

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

AT DAR ES SALAAM

PC CIVIL APPEAL NO. 06 OF 2020

**(Arising from the Judgment of Kilosa District Court in Civil
Appeal No. 17 of 2019 dated 22nd October, 2019 before
Hon. T.A LYON, RM, Original Probate Cause
No.44 of 2013 in Ruaha K II Primary Court)**

MAGRETH REUBEN MMARY 1st APPELLANT

WILLIAM REUBEN MMARY 2nd APPELLANT

ROSE REUBEN MMARY 3rd APPELLANT

VERSUS

MARY REUBEN MMARY RESPONDENT

JUDGMENT

16th March & 29th May, 2020.

E. E. KAKOLAKI J

This is a second appeal against the decision of Kilosa District Court in Civil Appeal No. 17 of 2019 which was entered in favour of the respondent. Disgruntled the appellants decided to appeal in this court equipped with five grounds of appeal as stated hereunder:

1. That, the appellate court misdirected itself by dismissing the appeal while the trial court erred in law and fact by ordering a

more than fifty percents of the deceased estates be given to the Respondent.

2. That, the first appellate court erred in law and fact by deciding that in law there is no distinction between probate matter and matrimonial matter.
3. That, the first appellate court failed to show the illegality of the Respondent's act of using the deceased money to pay school fees for a non-heir (Irene a step child of the deceased).
4. That, the appellate court erred in law and fact by upholding the decision of the Primary Court which favoured the Respondent who used Tanzania Shillings Sixteen Million (Tshs. 16,000,000/=) the deceased money without any proof.
5. That, the first appellate court erred in law and fact to overrule the ground that the decision that a farm/harden of 1 acre is Respondent's property.

The three appellants together with one Elice Reuben Mmary not a party to this appeal are children of late Reuben William Mmary whose mother passed away sometimes 1994 when they were still young. The deceased who met his demise on the 30/08/2013 at Muhimbili National Hospital on 09/05/1998 re-married to the respondent and led their life peacefully until his death. Upon his death the respondent successfully petitioned and granted with letters of administration of estates of the late Reuben William Mmary through Probate Cause No. 44 of 2013 in the Ruaha KII Primary Court in its decision issued on 20/12/2013. While administering the estates the 2nd appellant successful filed a complaint in court for revocation of the letters of administration of the respondent which in turn he was appointed the administrator of the estates. Being dissatisfied the respondent appealed to the District Court which

overturned the decision of the trial court and restored her to the former status as administratrix of estates. Disgruntled the 2nd appellant successful appealed to the High Court in PC. Civil Appeal No. 8 of 2017 and was restored to his position as the administrator of estates on 01/08/2017. It would appear the 2nd appellant as administrator of estates was under pressure to distribute the estates to the heirs and beneficiaries. After the respondent and 2nd appellant had purportedly filed to the trial court the inventory and accounts of the estates as required by the law on the 04/06/2019 through what is termed Parties Agreement requesting the court's assistance to distribute the estates for them "Hati ya Makubaliano ya wadaawa juu ya Uamizi wao kuwa Mahakama iwasaidie kugawa mali za mirathi" the estates were distributed. It appears the request was made by the 2nd appellant and supported by the respondent, 1st appellant that also represented the 3rd appellant and one Elice Reuben Mmary. Following that request the trial court on the 21/06/2019 entered a ruling that distributed the said estates amongst the heirs, the respondent being awarded more than 50% of the estates. It is from that decision the appellants were dissatisfied and unsuccessful appealed to the District Court in Civil Appeal No. 17 of 2019. Undaunted they are now before this court battling their rights by way of appeal.

Both sides in this appeal are represented. The appellants engaged Mr. Julius Novacatus Morris learned advocate whereas the respondent enjoyed the services of Mr. Cherubin Ludovick Chuwa learned advocate. Both parties by consent prayed the court to have the appeal disposed by way of written submission and the filing schedule was entered accordingly and complied with. The case was set for judgment on 29/05/2020. As I was writing the judgment, I noted some material

irregularity in the decision of the trial court in Probated Cause No. 44 of 2013 issued on 21/06/2019 that sourced the appeal to the District Court and later on to this court, the irregularity which later on forced me to invoke the revisionary powers of this court. The court had to pause and call the parties to address it on whether the trial court has powers to distribute the estates? Whether the trial court in this matter distributed the estates? And if the answer to second issue is yes what are the consequences? The controversial part of the decision of the trial court can be loudly read as follows:

