IN THE HIGH COURT OF TANZANIA

LAND DIVISION

AT SUMBAWANGA

LAND APPEAL NO. 27 OF 2019

(From the Decision of the District Land and Housing Tribunal of Rukwa District at Sumbawanga in Land Case No. 29 of 2016)

STIVIN S/O KANDAWILE.....APPELLANT

VERSUS

REVOCATUS S/O MWANAMYOTO
LADISLAUS LEONARD SONKWE } **.....RESPONDENTS**

JUDGEMENT

30th April – 21st May, 2020

MRANGO, J

This is an appeal against the judgement and decree of the District Land and Housing Tribunal for Rukwa (henceforth the trial tribunal) in application No. 29 of 2016 which delivered on 29. 08. 2019. The appellant along with 2nd respondent herein were sued by the 1st respondent herein at the trial tribunal over the ownership of the disputed house. The 1st respondent was declared the rightful owner of the disputed house by the trial tribunal.

Aggrieved by the trial tribunal decision, the appellant has preferred this appeal by lodging the following grounds of appeal;

1. That the trial tribunal erred in law and fact by determining the matter which was re judicata and hence reached to a wrong decision.
2. That the trial tribunal erred in law and fact by determining the matter without having requisite jurisdiction
3. That the trial tribunal proceedings are vitiated for lack of necessary party in the proceedings

As this appeal was called on for hearing, the appellant was represented by Mr. Mussa Lwila – learned advocate, whilst 1st respondent had a legal service of Mr. Peter Kamyalile – learned advocate and the 2nd respondent appeared in person, unrepresented. The 2nd respondent prayed to this court to argue the appeal by way of written submissions whereas both learned advocates for the appellant and 1st respondent conceded. This court set a date for each to file submission, therefore each filed respective submission as scheduled.

Arguing in support of his appeal, Mr. Deogratius Sanga – learned advocate for the appellant said the 1st respondent herein successfully sued the appellant (the administrator of estates of the late James Kandawa in whose estate the disputed land follows and which was declared by the probate court appointed the respondent to be part of the said estates) together with the 2nd respondent in District Land and Housing Tribunal for Rukwa "herein referred to as the trial tribunal".

Being aggrieved and dissatisfied with the decision of the trial tribunal, the appellant appealed to this court against the whole of said decision together with its subsequent decree and orders on three namely grounds, 1st, that the trial tribunal erred in law and fact in determining the matter which is *res judicata* and hence reached to a wrong decision, 2nd , that the trial tribunal erred in law and fact by determining the matter without having requisite jurisdiction and 3rd , that the trial tribunal proceedings are vitiated for the lack of necessary party in the proceedings.

Mr. Sanga informed this court that he wished to submit 1st and 2nd grounds of appeal jointly and 3rd ground separately as hereunder;

Regarding the 1st and 2nd grounds of appeal, it is his submission that the trial tribunal erred in law and fact in determining the matter which was *res judicata* and without having requisite jurisdiction over the same basing on reasons he explained hereunder;

i. It is clear and the requirement of the law under **section 9 of the Civil Procedure Code, Cap 33 RE 2019** "the CPC" that no court (including the trial tribunal) should try any suit or issue in which the matter in issue is the same to the previous instituted suit by either the same parties or between parties under whom they or any of them claiming litigating under the same title and same has been determined to its finality either by the same court or any other court with competent jurisdiction over such a matter and or issue in concern.

ii. Again it is not disputed that the disputed house was the house of the late James Kandawa whom the appellant is the administrator of his estates and that the disputed house follows under such estates and that the same has never been transferred to any one save to the appellant by virtues of being the administrator of the said estates.

