

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

AT DAR ES SALAAM

PC CIVIL APPEAL NO. 117 OF 2019

**(Arising from the Judgment of Kinondoni District Court in
Probate Appeal No. 20 of 2018 dated 29th March, 2019 before
Hon. KILIWA, RM, Original Probate Cause No.142 of 2012 in
Magomeni Primary Court)**

KELVIN JOHN KAYUNI APPELLANT

VERSUS

GRACE JOHN KAYUNI RESPONDENT

RULING

16th March & 18th May, 2020.

E. E. KAKOLAKI J

This is a second appeal, which is in respect of the decision of Kinondoni District Court in Probate Appeal No. 20 of 2018 entered in favour of the respondent. Disgruntled the appellant knocked doors of this court canvassed with three grounds of appeal as registered hereunder:

1. That, the Trial magistrate erred in law and fact reaching the decision depending on the assertion that inventory filed in court was signed by all heirs as their consent for the distribution while there was no signed inventory filed in court records.
2. That, the trial court erred in law and fact by upholding the decision of the trial court on grant of letters of administration.

3. That, the Honourable Magistrate erred in law and fact by not considering the worthiness of the evidence as adduced by the appellant and witnesses at the trial court.

The facts giving rise to this appeal can be stated as follows. Sometimes in March, 2012 the respondent petitioned before Magomeni Primary Court in Probate Cause No. 142 of 2012 for grant of letters of administration of estates of the late **John Kayuni** who met his demise on the 31/02/2011. The deceased survived with fourteen children the appellant and respondent being among them and two wives who are alive namely **Cecilia John Kayuni** and **Hellen John Kayuni** as the third one **Mary Mwakanya** had passed away by then. Out of those fourteen children each wife has four while two others are from two different wombs. Upon registering the matter the trial court on 26/03/2012 proceeded with hearing and on the same date appointed the respondent as administratrix of the estate of the said late **John Kayuni** as it appears there was no objection to her appointment. The trial court went further to decide on the distribution of the estates and ordered the administratrix to execute the said decision accordingly.

The appellant being one of the heirs and beneficiary of the estates on the 07/01/2013 filed a complaint before the trial court accusing the respondent of processing sale of house No. 102/2 situated at Regent estate Mikocheni area within Kinondoni District which is part of the estate without their involvement as half of the purchase price was already paid. The alleged house as per the distribution made by the trial court on the 26/03/2012 was allocated to the first wife **Cecilia John Kayuni** and her four children including the respondent. The respondent was summoned and responded to the complaint. She denied all claims

raised by the appellant. On the 26/01/2013 the court dismissed the appellant's claims ruling that the issue of the said house was already decided on the 26/03/2012 and that Cecilia John Kayuni promised could consider other beneficiaries on the proceeds of sale if so done. Therefore the trial court could not vacate the clan meeting's decision as well as its decision entered earlier on.

Being discontented with that decision of the trial court the appellant filed an application for revision before the District Court of Kinondoni in Misc. Application No. 8 of 2013 praying the court to call and examine the records of the Primary Court of Magomeni in Probate No. 142 of 2012 and give direction upon correction of all irregularities which appeared in the records. Further to that called upon the court to declare that the appointment of the administratrix of estates was not properly done among other reliefs sought. Upon hearing of the application the District Court in its decision of 13/10/2014 noted that the trial court had no jurisdiction to divide the deceased's estates. However, it ordered the matter to go back to the trial court for the magistrate in-charge of Magomeni Primary Court to resolve the parties' differences.

Following the District Court's order dated on the 13/10/2013 returning the file to the trial court, the said court summoned both parties to hear and resolve their differences. The main complaint of the appellant was on the sale of the house located at Regent Estate by the respondent without apportioning the proceeds of sale to other heirs including him. On conclusion of the hearing the trial court on the 23/04/2015 entered its decision that parties should resolve their differences and bring the feedback to the court so that the case file is closed.

