

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**  
**IN THE SUB- REGISTRY OF MWANZA**  
**AT MWANZA**  
**LAND APPEAL NO. 30 OF 2021**

*(Arising from the District Land and Housing for Mwanza in Application No. 192 of 2017)*

**ADOLF ANTHONY..... APPELLANT**

(Administrator of the estate of Pius  
Rwechungura and Arodia Anthony Pius)

**VERSUS**

**ADINANI ALLY MFINANGA ..... 1<sup>st</sup> RESPONDENT**

**JOSEPHINA AUGUSTINE ..... 2<sup>nd</sup> RESPONDENT**

**JUDGMENT**

*23<sup>rd</sup> September 2022 & 30<sup>th</sup> March 2023.*

**ITEMBA, J**

The appellant Adolf Anthony is appealing against the decision issued by the District Land and Housing Tribunal for Mwanza, herein the tribunal. In his memorandum of appeal, the appellant has advanced three grounds of appeal as follows:

- 1. That, the trial Tribunal Chairman erred both in law and fact to declare the Respondent lawful owner of the disputed land relying on unstamped agreement contrary to the law.*
- 2. That, the Trial Chairman erred in law to declare the 1<sup>st</sup> Respondent as a lawful owner of disputed plot while correctly held the appellant was the administrator of the estate of the deceased.*
- 3. That, Trial Tribunal erred in law and fact when it fails to visit the locus in quo to determine boundaries of the disputed land before*

*delivering judgment and declare the 1<sup>st</sup> Respondent as a legal owner of unknown size of land.*

The centre of the dispute is a squatter house located at Tarazo Isamilo "B" Ward within Nyamagana in Mwanza, herein the suit plot.

Facts which led to this appeal are that; one Pius Rwechungura is alleged to have been married to Arodia Anthony in an unknown date. Both died in 2003 and 2008 respectively. The only child they had died in 2004. Before they died, they were living in the suit house. The appellant alleges that he was living at the suit plot with Arodia Anthony who is her biological sister until her death and taking care of her when she was sick. That, before Arodia died, she gifted him the suit house in the presence of witnesses including PW2, Emmanuel Ayub who is a neighbour. That, Arodia Anthony told the appellant that, neither of her husband relatives had showed up or helped her when she was sick hence the appellant should inherit the house. After Arodia's death, the appellant filed a probate cause No. 5/2011 at Nyamagana District Court and he was appointed an administrator of Estate of both **Merchades Pius Rwechungura and Arodia Anthony Pius** on 24/7/2013. Later on, one Josephine Augustine, the second respondent who alleges to be the mother of Pius Rwechungura appeared with a judgment from Kamachumu

Primary Court, which also appointed her the administrator of estate of Pius Rwechungura. She vacated the appellant from the suit house.

The appellant filed revision against the Kamachumu Primary Court at Muleba District Court in Revision No. 4/2013. A revision order was issued to the effect that the appointment of the appellant is not res sub judice in respect of the appointment of 2<sup>nd</sup> respondent however due to sensitivity of the matter, execution should not proceed pending the appointment of the proper administrator.

Nevertheless,..... months after the said order, the 2<sup>nd</sup> respondent went ahead and sold the suit house to the 1<sup>st</sup> respondent. The appellant was evicted from the suit plot in 2013.

The appellants told the Tribunal that, he is the administrator of estate of the late Pius Marchades Rwechungura and Arodia Anthony Pius who were the lawful owners of the suit house and that, being the administrator, he is legally entitled to have possession of the suit house and, to distribute the same to the lawful heirs, but he could not proceed because the 1<sup>st</sup> respondent is occupying the suit house and has refused to vacate. In the other side, the 1<sup>st</sup> respondent stated that he is the lawful owner of the suit house after buying it from the 2<sup>nd</sup> respondent who is the mother of Pius Rwechungura and the administrator of his estate. At the

end of hearing which was heard *ex parte* against the 2<sup>nd</sup> respondent, the appellant's claims were dismissed, hence this appeal.

At the hearing, the appellant was represented by Mr. Innocent Kisigiro while the 1<sup>st</sup> Respondent was represented by Mr. Jackson Maro, both learned counsels. The second respondent was absent. Both parties explained that the 2<sup>nd</sup> respondent could not be traced since the time when the dispute was heard before the Tribunal.

