

IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM
LAND CASE NO. 201 OF 2020

PHILLIP MLAY (As Administrator of the Estate
of the late **ANNA FOCUS MLAY**) **PLAINTIFF**

VERSUS

STANBIC BANK TANZANIA LIMITED **1ST DEFENDANT**
DOREEN HURUMA MAWOLE **2ND DEFENDANT**
SENSITIVE AUCTION MART
& COURT BROKER **3RD DEFENDANT**

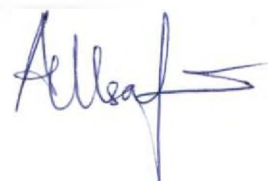
RULING

Date of Last Order: 23/08/2021 &
Date of Ruling: 13/09/2021

MSAFIRI, J

In response to the plaintiff's Complaint through the Written Statement of Defence, the 1st defendant on 21st January 2021 advanced six points of preliminary objection to the effect that:

1. *The case is incurably defective for misjoinder of the cause of action and misjoinder of parties;*
2. *The claim on registration of the title to the suit land is incompetent for being brought contrary to the law and the same is time barred;*
3. *The suit is incompetent for non-joinder of the Registrar of Titles; Ministry of Land and Human Settlement Development as necessary party;*
4. *This Honourable Court has no jurisdiction to entertain this case as its basis is not on land;*
5. *The plaintiff has no locus standi to institute this case;*



6. The plaintiff has no cause of action against the 1st defendant.

The 1st defendant is represented by the learned counsel Makarios J. Tairo while the plaintiff is represented by the learned counsel Ndanu Emmanuel. The points of preliminary objection were disposed of by way of written submissions as ordered by this Court on 25th February 2021.

On the **first** point of preliminary objection that, the case is incurably defective for misjoinder of cause of action and misjoinder of parties, Mr. Tairo submitted that, the plaint contains three different causes of action, with each cause of action regulated by specific laws and involving different parties. These involves probate and administration of estates, mortgage and registration of the title to land and they were analysed as follows;

On matter involving probate and administration of estate, according to Section 104, 103, 99 82 and 44 of the Probate and Administration of Estates Act (PAEA), Cap 352 R.E 2002; in Mr. Tairo's opinion the plaintiff was required to sue the 2nd defendant basing on provision of PAEA (supra) for all matters and issues relating to administration of estate of Anna Focus Mlay and not otherwise. But this is subject to the plaintiff proving that he is legally still an administrator. Also, the beneficiary of estates of deceased can invoke the provisions of PAEA to sue the Administrator of Estate in case of the abuse of the deceased property therefore, Raymond Focus Mlay acting through the power of attorney given to him by Hilda Focus Mlay the beneficiary can sue Doreen Huruma Mawole.

On matter of mortgage, since the plaintiff claimed the suit property was unlawfully mortgaged to the first defendant without consent of the

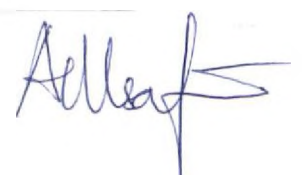


beneficiary, then plaintiff in cause of action on mortgage is required to be Raymond Focus Mlay as he was given the power of attorney to act on behalf of the beneficiary Hilda Focus Mlay as stated in paragraph 15 of the plaint.

On registration of title to land, since paragraph 13 and 16 of the plaint state that the 2nd defendant fraudulently acquired title deed of the suit property in the name of Doreen Huruma Mawole as the guardian of Hilda Focus Mlay the minor without the consent of the beneficiary the said Hilda Focus Mlay and co-administrator, the plaintiff here was supposed to be Raymond Focus Mlay through the power of attorney given by Hilda Focus Mlay. Mr. Tairo submitted further that, since the matter of registration are governed by the Land Registration Act, Cap. 334 R.E 2019, then the plaintiff was required to challenge the registration to the Registrar of Titles through section 102(1) of Cap. 334 before coming to this Court.

According to Mr. Tairo, this case is incurably defective for misjoinder of cause of action and misjoinder of the parties. He pointed out that, the general rule governing misjoinder of parties is covered by Order 1 rule 3, 9, 10 (2) of the Civil Procedure Code. There is no way with reference from the above analysis that laws and facts on probate administration of estates, mortgage and registration of title to land can be common, they are separate and distinct that joining them is completely impossible. He cited the case of **Stanslaus Kalokola vs Tanzania Building Agency and Mwanza City Council**, Civil Appeal No.45 of 2018, CAT at Mwanza (unreported).


