IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

CONSOLIDATED LAND APPEAL NO. 178 AND 198 OF 2019

(Arising from the decision of District Land and Housing Tribunal for Ilala in Land Application No. 106 of 2019)

SEVERINI EMMANUEL SWAI.....1ST APPELLANT

LUGANO ALFRED MWAKASUNGULA.....2ND APPELLANT

VERSUS

CHRISTOPHER EMMANUEL SWAI..... 1ST RESPONDENT

LAURIAN EMMANUEL SWAI ..... 2ND RESPONDENT

LAURENCE EMMANUEL SWAI..... 3RD RESPONDENT

Date of judgment 20/11/2020

Date of the last order 09/10/2020

JUDGMENT ON CONSOLIDATED APPEALS

I. MAIGE, J

This consolidated appeal arises from the decision of the District Land and Housing Tribunal for Ilala ("the trial tribunal") as per Hon. Rugarabamu, the Chairman, in Land Application No. 106 of 2019. In the said proceeding, the second respondent herein was a claimant. He was suing the respondents herein along with the first appellant for ownership of a landed property described as Plot No. 484 Block "A" Part 1 Tabata Area Dar es Salaam with

CT No.24302 ("the suit property"). The second appellant claimed to have acquired the **suit property**, by way of abrupt purchase, from the first appellant.

In his reasoned decision, the trial chairperson dismissed the claim and nullified the sale agreement on account that, the first respondent being the former administrator of the deceased estate of his late wife, could not, in his individual capacity, transfer the entire **suit property** while his wife had ownership interest therein. The **trial tribunal** ordered further for reimbursement of the full purchase price of the **suit property** plus interests to the second respondent.

The respondents herein are by virtue of being the descendants of the late wife of the first appellant, claiming beneficial interests on the **suit property**. Indeed, the first respondent is the successor administrator of the estate after revocation of the letters of administration in favour of the first appellant.

From the record of the **trial tribunal**, it is clear that, the late wife of the first appellant one Lydia Severine Swai, expired in 2011. The first appellant successfully applied for letters of administration of the estate. I have no doubt from the judgment and proceedings of the **trial tribunal** that, the

house which is referred by the first appellant in exhibit **D3** to have been acquired jointly between him and his late wife is the **suit property**. It is the same property the validity of whose sale was raised by the first respondent in the probate and administration cause in exhibit **D3.** Upon the parties being heard, it is express in exhibit **D3,** the letters of administration granted in favour of the first appellant was revoked and the first respondent appointed the successor administrator of the estate.

It is also express in exhibit **D3** that, upon the first appellant questioning the sale under discussion, both the appellants were summoned and afforded opportunities to be heard. The substances of their testimonies at the probate and administration court are reflected in exhibit **D3.** It is also suggestive therein that, after the hearing, the matter was placed for judgment. The copy of the judgment is however not in the record of the **trial tribunal.**

In the conduct of this appeal, Mr. Mussa Godwin, learned advocate represented the second appellant whereas the first appellant was represented by Killey Mwitasi, learned advocate. Mr. Benitho Mandele, also learned advocate, appeared for the respondents. The appeal was disposed of by way of written submissions. I thank the counsel for their brilliant job.

If everything remained constant, judgment would have been delivered on 29th May 2020. Alas, it could not be possible. That was not without reason. As I was composing the judgment, I found a very crucial fact missing. Though exhibit **D3** suggests that, a decision would be pronounced on 15th January 2019 on the validity of the sale of the **suit property** between the appellants, the same was not in the record of the **trial tribunal**. So that I could not deny either of the parties a right to be heard, and, in order that I would not pronounce a judgment contradictory to any existing decision of the probate and administration court, I, on the would be the date of the decision, placed the matter for hearing so that parties could debate on the issue of relevancy of the said judgment in the instant appeal.

The parties through their counsel appeared before me. Seemed to be aware of being a decision of the primary court in the probate and administration proceedings dated 15th January 2019. Indeed, the counsel for the respondents supplied the Court with a copy thereof. The counsel for the appellants were as well supplied. At page 5 of the said decision, the primary court remarked as follows:-

Na kwa kuzingatia fungu la ***85 (1) (a) la The Civil Procedure Rule in Primary G/N 310/1964*** *fungu lilitoa nguvu kwa mahakama ya mwanzo kuweka/kuvunja mauzo hayo na hivyo mahakama hii baada ya kumuita mnunuzi na kumpa haki ya kumsikiliza na kuona kuwa palikuwa na hila katika mauzo hayo kwani alijua ya kuwe hiyo ni mali ya mrithi basi mauzo hayo yamevunjwa na mnunuzi kwa mujibu wa fungu hilo anayo haki ya kurudishiwa fedha zake kasha warithi wafuate taratibu katika kuuza au kugawa mali yao.*

I ordered the parties to address me on the issue and the way forward by way of supplementary submissions which they did. I recommend them for their very impressive submissions.