This is said to be considering the unchallenged evidence of the appellant in the records of the trial tribunal to that regard which was further supported with the sworn testimony of the 1st respondent before the trial tribunal as seen at page 5 paragraph one of the trial tribunal's proceedings where the 1st respondent stated the following, he quoted;

> "I am 63 years old. The house disputed for is at Kirando and I am an in dangerous at Kirando. **Later on I came to know that the house was property of the late James Kandawile. I want the 1st respondent to return my money**" [emphasis is mine]

He further submitted that on top to the foregoing the issue of ownership of the disputed house was determined by the Sumbawanga Urban Primary Court the probate court which was also maintained by Sumbawanga District Court in Misc. Civil Application No. 25 of 2012 to the effect that the said house is falling under the estate of the late James Kandawa and currently in ownership of the administrator of such estates to

wit: the appellant of which the said decision has never been challenged to date.

He said further to that it was in the knowledge of the 1st respondent while suit before the trial tribunal that issue of ownership of the disputed house had already been determined by the probate court and that is why in whole of his pleadings and evidence he never claimed ownership of the disputed house rather for refund of his money see page 4 and 5 of the trial tribunal proceedings. The disputed house being part of the deceased estate as clearly evidenced, the probate court, Sumbawanga Urban Primary Court which determined the matter at issue inclusive is the court with competent jurisdiction in the circumstance.

iii. Despite of being aware with the requirement under section 9 of the CPC and as per the evidence brought before it and further that the disputed house follows under deceased estates [probate] and that the trial tribunal is not a probate court again the trial tribunal proceeded to determine ownership of the disputed house the issue which is contrary to the principle of res judicata.

Mr. Sanga further argued that by taking into concern the circumstance of this case and be guided with position of the law as cited herein, he humbly invited this court to find merit in his 1st ground of appeal and thus nullify the trial tribunal proceedings for contravening with the principle of res judicata.

He submitted that without prejudice to the foregoing it is his further submission that the house in dispute being declared part of the estates of the deceased [James Kandawa] of whom the appellant is his administrator, the issue of ownership of the same in case it rose as in the circumstance of this case it is only the probate and administration courts seized with jurisdiction to determine the same. This was the position in the case of **Mgeni Seifu versus Mohamed Yahaya Khalfani, Civil Application No. 1 of 2009**, unreported where the court held that, he quoted;

> "As we 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 ownership"

He is of the view that taking the position in afore cited case it is clear and his submission that the spirit of the principle laid by the Court of Appeal in afore cited case was to the effect that no court which is not probate court can determine matter concerning the estates of the deceased like the matter at hand.

He further said it is clear and certain as per law in our jurisdiction that, trial tribunal is neither the probate and administration court nor have jurisdiction to determine probate matters. That being the case therefore he said it is proper to hold that the trial court had no jurisdiction to determine the matter subject to this appeal simple on basis that the same was purely a probate matter and had to be determined by probate courts as it did.

Mr. Sanga said in the circumstance he humbly invited this Honourable court to find merit in his second ground of appeal and according nullify the whole of the trial court proceedings together with its subsequent orders for want of jurisdiction as the same goes to the very merit of the case.

In respect to 3rd ground of appeal he submitted as follows;

i. It is clear in records of the trial tribunal as per the evidence of the parties to be specific the evidence of 2nd respondent herein and the

tendered exhibits alleged to be the sale agreements regarding to the disputed land that prior the disputed land be sold to the 1st respondent by the 2nd respondent, the same was brought from one Mary Mwazembe [alleged wife of the late James Martin Kandawa]. It was the said Mary Mwazembe who sold the disputed land to the 2nd respondent despite of neither being the owner of the said house nor having legal power to that regard.

ii. Again the said Mary Mwazembe (the first seller) was not formed party to the proceedings before the trial tribunal though her name appears at 1st page of the proceedings as among the respondent but without justifiable course she was removed there from and never involved anyhow in the said proceedings despite of the fact that she was the necessary party thereto as the outcome of the case could affect her interest over the disputed house. The interest of the said Mary Mwazembe could have been affected in the circumstance where the trial tribunal could decide the matter contrary to the current decision: say in favour of the appellant, in the premises the said was Mary Mwazembe was essential required to be joined as party to the proceedings non joinder of her renders the whole of the trial tribunal

vitiated. That was the position in the case of **Juma B. Kadala versus Laurent Mnkande, 1983 TLR 10** in which among other this court held the following, he quoted

> "In a suit for recovery of land sold to a third party, the buyer should be joined with the seller as a necessary party defendant non joinder will be fatal to the proceedings...."

