

IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
LAND CASE NO. 63 OF 2019

MBWIZA I ATHUMAN.....PLAINTIFF

VERSUS

ABDULA SALUM SLEYUM.....DEFENDANT

Date of Last Order: 11/10/2021

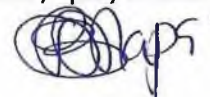
Date of Judgment: 22/10/2021

JUDGMENT

MKAPA, J

The centre of controversy in the present suit is a landed property situated on Plot No.5 Block 60 Sikukuu Street, Kariakoo area in Dar-Es-Salaam region (the suit property). It is alleged that, the suit property belonged to the late Ally Athuman Mbwishu. According to the Plaintiff, in 2018 the plaintiff obtained letters of administration of the estate of the late All Athuman Mbwishu, plaintiff's uncle. Prior to 2018, the suit property was under the care of Tamasha Issa Athumani, (now deceased) who was staying in the suit property. Later, in 2009 by way of exchange with the defendant she transferred the suit property to the defendant thereafter, the defendant obtained right of occupancy of suit property in his name.

The plaintiff preferred this suit against the defendant for; a declaration that he is the rightful owner of the landed property on Plot No. 5 Block 60 Sikukuu Street, Kariakoo, Dar es Salaam; vacant possession from the suit property and handing over the same to the plaintiff; payment of



mesne profit at the rate of Tshs. 6,000,000/= per month from 2009 to date; permanent injunction against the defendant from interfering or trespassing the suit property and payment of general damages and cost of the suit.

The cause of action arose on 18th March 2019 when the Ilala Municipal Director informed the Kariakoo Primary Court that the suit property was in the process of being registered in the name of the defendant. The plaintiff decided to prefer this suit against the defendant.

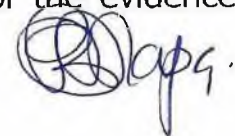
The defendant filed a statement of defence (WSD), denying all the allegation by the plaintiff. Under paragraph 6 he claimed to be the lawful owner of the suit property having being issued with a certificate of title of the suit property following disposition of the same by way of transfer.

At the hearing Ms. Shamima Hiza learned advocate appeared for and represented the plaintiff while the defendant had the services of Mr. Egidi Mkoba also learned advocate.

Before commencement of the trial two issues were framed for determination:

1. Whether the plaintiff is the lawful owner of the suit property.
2. To what reliefs are the parties entitled.

In order to prove his case, the plaintiff summoned two witnesses; Tabu Issa PW2, and himself as PW1. On the other hand, the defendant also summoned three witnesses, himself as DW1, Yahya Anuar Abdallah as DW2 and Waziri Masudi Mganga DW3. At the closure of the evidence parties opted to file final submissions.



The witnesses for the plaintiff generally maintained that the plaintiff is the lawful owner of the suit property after obtaining letters of administration of the estate of the late Ally Athuman Mbwishah. PW1 testified that, his uncle the late Ally Athuman Mbwishah the owner of the suit property died intestate on 7th June, 1977. The death certificate of the late Ally Athuman Mbwishah was admitted as Exhibit P1. After his death his estate was under the care of their sister Tamasha Issa Athuman who was staying in the suit property. That there were no grudge or dispute over the suit. Property as they all lived peacefully and the late Tamasha Issa Athuman used to collect rent from the suit property and distribute among the family members.

It was his further testimony that, in 1993 the late Tamasha announced to the family members that the suit property belonged to her having being inherited from their late auntie one Tabu Athuman Mbwishah who was the only survivor in the family of late Ally Athuman Mbwishah.

PW1 testified further that, he later discovered that in 1993 her auntie instituted a probate and administration cause before the Kariakoo Primary Court and the same was placed in the Newspaper as Probate and Administration Cause No. 129 of 1993 which appointed Tabu Athuman Mbwishah as the administratrix of the estate of late Ally Athuman Mbwishah.

They filed a case at Kisumu Resident Magistrates' Court in 1996 but the case was dismissed for non-appearance. They applied at the Kariakoo Primary Court in 2018 for search of court file on Probate and Administration Cause No. 129 of 1993 and in reply, they were informed that no such case was instituted before that court. However, the letter



alleged to have been issued by the Kariakoo Primary Court informing the plaintiff on the non-existence of the Probate Cause No. 129 of 1993 was objected by the counsel for the defendant to be admitted into evidence for non-compliance of with the procedure for tendering secondary evidence.