Arguing for the appeal, Mr. Kisigiro abandoned the 3<sup>rd</sup> ground of appeal. In respect of the 1<sup>st</sup> ground, he submitted that the Tribunal, erred in declaring the 1<sup>st</sup> respondent the lawful owner of the suit house while he produced the contract which was not stamped. He relied on section 47 of Stamp Duties Act Cap. 189, R.E 2002 and the decision in **Josephat Rugaimukamu v B.J. Mzuwande** [1986] TLR 69 and stated that, the contract shouldn't have been relied by the tribunal in reaching its decision.

In the second ground, the appellant's counsel argued that, the Tribunal erred in declaring the 1<sup>st</sup> respondent the lawful owner of the suit house while at the same time acknowledging that the appellant was the administrator of estate of Pius Rwechungura and Arodia Anthony a decision in probate cause No. 5/2011 at Nyamagana District Court Exhibit P.1.

He added that, the appellant challenged the appointment of the 2<sup>nd</sup> Respondent as an administrator at the District Court of Muleba and it was ordered that the 2<sup>nd</sup> Respondent should stay execution as an administrator. That the 2<sup>nd</sup> Respondent tried to object the appellant appointment as an administrator but the application was dismissed. However, under the same circumstances, the 2<sup>nd</sup> respondent proceeded to sell the suit house while her appointment was stayed pending the appointment of the proper administrator.

In reply, Mr. Maro strongly opposed the appeal, he submitted that the tribunal was justified in its decision. That, at page 8 of proceedings the said contract was not admitted as there were objections raised. Thus, the Tribunal did not rely on the sale contract in reaching its decision but it relied on the evidence from 5 witnesses. That, the tribunal's conclusion was thus the 'sale was legal' as opposed to the contract.

In the second ground, he argued that it is trite law that one who alleges must prove but there was no evidence to prove that the appellant was appointed an administrator of estate of Pius Rwechungura. That, the owner of the suit house was Pius Rwechungura who was said to have married the appellant's sister. But there was no certificate of marriage between the two. That, on the other side, the 2<sup>nd</sup> respondent is the

biological mother of Pius Rwechungura who was appointed an administrator without any objection.

He added that, there were attempted objections made by the appellant at Muleba District Court but the decision thereof did not set aside the appointment of the respondent rather, the court issued a stay of execution of deceased's estate pending appointment of the right administrator.

That, the tribunal considered all these other court's decisions and decided that the lawful administrator is the one appointed at Kamachumu Primary Court, the 2<sup>nd</sup> respondent. He argued further that under **Section 101 of the Probate and Administration of Estate Act (Cap 352)** the administrator of estate is empowered to sell the house as the deceased left no child.

In rejoinder, the appellant's counsel expounded that the law requires that for all immovable properties there must be a written transfer especially in city centers and that none among the respondents' 5 witnesses witnessed the said sale thus the contract was important to prove that there was sale.

He added that, the administrator could not sell the suit house under her name but as a personal legal representative.

In the second ground he insisted that the 2<sup>nd</sup> respondent was estopped from selling the suit house and that the decision in Kamachumu Primary Court is the one which followed the one in Nyamagana and not vice versa. He finalized by stating that Section 101 of Cap 352 do not apply to sale in Primary Court.

Having appraised the submissions from both sides, and all the records of appeal, the issue is whether the appeal has merit.

I have cautiously gone through the records of appeal and parties' submission and have observed the following:

In respect of the first ground, records show that, during trial, the 1<sup>st</sup> respondent attempted to tender the sale agreement but the appellant's counsel objected for it had no stamp duty, an objection which was sustained. See page 36 – 38 of the typed proceedings. I have also gone through, the judgment, two issues were raised by the tribunal the first was *who between the appellant and the 2<sup>nd</sup> respondent is the lawful owner of the disputed land?* And the second was *whether the sale agreement between the 1<sup>st</sup> and 2<sup>nd</sup> respondent was lawful.* Throughout the judgment, the Tribunal's Chairman has not at any stage mentioned or referred to the sale contract. His reasoning at page 11 of the judgment was that when the 2<sup>nd</sup> respondent Josephine Augustine was selling the

suit house, she was still an administrator of Pius Rwechungura and had the capacity to sell the deceased estate and therefore 1<sup>st</sup> respondent bought the house lawfully.

