

IN THE HIGH COURT OF TANZANIA

AT SUMBAWANGA

PC. PROBATE AND ADMINISTRATION APPEAL NO. 2 OF 2018

PRIMUS MKONDOKWA.....APPELLANT

VERSUS

GRACE GERVAS SUKWA.....RESPONDENT

**(Appeal from the decision of Sumbawanga District Court in Probate and
Administration of Estate Appeal No. 2 of 2018)**

JUDGMENT

14th December, 2018 – 23rd January, 2019

MRANGO, J:

This is a second appeal. The matter has its genesis from the decision of Sumbawanga Urban Primary Court (henceforth the trial court) in Maombi Mirathi Na. 8 of 2017 (henceforth Maombi Na. 8 of 2017) whereby the respondent herein vide undated letter prayed the revocation of appointment of Primus Mkondokwa, the appellant herein as administrator of the estate of late Thadeo Kilozi who passed away intestate on 18.5.2013. The trial court magistrate (Hon. Lipiki, PCM) after had heard the application, found the same has not merit and dismissed it. The respondent dissatisfied with that decision hence appealed to the District court of Sumbawanga (henceforth the first appellate court).

Before I go into details of the appeal, I find apt to narrate albeit briefly, the material facts of the case leading to the appeal and what transpired in the two courts below. In Shauri la Mirathi Na. 65/2013 (henceforth Mirathi Na. 63/2013), which was filed on 9.7.2013 by Adolofina Thadeo Kilozi to be appointed as Administratrix of the estates of her father, Thadeo Kilozi, (henceforth the deceased) who as I have said earlier passed away intestate on 18.5.2013.

After had heard the application the trial court magistrate Hon. M. Mkinga, SPCM (henceforth the first trial court magistrate) found with merit and by a ruling delivered on 10.7.2013 granted the application and appointed Adolofina Thadeo Kilozi as administratrix of the estates of the deceased. The appointed administratrix continued with her activities until she passed away on 10.5.2015.

After her death on 25.9.2017 one Primus Mkondokwa, the appellant herein filed an application to the trial court to be appointed as administrator of the estates of the deceased to replace the former appointed administratrix. As a result Maombi Mirathi Na. 8 of 2017 (henceforth Maombi Na. 8/2017) was opened and registered. That case file (Maombi Na. 8/2017) was placed before the first trial court magistrate who

again heard the application and on 22.6.2017 he was appointed as administrator of the estate of the deceased.

After his appointment, the respondent herein rose up and by her undated letter complained to the trial court against the appellant's appointment, therefore she requested to be revoked. As a result Maombi ya Mirathi Na. 8 of 2017 case file was reopened and placed before the first trial court magistrate for determination of the complaint. The first trial court magistrate heard the objector's case by recording the testimonies of SM1 Joyce ^d/o Sukwa and SM2 Grace ^d/o Gervas Sukwa. However, on 14.2.2018 again the respondent wrote a complaint letter to the District Court Magistrate In-charge with a request that the case be reassigned to another magistrate for the reason that the trial magistrate is adjourning the case with no reasons. That complaint letter was forwarded to the trial court magistrate incharge with the directives that the same be brought to the attention of the trial magistrate for its compliance and or for giving necessary orders. The record is silent on whether the said letter was brought to the attention of the trial magistrate. Instead on 15.2.2018 Maombi Mirathi No. 8/2017 case file was placed before the trial court magistrate incharge who reassigned it to Hon. P.J. Lipiki, PCM (henceforth

the second trial court magistrate). On the same date the case file was placed before him where he adjourned and ordered to come for hearing on the following day of 16.2.2018. When the matter was called on for hearing on 16.2.2018 as scheduled, the second trial court magistrate gave an order that the hearing of the application will start afresh and thereafter the hearing took off. After he had heard the testimonies of both objector and respondent sides, found the complaint to revoke the appointment is without merits.

Aggrieved by the said decision of the second trial court magistrate, the respondent herein (the then appellant) appealed to the District Court of Sumbawanga (henceforth the first appellate court). Her complaints before the first appellate court amongst was that the trial magistrate erred to confirm the appointment of the present appellant as administrator of the estate of the late Thadeo Kilozi without first there being a proceeding of the court to revoke the appointment of the late Adolofina Thadeo Kilozi.

Before the first appellate court the parties appeared in persons, unrepresented. Upon heard the appeal the first appellate court found the same meritorious and it proceeded to allowed it. In allowing the appeal the first appellate court had that filing of probate matter by the appellant (the

then respondent) after expiration of five years and also complaining after elapse of four months when the administratrix filed account and inventory of deceased estate or properties was hopelessly time barred. Hence, it nullified the whole proceedings in Maombi Mirathi Na. 8/2017 with costs.

So much for the background material facts and what transpired in the subordinate courts.

Dissatisfied with the first appellant court's decision, the appellant filed eight grounds memorandum of appeal instead of the petition of appeal which to my view is not fatal. But after I passed through those grounds, I found generally the only sound complaint by the appellant's complaint the matter before the trial court was not time barred.

Like when the matter was before the lower courts, before this court, again both parties appeared in persons during the hearing of this appeal. They were unrepresented. Arguing for his appeal, the appellant prayed to adopt the grounds of appeal as they appeared in his petition of appeal. He had nothing more to add.

In response, the respondent as well had nothing to add, but instead she prayed for this court to adopt her reply to memorandum of appeal he had lodged in this court. She had nothing to add.