He came to know the defendant after he had applied to transfer ownership of the suit property and was notified by the Land Officer that the suit property bears the name of the defendant as the owner.

The plaintiff claims ownership over the suit property after having being appointed at a family meeting on 9th October 2018 to petition for letters of administration of the deceased the late Ally Mbwisha and later obtained letters of administration in "Mirathi No. 102/2018" at Kariakoo Primary Court. The Letters of administration in "Mirathi No. 102/2018" were admitted as Exhibit P2.

PW2 evidence supported what was stated by the plaintiff. She averred that the last time she received her share of rent from the suit property was in 1990's. That, she met the defendant at the reconciliation meeting at the office of the Dar-Es-Salaam Regional Commissioner.

It was the defence case through DW1, Abdula Sleyum that he is the lawful owner of the suit property following the disposition of the same by way of exchange. It was his further testimony that, in 2009 the late Tamasha Issa Athuman informed him of her desire to acquire an alternative house. They agreed to exchange houses in which the suit property was transferred to him in exchange with a house situated on Plot No. 10 Block 37 Amani Street at Kariakoo, which was transferred to



the late Tamasha Issa Athumani The transfer was at a consideration of one shilling.

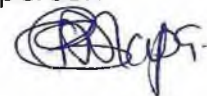
It was his further testimony that, assisted by DW2, DW2 filed documents for the disposition of the suit land at the Land registry through Exhibit D1. In 2010 he was issued with Certificate of Title No. 86425 dated 18th March 2010 (Exhibit D2) in his name in respect of the suit property, while Plot No. 10 Block 37 at Amani Street previously owned by the defendant the certificate of title was issued in the name of Tamasha Issa Athuman. He then applied for building permit and built a three-storey building on plot No. 5 Block 60 at Sikukuu Street Kariakoo area in which originally situated a log house.

DW3 testified that, as a registrar of title officer, he registered the Title Deed No. 86425 relating to Plot No. 5 Block 60, (the suit property) in the name of the defendant.

Having elucidated the evidence obtained from the witnesses and the exhibits tendered, I shall now proceed to determine the first issue as to whether the plaintiff is the lawful owner of the suit property.

The law is well settled in civil cases to the effect that, whoever alleges must prove. Section 110 of the Law of Evidence Cap 6 [R.E 2019] reads;

- (i) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts he asserts must prove those facts exists.
- (ii) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person



The Court of Appeal of Tanzania fortified this position in **Anthony M. Masanga Versus Penina (Mama Mgesi) & Lucia (Mama Anna), Civil Appeal No. 118 of 2014** (Unreported) when the Court emphatically observed;


".....let's begin with re-emphasizing the ever-cherished principle of law that generally, in civil cases the burden of proof lies on the party who alleges anything in his favour"

In commentaries by **Sarkar's Law of Evidence** 18th Edn., **MC. Sarkar, S.C Sarkar** and **P.C. Sarkar**, published by Lexis Nexis, it was observed at page 1896 as follows;

"....the burden of proving a fact rests on the party who substantially asserts the affirmative of the issue and not upon the party who denies it; for negative is usually Incapable of proof"

*It is ancient rule founded on consideration of good sense and should not be departed from without strong reason.....until such burden is discharged, the other party is not required to be called upon to prove his case. **The Court has to examine as to whether the person whom the burden lies has been able to discharge his burden. Until he arrives at such a conclusion, he cannot proceed on the basis of the weakness of the other party...."***

The plaintiff claims ownership over the suit property through appointment of letters of administration which appointed him as the administrator of deceased estate in Probate Cause No. 102 of 2018.

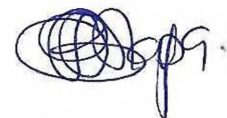


The defendant on the other hand claims to be the lawful owner of the suit property after disposition of his landed property situated on Plot No. 10 Block 37 at Amani Street Kariakoo by way of exchange with landed property (the suit land) situated on plot No. 5 Block 60 at Sikukuu Street, Kariakoo area owned by Tamasha Issa Athuman.

