

**IN THE HIGH COURT OF TANZANIA**

**IN THE DISTRICT REGISTRY**

**AT MWANZA**

**PC. PROBATE APPEAL No. 11 OF 2019**

(Arising from the Ruling and Order in District Court Civil Revision No. 04/2018 of the District Court of Nyamagana, which Originates from Probate and Administration of the Estate Cause No. 176/2016 of Mwanza Urban Primary Court of Nyamagana District)

**1. JUMA ISSA (Administrator of the**

**Estate of ISSA FERUZI .....1<sup>st</sup> APPELLANT**

**2. SHELLA HAMAD (Administrator of the**

**Estate of AHMAD MAKUSUDI .....2<sup>nd</sup> APPELLANT**

**3. SHABAN ABDALLAH (Administrator of the**

**Estate of the late ABDALLAH FERUZI .....3<sup>rd</sup> APPELLANT**

**4. KARUME J. MAKUSUDI ( Administrator of the**

**Estate of AHMAD MAKUSUDI ..... 4<sup>th</sup> APPELLANT**

**VERSUS**

**CHARLES NDESSI MBUSIRO .....RESPONDENT**

**JUDGMENT**

*31<sup>st</sup> March & 27<sup>th</sup> July, 2020*

**TIGANGA, J.**



Before the District court of Nyamagana, the respondent Charles Ndessi Mbusiro filed Civil Revision No. 04 of 2018 against the appellants in this appeal (who were the respondents in that application).

In that application for revision the applicant asked for the District Court to use its powers under section 22 (1) of the Magistrates Courts Act [Cap 11 RE. 2002], now [RE. 2019] to call for and examine the record of the proceedings of the urban Primary Court in Mirathi No. 176/2016 for the purpose of satisfying itself as to the correctness, legality and propriety of its decision. The other prayers were for the costs of the application to follow event and any other order / relied the honourable court may deem fit to grant. The centre of complaint was that a house on Plot No. 65 Block "T" Lumumba Street was a subject of Probate No 55/2004 of the late Ahmad Makusudi Kisesa, in which Kalume J.A. Makusudi was appointed as Administrator of the Estate.

In fulfilling his duty, the Administrator of the Estate in that probate (who is now the 4<sup>th</sup> appellant) sold the said house to the respondent Charles Ndessi Mbusiro, in a contract concluded on 14/12/2015. In the year 2016, in probate and administration cause before the same primary court one Juma Issa petitioned for letter of administration of the Estate of the late Issa Feruzi. In the end of that matter it was established that the house on Plot No 65 Block "T" Lumumba Street was owned jointly by three owners, namely, **Issa Feruzi, Ahmad Makusudi** and **Abdallah Feruzi**. Since all these owners were already the deceaseds, then it was ordered by the primary court that, their administrators of the Estates who were **Juma**





**Issah Feruzi, Shella Ahmad Makusudi** and **Shabani Abdalla**, be registered as joint occupants by the land registration authorities.

That order excluded **Karume J. Makusudi** who was an administrator of the estate of the late **Ahmad Makusudi** in Mirathi No. 55/2004 under which that administrator had allegedly already sold the house in question to **Charles Ndessi Mbusiro** the current respondent.

It seems from the record, following that order; **Karume J. Makusudi** did not take any action, which thing worried most the respondent in this application a result of which he decided to file Civil Revision No. 4 of 2018.

Having received such application for Revision, the District Court ordered service to the opposite side (the current appellants) who jointly hired the service of Advocate Renatus Lubango Shiduki to represent them.

At first, Mr. Renatus Lubango Shiduki filed a notice on 01/07/2019 containing a total of five preliminary point of objections, that was before filing another notice titled a Notice of additional preliminary objection adding two point making a total of seven points of preliminary objection. All objections were overruled by the ruling of the District Court dated 09/08/2019.

The ruling overruling objections was followed by the hearing and determination of the Revision Application in which it was held *inter alia* that, Probate No. 176/2016 which was filed in respect of the estate of the late **Issa Feruz**, the sole property in that estate being a house on Plot 65



Block "T" Lumumba Street, which was also part of the Estate in Probate and Administration No. 55/2004, and that from 2004 to 2016 when Probate cause No. 176/2016 was filed, the appellant, especially 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> were parties to a number of Land Disputes involving the said Plot No. 65 Block "T", obvious litigating under the titles of the persons they were administering their estates.

