

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

**AT DAR ES SALAAM**

**CIVIL APPEAL NO. 280 OF 2018**

**HAMIDU MPANGA MISINGA..... 1<sup>ST</sup> APPELLANT**

**FERUZI NASSORO MISINGA.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**ABDALLAH NASSORO MISINGA.....1<sup>ST</sup> RESPONDENT**

**SABRINA HASHIM HAJI.....2<sup>ND</sup> RESPONDENT**

*(Arising from Civil Case No. 26 of 2018 Ilala District Court)*

**JUDGMENT**

*Date of last order: 14/04/2020*

*Date of Judgment: 30/07/2020*

**S.M. KULITA, J.**

The appellants **HAMIDU MPANGA MISINGA** and **FERUZI NASSORO MISINGA** aggrieved with the decision of the of Ilala District Court lodged their appeal with four grounds in the memorandum as follows;

1. That the Magistrate erred in law and in fact in not considering the appellants' submission in respect of

preliminary objection when holding that appellants did not reply the preliminary objection on the ground that the respondent did not file the submission while in fact the submission was filed in court within time.

2. That the court erred in law and in fact when holding that the appellants did not reply the preliminary objection in their reply to the written statement of defense while in fact there is no procedure of law to reply preliminary objection in defense.
3. That the court erred in law and in fact in holding the matter was *Res Judicata* while in fact the question raised by the appellants in District Court which was to be determined by the court was so different with issues raised in primary court.
4. That the magistrate erred in law and in fact by applying Probate and Administration Act to determine the preliminary objection.

The appeal was argued by way of written submissions.

In respect of ground one of appeal the appellants submitted that the records of proceedings at the trial court indicates that when

the matter was scheduled for mention on the 7<sup>th</sup> August, 2018 the parties herein were ordered to dispose the matter by way of written submission. The appellants submitted that the matter was scheduled for ruling on the 10<sup>th</sup> October, 2018 where on that particular day they informed the court that they were not served with the submissions of the respondents and prayed for extension of time of which they were granted and filed the same on 24<sup>th</sup> October, 2018. The Exchequer Receipt was issued by the court following the court's schedule to file it by 29<sup>th</sup> October, 2018.

The appellants submitted that the trial court was wrong to hold that the appellants did not file the written submission within time.

Arguing on the second ground of appeal, the appellants submitted that there is no procedure of law in replying the preliminary objection in the written statement of defense when raised by the counter party, thus the trial court was wrong in holding that the appellants did not reply the preliminary objection.

Arguing on the third ground of appeal the appellants submitted that the matter was not *res judicata* due to the fact that the parties were the same but the issues for determination were different whereby in the Primary Court the parties were litigating on the issue of inheritance but in the District Court the parties were

litigating on the issue of unlawful acts of the administrator. Thus the principle of res judicata as per section 9 of the Civil Procedure Code cannot apply.

As for the fourth ground of appeal the appellants submitted that they instituted a civil suit at the District Court because the property passed hands from the second respondent as the administrator of the estate of the late Umayya Mashaka Masoud who then sold the said property to another person. In such circumstances the District Court was wrong in applying the provisions of the Probate and Administration of Estates Act.

Replying on the appellants' submissions the respondents submitted in their joint submission in respect of first ground of appeal that the trial Magistrate had fully administered justice and if the appellants filed their submission then the trial magistrate would have considered it.

In respect of the second ground of appeal the respondents submitted while citing the case of MUKISA BISCUITS COMPANY LIMITED V. ESTERN DISTRIBUTORS (1969) E.A 696 that the essence of the preliminary objection ought to have argued by both parties that it may dispose the suit but on the appellants did not

argue the said preliminary objection for proper consideration of the court, in that regard the ground of appeal lacks merit.

On the third ground of appeal the respondents submitted that in the trial court the appellants sought for declaratory orders against the unlawful acts of the administrator of estate of Late Maua Misinga where the letters of administration were granted by the Primary Court of Kariakoo in the Probate and Administration Cause no. 259 of 1994, subsequently the appellants brought the same issue at the trial court vide Civil Case no. 26 of 2018 (original case to this appeal). They submitted that the trial magistrate was right to conclude that the matter was *Res Judicata*.

Lastly, in respect of fourth ground the respondents submitted that the Primary Court of Kariakoo is vested with the powers to revoke the appointment of the 1<sup>st</sup> respondent as provided under rule 2(c) of the Fifth Schedule to the Magistrates Court's Act.

In conclusion the respondents prayed the dismissal of the appeal for lack of merit.

Having carefully considered the submissions by both parties I hereby analyse them collectively as follows; Starting with the issue of Preliminary Objection whether it requires a reply, in law and practise there is no reply in the Preliminary Objection. Therefore,



the trial Court was wrong to dismiss the original case, Civil Case No. 26 of 2018 on the ground that the appellants conceded the Preliminary Objection for their act of not filing a reply. However, I concur with the trial Magistrate that the District Court had no jurisdiction to try that Civil Case in which the Plaintiffs (Appellants) prayed for the revocation of the letters of administration of estates granted to Abdallah Nassoro Misinga (1<sup>st</sup> Respondent) in the Probate & Administration Cause No. 259 of 1994 Kariakoo Primary Court. That matter is supposed to be handled by the same court, Kariakoo Primary Court which had entertained the said Probate & Administration Cause.

Having so said I find the other issues overtaken by event. In upshot the appeal is dismissed with no orders as to costs.

*HC*  
**S.M. KULITA**  
**JUDGE**  
**30/07/2020**

