

IN THE HIGH COURT OF TANZANIA

DAR ES SALAAM REGISTRY

PC CIVIL APPEAL NO. 26 OF 2015

(Originating from the District Court of Kinondoni, Civil Appeal No. 11/2012)

PAULINA MARURU.....APPELLANT

VS

CHRISTINA COSMAS MARURU.....RESPNDENT

JUDGMENT

Date of last Order 8/4/2016

Date of Judgment 8/4/2016

W.B. KOROSSO J.

In the appeal before this Court, is an appeal originating from the Kinondoni Primary Court (Mirathi namba 189 of 2007), the appellant being aggrieved by the decision of the Kinondoni District Court in Civil Appeal No. 11/2013 on the following grounds:

1. That, the appellate Magistrate of the District Court erred in law and fact by refusing to rule that the primary court had no jurisdiction to entertain the Probate and Administration of Estate of a person who professes Christianity.
2. That, the appellate magistrate erred in law in holding that selling of the house for purpose other than distributing the proceeds to the beneficiaries is legal and tantamount to collecting the property of the deceased.

3. That the appellate Magistrate misdirected herself in holding that the advocate for the appellant raised preliminary objection instead of appeal without considering lack of jurisdiction was a new ground of objection which can be raised at any time

4. That the appellate Magistrate went wrong in ordering the respondent to distribute the money to the beneficiaries while the respondent informed her that she had no such money as he sold the house as his own

5. That, the appellate Magistrate erred in law by not considering the proceedings against minor were illegal as it proceeded without recognized guardian

6. That, the appellate Magistrate erred in law and in fact by overlooking to rule on all issues and laws submitted by the parties

The appellant consequently is seeking the following reliefs thereto; First, orders that, the Primary Court had no jurisdiction to entertain the matter concerning the administration of estate of a person professing Christian religion; Secondly, declaration that the sale agreement of the house was illegal and fraudulent as it was done in order to robe the inheritance of the rest of the beneficiaries. Third, a Declaration that all deeds of the respondent was nullity due to the fact that it was done contrary to the law and at some point without jurisdiction and fourth, order for costs for the appeal.

On the date fixed for hearing, the parties with the leave of the Court agreed for the hearing to be argued by way of written submissions as per a schedule outlined by the Court. All parties complied to the scheduled dates of filing their submissions. The appellants were represented by Mr. Luguwa, learned Advocate and the Respondents were represented by Mr. Onesmo, learned Advocate.

In their submissions, the appellants first alluded to the facts of the case, stating that Cosmas Maruru and Christina Maruru were married according to Christian rites and their marriage was not blessed with any issue. At the time of their marriage, Cosmas Maruru had a daughter by the name of Whitney Cosmas Maruru born by another woman. Up to the finalization of proceedings of the District Court, the child was a minor. That soon after the death of Cosmas Maruru, the family appointed the deceased elder brother to seek letters of administration. But on being granted the letters and on seeing that he was not administering the estate diligently, the family members went to Court to seek for nullification of the letters of administration and the Respondent was the one who was granted the letters of administration instead.

The appellants submissions started with narration of new facts having been discovered for Courts Consideration, the new fact being that, it has been discovered that, the house was not sold to Mr. James Temba. The counsel submitted that the sale agreement attached in Court was fake and the truth being that the house was still under the control of the respondent and that James Temba was a tenant. It was the counsel's prayer that the new fact be accommodated by the Court pursuant to section 95 of the Civil Procedure Code, Cap 33 R.E 2002.

The counsel for the appellant, arguing on the 1st and 3rd grounds, submitted that the Primary Court had no jurisdiction to entertain the matter because the family of the deceased professed Christian faith. That the appellate Magistrate erred in dismissing the preliminary objection relying on the contents of section 18(1)(a)(i) and 18(2) of the Magistrate Courts Act, Cap 11 RE 2002 and the case of *Ibrahim Kusaga vs. Emmanuel Mweta (1986) TLR 26* where the Court held that:

"The Primary Courts (Administration of Estates) rules were published under Government Notice N. 49 of 1971. These Rules prescribe the entire procedure to be followed by the Primary Courts in Administration of Estates. Rule 8 of the Rules GN 49 of 1971 stipulates the matters that the Primary Court may hear and decide. The effect of the above quoted provisions touching an affecting administration of the estate in Primary Courts can be summed up as follows:

4. A Primary Court has jurisdiction to hear an Administration of Estate's matter PROVIDED the law applicable to the Administration or distribution or the succession to the estate of the deceased is CUSTOMARY LAW or ISLAMIC LAW.