The Tribunal's decision was based on the reasoning that the 2<sup>nd</sup> respondent was appointed first, on 13/6/2013 followed by the appellant appointment on 24/7/2013 and that the appellant was appointed while the 2<sup>nd</sup> respondent's appointment was not yet revoked.

Therefore, the tribunal was satisfied that the sale was lawful based on the evidence in its totality and not at all in the sale agreement

In respect of the second ground, it is true that the tribunal acknowledged that the appellant was appointed the administrator of estate of the deceased Pius Rwechungura and Arodia Anthony. Nevertheless, as mentioned hereinabove, the tribunal also acknowledged the 2<sup>nd</sup> respondent has been appointed as an administrator of Pius Rwechungura. The Tribunal also went ahead and state that, I will quote page 12 and 13 of the judgment.

*'The assessors of the Tribunal were of the view that the sale was legal. I concur with them taking into consideration that the seller of the house was the administrator of the estate of the late Pius Rwechungura and therefore the sale contract was lawful'*



It means therefore, the Tribunal was satisfied that the 2<sup>nd</sup> respondent, as administrator of estate appointed on 13.6.2013 was a right person to sell the house. I agree with the Tribunal's decision that there cannot be 2 administrators co existing and therefore, the 1<sup>st</sup> to be lawful appointed is the rightful one unless his appointment is revoked. I am in support of this opinion considering that, the appellant was appointed after the 2<sup>nd</sup> respondent and by then, the 1<sup>st</sup> respondent's appointment has not been revoked.

I would also like to point out that, while arguing the 2<sup>nd</sup> ground of appeal, the appellant's counsel has mentioned that the 2<sup>nd</sup> respondent was not justified in selling the suit house while there was an order of stay of execution issued by Muleba District Court. It suffices to state that the said order of stay of execution issued by Muleba District Court, was not meant to be perpetual. It was issued temporarily, pending resolution of who is the proper administrator of the late Pius Rwechungura. It means, during all this time since the said order was issued on **5.8.2013**, the appellant if he was still aggrieved, he would have moved the probate court to determine the appropriate administrator. However, there is no evidence to that effect. Stay of execution orders just like temporary injunction orders which lasts for 6 months are meant to be temporary

orders, to prevent any risk or loss which might occur. Therefore, in the absence of any remedial cause in the probate court, the appellant cannot complain before this court on the competency of the 2<sup>nd</sup> respondent as the administrator.

It is trite law that one who alleges must prove. **Section 112 of the Evidence Act**, provides as follows:

*" The burden of proof as to any particular act lies on that person who wishes the court to believe in its existence unless it is provided by law that the proof of that fact shall lie on any other person."*

See also the cases of **Pauline Samson Ndawavya v Theresia Thomas Madaha**, Civil Appeal No. 45 of 2017, and **Anthony M. Masanga v Penina (Mama Mgesi) & Lucia (Mama Anna)**, Civil Appeal No. 118 of 2014 (both unreported)

If I can re-emphasize the above principle of law, the evidence adduced in the trial tribunal could not prove that the appellant is the rightful owner of the disputed plot. As the property belonged to the deceased Pius Rwechungura, the right subsequent owner would be the one who is the lawful administrator of estate and that has been proved to be the 2<sup>nd</sup> respondent. Therefore the 2<sup>nd</sup> ground falls as well.

That being said the appeal lacks merit and it is hereby dismissed with costs.

It is ordered.

Right of appeal explained.

Dated at MWANZA this 30<sup>th</sup> day of March 2023.

  
  
**L. J. ITEMBA**  
**JUDGE**

Judgment delivered in chamber in the presence of advocate Yuda Kavugushi holding brief for Advocate Innocent Kasigiro for the appellant, the respondent in person and Ms. Glads RMA.

  
**L. J. ITEMBA**  
**JUDGE**  
**30.03.2023**