Also, the same position was held in the case of **National Housing Corporation vs. Tanzania Shoe Company & Others, [1995] TLR**, where it was held that he quoted;

> "Since the trial commenced and continued in the absence of the necessary party proceeded without the authority and that constituted the major defect which went to the root of the trial thus rendering the proceedings null and void"

Considering the position of the law in the cited case law he humbly invited this court to find the trial tribunal proceedings vitiated and thus be nullified.

He further submitted that it is well within his knowledge that the issue of non-joinder is the creature of the CPC but it is his submission that the same is applicable in circumstance of his case under the virtues of **section 51 (2) of the Land Disputes Courts Act, 2002** as there is lacuna in the respective issue and the said provision allows the use of the CPC in the circumstance.

Moreover and without prejudice to the generality of what have been submitted herein above, it is his prayer under **Order xxxix Rule 2 of the CPC** this court to deem fit and just to be granted with leave to address one more serious irregularity observed in the trial proceedings and judgement which was not pointed out in his memorandum of appeal and accordingly consider it in its determination to wit: the trial tribunal erroneously failed to accommodate properly and legally the assessor's opinion in its proceedings, the act which renders the whole of its proceedings a nullity.

That is said so to be as the assessors were not accorded with the opportunity to give their opinion in regard with the matter (the case subject to this instant appeal). Despite that they formed part to the tribunal as required under the law and the awareness of the chairman as to

the existence of **section 23 (1) and (2) of the Land Disputes Court Act, Cap 216 RE 2002** herein after to be referred as the Act and **Regulation 19 (1) and (2) of the Land Disputes Courts (The Land and Housing Tribunal) Regulations, 2003.** This is said to be so it is clear to the proceedings of the tribunal itself, nowhere in the proceedings shows that neither the said assessors gave their opinion nor their opinion availed and read in the presence of the parties.

Despite the fact that assessors opinion were not properly accommodated, not being availed and read to the parties nor even featured in records of the proceedings as required under the law, the chairman without any good cause, assumed the same by reading her acknowledgement in the judgement, the act which amount to procedural error and vitiate the whole of the proceedings. This vitiates the entire proceedings of the trial tribunal and the same deserves to be nullified.

This was also the position of the court of appeal in the case of **Sikuzani Said Magambo & Another vs. Mohamed Roble, Civil Appeal No. 197 of 2018** at Dodoma, unreported at pg. 9, 10 and 11 where interlia held, he quoted;

"Therefore in our own considered view, it is unsafe to assume the opinion of the assessors which is not on record by merely reading the acknowledgement of the chairman in the judgement. In the circumstance we are of the considered view that, assessors did not give any opinion for consideration in preparation of the tribunal's judgement and this was a serious irregularity"

Taking in concern the serious irregularities seen to have been done by the chairman as submitted herein, while guided with the provision of the law they cited, he humbly prayed to find the whole of the tribunal proceedings vitiated and thus found whole of its findings nullity and therefore accordingly nullify its entire proceeding.

In the upshot and by taking into concern and properly be guided with the binding position of the law and case laws cited above he humbly invited this court to find the trial tribunal decision lacks merit and accordingly allow his appeal by nullifying the whole of its proceedings, quashing the decision and set aside its subsequent orders with costs.

In reply, learned advocate for the 1st respondent and 2nd respondent Mr. Peter Kamyalile in rebuttal replied that the instant appeal is lacking merit and should be dismissed with cost for the following reason which he begged to submit as follows:-

In reply to ground one of the appeal, he argued that it is a trite of the law that before the doctrine of *res judicata* is applied the following essential elements must be shown to exist: First, that the judicial decision was pronounced by a court of competent jurisdiction. Second, that the subject matter and the issues decided are substantially the same as the issues in the subsequent suit, Third, that the judicial decision was final, and Lastly, that it was in respect of the same parties litigating under same title.

