IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

PC CIVIL APPEAL NO. 149 OF 2019

(Arising from the Ruling of Kinondoni District Court in Misc. Civil Application No. 66 of 2018 dated 30th August, 2019 before Hon. J. Mushi, RM, Original Probate Cause No. 55 of 2014 in Sinza/Manzese Primary Court)

SHUKURU MOHAMED SAIDI ..... 1st APPELLANT

HIYARI MOHAMED SAID ..... 2nd APPELLANT

KITWANA MOHAMED SAID..... 3rd APPELLANT

VERSUS

ATHUMANI MOHAMED MNYANGA (Administrator

of Estates of the Late Mohamed Said Mnyanga) **..... RESPONDENT**

JUDGMENT

16th March & 18th May, 2020.

E. E. KAKOLAKI J

This is the first appeal in respect of the decision of Kinondoni District Court in Misc. Civil Application No. 66 of 2018 proclaimed in favour of the respondent. Disgruntled the appellant knocked doors of this court canvassed with two grounds of appeal as registered hereunder:

1. That, the Honourable magistrate erred in law and fact for upholding the decision of the Sinza/Manzese Primary Court.

2. That, the trial court erred in law and fact for not considering the evidence adduced by the appellant.

The facts giving rise to this appeal stated briefly speak as follows. The first appellant being one of the heir and beneficiary of the estate of the late Mohamed Said Mnyanga, filed an application or complaint with the Sinza/Manzese Primary Court in Probate Cause No.55 of 2014 against the respondent and administrator of the estate of the late **Mohamed Said Mnyanga** seeking an order of revocation of his appointment as administrator. It was the applicant's claims that the respondent was misusing and misappropriating the estates and failed to discharge his legal duties as administrator including denying him his legal shares of the estates. After hearing both parties on the 22/03/2018 the Primary Court found out that the applicant's claims were unfounded as the respondent had violated no law, thus dismissed the application. Discontented the appellant requested for a copy of judgment for appeal purposes but the same could not be procured timely as a result on the 23/04/2018 he rushed to the District Court of Kinondoni and filed an application for revision in Misc. Civil Application No. 66 of 2018, this time adding the 2nd and 3rd appellants as co-applicants. The District Court found the grounds for revision unmeritorious and proceeded to dismiss the application. It is from that decision which aggrieved appellants the appeal is preferred before this court.

When the appeal came for hearing on 16/03/2020 parties sought court's leave to argue it by way of written submissions. The appellants on that day appeared in person as were not represented whereas the respondent was represented by Mr. Malima Daud learned advocate. The court issued filling schedule in which parties complied with and the judgment date was set to be on 15/05/2020.

While composing the judgment and before starting to consider the parties submissions the court paused and suo motto raise a question as to whether there was a proper appeal before it. It had therefore to invite the parties to address it on the question first. The court wanted to know whether it was proper for the District Court to hear and determine the application for revision in Misc. Civil Application No. 66 of 2018 which was preferred as an alternative to appeal from the ruling of Sinza/Manzese Primary Court in Probate No. 55 of 2014.

On the 15/05/2020 when the appeal was called for judgment the court extended it to 18/05/2020 to allow the parties address it on the raised question. The appellants submitted that they decided to file the an application for revision in Misc. Civil Application No. 66 of 2018 because the judgment of the Primary Court which was intended for appeal purposes was not procured in time. And that during revision proceedings their advocate decided to proceed filing the application without a copy of judgment. Otherwise there were no other reasons, they submitted. On the other side Mr. Malima learned advocate for the respondent was of the view that the appellants' decision to lodge an application for revision was wrong. The proper course to be taken by them when aggrieved with the primary court's decision was to file an appeal which they failed to do. He was therefore of the submission that this court finds the entire proceeding of the District Court a nullity and proceed to quash it and set aside its decision. And that since this appeal is premised on nullity proceedings then it is as good as there is no appeal before this court. He prayed the court to find the appeal incompetent and struck it out.

