copy to the appellant while it was tendered by the respondent's witness to the effect that the same was to the appellant's relative at Makambako and the appellant had once went there asking for the same.

Four, there was contradicting evidence between PW1 and the appellant regarding presence of the appellant at the place of attesting the deed of gift. The appellant when cross examined said that she did not attend when the deed was attested as she remained outside the office while PW1 said that the appellant remained at home and it was him, the donor (the deceased) and one wife of Kajigili. Such contradiction in view goes to the root of the matter as it creates doubt if really there was signing of the deed of gift.

Five, there were statements given by PW1 which rendered his credibility questionable. PW1 in his testimony said that the deceased had

no relatives than the appellant. It was also indicated that he gave very evidence before the Primary Court when the appellant petitioned for letters of administration, but when he was cross examined he changed and said that he knew some relatives of the deceased at the day of mourning of the deceased. And when asked if he knew one Zabron at Makambako he admitted.

Six, the appellant stated in her testimonies that she noticed that title deed has be lost in 2001 but the report of loss was given in 2008 after seven years when she was in the process of transferring the certificate of title. And, it was alleged that the gift was given to the appellant in 2000 while PW1 said in 2001 but it took seven years, that is until 2008 when transfer was effected. The disturbing question is why the appellant remained all that long to effect transfer while she knew since 2002 when the deceased passed on that her relatives claimed the same suit land.

Seven, PW1 said that he was orally told by the deceased that in case of her death the premises will be a property of the appellant. But this kind of evidence was not adduced by any other witness. And it is not understood if the said statement means giving as a gift or an oral Will.

All these, and considering that the appellant did not include in her pleadings that the original Certificate of title had lost and did not state so in her evidence in chief than introducing during cross examination had left much to be desired. Had the appellant introduced that fact in her pleadings this Court would have considered that her relatives might have stolen the original title deed. But stating so in cross examination was an afterthought which creates doubt makes this court believe that indeed the deed of gift was dubious as it was held by the trial Tribunal. In the circumstance, I do not find any reason to fault the complained decision of the trial Tribunal. I thus, dismiss the complaints.

As to the 6th ground of appeal, Ms. Luhanga submitted that section 47 of the Evidence Act requires an expert possessing knowledge about hand writing or finger print to clarify on the authenticity of the document. That the trial Tribunal erred when it relied on words of mouth of the respondent and his witnesses in discrediting the deed of gift.

Submitting on the 7th ground of appeal she contended that the trial tribunal made a decision basing on irrelevant issue of validity of the deed of gift instead of resolving the issue of whether the deceased gave a suit land to the appellant as a gift. Ms. Luhanga based her argument on the case of **Rugaba Kasusura & Another vs. Phares Kabuje**

[1982] TLR 338 where it was said that a judgment leaving contested material issues of facts unresolved is fatally defective.

In reply, about the 6th grounds Mr Kyando submitted that the trial Tribunal was right to question the authenticity of the deed of gift as it bears material differences such as it was shown on the original Certificate of Title that the deceased known as JENNE CHILUNDIKA and she knew how to write her name but in the deed it was named as JENE CHELELO SANGA CHILUNDIKA and attested by finger prints. That it was executed on 1/1/2001 before a state attorney in a Public office while it was a public holiday and that transfer of ownership was not effected after grant of gift but it came to be transferred by the appellant herself and after a long time to laps without any justification of the delay and all those discrepancies.

As to the complaint that the trial Tribunal assumed powers to decide forgery of the document Mr. Kyando argued that it is right, forgery to be determined in civil case as long as the standard of proof required is higher than that of in civil cases which is to the balance of probability. He substantiated his stance with the case of **Omary Yusuph vs Rahma Ahmed Abdulkadr** (1987) TLR 169 and **Ratilal Gordhanbhai Patel vs Lalji Makanji** (1957) EA 314. Also Mr. Kyando

challenged the application of section 47 of the evidence Act in the circumstances of the present case.

I do not see anything disturbing in the impugned decision to warrant much arguments. Having read the evidence adduced before the trial Tribunal and the reasoning in the impugned judgment, I am of concerted view that, determination of validity of deed of gift was in the course of determining whether the deceased gave the suit land as a gift to the appellant. The claimed gift would not have been effectively resolved without looking at the deed of gift. It is like determining the issue whether there was contract without looking at the written contract where the same is adduced as evidence. In the circumstance, I find no error committed by the trial Tribunal for looking at the validity of the deed of gift since the claim by the appellant based on that document.

The complaint that forgery cannot be looked at in civil cases it is a misconception of law by the learned counsel for the appellant. As correctly argued by Mr. Kyando, forgery can be determined in both civil and criminal case. See, **Omary Yusuph vs Rahma Ahmed Abdulkadr** (supra). Grounds 6 and 7 therefore, are lacking in merit.

Regarding the 8th ground of appeal, Ms. Luhanga contended that the trial Tribunal based its decision on the opinion of one assessor whom her opinion was not recorded in the proceedings which is contrary

section 23 (1) and (2) of Cap. 216 which requires assessors to give their opinion before delivering judgment. She substantiated her contention with the decision in the case of **Tubone Mwambeta vs. Mbeya City Council**, Civil Appeal No. 287 of 2017. On the bases of the those law she prayed for this court to quash and set aside the trial tribunal's judgment and any relief this court may deem fit and just.

Responding to the 8th ground, Mr Kyndo contended that the complained procedure was adhered to by the trial Tribunal as the record indicates prefaces. He thus prayed that the appeal be dismissed with costs.

Indeed, as rightly argued by Mr. Kyando. The complaint by counsel for the appellant is misconception of the principle set in the **Tubone Mwambeta case**, in which the proceedings did not indicate if the chairman invited assessors to give their opinion as per the requirement of the law. In this matter the proceedings are clear that on 27/2/2023 after closure of defence evidence the Chairman set a date for assessor to prepare and avail his opinion which was to be on 9/3/2023 and it was actually read and the chairman went further by recording it in the proceedings and the written opinion is also on the record at the back of the file. His complaint is thus unmaintainable. I dismiss it.

In the end I find the appeal lacking in merit to its entirety. I thus, dismiss it with costs.

It is so ordered.

D. B. NDUNGURU

JUDGE

19/03/2024