He said the above position was laid in the case of **Gerald Chuchuba versus Rector, Itaga Seminary [2002] TLR 213**, where it was held that:-

> "Before the doctrine of res judicata is applied the following essential elements must be shown to exist: that the judicial decision was pronounced by a court of competent jurisdiction, that the subject matter and the issues decided

are substantially the same as the issues in the subsequent suit, that the judicial decision was final, and that it was in respect of the same parties litigating under same title;"

He further argued that it is the principle of the law that for the doctrine of *res judicata* to be ascertained or proved the previous judgment must be provided to the trial Court. This position was laid down in the case of **Nasibu Bahati Mwasote** (Administrator of the Estate of the Late Mbush N. Mwangwale) **versus Obite Ulenje and 2 Others, Land Appeal NO. 32 OF 2019, HC of Tanzania at Mbeya** (Unreported) at page 4-5, where this Court held that:-

"If Willium had won the case then the matter would have been res judicata. However, **the ascertainment of these allegations would have necessitated calling for evidence, particularly documentary evidence by providing the judgment in question."**

He is of the view that the record does not show that the Probate Cause no. 84 of 2012, at Sumbawanga Urban Primary Court was tendered/produced in Court as exhibit or for trial tribunal to take judicial

notice, and the said Exhibit D5, the Proceeding of Misc. Civil Application No. 25 of 2012, did not determine the ownership of the disputed land that it falling under the estate of the late James Kandawa.

He went on saying the record show that the parties in the case of Misc. Civil Application No. 25 of 2012, were Mary Mwazembe and Appellant, the 1st and 2nd respondents were not the party and being accorded the rights to be heard. This cannot make the said Misc. Civil Application No. 25 of 2012 res judicata for 1st and 2nd respondents. This is also against the case of **Ibrahimu Kusaga versus Emanuel Mweta [1986] TLR 26** page 30 the Court state that:-

> "I appreciate that **there may be cases where the property of a deceased person may be in dispute**. In such cases **all those interested in determination of the dispute or establishing ownership** may institute proceedings against the Administrator or **the Administrator may sue to establish claim of deceased's property."**

Mr. Kamyalile submitted that the rationale behind providing the previous judgment is to enable the trial court to satisfy itself if essential elements of principle of res judicata are exist on the said judgment as provided under **Section 9 of the Civil Procedure Code, [CAP 33 R.E 2019].**

He further submitted that failure to provide/tender the judgment of Probate Cause No. 84 of 2012, at Sumbawanga Urban Primary Court then the ascertainment whether the matter is res judicata is impossible. Therefore, since the appellant has miserably failed to show how the matter was res judicata hence this ground lacks merits.

In reply to ground two of the appeal, he submitted that according to **Section 3(1) of the Land Dispute Court Act, [CAP 216 R.E 2019]**, provides that every dispute or complaint concerning land shall be instituted in the Court having jurisdiction to determine land disputes in a given area. Under **Section 3(2) of the Land Dispute Court Act, [CAP 216 R.E 2019]**, it provides that the Land Courts are:- The Village Council; The Ward Tribunal; The District Land and Housing Tribunal; The High Court (Land Division); and The Court of Appeal of Tanzania.

He informed the court that the dispute at the District Land and Housing Tribunal was on the ownership of the disputed land by the applicant (now 1st respondent) after purchased the same from 1st respondent (now 2 respondent). Therefore he said this is a pure land case in which its jurisdiction is exclusively vested to the Land Court above.

Mr. Kamyalile submitted that the case of **Mgeni Seifu versus Mohamed Yahya Khalfani, Civil Application No. 1 of 2009**, cited is distinguishable to this case on ground that such case emanates from Probate Cause 15 of 1985, at Kariakoo Primary Court. When such case was opened the primary courts in matters of administration of estates had jurisdiction on land matters per case of **Scolastica Benedict versus Martin Benedict [1993] TLR I.**

He further informed the court that the case of **Mgeni Seif** was before the enactment of the **Land Dispute Court Act, [CAP 216 R.E 2019]**, which provide that every dispute or complaint concerning land shall be instituted in the Court having jurisdiction to determine land disputes in a given area.