Also that, probate No. 176/2016 did not nullify probate cause No. 55/2004 or in any way revoke the appointment of the 4<sup>th</sup> appellant, and everything he did under his office as an administrator of the estate of **Ahmad Makusudi** under Probate cause No. 55/2004.

He is the in end held that, the only probate cause, properly filed before the court was Probate Cause No. 55/2004 over the subject matter house Plot No 65 Block "T" Lumumba Mwanza.

Now, dissatisfied by that decision in Civil Revision No. 4 of 2018, the appellants through the service of Mr. Renatus Lubango Shiduki, advocate, appealed to this court by filing a total of seven grounds of appeal as follows;

1. The District court erred in law and in fact in failing to determine the preliminary objection raised by the appellants against the competence of Civil Revision no 04/2018 at the District court.
2. In the alternative to ground no 1, the District court erred in law and in fact by hearing and determining the application that was in competent and time barred before it delivering its decision in favour of the respondent.






3. The District court erred in law and in fact in hearing and determining the application that was not a probate / administration matter.
4. The District court materially erred in law and in fact in considering extraneous matters that were not before the court and beyond the parties respective pleadings and delivered its decision in favour of the respondent.
5. The District court erred in law and in fact in relying on decisions that were not part of the proceedings and which was not related to the matter under appeal.
6. The District court erred in law and in fact in hearing and entertaining the revision on probate matters filed by the respondent who is neither a creditor nor beneficiary in respect of the estates of the late **Issa Feruzi, Ahmad Makusudi and Abdalla Feruzi.**
7. The District court erred in law and in fact in holding that the proper case in respect of Plot No. 65 Nock "T" Lumumba was probate cause no 55/ 2004 at the Urban Primary court of Mwanza.

In the end, the counsel asked that the appeal be allowed and the proceedings, ruling and order of the District court of Mwanza in Civil Revision No. 04/2018 be quashed and set aside and the respondent be ordered to bear costs of the appeal.

This appeal was argued orally. The appellants were represented by Mr. Renatus Lubango Shiduki learned counsel while the respondent was represented by Mr. Edwin Aaron learned counsel.

In his submission in Chief Mr. Shiduki argued the 1<sup>st</sup> and 2<sup>nd</sup> grounds of appeal together as they are challenging the legality of the revision



application and its competence in the District court. He submitted that when the application was filed the appellants filed a notice of preliminary objection that the affidavit in support of the application was defective, that the applicant lacked *locus standi*, and that the application was filed out of time. The argument was that the affidavit was defective in its verification clause; he referred this court at page 16 of the proceedings on the second paragraph which shows the argument to that effect.

He further submitted that, despite the facts that he rose all those legal issues, the magistrate before the District court did not consider their submission, as had he considered them, he would have reached to a different conclusion, that since the affidavit was defective then the decision could not stand .

In support of his argument he cited the authority in **Juma S. Busiya vs. The Zonal Manager (South) Tanzania Post Corporation**, Civil Application No 08/2004 CAT (unreported) page 7 in which the Court of Appeal rejected the affidavit on that ground.

Further to that he cited a persuasive authority in **ANL 2007 Company Limited vs. TIB Development Bank Limited and Another**, HC of Tanzania Mwanza Registry, at page 4 and 5 where on that very ground the court rejected the application under Order XIX of the Civil Procedure Code (*supra*). He in the end submitted that the District court erred in dealing with the application which was defective.

On the 3<sup>rd</sup> ground of appeal which raises the complaint that the decision filed did not concern and was not a probate matter.





The respondent said that, he was the owner of the house in question and so asked to be declared the owner of the property in question however, the decision of the court was different from what was submitted. That according to the affidavit and the argument was supposed to be a land dispute not a probate matter.

While submitting on the 4<sup>th</sup> ground of Appeal, their complaint is that the court considered matters which were irrelevant and were not before the court and between the parties. This was argued together with ground No. 5. He submitted that the district court at page 6 and 7 of the decision the court considered the case filed before the District Land and Housing Tribunal and the High court Land Division. According to him, those decisions were not a part of the proceedings and were not related to the matter under revision. He submitted that the decision basing on the unrelated matter is illegal.

