

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

PC CIVIL APPEAL NO. 5 OF 2017

**(Arising from the decision of the Kinondoni District Court in
Miscellaneous Civil Application No. 61 of 2016, arising from
the decision of Magomeni Primary Court in Mirathi Na. 25 of
1975)**

PILI HAMISI.....APPELLANT

Versus

**1. MTUMWA HAMISI.....1ST RESPONDENT
2. UKIWAONA HAMISI.....2ND RESPONDENT**

JUDGMENT

B.R. MUTUNGI, J:

The appellant herein is dissatisfied by the decision of the Kinondoni District Court on the following grounds;

- 1. That the trial Magistrate erred in law and fact for misdirecting herself in discussing the merits of the case at the primary court and consequently failed*

to analyzed the weight of the appellants reasons for the transfer of the case to the District Court.

- 2. That the trial Magistrate erred in law and fact for holding that the Appellant's right to be represented before the District Court was in itself unnecessary for the stage at which the case does not require legal knowledge.*

In order to appreciate the gist of the appeal filed, it is imperative to venture in to what was the genesis of the dispute at hand. The record itself speaks out loud that, way back on 3/10/2002 the appellant did file probate proceedings for administration of the estates of one HAMIS KONDO (apparently the father to the parties in the dispute). The court (Magomeni Primary Court) did admit the said matter and christened it 'Mirathi Na. 25/1975'.

The trial court did proceed to appoint the appellant as an administrator of the estate of the late HAMIS KONDO. Thereafter the heirs of the said estate (the appellant and her

two young sisters (the respondents) did approach the trial court and made a prayer that, they wanted the house forming part of the estate sold. The court did proceed to order the said house valued at 18,800,000 to be sold. Meanwhile the appellant did seem to have changed her mind since she is seen before the trial court resisting the sale of the house.

The Respondents urged the trial court to proceed with the sale and ultimately the house was sold for Tshs. 20,700,000/=. The proceeds of the sale were divided and each was to receive Tshs. 6,900,000/=. The respondents did receive their shares but the appellant adamantly refused the money. The appellant did not stop here but went ahead and knocked at the doors of the District Court of Kinondoni in Revision No. 39 of 2003 in respect of the order of the primary court of Magomeni which sold the disputed

house without her consent. The District Court did dismiss the revision application and pronounced the sale legal.

Aggrieved with this finding, the appellant once again went through the window of appeal to the High Court (Appeal No. 19 of 2004), which appeal was struck out by Hon. Ihema .J. for misjoinder of parties. Still dissatisfied, the appellant made yet another attempt by writing a complaint letter to the Judge In charge who consequently upon inspection, ordered for a revision (Civil Revision No. 23 of 2006). Hon. Mandia, J. (as he then was) found in the revision that the trial court had involved itself into illegal acts in selling the said property without the participation of the administrator (appellant) who had indicated that she was not in favour of the sale. It was thus ordered that the administrator (appellant) to administer the estate property in accordance with the law.

The decision by Hon. Mandia (as he then was) was challenged in the Court of Appeal by the then respondent (Burton Msemwa-the buyer of the disputed house) for the court being functus officio following the striking out of an appeal before the same court. The Court of Appeal blessed the findings of Hon. Mandia, J. hence parties were to proceed with the distribution of the deceased's estate, that is the house situate at Magomeni Dar es Salaam.

It would seem from the record that, in 2016 the respondents became impatient after waiting for ten solid years without any word from the appellant nor was she executing her duties as an administratrix of the said estate. The respondents went back to the trial court complaining against the appellant's failure to discharge her duties and hence the probate matter had consequently not been finalized.

Following the said letter, the trial court did summon the appellant but instead, she filed Miscellaneous No. 61/ 2016 with the District Court praying for the court to order the transfer of the proceedings in Probate Cause No. 25 of 1975 from Magomeni Primary Court to the said Court. The reason being that, the appellant who is now of old age cannot defend herself and has no legal knowledge to challenge the claims against her. She also pleaded that through out the proceedings of the said probate matter she had enjoyed the services of Advocate Issa Maige. She asked the court to be mindful of the principle of law that, every person has the right to be represented which right is enshrined in the Constitution of the United Republic of Tanzania.

In her decision, the Honourable District Magistrate did find that, the stage the case had reached (execution) one need not require any legal knowledge as claimed by the

appellant. The appellant was duty bound to divide the deceased's property as required by law. In the event the Primary Court finds the administrator incapable of performing his/her duties, the court is vested with a discretion to revoke the previous appointed administrator and appoint a new administrator. In case one is aggrieved can appeal to the District Court. In view of the foregoing findings, the court did dismiss the filed application.

Following the foregoing sequence of events, the appellant has now come to this court on appeal.

On 13/2/2018 when this appeal was called for hearing, Talha Seleman and Rwegasira learned Counsel appeared for the appellant and respondents respectively.

Briefly Talha Seleman reiterated what was stated in the grounds of appeal and thereafter insisted the District Court of Kinondoni erred by ignoring the applicability of **section 47**

(1) of the Magistrate Courts' Act [Cap. 11 R.E 2002] as far as the principle of representation is concerned. She thus prayed the appeal be allowed with costs.

In reply, basically Mr. Rwegasira learned counsel supported the decision of the Kinondoni District Court and insisted the appellant has to execute her obligations and each to be given her share. In the said property.

In the rejoinder Miss. Talha Seleman strongly urged that, the Kinondoni District Court was wrong to deny the appellant's right of legal representation by refusing to transfer the case from the trial court to the District Court.

I have gone through the entire court record and submissions from the disputing camps and found the issue which will easily determine this appeal is, whether the District Court in Miscellaneous Civil Application No. 61 of 2016 was

correct in refusing to transfer the case from the Magomeni Primary Court to the District Court.

Considering the already stated historical background of the matter at issue, there is no dispute that the matter at hand is a probate cause which originated from the Magomeni Primary Court in Mirathi Na. 25 of 1975 in which the appellant was appointed the administrator of the estate of her father. There is no dispute that the respondents are the heirs of the said estate together with the appellant.

Following the above and the respondents harbouring a view that, the appellant as an administrator was acting against their interests, they were correct to file the said complaint letter at the Magomeni Primary Court against the appellant. The said court in my settled view was the appropriate forum to deal with the said complaint and not otherwise. Secondly, the said court (Magomeni Primary Court) was the appropriate forum since the respondents

had stated in their complaint letter their lack of faith with the appellant as an administrator. This right is provided for under **Rule 9 (1) (e) of the Primary Courts (Administration of Estates) Rules [Cap. 11 R.E 2002]** which states as follows;

*9 (1)- Any creditor of the deceased person's estate or any heir or beneficiary thereof, **may apply to court which granted the administration to revoke or annul the grant on any of the following grounds;***

*(e) **that the administrator has been acting in contravention of the terms of the grant or willfully or negligently against the interests of the creditors, heirs or beneficiaries of the estate.** [Emphasis is mine]*

More recently in the case of **ALLY OMARI ABDI VERSUS AMINA KHALIL ALLY HILDID (As an administratix of estate of the late KALILE ALLY HILDID), CIVIL APPEAL NO. 103 OF 2016 (CAT-AR) (UNREPORTED)** at pages 17 and 18 where the Court of Appeal of Tanzania cited with approval the case

of **RICHARD SOMBA VERSUS MARIA SOMBA, CIVIL APPEAL NO. 126 OF 2006 (UNREPORTED)** it was held;

'...A look at the record of the primary court will show that, the appointment of the appellant as the administrator of the deceased's estate was made under paragraph 2 (a) of Part I of the Fifth Schedule to the Magistrates' Courts Act, 1984, as amended. Under sub-paragraph (c) thereof, a primary court has power to revoke an appointment of an administrator for good and sufficient cause...'

For that reason, I find the Magomeni Primary Court had exclusive jurisdiction to hear and determine any subsequent complaints which would arise against the appellant as an administrator and not otherwise.

In view of the foregoing analysis , I find it was wrong for the appellant to rush to the District Court to seek for the transfer of the case under **section 33 (1) of the Magistrate Courts' Act (supra)** before the Primary Court had

determined whether the respondents had shown sufficient causes for the revocation of the appellant as an administrator. In other words, the remedies available in the Primary Court as per **Rule 9 (1) (e) of the Primary Courts (Administration of Estates) Rules (supra)** and as stated in the case of **ALLY OMARI ABDI VERSUS AMINA KHALIL ALLY HILDID (As an administratrix of estate of the late KALILE ALLY HILDID) (supra)** had not been fully utilized by the respondents.

In the circumstances of the matter, I find the appellant's wishes of transferring the case to the District Court would have pre-empted the respondents' right to be heard of their complaint which had already been filed earlier at the Primary Court. All that was required of the appellant is to distribute the estate which does not require legal knowledge, in line with the Hon. Mandia .J.'s decision.

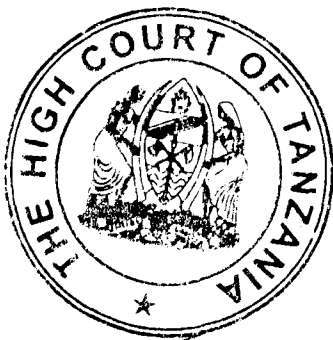
Having found as above, I find no sufficient reason to fault the Kinondoni District Court's findings in Miscellaneous

Civil Application No. 61 of 2016. It is not that the Magistrate had misdirected herself but she rightly found that there was no need for the case to be transferred to the District Court in the prevailing circumstances and in accordance with the dictates of law.

In the event I find this appeal has no merit and the decision of the Kinondoni District Court in Miscellaneous Civil Application No. 61 of 2016 is hereby sustained.

Consequently, I hereby proceed to dismiss the appeal with no order to costs because the parties herein are closely related.

It is so ordered.




B.R. MUTUNGI

JUDGE

8/3/2018

Read this day of 8/3/2018 in the presence of appellant and both respondents.




B.R. MUTUNGI

JUDGE

8/3/2018

Right of Appeal Explained.




B.R. MUTUNGI

JUDGE

8/3/2018