Since the case of **Mgeni Seifu versus Mohamed Yahya Khalfani, Civil Application No. 1 of 2009** are at variance with **Land Dispute Court Act, [CAP 216 R.E 2019**] hence the case of Mgeni cannot supersede the Land Dispute Court Act, [CAP 216. This position was laid in the case of **National Bank of Commerce versus Jackson Nahimawa Sinzobakwila (1978) LRT No. 39**, where it was held that:-

> "4) Where case law and statute law are at variance, the latter takes precedence' over the former."

He further submitted that the case of **Mgeni Seifu versus Mohamed Yahya Khalfani, Civil Application No. 1 of 2009**, cited is distinguishable to this case on ground that in the present case the disputed Land was not owned by the deceased per exhibit D1, which show that Mary Mwazembe was lawful owner after purchasing the same from Richard Sungula before she sold it to the 2nd respondent per exhibit D2. While on the case of Mgeni Seif there were no dispute that the disputed land was owned by the deceased.

Based on the submission above it is his submission that the trial tribunal was vested with jurisdiction to determine the case hence this ground lack merit.

In reply to ground three of the appeal he submitted as follows.

The application shows that the said Mary Mwazembe was sued by the 1st respondent, as the co-respondent with the 2nd respondent. Hence the proceedings of the Trial Tribunal is not fatal.

He said, he is aware that the issue of non-joinder of parties is the creature of **Civil Procedure Code, [CAP 33 R.E 2019]**. However, it is the trite of the law that all objections on the ground of non-joinder or misjoinder of parties shall be taken at the earliest possible opportunity when issues are settled, at or before such settlement failure to raise it at earliest possible shall be deemed to have been waived. Since the appellant did not raise it at earliest possible then such ground cannot be raised at this stage. This is provided under **Order 1 Rule 13 of Civil Procedure Code, [CAP 33 R.E 2019]**, which provide that:-

"All objections on the ground of non-joinder or misjoinder of parties shall be taken at the earliest possible opportunity and, in

all case where issues are settled, at or before such settlement unless the ground of objection has subsequently arisen; and any such objection not so taken shall be deemed to have been waived."

With regard to the issue that the Trial Tribunal failed to accommodate assessor's opinion he submitted as follows.

It is the principle of the law that the precedent cannot applied to the case which has finally determined or decided. The case of **Sikuzani Said Magambo & Another vs. Mohamed Roble**, was decided on 1st day of October, 2019, which the case at the trial Tribunal was decided on 29th day of August, 2019 hence the said principle cannot apply. He finally said based on the submission above and the plethora of relevant authorities pined in, he prayed for the appeal be dismissed with cost because the documentary evidence such as exhibits D1, D2, and D3 proved the ownership of the disputed land by the 1st respondent.

In rejoinder, learned advocate for the appellant herein having gone through the respondent's reply to his submission found it baseless, unsubstantiated and with no merit wished to make a short rejoinder by

reiterating what he has submitted in his submission in chief and further stated as follows:

With regard to first ground of appeal, he submitted that it is trite law that the court can take judicial notice to peruse the correspondence file in the court that associates with the matter at hand. This position was laid down in the case of **Atlantic Electrict LTD Versus Morogoro Region Cooperative Union (1993) TLR 12** at page 20 in which the court provided as follows, he quoted:

> "I ruled out that such information as obtainable in Court records could be taken judicial notice of"

It is clear in records of trial tribunal that the proceedings and ruling of Misc. Civil Application No. 25 of 2012 was produced and admitted thereto and it is in such proceedings where the issue of ownership of the disputed house was determined and declared to be failing under the estates of which the appellant is the administrator as decided by probate court in Probate Cause No. 84 of 2012 was again maintained against the said Mary Mwazembe.

Learned advocate submitted that be it as it may even if the 1st and 2nd respondent was not formed party to the said proceedings in Misc. Civil Application No. 25 of 2012, for they was neither necessary nor interested parties at the time being, the said Mary Mwazembe was joined and the same was decided against her. On top to that it is her who again prior to court's decision, unlawfully sold the disputed house to the 2nd respondent who against sold the same to 1st respondent.