Arguing ground No. 6 of Appeal which raised a complaint that the proceedings were instituted by a person who had no *locus standi*, his argument based on the law, that is rule 9 of the Primary Courts (Administration of Estates) Rules, GN No. 49 of 1971, he submitted that the respondent was not a heir, creditor or beneficiary of the Estate whom the law allow to challenge anything in relation with the administration of the Estate. He submitted that had the respondent intended to challenge anything he was supposed to go to the primary court and submitted that due to these shortcomings the proceedings became a nullity.

On the seventh ground of appeal, which complains against the findings of the District court that the only probate in respect of the House



on Plot No. 65 Block "T" Lumumba Street Mwanza was only Probate No 55/2004 of Mwanza Urban Primary court. He submitted that, that is the wrong view, as the house was under joint occupancy under the ownership of three persons. He referred to section 159 of the Land Act which provides that each occupant had joint shares, that means the District court had no justification to declare any one probate as invalid. He asked this court to fault the findings of the District Court and allow the appeal with costs.

In reply Mr. Edwin Aaron Advocate for the respondent submitted that, with regard to the first ground of appeal he submitted that, it is not true that the District court did not decide the preliminary objection raised, he submitted that, the point of objection were argued and the decision was given by the District court by overruling the same for want of merit and the appellant did not appeal against that decision.

On the issue of time, he submitted that the matter was within time as the probate was finalised before the trial primary court on 13/07/2018 and the Revision was filed on 20/06/2019 before the period of 12 months.

On the 3<sup>rd</sup> ground of appeal, that the application for Revision was filed by a person who was not a party. He submitted that the respondent had already filed a case before the High court Hon. Mgeyekwa J, challenging the act of the Registrar of Title in registering the land on Plot No. 65 Block "T" in the names of other people.

In that case Hon. Mgeyekwa, J, told them that as the original case is probate, they first resolve probate case, and they all agreed that they go to the District Court to ascertain who the administrator was. That land case was withdrawn with leave to refile. He submitted that as long as he has





interest, he has the right to defend his interest that being the position then his opinion, this ground has no merit.

In respect of the 4<sup>th</sup> and 5<sup>th</sup> ground of appeal, that the issues discussed were not part of application before the court. He submitted that what was referred was on record, this is because the applicant before that court submitted that parties had Land Case No. 65/2005 among the people who were involved in that case are the appellants. He said the 4<sup>th</sup> appellant who was the administrator in Mirathi No. 55/2004. He submitted that, when the respondent presented his case, the District Magistrate understood them and advised them to go and settle the matter.

On 06<sup>th</sup> ground, he submitted that he object it, as the respondent had the power to file Revision because he had interest and is intending to safe guard his interest, he had the right to go to court to safeguard his interest as a *bonafide* purchaser in Mirathi No. 55 of 2004 therefore Mirathi No. 176/2016 could not take away his right.

Mr. Edwin submitted that the respondent did not go there to challenge the probate cause, not even as a purchaser, he went there not as a creditor or beneficiary of the estate, but as a *bonafide* purchaser.

He submitted further that it was the 4<sup>th</sup> appellant who was supposed to go back to the Primary Court but to his surprise he kept quite and joined his fellow appellants.

He submitted that section 69 of the Land Registration act is direct that if there is a joint occupancy any of the administrator from any family may conclude the agreement he submitted that Karume (the 4<sup>th</sup> appellant was right) and if he did not give them their portion, then that should not



be the respondents business and the solution was not to file another probate and turn against the *bonafide* purchaser. He submitted that he is in one with the decision of the District Court that Probate Case No. 55/2004 has never been revoked.

In rejoinder Mr. Shiduki submitted that they could not have appealed the ruling overruling objection as it was an interlocutory order and the CPC is clear on that. Also that, the said revision has no legal base, on deciding an unrelated matter he submitted that the decision were not annexed to the Affidavit. He submitted rejoining ground 6 of appeal that, the respondent was supposed to file a Land case.