Katika kuelekea Uamizi huu, Mshauri Asia Mkoka alitoa Maoni kuwa mjane Mary R. Mmary, anastahili mgao ulio sawa na watoto wa marehemu. Mashauri Rose Mlanda alitoa maoni yake kuwa, mgao wa Mary R. Mmary lazima uzidi ule wa watoto wa marehemu. Hivyo basi kwa kuzingatia kipimo cha mizani ya maoni ya washauri wa Mahakama na yake ya Hakimu, Mahakama hii inatoa maamuzi yafiatayo:-

1. Mary Reubeni Mmary apewe:-

- (i) Nyumba ya familia, yumba vitatu na korido iliyopo Ruaha.*
- (ii) Nyumba ya biashara ya vyumba 15 iliyopo Ruaha sokoni.*
- (iii) Frames za mbele zilizopo eneo la sokoni Ruaha.*
- (iv) Frames 2 za katikati zilizopo eneo la sokoni Ruaha.*
- (v) Stoo 1 ya nyuma eneo la sokoni Ruaha.*
- (vi) Shamba ekari nne na nusu (4 1/2) lililopo Mtafuteni.*
- (vii) Gari –Toyota Hilux No. T 469 APW lililopo kituo cha polisi Ruhembe.*

2. Magreth Reuben Mmary apewe:-

(i) Nyumba iliyobakia yenye vyumba saba (7) iliyopo eneo la juu Ruaha.

(ii) Frames tatu za biashara zilixopo eneo la juu Ruaha.

(iii) Shamba ejari mbili lililopo Mtafuteni.

3. Elice Reuben Mmary apewe:-

(i) Nyumba iliyobakia yenye stoo mbili (2) na frame mbili (2) iliyopo eneo la chini Ruaha.

(ii) Frames nne(4) za katikati eneo la sokoni Ruaha.

(iii) Stoo mbili (2) za nyuma zilizopo eneo la sokoni Ruaha.

4. Rose Reuben Mmary apewe:-

(i) Frames nne (4) za katikati eneo la sokoni Ruaha.

(ii) Stoo mbili (2) za numba zilizopo eneo la sokoni Ruaha.

5. William Reuben Mmary apewe:-

(i) Frames nne (4) za katikati zilizopo eneo la sokoni Ruaha

1. Sgn A. MKOKA

G. W. YAKISOLA – RM II

2. Sgn R. MLANDA

21.06.2019

Mahakama:

1. Msimamizi Williamu Reuben Mmary akagawe na kukabidhi mali hizo kwa kila mrithi kusaini fomu ya kukabidhi mali zake.

2. Wakodishaji na wapangaji wote wapewe taarifa kwamba mmiliki wa eneo alilopanga ni nani, kutokana na magao uliopo ili taratibu za ulipaji kodi zifuate.

3. Msimamizi arudi Mahakamani kufunga mirathi hiimara tu baada ya siku za rufaa kupita.

1. Sgn A. MKOKA

G. W. YAKISOLA – RM II

2. Sgn R. MLANDA

21.06.2019

Rufaa:-

Haki ya rufaa ipo wazi kwa asiyeridhika na uamuzi huu kwenda Mahakama ya wilaya ndani ya siku 30 kuanzia leo.

1. Sgn A. MKOKA

G. W. YAKISOLA – RM II

2. Sgn R. MLANDA

21.06.2019

On 27/05/2020 both parties appeared in court and after being introduced to the questions to be addressed on they entered their submissions. It was Mr. Morris's submission that after going through item 2 of the fifth schedule to the Magistrates Courts Act, [Cap. 11 R.E 2019] it was clear to him that Primary Court has no powers to distribute estate but rather the administrator of estate. And that what was done by the trial court was distribution of estate which in his view has the effect of rendering the proceedings and the said decision a nullity. Mr. Chuwa for the respondent had different view. It was his contention that under Rule 2(d) and (h) of the fifth schedule to the Magistrates Courts Act, [Cap. 11 R.E 2019], the Primary Court is empowered to make any order which has powers to make including distribution of estates. That, that powers are derived from rule 2(h) which is rooting from rule 2 (b). He added that what the court did was just to direct the administrator to distribute the estates in accordance with its instructions and return the filled in forms acknowledging the said distribution from the heirs. That, the court decided to do so following a request from the administrator supported by the heirs to intervene the process of distribution of estate. He rested his submission by stating that what the court did was right and did not mean to usurp the administrator's powers at all. He urged this court to consider the fact that this matter has stayed longer in court without having the heirs enjoy their shares of estate, therefore should be looked into with lenient eyes and determined conclusively.