5. After hearing the application, the Primary Court may grant Administration to one or more persons or to an officer of the Court".

It was the contention of the counsel for the appellant that so far as the estate in issue was the estate of a person who professed Christian faith up to his demise, the Primary Court was not clothed with jurisdiction to handle the administration cause of that estate. In expounding the 2nd and 4th ground of appeal, Mr. Luguwa learned counsel for the appellant submitted that the lower Courts erred by blessing the act of the respondent to sell the deceased house without informing the court and other beneficiaries. This argument was supported by reference to section 8(d) and (f) and Rule 10 of the Primary Court (Administration of Estates) Rules, GN No. 49 of 1971, which in effect requires the Administrator after being granted letters of Administration must file the statement of assets and liabilities and accounts of the estate within four months or as directed by the Court. That this can be done in prescribed form IV and V. That in the present case this was not done by the respondent and therefore the proceedings at the trial Court were illegal.

Amplifying on ground 5 and 6 of appeal, the appellants contended that, the trial Court blessed the conduct of the respondent who parted with all the proceeds of a minor despite the fact that an account for the minor was opened at CRDB Bank. That it was illegal for the respondent to deal with the deceased's house and employment benefits irrespective of the guardian of the minor. The said argument was cemented by pursuing the provision so Rule 5(2) and 6(2) of the Primary Court (Administration of Estate) Rules (supra). The appellants reiterated their prayers for the Court to consider their grounds of appeal and to order for nullification of respondent appointment as administratrix and costs for the appeal.

Submitting rival contentions, the respondents through his advocate, Mr. E. Nasson, first started by addressing the new fact presented by the appellant at this stage by stating that no new fact can be allowed for the first time in an appeal. That if a party thinks that there are new important facts for consideration, one has to seek the leave of the Court to add the same under Order XLIII Rule 2 and 3 where one must make a formal application. Addressing the 1st and 3rd grounds of appeal, emulating how the appellants have proceeded, the respondents submissions were to the effect that, the appellants preliminary objection in the subordinate Court was not based on a point of law referring the Court to *Mulla on Code of Civil Procedure 16th edn at page 3846-3847* and the case of *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696*, which had addressed the issue that preliminary objections must be on points of law and not facts. For the respondents, the first ground and third should be dismissed because they are new matters brought in by the respondents without the leave of the Court.

With regard to the issue of inventory submitted which was raised in the 2nd and 4th grounds of appeal, the respondents contended that this issue was not raised in the Primary Court and therefore it is impossible to bring it by way of appeal. He further stated that, it is not the duty of the Primary Court to advise or instruct the administrator on how to distribute the deceased properties. Referring to *Ibrahim Kusaga vs. Emmanuel Mweta (1986) TLR 26* which stated "A primary Court ought not to distribute the estate of the deceased, that is the job of an administrator appointed by the Court". Another case referred was *Mohamed Hassan vs. Mayasa Mzee (1994) TLR 255* where the Court held, "the administrator is not legally required to obtain consent of all heirs before disposing the property by sale of house".

The counsel for the respondent also averred that the respondent failed to provide a share to Whitney Maruru because she never saw her but only heard of her. The opened account for Whitney beared the photograph of Suzan, the daughter of the appellant and therefore the respondent failed to deposit the money in the said account. The respondent submissions was also to deny that the law was not followed, by not considering the guardian. The respondent contended, that if that was the case, this has been done by the first Administrator and not the respondent and that failure not to consider the guardian under Rule 5(1) and 6(2) does not nullify the whole proceedings.