He submitted that Section 69 provides about the survivors of the heirs he asked the court to read it between lines the provision of that section. He submitted that the presence of Probate No. 176/2016 meant Probate No. 55/2004 died naturally. He submitted that under the provision of Rule 29 of the Probate Rules the same has been used out of context as the probate at hand was supposed to be under Islamic law which is governed by the Magistrates courts Act. He in the end prayed the appeal to be allowed with costs.

Having taken into account all facts as contained in the records before me, from the two courts below, the grounds of appeal and the argument in support and against the appeal as presented by both counsel and having assessed one ground of appeal after the other, I find for easy flow of ideas, and for the reason to be adduced later in the course of this Judgment, I will start with the sixth ground of appeal.





This ground raises a complaint that the District court erred in law and fact by entertaining the application which was filed by an applicant who is neither a party to the Probate No. 176 of 2016, nor a creditor or beneficiary in respect of the estate of the late Issa Feruzi, Ahmad Makusudi and Abdalla Feruzi. To buttress this position, the counsel for the appellant argued that by not being a party to probate cause No. 176/2016, a heir, beneficiary or creditor in the estate of the above mentioned deceased, the respondent lacked *locus standi* to move the court to revise the proceedings in Probate cause No. 176/2016. He relied on Rule 9 of the Primary courts Administration of Estates) Rules GN. No. 49 of 1971. He argued that, had he demanded to challenge anything he was supposed to go to the Primary court.

Mr Edwin learned counsel for the respondent, submitted on that ground that he had interest and he had the right to safe guard his interest in court as a *bonafide* purchaser in Mirathi No 55/2004 therefore Mirathi No. 176/ 2016 could not take away his right. He admitted to go there not as heir beneficiary or creditor but a *bonafide* purchaser. He said his mission was not to challenge the probate but to safeguard his interest as the *bonafide* purchaser.

Now from the above arguments there is no dispute that the matter for which the respondent applied for Revision was Probate Case (Mirathi) No. 176/2016. It was a matter filed by **Juma Issa**, the 1<sup>st</sup> appellant being application for the appointment to be administrator of the estate of the late **Issa Feruzi**. In that Probate the said Juma Issa was appointed and among the properties of the deceased he listed was a house on Plot No. 65 Block



"T" Lumumba Street, Mwanza city and the other one was and Plot No. 16 Block "V" Mbugani Mwanza. In that Probate, the evidence show that the deceased died in 1979.

The evidence shows that on the house on Plot No. 65 Block "T" the deceased was just one of the heirs. The record shows further that on 31/05/2017 after the heir of the deceased were called, they all agreed with what the appointed administrator actually gave them that is 11.1% of the house on Plot No. 65 Block "T". The other house was wholly inherited by the administrator.

However on 17/07/2017, the court in the presence of the administrator recorded the following order;

*"Tumepokea barua kutoka Idara ya Mipango Miji ikielekeza kuwa kiwanja Na. 65 kitalu "T" Lumumba kinamilikiwa na Abdallah Feruzi, Issa Feruzi na Ahamad Makusudi. Hivyo naelekeza msimamizi wa Mirathi akaandae mgao utakaogusa marehemu hao wote watatu (3), waliotajwa kumiliki mali hiyo afike tarehe 27/07/2017 na hiyo taarifa."*

Meaning that he received a letter from Town Planning department that the house on Plot No. 65 Block "T" is registered in the names of three people who are Abdallah Feruzi, Issa Feruzi and Ahmad Makusudi, so the distribution should involve all three names.

On 28/07/2017 the court directed a letter to be prepared and sent to the Municipal Director directing him to prepare the title deed with three names namely; Shaban Abdallah, Juma Issa and Shella Ahmad.





Looking at all these proceedings nowhere the respondent in this appeal was involved, he does not feature in the proceedings before the primary court as beneficiary, creditor or one of the heirs. He did not even go there by way objection proceedings as a *bonafide* purchaser challenging the inclusion of a house on Plot No. 65 Block "T" Lumumba Street on the ground that he had already purchased it in Mirathi No 65 of 2004.

Now the issue is whether having been not a party to the Mirathi No. 176/2016, a heir, beneficiary or creditor of the deceased, in that probate case, the respondent had right to file Revision proceeding before the District court? In my considered view, the interest of the respondent was never on the Probate, but on one of the property which was included as one of the property of the deceased in that estate.