I have perused the records of this appeal and have thoroughly gone through the files of the two courts below. Therefore I proceed to dispose of this appeal generally as hereunder.

It had been the complaint by the respondent before the first appellate court that the appointment of the appellant proceeded without first there being the court proceeding to terminate the appointment of the former appointed administratrix, Adolofina Thadeo Kilozi.

But before going far, I must state at the outset as correctly found by the first appellate court that the appointment of the subsequent administrator ought to have made in the very same case file which was used in the appointment of the first administratrix that is to say that Mirathi Na. 65/2013. Therefore, it was wrong and improper to have multiplicity of case files in respect of the same deceased person. That anomaly alone would have sufficed to dispose of this appeal. But despite that anomaly yet I find proper to proceed to see what follows thereafter as regards to this matter.

The record is clear that probate in respect of the deceased person, Thadeo Kilozi was filed and registered as Shauri la Mirathi Na. 65/2013 whereby Adolofina Kilozi applied and appointed as administratrix of the deceased estates. After his appointment as said earlier the appellant herein applied to be reappointed after the death of the former administratrix. He was appointed after Maombi Na. 8/2017 was filed and registered. Unfortunately, when Maombi Na. 8/2017 was opened, registered and determined the late Adolofina was still the administratrix of the deceased estate. Her appointment in Mirathi Na. 65/2013 had never been revoked by the court with competent jurisdiction. It follows therefore that the subsequent appointment of Primus Mkondokwa by the same court in Maombi Na. 8/2017 is improper and therefore fit to be nullified.

Even if I could have found there being the proceedings which revoked the appointment of the late Adolofina, yet the proceedings after the second trial court magistrate took over the matter has problem. As said elsewhere herein above. The respondent complained that the application be reassigned to another magistrate. That complaint had never been heard by the first trial magistrate and had never been part of the trial court record. The procedure has always been that once there is a complaint by

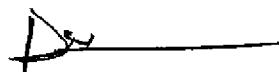
any party to the proceedings that the trial judge or magistrate be withdrawn from the conduct of the hearing of the case before him or her, that trial judge or magistrate should first determine the objection raised before he/she proceed with the hearing of the matter or withdrawn from the conduct of the case. [See the decision case of **Laurean G. Ragaimukamu versus Inspector General of Police and Another**, Civil Appeal No. 13 of 1999 CAT (Unreported), **Zabron Pangamaleza versus Joachim Kiwaraka and Another** [1987] TLR 140, and **Donasio Mweupe versus Emmanuel Lusambo** Misc. Land Appeal No. 5 of 2012 HC – Sumbawanga registry (Unreported)].

In the instant case that was not done, but unknowingly the case file (Maombi No. 8/2017) was remitted to the trial court magistrate incharge who reassigned to another magistrate. This was also wrong. It was the first trial court magistrate himself could have been in a position to weigh if the objection raised against him has merit or otherwise.

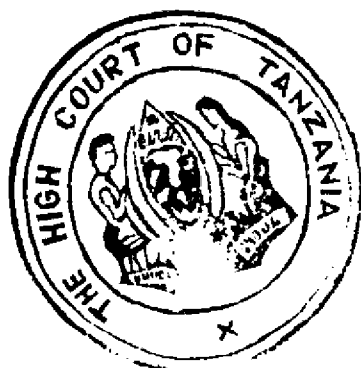
From the foregoing, I find the irregularities pointed out herein above in respect of filing; hearing and determination of Maombi No. 8/2017 are fatal and makes proceedings and decisions/orders thereof of the trial court nullity. The judgment and or order in appeal in the first appellate court

were based on such nullity proceedings and judgement of the trial court. In the premises, I do invoke the revisionary powers bestowed to me by the provision of **Section 30 (1) of the Magistrate Courts Act, Cap. 11 [R.E. 2002]** and proceed to quash and set it aside the proceedings and decisions/orders of the trial court in Maombi No. 8/2017 for being nullity. The proceedings and decision/order in Probate and administration of Estate Appeal No. 2 of 2018 of the District court was based on such nullity proceedings and decision/orders of the trial court in Maombi No. 8/2017. In the circumstances of the case as a whole, I find the order of a retrial is not preferable. Instead, I direct and order that any person who is interested with the estates of the deceased, if he or she so wishes, upon being proposed by the family or clan meeting, may apply to be reappointed to be the administrator or administratrix of the deceased estate subject to the revocation of the formerly appointed administratrix. In view of the fact that the irregularities were raised by this Court *suo motu*, and that this is a probate matter, I make no order as to costs.

It is so ordered.



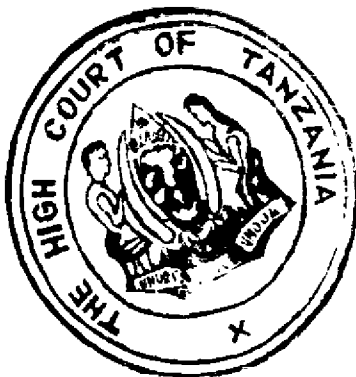
**D.E. MRANGO
JUDGE
23.1.2019**



Date - 23.01.2019
Coram - Hon. R.M. Mbuya – DR.
Appellant - Present
Respondent - Present
B/C - J.J. Kabata

COURT: Judgment hereby delivered in the present of both parties and the Court Clerk Ms. J.J. Kabata this 23rd day of January, 2019.

Rights of appeal explained.



A handwritten signature in black ink, appearing to read "R.M. Mbuya".

R.M. MBUYA

DEPUTY REGISTRAR

23.01.2019