He is of the firm view that the issue/dispute over ownership of the disputed house had been determined prior the sale of the same to the 2nd respondent then to the 1st respondent and proof to that effect was produced during hearing of the matter in the trial tribunal. In the premises the respondent ought to conduct due diligence before buying the same and not claiming ownership at this stage.

He submitted that taking into concern the circumstances herein, it is clear to find that the position in cases cited by counsel for the 1st respondent to wit: the case of **Nasibu Bahati Mwasote** (Administrator of Estate of the late Mbush N. Mwangwale) **Versus Obite Ulenje and 2 Others** and that of **Ibrahim Kusaga Versus Emanuel Mweta [1986]**

TLR 26 is distinguishable in the circumstance since as submitted herein the issue of ownership over the disputed house had already been determined by the court with competent jurisdiction against proper/competent parties and proof to that effect is within the court's records.

Being guided with the provision of **section 9 of the Civil Procedure Code, [Cap 33 R.E. 2019]** together with the substantiated submission herein above, he humbly invited this court to satisfy itself and join hand with him that all the essential elements of the principle of res judicata are met in the circumstance of this case and therefore find merit in his first ground of appeal.

With regard the second ground of appeal, he rejoined that without prejudice to the provisions **of section 3(1) and (2) of the Land Disputes Courts Act, [Cap 216 R.E 2019]** it is trite law in matters of administration of estates, the primary court has jurisdiction to determine ownership of land though it is not among the land courts. This is the position in the cited case of **Scolastica Benedict versus Martin Benedict (1993) TLR I** which was again praised by the Court of Appeal

in the case he cited in his submission in chief to wit. **Mgeni Seifu Versus Mohamed Yahya Khalfani** which come into existence after the enactment of the **Land Disputes Court Act, Act No. 2 of 2002** which provides that, he found it proper to re-quote:

> "As we have earlier, **where there is a dispute over the estate of deceased, only the probate and administration court seized of the matter can decide ownership**"
>
> [Bold is his for emphasis]

He said the records shows clear that, the house in dispute falls under the estates of the of late James Kandawa whose administrator is the appellant herein, which proof of its determination against the said Mary Mwazembe was tendered and admitted by the trial tribunal as Exhibit D5 and after the said determination, the said Mary Mwazembe sold the disputed land to the respondent.

He further said since before being sold to the 2nd respondent then to the 1st respondent, the disputed house was determined to be property of and part to the deceased estates under administration of the appellant, considering the position in the case of **Mgeni Seifu versus Mohamed**

Yahaya Khalfan, the respondents ought to go back to the probate court in case they had any claim over the dispute house and not to the trial court which in essence had no jurisdiction in the circumstances.

He submitted that it is not true as alleged by counsel for the 1st respondent that, the position of the case of **Mgeni Seifu Versus Mohamed Yahya Khalfan** he cited was before the Enactment of the **Land Disputes Courts Act [Cap 216 R.E 2019**). This is said to be so as it is clear and certain that said the **Land Disputes Courts Act [Cap 216 R.E 2019]** was enacted in 2002 and the said case was decided in 2009 which 7 clear years after enactment of the said Law. Thus his misleading averments better be disregarded.

In the premises by considering the position laid in the case cited by the counsel for the 1st respondent to wit; **National Bank of Commerce versus Jackson Nahimawa Sinzobakwila (1978) LRT No. 39**, as it is clear and certain that, the case of **Mgeni Seifu versus Mohamed Yahya Khalfan** he cited in his submission, was made latter to the provision of the law cited, thus he urged this court to take the position of his case as it takes precedence over the provisions of the said law.

Basing on his submission and the position of the authorities cited, he humbly invited this court to find merit in his ground and found that the tribunal had no jurisdiction over the matter.

Regarding to his 3rd ground of appeal, he rejoined that, it is not disputed by the counsel for the 1st respondent, that Mary Mwazembe was a necessary party to the proceedings of the trial tribunal and that, she was properly joined to the said proceedings for it is clear in the proceedings that at the opening of the case the 1st respondent joined her but on the reason that, she was joined by mistake as seen at page two of the proceedings as she prayed the trial tribunal to struck her name off records.