In his submissions on relevancy of the said judgment in the instant appeal, Mr. Killey Mwitasi for the first appellant informed the Court that, the same is irrelevant because it is not part of the record of the **trial tribunal**. Neither has it been brought as additional evidence in terms of *Order XXXI1 Rule 27,28 and 29 of the Civil Procedure Code, Cap. 33 R.E. 2019.* He placed reliance on the authority of the Court of Appeal in **Ismail Rashid vs. Mariam Msati, *in Civil* Appeal No. 75 of 2015.** In the second place, it was the counsel's submissions that, in so far as it relates to probate and administration proceeding, the said decision is not relevant in the instant suit considering the fact that the first appellant was the administrator of the

estate of his wife when he was selling the **suit property**. He therefore advised the court not to consider the said judgment in its decision.

Mr. Musa Godwin for the second appellant shared the same view. He invited the Court to further consider that, the respondents did not wish to place reliance on the said decision. He submits further that, as the parties in the said decision are different from the instant one, the same cannot be relevant. Like Mr. Mwitasi, he asked the Court not to rely on the said decision.

Mr. Mwelelwa speaking for the respondents was of the contention that, the said decision is relevant in the instant matter. The reason being, according to him that, in the said decision the validity and legality of the sale of the **suit property** was conclusively determined. He submit further that, the existence of the said decision was reflected in exhibit **D3**. The decision therefore arose from the said proceedings, concludes the counsel.

I have considered the rival submissions. It is worthy to observe that, neither of the counsel has in his submissions doubted the existence and authenticity of the said decision. More so, parties are not in dispute that the said decision arose from the probate and administration proceedings in exhibit **D3**. The

dispute, it would sound to me, is on the relevancy of the same in the instant issue. As it shall apparent as I proceed, the issue raised being on the effect of the said decision in the dispute at hand, is a pure point of law which requires legal evidence and not factual evidence. The authority in **Ismail Rashid vs. Mariam Msati,** *(supra)* and the provision as to additional evidence may therefore not be relevant. Besides, it may be relevant to take into account the fact that the issue has been raised by the Court on its own motion after the parties had opted not to draw the attention of the **trial tribunal** and this Court on the existence of the judgment despite being aware thereabout.

It is common ground that, the existence of the said decision was not brought to the attention of the **trial tribunal.** I agree with the counsel for the appellants that, that was not the basis of the decision of the **trial tribunal.** Reading from the contents of exhibit **D3** however, it is correct to say that the existence of the said judgment was implicit. The date of the decision is as stated in exhibit **D3.** The decision appears to have been made by the same magistrate who presided over the proceedings. It is sealed with the official seals of the primary court of Kariakoo. There being no doubt raised by the parties on the existence and authenticity of the said judgement, I will,

in terms of section 59 (1) (d) of the Evidence Act take judicial notice that it is a valid decision of the primary court in the proceedings in exhibit **D3.**

Whether the decision is relevant in the first in issue is a question of law. Section 42 of the Evidence Act which is read together with section 9 of the Civil Procedure Code, Cap. 33, R.E., 2019 provides for relevancy of previous decision in preventing a second trial. It provides as follows:-

> 42.*The existence of any judgment, order or decree which by law prevents any court from taking cognizance of a suit or holding a trial is a relevant fact when the question is whether such court ought to take cognizance of such suit or hold such trial'.*

Section 43(1) (d) provides specifically how a judgment or order in probate and administration can be relevant in other proceedings. It provides as follows:-

> *43-(1). A final order or decree of a competent court, the exercise of probate, matrimonial, admiralty or insolvency jurisdiction, which confers upon or takes away rom any person any legal character, or which declares any person to be entitled to any such character, or to be entitled to any specific thing, not as against any specified person but absolutely, is relevant when the existence of any such legal character or the title of any such person to any such thing, is relevant.*
>
> *(2) A judgment, order or decree referred to in subsection (1) is conclusive proof-*

(d) that anything to which it declares any person to be so entitled was the property of that person at the time from which such judgment, order or decree declares that it had been or should be his property.

It was submitted for the appellants that, because the said decision was not pleaded nor testified upon, it should be deemed that the respondent never wished to rely on it. Be what as it may, parties cannot, by agreement, confer jurisdiction to the Court that it does have. In the situation like this, where the decision would have the effect of barring the **trial tribunal** to adjudicate upon the dispute, parties were expected to inform the **trial tribunal** thereabout. Their omission to do so cannot prevent the Court to make use of the judgment to correct the illegality in the decision of the **trial tribunal**. The position of law is that the issue of jurisdiction can be raised at any stage of the proceedings.

On that account therefore, since the issue of legality of the purchase was finally and conclusively determined by the probate court after the appellants had been afforded a right to be heard, unless such decision is reversed by the higher court, the **trial tribunal** was not vested with jurisdiction to predetermine the issue. The second respondent if aggrieved by the decision would have applied for revision to the High Court.

In the circumstance therefore, I exercise my revisional jurisdiction under section 43 (1) (b) of the **Land Disputes Courts Act, Cap. 216, R.E., 2019** and nullify the judgment and proceedings of the **trial tribunal**. I further order that the *status quo* as it was after the said decision of the primary court dated 15th January, 2019 stands unless the same is invalidated by way of appeal or revision. As the issue was raised by the Court on its own motion, I will not give an order as to costs.

It is so ordered.

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I. Maige
JUDGE
20/11/2020

Judgment delivered this 20th day of November 2020 in the presence of Mwitasi and Musa Godwin, learned advocates for the first and second appellants, respectively and Rose Sanga, learned advocate for the respondents.

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I. Maige
JUDGE
20/11/2020