To prove his claim the Plaintiff tendered "Demand Notice" for Plot No. 5 issued on 30th December 1968 (Exhibit P4). However, weighing the said Notice on balance of probability, I am not satisfied the plaintiff to have proven ownership of the suit property to the late Ally Athuman Mbwishu from which is alleged to form part of the deceased estate. The reason why I hold so, is the fact that, the Demand Notice does not bear the Land Office number nor Title number of the suit property. This leaves a lot to be desired hence, in my view it is just a document of service to one Ali s/o Athumani.

On the other hand, DW1 testified the fact that, he is the lawful owner of the suit property. To support his claim he tendered Exhibit D2 (Certificate of Title) issued in his name after having exchanged with Tamasha Issa Athuman. However, he did not establish as to how Tamasha Issa Athuman came to own the said suit property.

As cumulative effect of the circumstance, I am of the considered view that, both parties failed to prove ownership of the suit property to the late Ally Athuman Mbwishu. As per the pleadings the plaintiff claimed ownership of suit property for the reason that he is the legal representative of the late Ally Athumani Mbwishu's estate. He also testified that, he is yet to file inventory at the Kariakoo Primary Court.



He further claimed that, he is aware of the Probate Cause No. 129 of 1993 which was filed at the Kariakoo Primary Court. However, following an official search with the Kariakoo Primary Court, he was informed through a letter, the non- existence of the same. However, the letter was not admitted into evidence hence, no proof exists as to the non-existence of Probate Cause file No. 129 of 1993.

Considering what he had stated in his plaint together with what the plaintiff as adduced at the hearing, on balance of probability it is undoubtedly the fact that, there exists Letters of Administration in Probate Cause " Mirathi No. 102/2018 at the Kariakoo Primary Court which appointed the plaintiff administrator of the late Ally Athumani Mbwishu's estate.

Now this court is faced with two Probate Causes which appointed two separate administrator/trix of the same suit property.

To determine who is the legal representative of the deceased estate for purpose of determining *locus standi* as to whether the title properly passed through the administrator of the estate, is not within the jurisdiction of this court, thus cannot be entertained at this stage. The decision in the case of **Ally Omari Vs. Amina Khalil Ally Hildid (Administratrix of estate of late Kalile Ally Hildid [Civil Appeal No. 103 of 2016]**, is relevant when the Court of Appeal observed;

".....We think, before moving on to receive the evidence from the parties, the learned trial Judge should have first determined whether the High Court had jurisdiction in the suit before her to determine probate matters which parties had already submitted before two primary



courts and had not been completed by completion full accounting to dose the probate before the primary courts."

Guided by the above legal authority, this court cannot dwell on determining the issue of ownership of the deceased estate without touching on the probate and administration issue since the plaintiff claims ownership over the suit property through letters of administration and the question of ownership cannot be dealt with without first determining whether the deceased was the owner of the suit property. This position was reaffirmed in the case of **Kigozi Amani Kigozi (Administrator of the estate of Late Juma Seleman) Vs. Ibrahim Seleman and 5 Others [Land Appeal No. 2 of 2019]** where the Court emphasized that;

"..... only a probate court is vested with powers to determine whether the property in dispute belongs to the deceased person.

It is well settled that, once parties have submitted a probate matter for administration by the primary court the dispute ought to be determined by the court presiding over the probate and administration namely, the primary court concerned. [See **Richard Somba vs. Maira Somba, Civil appeal No. 120 of 2006, CAT, (Unreported)**]

In the present suit, the suit property is a subject of two separate letters of administration namely; **Probate Cause No. 129 of 1993 and Probate Cause 120 of 2018** respectively, by the Kariakoo Primary Court. It is therefore not the duty of this court to determine which of the two probate and administration causes is to guide this court in determining the question of ownership of suit property.



It is worth noting at this juncture that, the onus of proving a fact in civil matters is on the one who alleges and further that, in civil cases the burden of proof is on balance of probabilities. Therefore the question to be asked is, whether the plaintiff has discharged his duty by proving ownership on balance of probability, the answer is in negative. Having so determined, the second issue as to the relief(s) entitled to parties has no legs to stand.

Consequently, the suit is dismissed and each party to bear own costs.

It is so ordered.

Dated and delivered at Dar-Es-Salaam this 22nd day of October 2021



A handwritten signature in blue ink, appearing to read "S. B. Mkapa".

S. B. MKAPA
JUDGE
22/10/2021