He submitted that the name of the said Mary Mwazembe, being struck out amount to non-joinder and the same renders the entre trial tribunal's proceedings fatal. At the trial tribunal the issue of removing the name of the said Mary Mwazembe was not in control of the appellant for he couldn't know as if the said Mary was a necessary party until the time respondents were giving their evidence. In the premises while aware of the position of **Order 1 Rule 13 of the Civil Procedure Code, [Cap 33 R.E 2019]** he is of the firm view that he has raised the same at the earliest possible

opportunity. He could not raise the same at any time before, because it came to his knowledge when the matter was at defence stage. In the premises he cannot be deemed to have waived the same.

In the upshot he prayed for this court to find merit in his 3rd ground and accordingly nullifying the entire tribunal's proceedings for non-joinder.

Coming to the issue of failure of the trial tribunal to accommodate assessor's opinion, he argued that counsel for the 1st respondent did not dispute that the assessor's opinion was not properly accommodated in the proceedings of the trial tribunal as strictly required in the cited **section 23 (1) and (2) of the Land Disputes Courts Act, Cap 216** together with **Regulation 19 (1) and (2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003**. He is fully aware and not disputing that such omission renders the proceedings nullity.

The counsel for 1st respondent in his submission argued that the position in his cited case of **Sikuzani Said Magambo & Another versus Mohamed Roble** (Supra) is not applicable solely on the reason that, the same was laid down prior to the impugned judgment. What was done in

the said case of **Sikuzani Said Magambo & Another versus Mohamed Roble** was interpreting the **section 23(1) and (2) of the Land Disputes Courts Act, Cap 216 together with Regulation 19 (1) and (2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003** and not bringing the same into force, the position of the said provisions was in force since 2002 and 2003 respectively even before the impugned decision and thus applicable over the same.

He argued that be it as it may even if it is true that, the position in case he cited could have come into existence after the impugned decision but this court can bound itself to the said position since what was done there was strictly interpreting the existing provision of the law which even in absence of the said decision are binding to this court.

In the upshot and basing on his well substantiated submission in support with the cited authority he humbly invited this court to find merit in his appeal by accordingly nullifying the entire proceedings of the trial tribunal with costs.

The crucial question to determine is whether the appeal which is before this court has merit.

The appellant alleged that the present appeal is res judicata as the matter at hand was determined to its finality by both the Sumbawanga Urban Primary Court in Probate Cause No. 84 of 2012 and Misc. Civil Application No. 25 of 2012. Having perused the records of the trial tribunal, this court found that the appellant herein applied for letter of administration at Sumbawanga Urban Primary Court in Probate and Administration cause No. 84 of 2012, the deceased being James Martin Kandawa who said to have died intestate on 12. 06. 2012, the administration was granted by primary court on 24. 08. 2012.

It appears on record that, the administrator of the deceased who is now the appellant herein listed the disputed house among the estate of the deceased. The administrator now appellant eventually evicted Revocatus Mwanamyoto (1st respondent herein) who then was sentenced to four months jail imprisonment for refusing to vacate from the disputed house.

Being the position above, a person namely, Mary j. Mwazembe filed Misc. Civil Application No. 25 of 2012 at District Court of Sumbawanga

being originated from Probate and Administration No. 84/ 2012 of Sumbawanga Urban Primary Court in attempt to oppose the appointment of Stivin Kandawile (the appellant) as administrator. The matter did not go unto the end as the same was dismissed with costs as the applicant (Mary Mwazembe) defaulted appearance and her learned advocate, Mr. Baltazar Chambi withdrew from prosecuting such application. However, my scrutiny into such application the court along with both learned advocates for the applicant and respondent successfully drew suggested issues which were to be resolved by the District Court. Such issues may be used to provide clue on what was the rationale of application by Mary Mwazembe; the issues are quoted as follows;

1. Whether the respondent, knows the property of the administration of the deceased estate.
2. Whether the respondent has discriminated the wife of the deceased.
3. Whether the house listed in the estate of the deceased is not liable for the administration of the deceased estate as the same claimed to be personal property.
4. Whether the applicant is the legal wife of the deceased

5. Whether the respondent is competent to be the administrator of the deceased's estate/ whether the respondent was properly appointed administrator of the deceased's estate.