In deciding this matter I find it incumbent to revisit the law on powers of Primary Courts in administration of estates. Powers of the Primary Court concerning administration matters are derived from the provisions of section 19(1)(c) of the Magistrates Courts Act, [Cap. 11 R.E 2019] and in the exercise of its jurisdiction in the administration of estates item 2 of the fifth schedule to the Act is applicable. For the purposes of precision I quote section 19(1)(c) of the Act:

19.-(1) The practice and procedure of primary courts shall be regulated and, subject to the provisions of any law for the time being in force, their powers limited

(a) ...N/A.

(b) ...N/A.

(c) in the exercise of their jurisdiction, in the administration of estates, by the provisions of the Fifth Schedule to this Act,

and, in matters of practice and procedure, by rules of court for primary courts which are not inconsistent therewith; and the said Code and Schedules shall apply thereto and for the regulation of such other matters as provided for therein.

Item 2 of the fifth schedule to the MCA also provides as follows:

2. A primary court upon which jurisdiction in the administration of deceased' estates has been conferred may

(a) either of its own motion or an application by any person interested in the administration of the estate appoint one or more persons interested in the estate of the deceased to the administrator or administrators, thereof, and, in selecting any such administrator, shall, unless for any reason it

considers inexpedient so to do, have regard to any wishes which may have been expressed by the deceased;

(b) either of its own motion or on application by any person interested in the administration of the estate, where it considers that it is desirable so to do for the protection of the estate and the proper administration thereof, appoint an officer of the court or some reputable and impartial person able and willing to administer the estate to be administrator either together with or in lieu of an administrator appointed under sub-paragraph (a);

(c) revoke any appointment of an administrator for a good and sufficient cause and require the surrender of any document evidencing his appointment;

(b) make orders as to the administration of the estate, and, in particular but without prejudice to the generality of the foregoing, as to the law to be applied in the distribution of the estate and as to advertising for creditors;

(e) require an administrator to sign an undertaking to administer the estate faithfully;

(f) require an administrator to give security for the due administration of the estate;

(g) make orders as to the payment of the share in the estate of any minor or other person under a disability to a relative or other suitable person for the maintenance or otherwise for the use of such minor or person under a disability, or with the consent of the Public Trustee, to the Public Trustee;

(h) make any order which it has Power to make under this Act in cases of a civil nature.

There is also Primary Courts (Administration of Estates) Rules, GN. No. 49 of 1971 that prescribe procedures to be followed by the Primary Courts in Administration of Estates. Rule 8 of the Rules stipulates the matters that the primary court may hear and decide on. It provides as follows:

***Rule 8.** Subject to the provisions of any other law for the time being applicable the court may, in the exercise of the jurisdiction conferred on it by the provisions of the Fifth Schedule to the Act, but not in derogation thereof, hear and decide any of the following matters, namely:-*

- (a) Whether a person died testate or instate;*
- (b) Whether any document alleged to be a will was or was not a valid or subsisting will,*
- (c) Any question as to the identity of persons named as heirs, executors or beneficiaries in the will;*
- (d) Any question as to the property, assets or liabilities which vested in or lay on the deceased person at the time of his death;*
- (e) Any question relating to the payment of debts of the deceased person out of his estate;*
- (f) Any question relating to the sale, partition, division or other disposal of the property and other assets comprised in the estate of the deceased person for the purpose of paying off the creditors or distributing the property and assets among the heirs or beneficiaries;*
- (g) Any question relating to investment of money forming part of the estate; or*

(h) Any question relating to expenses to be incurred on the administration of estates.”