The appellants rejoinder was to reiterate their submissions in chief that the Primary Court had no jurisdiction to entertain the matter and that the sale of the house is against the law since the inventory of the deceased assets and its division was not filed in Court and that the share of the minor must be taken into account and the new discovery be considered by the Court.

Before venturing into consideration of the submissions by the parties in this suit it is important to present a brief background to this matter as discerned from the Court records. One Cosmas Machori Daniel Maruru died on the 7th of January 2007. At the time of his death, the deceased left a widow one Christina Cosmas Maruru, who they had no issues together. The deceased also left a child, Whitney Gati Cosmas Maruru who was born before the deceased married Christina Maruru. On the 16th of January 2007 a family meeting selected one Camilius D. Maruru, a younger brother to the deceased, to seek letters of administration of Cosmas Maruru's estate. Camilius D. Maruru filed for letters of administration at Kinodoni Primary Court, Mirathi Na. 189/2007. On the 22/6/2007, Camilius D. Maruru was granted letters of Administration in the estate of Cosmas D. Kiputa. The identified heirs were Lucia D. Maruru (the deceased mother), Christina Maruru (the deceased wife) and Witness Cosmas (the deceased child) according to the order of the Primary Court of 22/6/2007.

In May 2008, Paulina Maruru wrote a letter to the Magistrate Incharge, Kinondoni Primary Court concerned about how the appointed administrator was mishandling the deceased estate, more letters were written to the Magistrate incharge with similar complaints. On the 11/6/2008 a hearing took place in Court on revocation of letters of administration, were relatives of the deceased requested that, Christina Cosmas Maruru be appointed as an administrator of deceased husband estate. The Court being satisfied by the need to revoke, proceeded to do the same and appointed Christina Cosmas Maruru to be the administrator of the estate and on the 11th of June 2008 she was granted the letters of administration. After an inventory of distribution of assets was filed but she informed the Court she has failed to distribute anything to the child because the family has failed to show her where the child was and that when money was

distributed she managed to find out that the bank account though opened in the name of Witness Cosmas the photograph was one of the children of Paulina Daniel Maruru named Susan.

Paulina Maruru complained against the administrator. The Court stated that it recognized the deceased estate had one house, employment benefits, bank accounts at NBC and ABC banks. That the money had ACB had already been distributed to the deceased mother, Lucia, the wife Christina and the child Witness. That the only remaining property to be distributed was the house at Mbezi Salasala, which on the date of the Ruling of the Court on 7/2/2012, the administration stated that it had already been sold to one James Temba as of 5/9/2011. But that the administrator failed to distribute the payment from the sale of the house to recognized heirs. The Court ordered that the Administrator should distribute what was paid for the house to Christina and Witness accordingly.

Christina Maruru declared in Court on the 7/2/2011 that she had sold the house to James Temba for Ths. 39,500,000/- since 5/9/2011 which was to be paid in four (4) installments and the buyer still owed her Tshs. 29,500,000/- and that she had sold it as the administrator and that she had taken all the money as the widow. Despite the fact that the relative sought the Court to order for rescinding of the sale, the Court stated that since that was not the earlier prayer, it could not interfere at that stage.

Paulina Maruru, a relative of the deceased was aggrieved and appealed to the District Court of Kinondoni in Civil Appeal No. 11 of 2012. The grounds being to challenge the Primary Court decision for blessing the sale of the house in Mbezi, which was part of the deceased without consent of all beneficiaries. That the

Court erred in not considering the stated purchase price was too low bearing in mind the geographical area (Mbezi Salasala) the house is where the average price is around 150,000,000/- and also challenged the illegality of the process.

In its judgment the District Court gave reasons for dismissing the appellants Preliminary objections stating they were wrongly submitted, that is submitted at the wrong stage. The Court also stated that the appeal grounds show the beneficiaries dissatisfaction with the distribution of assets of the deceased and therefore there avenue should have been seek for revocation of letters of administration and if not satisfied with the sale they should file objection proceedings at the trial Court. The District Court ordered that the Administrator distribute the proceeds resulting from the ale of the house to all beneficiaries.

