

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

CIVIL APPEAL NO: 106 OF 2015

(Arising from Civil Case No. 84 of 2014 of Temeke District Court)

FADHILI M. MSANGULE.....1ST APPELLANT

MWANAHAMISI M. MSANGULE.....2ND APPELLANT

VERSUS

ZUENA BUSHIRI.....RESPONDENT

Date of last Order: 09/11/2017

Date of Judgment: 16/02/2018

JUDGMENT

I. ARUFANI, J.

The appellants named hereinabove instituted Civil Case No. 82 of 2014 in the District Court of Temeke at Temeke claiming that both the appellants and the respondent are biological children of the late Sophia Nasibu Almasi (the deceased) who died intestate in August 2013. They stated that, the respondent was appointed to be an administrator of the estate of the deceased vide Mirathi No. 87 of 2014 filed in the Primary Court of Temeke. The appellants alleged that, the respondent unlawful and deliberately excluded them in the list of the legal heirs and

beneficiaries of the estate of the deceased. However, before the appellants' case being heard on merits, the respondent raised a preliminary point of objection that, the case is bad in law for being res judicata. The District Court sustained the point of objection and dismissed the suit on the ground of being res judicata.

Aggrieved by the decision of the trial court the appellants preferred the present appeal to challenge the decision of the trial court which held the suit was res judicata and they are now praying this court to set aside the said decision of the trial court. The appeal was argued by way of written submissions. Mr. Mwanjisi, learned advocate prepared the submission in support of the appeal. He argued in his submission that, the appellants prayed before the District Court vide Civil Case No. 82/2014 for declaration that, they are legal heirs and beneficiaries of the estate of their late mother. They argued that, the respondent's act of excluding them from the list of legal heirs of the deceased's estate is unlawful. Further to that, the appellants prayed to be included in the list of the legal heirs and be allocated and given their share in the deceased's estate. Basing on the nature and issues on the face of the

plaint, the learned advocate submitted that, the District Court erred on dismissing the case on the ground of being res judicata.

He elaborated that, the principle of res judicata is governed by section 9 of the Civil Procedure Code, Cap. 33 R.E 2002 (hereinafter the CPC). The learned counsel for the appellants argued that, under that provision of the provision, the suit is only declared to be res judicata when there is a proof from the pleadings that, parties and issues in the previous suit are the same like in the present suit. The learned advocate argued that, the Primary Court vide Mirathi No. 87 of 2014 never determined any issue rather than objection on appointment of the administrator. Under the premises, the learned advocate maintained that, the District Court erred in holding the case was res judicata. He concluded by stating that, although parties in the two cases are the same but the issues are not the same. For that reason he maintained his view that, the doctrine of res judicata cannot come into play, thus he prayed for this court to allow the appeal and set aside the decision of the District Court.

The respondent had a different view. She opined that, the appeal has no merit and should be dismissed accordingly. She submitted that,

section 9 of the Code bars parties like the appellants to reopen not only a suit but also raise issues which were directly and substantially in issue between the same parties in former proceedings. The respondent challenged the appellants' argument that the Primary Court did not determine the appellants were legal heirs of the deceased. She submitted in lieu thereof that, when the appellants entered caveat to the respondent's application for the letters of administration they appeared with five witnesses to support their grounds.

The respondent submitted further that, the appellants were objecting the grant because they were not involved in the process of petitioning for the letters of administration and that they were not recognized as legal heirs of the estate of the deceased. She added that, the same grounds were raised and discussed in the Primary Court were again raised in the District Court. Further to that she argued that, once a caveat is entered the court requires parties to enter appearance, the matter changes from application for letters of administration to a contentious suit. The issue of appellants' affiliation with deceased and their interest over the estate was discussed and determined by the

Primary Court. That, if the appellants were aggrieved by the decision of the Primary Court they ought to have appeal and not to file a fresh suit.

Mr. Kibasi Mwanjisi, learned advocate for the appellants filed in this court his rejoinder submission. He stated therein that, the issue before the Primary Court was appointment of the respondent as administrator of the estate of the deceased, and that any objection raised aimed at challenging the respondent's ability to administer the estate of the deceased. The Primary court was satisfied that there is no sufficient evidence to show that the respondent is unable to act as administrator. He subscribed to the case of **Tanganyika Motors Ltd Vs Continental Forwaders & Another [1997] TLR 158** cited by the respondent where it was held that:-

"When it is said that a previous decision is res judicata, it is meant that, the right claimed has already been adjudicated and cannot again be placed in context between the same parties."

After considering the rival submission from both sides the court has found that, there is no dispute that there was Mirathi No. 87 of 2014

before the Primary Court of Temeke through which the respondent was appointed as an administrator of the estate of the deceased. The appellants confirmed so under paragraph six of the plaint filed in Civil Case No. 82 of 2014 of the District Court of Temeke. In the suit filed in the trial court, the appellants were praying for a declaration that, they are legal heirs and beneficiaries of the estate of their late mother. They asked the court to declare the respondent's act of excluding them from the list of beneficiaries to be unlawful, null and void and they wanted to be included and allocated their inheritance. It is this suit the District Court of Temeke held to be res judicata to the previous suit which was Mirathi Na. 87 of 2014 of the Primary Court of Temeke.

Now the duty of this court is to determine whether Civil Case No. 82 of 2004 was indeed captured by the doctrine of res judicata as held by the District Court of Temeke. In principle, there are about three conditions which need to be fulfilled in order to establish the doctrine of res judicata. One is that, there was a former suit or proceedings in which the same parties as in subsequent suit or proceedings litigated. Two, the matter in issue in the later suit must have been directly and substantially in issue in the former suit. Three, a court with competent

jurisdiction to try the suit had heard and finally decided the matters in controversy between the parties in the former suit. See **Ganatra Vs Ganatra (2007) 1EA 76 (HCK)**. There are two key elements in condition two above, these are 'directly and substantially'. **Black's Law Dictionary** 6th Edn has defined these elements as follows:-

*"Substantially Essentially, without material
qualification in the main; in
substance, materially in a substantial
manner. About actually, competently
and essentially.*

*Directly In a direct way without anything
intervening, not by secondary but by
direct means."*

Before the Primary Court there was nothing more than probate and administration cause, in which parties therein were contesting for administering the estate of the deceased. What the Primary Court did was to appoint an administrator, the respondent and nothing more. In the District Court the appellants were trying to challenge the

respondent's process of administration of the estate of the deceased. Although parties are the same but the issues differ and that make it crystal clear that, the three elements indicated in the principle of res judicata listed above cannot be established in the appellants' case.

In the final result the court has been satisfied that, the appeal filed in this court by the appellants has merit hence the same is hereby allowed. The order of dismissing Civil Case No. 82 of 2014 of the District Court of Temeke issued by that court is hereby set aside. The District Court of Temeke is directed to hear the above case on merit. Basing on the nature of the case, the court is ordering each Party to bear his own costs.

Dated at Dar es Salaam this 16th day of February, 2018


I. Arufani
Judge
16/02/2018