The law is very clear under section 20(1)(b) of the Magistrates Courts Act;[Cap. 29 R.E 2019] that any party who is aggrieved by any order or decision of the primary court, may appeal to the district court for which

the primary court is established. The 1st appellant in this appeal who was seeking for court's order to revoke the letters of administration of the estates of the late **Mohamed Said Mnyanga** granted by the Primary Court of Sinza/Manzese to the respondent had his application dismissed for want of merit. The application having been disposed on merit qualified to be appealed against under that provision. However, instead of appealing against the decision of the Primary Court of Sinza/Manzese the 1st appellant joining the 2nd and 3rd appellants preferred revision to the District Court of Kinondoni under section 22(1) and (2) of the MCA, asking the court to call for records from the lower court and examine them for the purpose of satisfying itself as to the regularity, correctness, legality or propriety of findings and orders passed by said court on 22nd March, 2018. The District Court of Kinondoni proceeded to hear and determine the said application on merit and in the end dismissed it for want of merit. By so doing in my firm opinion and as rightly submitted by Mr. Malima the District Court was not clothed with jurisdiction to entertain it as revision could not be an alternative to appeal. Discussing on when a party or the court can invoke revisional jurisdiction the Court of Appeal in the case of **Halais Pro-Chemie Vs. Wella A.G** (1996) TLR 269 held that:

> *(i) The Court Could, on its own motion and at any time, invoke its revisional jurisdiction in respect of the proceedings in the High Court;*
>
> *(ii) Except under exceptional circumstances, a party to proceedings in the High Court could not invoke the revisional jurisdiction of the Court as an alternative to the appellate Jurisdiction of the Court;*

(iii) *A party to proceedings in the High Court could invoke the revisional jurisdiction of the Court in matters which were not appealable with or without leave;*

(iv) *A party to proceedings in the High Court could invoke the revisional jurisdiction of the Court where the appellate process has been blocked by judicial process: the decision of the applicant's application for extension of time to apply for leave to appeal did not amount to judicial process which blocked the applicant's move. The Court of appeal had concurrent jurisdiction with the High Court to grant extension of time and it was therefore open to applicant to come to court to seek extension of time after the High Court had refused it; the reliance on the court's revisional jurisdiction was clearly misconceived.*

(v) *The application was in the event hopelessly time-barred.*

Again in the case of **Moses J. Mwakibete Vs. The Editor-Uhuru, Shirika la Magazeti ya Chama and National Printing Co Ltd** (1995) TLR 134 the Court of Appeal in its decision held that:

(i) *The revisional powers conferred by S. 2(3) of the Appellate Jurisdiction Act, 1979 are not meant to be used as an alternative to appellate Jurisdiction of the Court of Appeal: accordingly, unless acting on its own motion,* ***the Court of Appeal cannot be moved to use its revisional powers under S. 2(3) of the Act in cases where the applicant***

has the right of appeal with or without leave and has not exercised that right;

(ii) *The Court of Appeal can be moved to use its revisional jurisdiction under S. 2(3) of the Appellate Jurisdiction Act, 1979* ***only where there is no right of appeal, or where the right of appeal is there but has been blocked by judicial process, and lastly, where the right of appeal existed but was not taken, good and sufficient reasons are given for not having lodged an appeal;***

(iii) ***The applicant in this case had a right to appeal and has not given any good and sufficient reasons why he did not appeal; therefore he cannot move the Court of Appeal to exercise its revisionai jurisdiction.*** *(emphasis supplied)*

Applying the principles enunciated in the above cited cases to the facts in Misc. Civil Application No. 66 of 2018 in the District Court of Kinondoni, it is obvious the decision which the applicants sought to be revised is appealable under section 20(1)(a) of the MCA. The 1st applicant for no apparent reason decided not to appeal instead joined by 2nd and 3rd appellants lodged an application for revision as an alternative to appeal. Looking at the reason advanced in the appellants which was also pleaded in their joint affidavit is support of their application in the District Court at paragraph 7 the appellants (applicants) claimed that they wrote a letter to the Primary Court applying for copy of judgment but the same could not be issued in time. The said paragraph reads:

7. That we have requested to be supplied with the copies of proceedings, decrees/orders and judgment but to-date we have

not been supplied with them despite of constant follow ups to the trial court registry.