Complying with the court's order of 23/04/2015 the respondent on the 09/06/2017 filed inventory of the collected estates and accounts on the division of estate. She informed the court that beneficiaries were all served with the copies of the documents. It is from those documents the appellant and other two heirs of the deceased whom he shares mother with lodged their complaints challenging the submitted inventory and accounts for not containing the collected money, costs incurred and debts paid. They also faulted the respondent of allocating a house of Upanga to them which is not part of the estates as it belongs to National Housing Corporation (NHC). After hearing them the trial court on the 25/07/2017 entered its ruling that the appellant was not supposed to raise once again the same complaint as it was already decided on the 23/04/2015. And that if anything he should have appealed against that decision to the District Court or to the High Court against the District Court's decision in Misc. Application No. 8 of 2013 that remitted back the case file to the primary court. Dissatisfied the appellant lodged an appeal to the District Court in Probate Appeal No. 20 of 2017, the appeal which was determined in respondent's favour. Undaunted the appellant has approached this court by way of appeal challenging the 1st appellate court's decision entered on 29/03/2019.

When the appeal was called for hearing on the 16th March, 2020 the appellant appeared unrepresented as he is the beneficiary of legal aid under Legal and Human Rights Centre (LHRC) whose assistance is for document drafting only whereas the respondent had the services of Ms. Modesta Medard learned advocate. Both parties agreed to have their matter disposed by way of written submission in which filing schedule was entered by the court and complied with.

The appellant has raised three grounds of appeal. I shall reduce down briefly the submission of each party in support and against the appeal on each ground. Submitting on the first ground of appeal the appellant contended that the court erred when reached its decision depending on the assertion that the inventory filed in court were signed by all heirs showing their consent to the distribution of estates made by the respondent while in fact there was no signed inventory filed in court. Opposing this ground Ms. Medard stated that the said ground was not raised in the District Court as appellate court. However, she noted that the said signed inventories were filed in the trial court attached with minutes of the meeting titled KIKAO CHA WANFAMILIA YA MAREHEMU JOHN LISUNGU KAYUNI KILICHOFANYIKA TAREHA 11/03/2012 duly signed on the 18/03/2012. Therefore, she prayed to have this ground dismissed.

On the second ground the appellant lamented that the Honourable Magistrate erred in law and facts by upholding the decision of the trial court on grant of the letters of administration of the deceased estate to the respondent depending on the forged minutes of the family meeting tendered in court. That he adduced oral evidence on how they were made to sign the said minutes when asked to sign only one page of the attendance sheet without knowing the contents of the minutes of the said meeting. That at the top of the said paper it was titled KIKAO CHA WANAFAMILIA YA MAREHEMU JOHN LISUNGU KAYUNI KILICHOFANYIKA TAREHE 11/03/2012 and below the said attendance sheet it was written MAAMUZI YA KIKAO: KIKAO KILICHOMCHAGUA KWA PAMOJA BI. GRACE JOHN KAYUNI KUWA NDIYE MSIMAMIZI WA MIRATHI YA MAREHEMU JOHN LISUNGU KAYUNI. It is his submission that in the family meeting there were on two agenda, one being

nominating an administrator of the deceased estates and second repair of the grave. Therefore he did not see any other sheet apart from the attendance sheet as in that meeting they neither discussed distribution of properties of the deceased nor signed to consent the said distribution. He therefore prayed for revocation of the letters of administration granted to the respondent. Ms. Medard responding to the second ground submission contended that the appellant had never alleged throughout the proceedings in the trial court that the said family meeting minutes were forged one nor had he denied his presence during the family meeting duly conducted on 11/03/2012. She stressed that the appellant did sign the said minutes. With regard to revocation of the respondent's letters of administration she was of the argument that the same has been overtaken by event as the respondent has already filed the inventory in court and closed the probate therefore discharged from the administration duties. That the appellant could have objected or filed his claims on revocation of the administratrix before closure of probate as the position for now is that she left with no any duty as administratrix as it was held in the case of **Ahmed Mohamed Al Laamar Vs. Fatuma Bakari and Another**, Civil Appeal No. 71 of 2012 (Unreported). She was of the view that this ground lacks merit and has to be dismissed.

On the third ground of appeal the appellant faulted the District Court for non-consideration of his evidence on signature in the attendance sheet signifying his attendance of meeting only and not the purportedly consent on the added agenda of distribution of estates/properties. Further that, that there was also tendered in evidence but unconsidered the procurement of letters of administration of estates through forged minutes and misappropriation of the deceased estates in particular the

sale of the house located at Mikocheni for TShs. 540,000,000/= (Four Hundred and Fifty Thousand Million) the money which was never distributed to the legal heirs. He was of the prayer that the appeal be allowed by setting aside the judgment and decree of the subordinate courts. In this ground Ms. Medard made a short reply in that the respondent contests the allegations and state that the court did consider the weight of the evidence tendered and arrived to a just decision. She invited the court to find the appeal unmeritorious and dismiss it with costs.

In determining this appeal for the reasons to be evident soon I have opted to start with the second ground of appeal. In this ground the appellant is faulting the appellate court for upholding the decision of the trial court on grant of letters of administration of the deceased estates to the respondent depending on the forged minutes of the family meeting duly tendered in court by the respondent. The novel question here is whether the decision for grant of letters of administration of estates is tainted with illegalities, forgery being one of them as alleged. Ms. Medard for the respondent has put it that the appellant never raised that complaint of forgery of the family meeting minutes during the trial and that the respondent has already closed up the probate thus her duties and responsibilities discharged. And for that matter there is nothing to be revoked she intimated. To answer the posed question the Court has to revisit the whole process of appointment of the respondent as administratrix of estates of the late John Kayuni. It is true as submitted by Ms. Medard that the applicant during hearing of the respondent's application for appointment as administratrix of estates of the late John Kayuni never contested nor raised the issue of forgery. It follows therefore that, that complaint was brought in as an afterthought

for the appellant was one of the witness during the trial on the 26/03/2012 and had an opportunity to raise it but opted to remain mute. He cannot therefore be heard raising it at this stage.

That conclusion aside while revisiting the process of appointment of the administratrix of the estates by traversing through the trial court proceedings this court has noted some irregularity in the decision entered on 26/03/2012. The trial court after granting the respondent with the letters of administration of estates went further to distribute the estates the powers which is not clothed with. Upon noting that irregularity the court on 15/05/2020 called parties to address on it and its legal effect as per the requirement of the proviso in section 44(1)(b) of the Magistrates Courts Act, [Cap.11 of R.E 2019].

On 15/05/2020 the date which was set for judgment the court invited parties to address it on the powers of the Primary Court to distribute deceased estates. The appellant could not enter appearance but the respondent was represented by Ms. Medard learned advocate who addressed the court. On the powers of the Primary Court to distribute the estates Ms. Medard conceded that the Magomeni Primary Court that distributed the deceased estate was not clothed with such powers. And that it is true that the District Court of Kinondoni in Misc. Application No. 8 of 2013 when conducting revision of the Primary Court proceedings noted the said irregularity but ignored it. That as a matter of law it ought to have quashed the primary court proceedings and set aside its decision, the course which she advised the court to take.

Powers of the Primary Court concerning administration matters are derived through 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. 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 nit 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.”*

Guided by the provision of Rule 8 above I am in agreement with what was submitted by Ms. Medard and therefore of the findings that the trial court's decision of distributing the estates was reached wrongly as it acted in violation of the powers provided under the item 2 of the fifth schedule to the Magistrates Court's Act and Rule 8 of the Rules 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. My finding is stemmed 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;*

When entertaining revision application in Misc. Application No. 8 of 2013 the District Court of Kinondoni noted that irregularity but instead of revising and rectifying it, it referred back the matter to the Primary court to have the parties reconciled. As a result all subsequent proceedings and decisions made thereafter including those in Misc. Application No. 8 of 2013 and the Probate Appeal No. 20 of 2018 all became null and void

for originating from null proceedings. Thus the appeal before me is incompetent. The question is therefore answered in negative.

In the circumstances and for the foregoing reasons, this appeal is allowed. 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 the Primary Court of Magomeni in Probate Cause No. 142 of 2012 and set aside its ruling entered on 26/03/2012 that granted the letters of administration of estates to the respondent and all other subsequent proceedings and decisions thereto. The process of appointment of the administrator of the estates of the late John Kayuni should start afresh if parties so wish. Each party has to bear his/her own 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 absence of the appellant and in the presence of Ms. Modesta Medard advocate for the respondent and Ms. **Lulu Masasi**, Court clerk.

Right of appeal explained.



E. E. Kakolaki

JUDGE

18/05/2020