In considering the appeal grounds, we first venture into addressing the issue of the new facts alluded to by the appellant for consideration by this Court. That is considering whether new facts which were not raised in the lower courts can be considered in this court for determination. The new issue raised where claims that the appointed administratrix did not sell the suit house to James Teemba as claimed in the Primary Court. This fact was not raise in the trial Court nor during the first appeal. It is trite law that a second appellate Court, as this Court is at the moment, is limited to points of law, it cannot re-open the evidence. It cannot reweigh the evidence. What it can do is to look at the findings or facts by the lower court and determine whether the Court in making those findings correctly addressed itself to the issues and facts that were before it.

It is also a settled principle that new facts are allowed in an appeal for the first time if they were not addressed in a trial court. Order XXXIX Rule 27 of the Civil Procedure Code, Cap 33 R.E 2002 states:

27.-(1) *The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Court, but if-*

(a) the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted; or

(b) the Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the Court may allow such evidence or document to be produced, or the witness to be examined.

(2) Wherever additional evidence is allowed to be produced by the Court, the Court shall record the reason for its admission.

Looking at Rule 27(2) it is clear that for the new evidence to be allowed to be produced in Court, there must be leave of the Court. In this case no leave was sought, therefore the Court cannot consider the said evidence entitled new facts in this appeal on hand.

The principle underlying this is that, as a general rule an appellate court will be slow to interfere in findings of fact by the trial court. The trial court having seen and heard the witnesses is the best judge of questions of fact. In *Peters vs. Sunday Post* [1958] E.A. 424, the Court of Appeal for East Africa said: It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution: it is not enough that the appellate court might itself have come to a different conclusion. And it goes further where the appellate Court is

hearing a second appeal. It follows therefore that there must be demonstrable justification in order for an appellate court to interfere in the findings of the trial court. It will interfere where there is no evidence or sufficient evidence to support a finding, where there is misdirection or non-direction on the evidence, or generally where the trial court has proceeded on wrong principles. Hence for new evidence to be considered an application to that effect to show cause why the Court should admit the new evidence is necessary.

With regard to the question of jurisdiction, there is no doubt that the learned appellate magistrate in the District Court of Kinondoni erred in law by rejecting the preliminary objection raised which was on matters related to jurisdiction. This is because issues related to jurisdiction are sacrosanct and paramount and override everything else and can be raised at any time even on appeal. The Court of Appeal decision in *Maisha Muchuguzi versus Scania (T) Limited* is relevant and a Court without jurisdiction had no powers to make any decision. That this is the position of the law, and has been confirmed various decisions of the Appellate Court such as *MIS Tanzania - China Friendship Textile Co. Limited Versus Our Lady Of The Usambara Sisters, Civil Appeal No. 84 of 2002* (Unreported) on p. 10 where it said: "*But since it is about jurisdiction of the Court, it can be raised at any stage even before this Court.*"

This shows a long chain of authorities set in the past. Thus *IS Mandavia Versus Singh (1965) E.A. 118*, where it was also held that the issue of jurisdiction may be raised at any time. In *John Versus R (1951) 18 EACA 218* it was held that jurisdiction is always in issue. On the argument that the Appellant having failed to raise the point in the lower Court is now estopped from raising it, the answer is also provided by the Court of Appeal in *Consolidated Civil Applications* in

Tanzania Electric Supply Co. Limited versus IPTL and Others, No. 19 of 1999 and 27 of 1999 that parties cannot by agreement or otherwise confer jurisdiction upon a Court.

In the light of the above, we are of the firm view that the omission to give the parties a hearing on the issue of jurisdiction at the District Court of Kinondoni occasioned miscarriage of justice. Hence, there is merit in this ground of the appeal. Therefore this Court in consideration of the issue raised on the challenge of the jurisdiction of the primary Court to try cases of probate and administration where the parties professed Christianity. Looking at Section 18(1) of the Magistrate Court Act, Cap 11 there is no provision which bars the Primary Court to entertain parties of Christian faith, but it just insists that cases based on customary law and islamic law must be determined by the Primary Court.

