IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: NDIKA, J.A., KITUSI, J.A. And MASHAKA, J.A.)

CIVIL APPLICATION NO. 171A/01 OF 2021

MARTHA EMMANUELY SHAYO ..... APPLICANT

VERSUS

JESCA GORDON ELIAS KARLO ..... 1ST RESPONDENT

ELISHA KARLO MUHEHE ..... 2ND RESPONDENT

(Application from the decision of the High Court of Tanzania at Dar es Salaam)

(Munisi, J.)

dated the 11th day of December, 2014

in

Probate and Administration Cause No. 28 of 2005

.....

RULING OF THE COURT

24th March & 11th April, 2023

KITUSI, J.A.:

This application for revision, under section 4(3) of the Appellate Jurisdiction Act, Cap 141 (the Act), originates from probate proceedings in High Court Administration Cause No. 28 of 2005, involving the estate of one Gordon Elias Karlo, henceforth the deceased. According to the applicant's affidavit, the deceased who died intestate on 18/10/2004, was survived by five children born of two different mothers and a widow, the present applicant. The respondents "were co-administrators" of the estate of the deceased, and we are referring to them in the past

because the available record, including the notice of motion, shows that they closed the administration on 11/11/2014, and got discharged.

We are being asked to examine the record of that Probate Cause with the view to satisfying ourselves on the legality, propriety or otherwise of the distribution of the estate exclusively done by the first respondent, leading to the closure of the probate and discharge of the respondents. The application raises issue with the distribution, alleging it to have been inequitable and unproportional for sidelining the applicant who is the widow and allocating or distributing nothing to her. She prosecuted the application by way of written and oral submissions made by Ms. Stella Simkoko, learned advocate. The first respondent filed an affidavit in reply as well as written submissions in contest.

In the affidavit and written submissions, it is argued for the applicant that the law applicable in the distribution of the estate in question should have been the Indian Succession Act 1865 applicable in Tanzania through the Indian Acts (Application) Ordinance Cap. 2, under which the applicant would be entitled to one third of the estate, as a widow. She attacked the first respondent for violation of that law, committing fraud and for breaching her fiduciary duty to the beneficiaries as defined in the case of **Joseph Shubusho v. Mary**

Grace Tigerwa, Civil Appeal No. 183 of 2016 (unreported). She also cited the case of **Bi. Hawa Mohamed v. Ally Seif** [1983] T.L.R. 32 to make a point that she contributed to the acquisition of the estate.

It has also been submitted for the applicant that she could not contest the distribution otherwise than by way of this revision because, she said, she was not aware of the distribution. The case of **Monica Nyamakare Jigamba v. Mugeta Bwire Bhakome as Administrator of the Estate of Musiba Reni Jigamba and Another**, Civil Application No. 199/01 of 2019 (unreported), was cited in support.

The respondents appeared through Mr. Adrian Mhina, learned advocate. As alluded to earlier, the learned counsel has also placed before us, an affidavit in reply and written submissions for consideration. In those submissions, Mr. Mhina counters the arguments raised by the applicant, but we have decided not to refer to those arguments because our decision turns on a completely different ground.

At this point, it is relevant in our final decision to reproduce the full text of section 4(3) of the Act:-

> *"(3) Without prejudice to subsection (2), the Court of Appeal shall have the power, authority and jurisdiction to call for and examine the record of any proceedings before the High Court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, order or any other decision made thereon and as to the regularity of any proceedings of the High Court."*

That, where revision is initiated by a party, the applicant assumes the duty to place before the Court the record, is both settled law and logical. It is settled law in **Benedict Mabalanganya v. Romwald Sanga** [2005] 2 EA 152 followed in many subsequent decisions. See also **Patrobert D. Ishengoma v. Kahama Mining Corporation Ltd (Barrick [Tanzania] Bulyanhulu) & 2 Others**, Civil Application No. 59 of 2014; and **Ramani Consultants Ltd v. The Board of Trustees of the National Social Security Fund & Another**, Civil Application No. 184 of 2014 (both unreported). It is logical because in the absence of a record, there would be nothing to examine and revise in line with section 4 (3) of the Act, reproduced above.

We therefore drew learned counsel's attention to this principle in view of the scanty record of revision in the instant matter and asked them to address us on it. The respondent's counsel did not bat an eye and just submitted that the record is too inadequate to be of any use. Ms. Simkoko reluctantly conceded despite the fact that she filed an "Additional Record" on 12th August, 2021.

Back to the instant application, it is not clear to us as to what proceedings and decision are meant for us to revise. The notice of motion seeks revision of *"the distribution of the estate"* and *"eventually the discharge of the respondents".* This cannot be anything but a misconception, in our view, because the only thing we can revise is a decision or order of the court, and the distribution of the estate done by an administrator is not one of them. Besides, the record before us does not include any proceedings and/or decision worth examining and revising. The arguments by the applicant which we have earlier referred to, have never been raised anywhere before the High Court so there is no decision on them for us to revise. We also take note that this application for revision has been preferred against the respondents in their personal capacities and not as administrators of the estate. There is therefore no nexus between the present application and Probate and

Administration Cause No. 28 of 2005 where they stood as administrators of the estate of the deceased. In the circumstances, we cannot pretend to revise orders made in that cause by impleading strangers, as it has been done by the applicant in the instant matter.

It is important to post a reminder here, though hardly necessary, that we are not a first instance Court, as per Article 117 (3) of the Constitution of the United Republic of Tanzania, 1977 and as per section 4 (1) of the Act. All those good arguments in the applicant's written submissions therefore, may not be considered for the first time on appeal or revision. This also is settled law pronounced in many of our decisions. For instance, see the case of **Raphael Enea Mngazija (Administrator of the Estate of the late Enea Mngazija) v. Abdallah Kalonjo Juma,** Civil Appeal No. 240 of 2018 (unreported). After referring to previous decisions on this point, the Court reiterated the position: -

> *"On the basis of the preceding cited authority, it is therefore settled that this Court will only look into matters which came up in the lower court and were decided...".*

Since this application offends the settled law on presentation of revisions before the Court, it is struck out for being improperly before us. We make no order as to costs because the point of the incompetence of the application was raised by the Court.

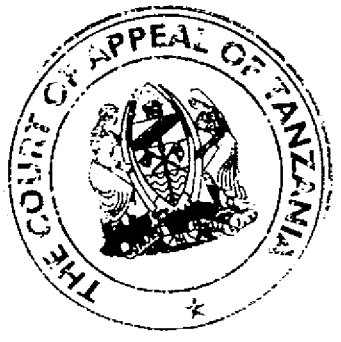
DATED at **DAR ES SALAAM** this 6th day of April, 2023.

G. A. M. NDIKA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Ruling delivered this 11th day of April, 2023 in the presence of Ms. Stella Simkoko, learned counsel for the Applicant and also holding brief for Mr. Adrian Mhina, learned counsel for the Respondents is hereby certified as a true copy of the original.



R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL