IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

PC CIVIL APPEAL NO. 27 OF 2017

(Arising from Civil Appeal No. 62/2016 District Court of Temeke at Temeke from the original Probate Cause No.360 of 2016 Temeke Primary Court)

JOHN COSMAS MATIMILA.....APPELLANT

Versus

JOHN COSMAS COSMAS.....RESPONDENT

JUDGMENT

B.R. MUTUNGI, J:

Originally at the Temeke Primary Court the appellant filed a Probate matter seeking to be appointed as an administrator of the estate of the late Cosmas Paul Matimila. The appellant therein alleged the deceased had left a house at Keko Mwanga 'B' Block No. 21 (the house in dispute). At the end of the hearing, the trial court ordered the appellant to hand over the house in dispute to the sons

of the late COSMAS PAUL MATIMILA which included the respondent.

The appellant was aggrieved by the said decision and unsuccessfully appealed to the District Court. His appeal was dismissed with costs. The appellant being aggrieved has once again preferred the appeal herein.

The appellant has raised two grounds of appeal which are as follows;

1. *The honourable Magistrate erred in law by deciding a case without regard to the ingredients of a lawful judgment.*
2. *The Honourable Magistrate erred in law by failure to properly analyse the grounds of appeal; especially issue no. 3 that the deceased left no estate. The Honourable Magistrate has actually not decided on the said ground.*

The facts leading to the appeal are straight forward. At the trial court the appellant applied to be appointed as an

administrator of the estate of the deceased Cosmas Matimila who died in 1988. The appellant further alleged the deceased left two children the respondent's father one COSMAS COSMAS MATIMILA who later died in 2009 and JOHN COSMAS MATIMILA MBAWALA. The appellant alleged the deceased had also left the house in dispute.

The remaining son of the deceased one JOHN COSMAS MATIMILA MBAWALA alleged the deceased in his life time owned two plots. One among which had a mad house therein (disputed plot). He further alleged the deceased gave the respondent's father the latter plot at Keko so as to develop the same but the respondent's father sold it. He further alleged in 1980 the deceased allowed the appellant's father to develop the remaining plot in dispute and built a block house therein.

In the final analysis, the trial court did find the house in dispute was among the properties comprising the

deceased's estate, thus the sons of the deceased were to be legal heirs. The appellant was further ordered to surrender the documents in relation to the said house to be distributed among all heirs.

The appellant was aggrieved but he unsuccessfully appealed to the first appellate court. Hence this is the second appeal.

When the appeal was called for hearing, the appellant had been enjoying the legal services of Mr. Mkoba learned Advocate whereas the respondent appeared in person and he represented himself.

Mr. Mkoba in his submission lamented that the judgment of the first appellate court dated 24/10/2016 had no parties inscribed therein. He urged that this is reflected in the heading and body of the judgment itself.

Starting with the above issue, I have had to closely scrutinize the whole record. After painstaking it is observed that, there are copies of the disputed judgment which have been properly titled in the court record. The court is puzzled as to where the appellant did get his copy from and as such the court on that stance cannot fault the said judgment. It follows this ground of appeal fails.

Now on the complaint raised by the appellant that the first appellate court did not address itself properly on the issue of the properties the deceased left. This is centered on house No. 211 located at Keko Muanga 'B' Street Temeke Municipality. The appellant's counsel was of the view that in fact the appellate court did not make any findings on this.

I have painstakingly gone through the first appellate court's record and disputed judgment. I find in deed this aspect formed the third ground of appeal in the District Court. Further it is true the court did not give a clear position

in so far as the said property is concerned. The foregoing notwithstanding this court vested with powers to look into the points of facts and law at this stage has over stretched itself to find what might have caused this scenario.

It is in the trial court's record and judgment that the Appellant had approached the said court seeking to be appointed an administrator of the estate of his late grandfather. The record further reveals that, the trial court also heard from the respondent who in fact had gone there to safeguard his interests being the deceased's son. To this end the court did appoint the appellant as the administrator of the said estate but went further to determine the fate of the disputed property, in other words the estate itself.

It does not need magic or a prophetic mind to find the trial court had over stepped its duties. All that it had to do is simply appoint an administrator pursuant to **Rule 7 (2) of the**

Primary Courts (Administration of Estates) Rules GN. No. 49 of 1971 nothing more or nothing less. The appellant should be left to perform his duties as he was never challenged by the respondent. If at all the respondent is aggrieved by the said appointment should find refuge in **Rule 9 (1) of the Primary Courts (Administration of Estates) Rules GN. No. 49 of 1971**.

It was thus wrong for the trial court to have made a finding and proceeded to determine the ownership of the said property and its distribution thereof. This ground succeeds.

All in all, I find the appeal has merits to the extent explained in the judgment. I do not order for costs based on the decision in the case of **K.Y Juma Versus Juma Mwango [1973] L.R.T 9** where it was held;

> *'Costs should not be ordered when this will generate misunderstanding and bitterness between the parties who are close relative.'*

It is so ordered.

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Right of Appeal Explained

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Read this day of 30/4/2018 in presence of Mr. Robert Mkoba for appellant and Lucas Nyagawa for the respondent.

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