The issues drawn by the District Court of Sumbawanga as cited above may suggest that the applicant was contesting the appointment of the respondent to the post of the administrator of deceased estate. The records of the trial tribunal show that the applicant who once lived with the deceased for several years before his demise is the one who sold the disputed house to 2nd respondent herein on 07. 10. 2013 (exhibit D2), then 2nd respondent sold the same disputed house to the 1st respondent herein on 05. 02. 2014 (Exhibit D3). Therefore upon being evicted by the order of the Primary Court in Probate and Administration Cause No. 84 of 2012 as hinted upon above, the 1st respondent filed Land Application No. 29 of 2016 at the District Land and Housing Tribunal for Rukwa against the 2nd respondent and the appellant herein claiming to be the rightful buyer of the disputed house of which the trial tribunal granted the application. Dissatisfied, the appellant filed this appeal.

It is crystal clear that the disputed house was listed by the administrator in the estate of the deceased in Probate and Administration Cause No. 84 of 2012 and the same was subject to Misc. Civil Application No. 25 of 2012 filed by Mary Mwazembe (the seller) as aforesaid. Therefore the District Court of Sumbawanga was in a better place to sort out whether the disputed house was personal property or was in the estate of the deceased. Unfortunately, the applicant (Mary Mwazembe) for the reason unknown to this court defaulted appearance in the Misc. Civil Application No. 25 of 2012 which made the court to dismiss the application.

Knowingly that the disputed house was subject to Probate and Administration Cause No. 84 of 2012 Mary Mwazembe proceeded to sell the same to 2nd respondent herein on 07. 10. 2013, and the 2nd respondent thereafter sold to 1st respondent on 05. 02. 2014.

With above in mind, the trial tribunal ought to have not deal with the application. Thus it can be said the District Land and Housing Tribunal erroneously entertained the matter which had originated from Probate and Administration Cause No. 84 of 2012 of the Sumbawanga Urban Primary Court as it has no jurisdiction on the matter.

As the matter now stand, those who have interest in the disputed house which was listed by the administrator as among the estate of the deceased must go back to the Administration Cause No. 84 / 2012 of Sumbawanga Primary Court which is still seized with the administration of the estate of the deceased namely James Kandawa as rightly argued by learned advocate for the appellant and as well as per the case of **Mgeni Seifu versus Mohamed Yahya Khalfan** (supra) as cited.

Let me make it clear that Sumbawanga Urban Primary Court did not determine the issue of the ownership of the disputed house as wrongly argued by the learned advocate for the appellant, what transpired in the administration of the estate in Probate and Administration Cause No. 84 of 2012 is the appointment of the administrator of estate of the deceased. Among the duties and right of the administrator is to collect the properties of the deceased as it was done by the appellant herein to identify and then listed the disputed house among the estate of the deceased.

Therefore the issue of *res judicata* does not apply in the circumstance of this case as the matter is still in the hand of the Probate Court.

For the foregoing reason, I sustain the ground that the trial tribunal had no jurisdiction to entertain the application and I therefore nullify the judgement and proceedings of the trial tribunal. I see no need to discuss the remaining grounds of appeal. The appeal is allowed without costs.

Order accordingly

D. E. MRANGO

JUDGE

21. 05. 2020

Date - 21.05.2020

Coram - Hon. D.E. Mrango – J.

Appellant - Present & represented by Mr. Deogratius Sanga – Adv.

1st Respondent } - Present

2nd Respondent }

B/C - Mr. A.K. Sichilima – SRMA

COURT: Judgment delivered today the 21st day of May, 2020 in presence of the Appellant, Mr. Deogratius Sanga – Advocate for the Appellant, the Respondents and Mr. Peter Kamyalile – Advocate for the 1st Respondent.

Right of appeal explained.

D.E. MRANGO

JUDGE

21.05.2020