In his submission Mr. Chuwa is contending that the primary court has jurisdiction to distribute estate deriving powers from the provisions of item 2(b) and (h) of the fifth schedule to the Act. With due respect to the learned counsel the two sub-items do not confer any powers of distribution of estates to the Primary Court. Guided by the provision of section 19(1)(c) of the Magistrates Courts Act, [Cap. 11 R.E 2019], item 2 of the fifth schedule to the Act and Rule 8 of the Primary Courts (Administration of Estates) Rules, I am in agreement with Mr Morris submission and therefore of the findings that the trial court’s decision of distributing the estates was reached wrongly. For that matter the trial court in its ruling dated 21/06/2019 acted in violation of the powers conferred to it under those provisions of the law consequently rendering the entire proceedings and decision thereof and all subsequent proceedings thereto nullity as that duty of distribution is of an administrator of the estates appointed by the court. In this finding I am persuaded by the case of **Ibrahim Kusaga Vs. Emmanuel Mwita** (1986) TLR 26 where this court had this to say:

- (a) A primary Court may hear matters relating to grant of administration of estates where it has jurisdiction, i.e., where the law applicable is customary law or Islamic law.*
- (b) A Primary Court ought not to distribute the estate of the deceased; that is the job of an administrator appointed by court;*

The trial court before indulging into the exercise of distributing the estates noted that distribution of estates is not its duty but rather to do justice to the parties. To let the court speak its mind I quote:

"Awali ya yote lazima ifahamike kuwa siyo kazi ya Mahakama kugawa mali za Mirathi bali jukumu kubwa na muhimu la Mahakama ni kutenda haki. Kwa kuwa katika hati ya makubaliano ya wadaawa iliyoandikwa tarehe 04/06/2019 juu ya Uamuzi wao wa kuwa Mahakama imuongoze Msimamzi kugawa mali, ilionekana wazi kuwa wadaawa waliridhia kuwa haki itatendeka katika uamuzi wowote."

Literally I can interpret the quote herein above as follow:

"From the outset it should be clear that the main duty of this court is not to distribute estates but to do justice. It appears from their agreement dated 04/06/2019 parties agreed this court to guide the administrator in his role of distribution of estates and satisfied that justice will be done in whatever decision made."

What the court ought to have done was to direct or guide the administrator of estates on matters and factors to be considered when distributing the estates such as verification of the available estates for distribution, consideration of larger shares in terms of percentage to the respondent as a wife, separation or exclusion of the wife shares from the estates subject of distribution. If one or the two administrators mismanaged or misappropriated the estates to order compensation that might be deducted from their part of estates as heirs instead of distributing itself. The trial court's act of distributing the said estates rendered the court's decision null and void ab initio.

Another irregularity noted is on the inventories and accounts by the respondent and 2nd appellant duly submitted in court on 20/05/2019 and 24/05/2019 respectively. The same are not in conformity with the form number V and VI as provided in the Primary Court (Administration of Estates) Rules, GN. No. 49 of 1971. Further to that they do not show with certainty the collected estates, debts paid, administrator's costs and the remained estates for distribution. The two administrators were just mentioning the activities that consumed the money without stating or giving account on how the amount was consumed. For example the respondent in the purported accounts form referred to payment of tuition fee for Magreth, Elice and William without mentioning the figure and providing receipts to substantiate the said expenditure. Others are payments of the alleged deceased hospital bills at Regency, TMJ, Lugalo and Boch Hospitals that cost Tshs. 12,324,000/= without any receipts. The same is the case to the 2nd appellant. I am therefore of the opinion that since the same are not meeting the standard forms as set out in the Rules cited above it was wrong for the trial court to admit them, they therefore deserve to be expunged from the record which I hereby do.

In the circumstances and for the foregoing reasons, this appeal is incompetent. I would invoke revisionary powers of this court under section 44(1)(b) of the Magistrates Court Act, [Cap. 11 R.E 2019] which I hereby do by quashing the proceedings of Probate Cause No. 44 of 2013 from 20/05/2019 onwards and set aside its ruling dated on 21/06/2019 that distributed the estates to the heirs; and all other subsequent proceedings and decisions thereto. I order that the process of submission of inventories and accounts of estates by the 2nd appellant and respondent as well as distribution of the estates should start afresh

in accordance with the law before another magistrate. Each party has to bear his/her own costs.

It is so ordered.

DATED at DAR ES SALAAM this 29th day of May, 2020.



E.E. KAKOLAKI

JUDGE

29/5/2020

Delivered at Dar es Salaam this 29th day of May, 2020 in the presence of Mr. Julius Morris learned advocate for the appellant, Mr. Cherubin Chuwa learned advocate for the respondent and Ms. Lulu Masasi, Court clerk.

Right of appeal explained.



E. E. Kakolaki

JUDGE

29/05/2020