Section 18(1)(a)(i) of the Magistrates Courts Acts confers jurisdiction over customary and Islamic laws to primary courts. Paragraph 1(1) of the Fifth Schedule to the Magistrate's Court Act Cap. 11 R.E. 2002 confers "Jurisdiction of a Primary court in the administration of deceased's states where the law applicable to the administration or distribution or the succession to the estate is customary law or Islamic Law".

Suffice to say for the case on hand though there is no evidence that the probate and administration case before the Primary court was determined under Christian rites. There was no application of any law such as the Indian Succession Act, in the distribution of the Property. Having regard to the fact that the wishes of the family were recognized, in identification of who were the beneficiaries of the estate and also who was to seek for letters of administration in the first instance, it is clear that the Court applied customary practices and not

Christianity. One should note if strictly, laws applying for christians would have been applicable that is the Indian Succession Act, 1865, under Section 43, the Act does not apply to the estate of a deceased moslem, It applies to Christians and all those of European origin. Illegitimate children are excluded from inheriting their fathers' estate, but they may only inherit from the estate of their deceased mothers. This means even Witness would have been excluded being a child born outside the wedlock.

The application of letters of administration by the first applicant did not allude to the fact that they prayed for property to be distributed by Christian rites. Therefore the appellant is estopped from coming at this stage alleging the Primary Court had not jurisdiction with claims that have not been substantiated. Therefore, this Court finds that the Primary Court had jurisdiction to determine the matter having regard to the Circumstances pertaining in this case and the fact. Therefore the issue of the Primary court having no jurisdiction in this matter is rendered without merit.

On the ground related to dissatisfaction with distribution of property and sale of the house, we start with the fact that respondent was appointed as the administrator of the estate and that when she applied there was no objection to the grant. Objection surfaced when the respondent, is sold the house in Mbezi part of the deceased estate without involving the other beneficiaries, and also not distributing the proceeds of the said sale. in the house in dispute were required to vacate so that the purchaser could take possession of the same. The records related to the sale of the said house are per the sale agreement dated 5th day of September 2011 between Christina Cosmas and James Temba which is part of the Primary Court records. This Court finds that the appointed administrator did not

conduct her duties and responsibilities in a reasonable manner by not involving the other beneficiaries in the sale of the house and also in failure to distribute the proceeds of the sale to the other beneficiaries. This Court on this issue finds that the Primary Court properly dealt with the matter on page 6 of the Judgment that:

"... Kuondoa usumbufu kwa mnunuzi wa Mahakama hii inaamuru msimamizi wa mirathi hii afanye mgawanyo wa fedha kama walivyotajwa hapo juu haraka iwezekanavyo ili kuletisha amani ndani ya familia". The trial Court came to this finding because there had been no objection by the applicant earlier when the fact of the sale had been alluded to. The District Court also alluded to this in their judgment by stating; *" According to the record she sold the house at the tune of Tshs. 39,500,000/= and already received Tshs. 10,000,000/-. The remaining amount is still in the hand of the buyer. For that matter I think other heirs on which is a deceased mother and a child they can get there share".* In effect ordering that the balance amount should be distributed to the remaining heirs to ensure they get their share.

Therefore on this issue, this Court finds no need to depart from the order of the Primary Court. The administratrix is ordered to distribute the proceeds accordingly to the other two heirs under the supervision of the trial Court. If the appellant has any other new facts or issues, they should raise them before the trial court. On the ground related to filing of inventory under Rule 10, that is Form V and Form VI. The requirement is for filing the statement of assets and liabilities and accounts of the deceased estate under Form V and VI and this is a formal way of informing the Court about the status of the deceased estate. Failure if any by an administrator to file the same should have been challenged at the Trial Court. The other remaining grounds relate to issues which we have already dealt with.

This Court finds that the Hon District magistrate had addressed all issues before him except for the one on Jurisdiction which we have already dealt with.

Having regard to what this Court has stated hereinabove, the appeal is dismissed, the decision of the Trial Court, the Primary Court is hereby upheld. Considering the circumstances of the case, each party to pay own costs. Ordered.

Winfride B. Korosso

Judge

8th April 2016