The **second** preliminary objection stated that the claim on registration of title to suit land is incompetent for being brought



contrary to the law and hence it is time barred. Mr. Tairo argued that since paragraph 13 and 16 (a) of the plaint alleged that the 2nd defendant have acquired the title deed over the suit property in the name of Doreen Huruma Mawole (as guardian of the minor Hilda Focus Mlay, the beneficiary), then the plaintiff was supposed to file a claim before the Registrar of Titles challenging the registration according to Section 101 of the Land Registration Act Cap. 334 and if aggrieved by the decision of Registrar, seek the remedy under section 102(1) of Cap.334 (supra). Therefore, the claim on aspect of registration of title to the suit land is incompetent for being brought contrary to the law and on the aspect of challenging the registration, since the plaintiff has delayed, he is now time barred therefore it should be dismissed.

The **third** point of preliminary objection is that the suit is incompetent for non-joinder of the Registrar of Titles, Ministry of Lands, Housing and Human Settlement Development as a necessary party. Mr. Tairo argued that, there is no way determination of matters on registration of title to the plot in dispute can be effectively done without the said Registrar of Titles being a party to the case on the sense that the decree cannot be effective especially on nullifying the title deed without challenging the decision of the Registrar of Titles to register the plot in dispute in the name of the 2nd defendant. He cemented his argument by citing the case of **Stanslaus Kalokola vs. Tanzania Building Agency and Mwanza City Council,(supra)**.

The **fourth** preliminary objection is that, this Honourable court has no jurisdiction to entertain this case as its basis is not on land. Mr. Tairo argued that, this court lacks jurisdiction to entertain the matter since it is not based purely on land matter, the basis of this matter is on different causes of action namely probate and administration of



estates, registration of titles and mortgage. In his opinion, Sections 2 and 167 (1) (b) of the Land Act, Cap. 113 R.E 2019 provides for the exclusive jurisdiction of this Court on land matters. As this case is a combination of different causes of action, and they cannot be separated, it makes the entire case to be before the court with no jurisdiction to entertain it.

The **fifth** preliminary objection is that the plaintiff has no locus standi to institute this case. The learned counsel submitted that the plaintiff lacks locus standi to institute the matter on the reasons that Raymond Focus Mushi was given power of attorney by Hilda Focus Mlay, the beneficiary of the suit property, and appointed him to deal with matters relating to suit property. This act brought to an end the power of the administrator of estate who is the plaintiff in this matter.

Lastly, the **sixth** preliminary objection is that the plaintiff has no cause of action against the 1st defendant. Mr. Tairo submitted that the plaintiff has no cause of action against the 1st defendant on the sense that, the suit property was in the name of Doreen Huruma Mawole, the 2nd defendant as guardian of the Hilda Focus Mlay who was a minor. The plaintiff is claiming to be the administrator of the estate of the late Anna Focus Mlay. However, the name Anna Focus Mlay doesn't appear on the title to the suit land. Therefore the plaintiff being an administrator of the estate of the late Anna Focus Mlay, he has nothing to do with the property of Hilda Focus Mlay and the mortgage deed agreement was entered between the 1st and 2nd defendants over the suit property of Hilda Focus Mlay.

In reply to all points of preliminary objection, learned counsel Ndanu, for the 1st point of preliminary objection, he stated that, the



plaint is required to contain facts that constitute cause of action according to Order VII Rule 1 (e) of the Civil Procedure Code Cap. 33 R.E 2019. The purported cause of action mentioned in the preliminary objections are mere facts which the plaintiff narrated for the purpose of establishing the foundation of his claim. He further stated the plaintiff has all legal mandate to institute claims regarding with the properties of the late Anna Focus Mlay being the administrator of the estate of the said deceased and that Hilda Focus Mlay is one of the beneficiaries of that estate. Mr. Ndanu argued that since Hilda Focus Mlay was in China pursuing her studies, she gave the power of attorney to his brother Raymond Focus Mlay to investigate the matter and not to represent her in court.

For the 2nd and 3rd points of preliminary objection, on the issue of misjoinder of parties particularly the Registrar of Titles, Mr. Ndanu submitted that the plaintiff has no dispute with the Registrar of Titles or the Commissioner for Lands and hence has no cause of action against the Commissioner since he was misled by the 2nd defendant in issuing a title deed over the disputed plot. Even so the plaintiff is not bound to sue them.

For the **fourth** preliminary objection, counsel for the plaintiff, Mr. Ndanu replied that, the issue of jurisdiction raised has no basis since the instant matter is pure land matter since the title deed to suit property was fraudulently obtained and it was mortgaged to the 1st defendant by the 2nd defendant therefore this Court has jurisdiction.

On the **fifth** preliminary objection, he submitted that, the plaintiff is the administrator of estates of the late Anna Focus Mlay and the land



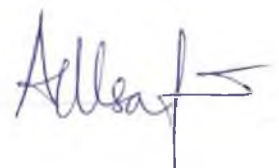
in disputes belongs to the deceased. Under that circumstances, the plaintiff has locus standi to bring the suit.

Lastly for the **sixth** preliminary objection, the counsel replied that the plaintiff has cause of action against the 1st defendant as administrator of estates of the deceased as the ownership was not yet transferred to the minor Anna Focus Mlay. Even so the same needs proof therefore it does not qualify to be an objection on point of law hence it should be dismissed with costs.

In rejoinder Mr. Tairo reiterated his submission in chief and insisted that the three different and independent causes of action are wrongly joined and the same cannot be rectified by amending the plaint.

I have gone through the submissions advanced by counsels for both parties. The core issue for these points of preliminary objection is whether they qualifies to be termed as preliminary objections. The law governing the preliminary objection has been well set in the case of **Mukisa Biscuits Manufacturing Co. Ltd vs. West End Distributors Ltd, [1969] EA 696** where Sir Charles Newbold at page 701 had this to say;-

"A preliminary objection is in the nature of what used to be demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any facts has to be ascertained or if what is sought is the exercise of judicial discretion."

A handwritten signature in blue ink, appearing to read 'Allan', with a stylized flourish extending to the right.

Furthermore, Law J.A. Judge sitting in the same panel with Sir Charles Newbold had this to state, I quote:-

"So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which, if argued as a preliminary objection may dispose of the suit. Examples are an objection to the jurisdiction of the court..."

The Court of Appeal of Tanzania in the case of **COTWO (T) OTTU Union and Another vs. Honourable Iddi Simba Minister of Industries and Trade and Others** (2002) TLR at page 88 Kisanga, JA reiterated the same position held in the case of MUKISA BISCUITS where he held that:

"A preliminary objection should raise a point of law which is based on ascertained facts, not on a fact which has not been ascertained and if sustained, a preliminary objection should be capable of disposing of the case."

In view of the above authorities, the following principles have been developed to guide courts in dealing with preliminary objections which are: a) there must be a point of law either pleaded or arising by implication from the pleadings; b) there must be a pure point of law which does not need scrutiny of evidence; c) determination of point of law in issue should not depend on the discretion of the court; and d) if sustained should dispose of the matter.

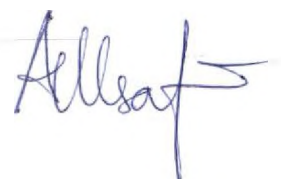
Because of its importance, I will begin to determine the 4th point of preliminary objection which is whether this Court has jurisdiction to determine this matter. In doing so, I will now turn to examine the extent to which the 4th point of preliminary objection in the instant case meets the tests laid down in MUKISA'S CASE at page 700.



In the case of **Lyamuya Construction Company Ltd vs. Board of Registered Trustees of Young Women Christians Association of Tanzania**, Civil Appeal No. 2 of 2010 (Unreported) it was held that;

"a point of law must be that of sufficient importance and, I would add that it must also be apparent on the face of record, such as the question of jurisdiction; not one that would be discovered by a long drawn argument or process."

Considering the submissions on both parties, let me be clear on the doctrine that says parties are bound by their pleadings, and the pleadings in this case are the plaint and written statement of defence (WSD). From the plaint it would appear that, from the very beginning, the dispute between the parties is based on probate gone wrong and the plaintiff recognized the 2nd defendant to be an administrator of estate of deceased property which was fraudulently mortgaged by her to the 1st defendant the same being guided by the Probate and Administration of Estate Act, Cap 352 R.E 2019. Mr. Tairo contended that the court had no jurisdiction to entertain the matter since its cause of action relied on probate and administration of estate, registration and Mortgage. I do agree with him on the sense that the plaint is based on administrator of estate's misconduct herein the 2nd defendant in her position as the co-administrator of estate and guardian of the minors (the two children of the deceased) who are the beneficiaries of estate. The 2nd defendant fraudulently entered into a mortgage over the suit property with the 1st defendant. I see that, the remedies to this claim is not to file the land suit but rather to challenge the matter by suing the administrator for misappropriation of the deceased property.