As they put it due to delay in supply of copy of judgment the appellants (applicants) decided to file the application for revision. With due respect to the appellants this is not sufficient reason for them to resort to revision as an alternative to the appeal which remedy they never attempted to pursue. As the records speak the decision by the Primary Court dismissing the 1st appellant's application for revocation of letters of administration granted to the respondent was entered on 22/03/2018. The application for revision was filed on the 23/04/2018; (1) one day after the time limitation of 30 days for the 1st appellant to appeal had passed. I specifically mentioned the 1st appellant as the status of the 2nd and 3rd appellants is reserved and will be discussed later in this judgement.

The law under section 20(4)(a) of the MCA empowers the district court to extend time for filing an appeal either before or after such period of 30 days has expired. To appreciate the spirit of section 20(4) of the MCA I find it incumbent to reproduce it hereunder:

S. 20(4) Notwithstanding the provisions of subsection (3)-

(a) the district court may extend time for filing an appeal either before or after such period has expired; and

(b) if an application is made to the district court within the said period of thirty days or any extension thereof granted by the district court, the district court may permit an appellant to state the grounds for his appeal orally and shall record them and hear the appeal accordingly.

Further to that under the provision of section 20(4)(b) of the MCA the intended appellant having applied for extension of time within which to appeal and so granted without copy of the judgment would have applied to the district court orally to state his grounds of appeal and proceed to argue his appeal. In my opinion the provision intended that attachment of the judgment to the petition of appeal in the appeal from the Primary Court to the District Court as appellate court is not a mandatory requirement for lodging the appeal. All these available remedies provided by the law were neither preferred nor exhausted by the 1st appellant. The reason of delayed supply of the copy of judgment from Sinza/Manzese Primary Court raised by the appellants (applicants) particularly the 1st appellant in my view is neither blockage of legal process nor a sufficient reason for his failure to file the appeal. Such reason by any stretch of imagination could not entitle him to lodge the said application for revision as an alternative to appeal. The District Court before entertaining the said application for revision ought to have established and satisfy itself whether it was properly moved to hear and determine it. Since it entertained the matter under revisional jurisdiction which was supposed to proceed under appellate jurisdiction I find that the whole proceedings there and the decision thereof were a nullity. Applying the provisions of section 44(1)(b) of the Magistrates Court Act, [Cap. 11 R.E 2019] I would invoke revisionary powers of this court by quashing the proceedings of Misc. Civil Application No. 66 of 2018 and set aside the ruling entered on 30/08/2019. It follows therefore that there is no competent appeal to be entertained by this court for originating from null proceedings.

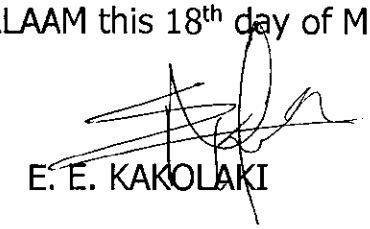
I now turn to consider the status of 2nd and 3rd appellants in this appeal. My perusal of the records has revealed that in the Primary court it is the

1st appellant only who applied for revocation of letters of administration by the respondent. When applying for revision he was joined by the 2nd and 3rd appellants who were not parties to the proceedings before. I also find this to be irregularity in the proceedings of the District Court in Misc. Civil Application No. 66 of 2018. The two not being parties to the trial court had no locus to make application or be joined in the said application.

In the circumstances and for the foregoing reasons, I hold that the appeal before this court is incompetent for originating from proceedings which are nullity and it is hereby struck out. As the outcome of the appeal has not resulted from the parties, I order no costs.

It is so ordered.

DATED at DAR ES SALAAM this 18th day of May, 2020.



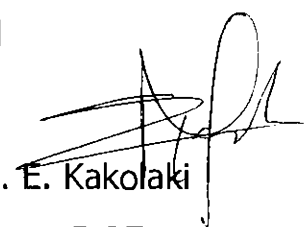
E. E. KAKOLAKI

JUDGE

18/5/2020

Delivered at Dar es Salaam this 18th day of May, 2020 in the presence of all appellants and Mr. Malima Daudi advocate for the respondent and Ms. **Lulu Masasi**, Court clerk.

Right of appeal explained



E. E. Kakolaki

JUDGE

18/05/2020