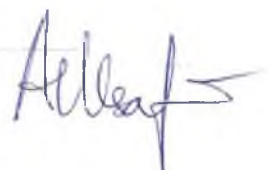
However, this was not done instead the plaintiff filed the present matter.

It is a trite law that the Administrator of Estate of the deceased property has legal power by law to dispose of the suit property without obtaining the consent of the beneficiary. As soon he has been appointed as the Administrator of Estate, he steps in shoes of the deceased and acquire or possess the same power as the deceased over the suit property. In the present matter, since there were two administrators, one administrator can do nothing on the deceased property without the consent of the other co-administrator. They remained to be jointly responsible over the deceased property. Paragraph 6 of the plaint states and I quote;

"the plaintiff is the administrator of the estate of ANNA FOCUS MLAY, who died on 9th January, 2005. After the death and burial of the late Anna Focus Mlay, the plaintiff and Dorin Albert Temu 2nd defendant were appointed by the clan meeting to be administrators of estate of the deceased who left two children. After the appointment the plaintiff and 2nd defendant applied to Kawe Primary Court for the letters of administration which were granted on 4th July 2005"

Furthermore, paragraph 11 of the plaint states that,

" that the plaintiff and the 2nd defendant while being granted with the letters of administration at Kawe Primary Court, they made declaration on oath that they shall faithfully and sincerely administer the properties of the deceased. However, the 2nd defendant secretly started to misappropriate the estate



of the deceased by illegally mortgaging several of the deceased properties.....”

From the above, it is clear with no doubt that the current matter stands on purely probate affairs. It is my view that sections 3(1) and 3(2) 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 of the Village Land Act [Cap. 114 R.E. 2019] removes jurisdiction over disputes relating to title to land from ordinary civil courts, however this is only possible if the dispute arises on land parse. Section 37 (1) (e) of the Land Disputes Courts Act Cap. 216 exclude the High Court sitting as a land Court to determine the matter which jurisdiction are limited to particular court. As for this matter, the probate and administration court need to be invoked to prove the fraudulent actions and misappropriation of the administrator of the said estate. I say so because although the 2nd defendant was removed as co- administrator of estate of the deceased and since the properties of the deceased were still under the protection of the two administrators of estate the plaintiff and the 2nd defendant and since the misconduct happened on the trust of the two administrator, who at the moment could not pass it to the beneficiaries who by that time were minor , **then**, probate matters were not yet been finalized and it is the Probate Court which is vested with power to determine such misappropriation of deceased property and cure the mischief before this matter is brought before this Court. The powers of such probate and administration of estate courts are limited to appointing the administrator, approving the rightful heirs and supervising the administrator to account for his/her administration of that particular estate.



It is the rule of law and practice that when the claim of ownership stemming from the right of inheritance or purchase for value arise while the probate and administration court is still seized with the matter meaning the administrator has not filed a final account and the court having not approved the same, the probate and administration court must determine whether the title has properly passed through administration of the estate. In the instant case the property of the deceased was not passed to the beneficiaries since they were still minor and the account of deceased property estate were not yet finalized. In such cases where the account of the deceased property has not fully finalized, the probate and administration court must determine whether the title passed through administration of the estate lawfully. Again, that is to say if the probate and administration cause has been closed by filing and approval of the final account, then other court can have jurisdiction.

In the case of **Mgeni Seif vs. Mohamed Yahaya Khalfani, Civil Application No. 1 of 2009**, Court of Appeal - Dar es Salaam (unreported) at page 14, it was held;

"As I 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"

The rationale behind 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 of 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”.

In that context the above case set a principle of general application that all disputes involving the deceased estate are determinable by the probate and administration court. Therefore, it goes without saying that this Court lacks jurisdiction to entertain the matter for now.

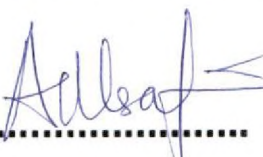
In that regard it is trite law that where a cause is filed in court without jurisdiction, there is no power in that court to transfer it to a court of competent jurisdiction. In that sense I have no option but to dismiss the suit accordingly.

Having said that I find no need to discuss other points of preliminary objection since the jurisdiction issue has dispose of the suit. The objection is upheld and the suit is dismissed. Each party to bear their own costs.

It is so ordered.

Dated at Dar es Salaam this 13th Day of September, 2021.




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A. MSAFIRI
JUDGE