That being the case, the proper re-courses for the respondent, was not to apply for revision in the District court to revise the whole probate but to apply to the Primary court before which that house was listed and included in the estate of the late Issa Feruzi by way of objection proceedings challenging the inclusion in the estate the house which he had already purchased. This is because he cannot have the right to appeal or file revision unless he expresses his interest before the court before which the said property (interest) is prejudiced before he acquires the right to appeal or file revision.

In this matter being not a party to the proceedings, the respondent had no right of appeal before the District court. In the case of **Kezia Violet Mato vs National Bank of Commerce and 3 others**, Civil



Application No. 127/2005 CAT Dar es salaam (unreported), where it was held *inter alia* that;

*"It is our considered view that, where a party has no right of appeal but there is an alternative remedy provided by law, he cannot properly move the court to use its revisional jurisdiction. He must first exhaust all remedies provided by law before invoking the revisional jurisdiction of the court. The applicant who has not exhausted all remedies provided by law cannot invoke the revisional jurisdiction of the court. This application is competent"*

In this matter before invoking powers of the District court under section 22(1) of the Magistrates Courts Act [Cap 11 RE. 2019], the respondent had an alternative remedy of filing objection proceeding before the trial primary court to challenge the inclusion of the house which he had already purchased. Having not exhausted that remedy first, he could not move the District court to invoke its revisional powers, but by then he had no *locus standi* to file the said revision.

That said, I find the 6<sup>th</sup> ground of appeal to have merit, I therefore sustain it. Having found that the respondent had no *locus standi* before the District court it goes without saying that, the proceedings before that court in Revision No. 04/2018 was nothing but a nullity and so are the orders made there -under.





In finding as I have, all other grounds becomes obsolete making it just an academic exercise to deal with them, which for the interest of time I am not ready to indulge into.

In a normal circumstance I would have ended here. However my thorough examination of the matter in totality has compelled me to go a step ahead. In these proceedings I have noted one peculiar thing which for the interest of justice and jurisprudence I find it worthy to ponder.

There is no dispute that the interest of the respondent in this matter emanates from Probate No. 55/2004 in which the 4<sup>th</sup> appellant was an administrator of the deceased one Ahmad Makusudi. It was under that Probate the respondent *bonafide* purchased a house on Plot No. 65 Block "T" Lumumba Street which was later listed as one of the properties in Probate No. 176/2016. The records show that, the respondent purchased such a house on 14/12/2015, from the administrator of the estate in Probate No 55/2004 who is the 4<sup>th</sup> appellant in this appeal.

There is no evidence that the said probate case has ever been reversed or nullified by the court of competent jurisdiction to do so. This means to date, the same is still functional. During the hearing when this question was posed over the status of probate No.55/2004, Mr. Shiduki submitted that the said probate died naturally after the filing of the Probate case No. 176/2016. With respect to the learned counsel, cases do not die natural death, once a case has been filed and heard, there is no automatic death of the case, it dies when it become reversed or nullified by the higher court competent to do so. Without an order nullifying or reversing



Probate Case no. 55/2004, it still exists together with the orders and all activities done there under.


That means, since the house on Plot No. 65 Block "T" was listed as one of the property in Probate No. 55/ 2004, it was not proper for the 1<sup>st</sup> appellant to list it again in Probate Cause No. 176/2016 and still distribute it while it has already been sold in Probate No. 55/2004, in facts about one years before Probate No 176/2016 has been filed.

It is surprising that the 4<sup>th</sup> appellant who sold the house as an administrator in Probate No. 55/2004 is also front liner demanding the court to shut eyes on the right of the *bonafide* purchaser, the respondent.

This court is a court of law and justice, the last thing which this court should loose is its powers to jealously make sure that justice is vivid to those coming to court, that includes the powers to supervise the court bellow not to be swayed by technicalities to the detriment of the rights of individuals in their duties to dispense justice. Loosing that powers and ability to supervise will definitely take away the legitimacy of its existence.

In this, it is enough to find that by this order made under section 44 of the Magistrates Courts Act [Cap.11 RE 2019], that his interest is still intact in Probate Case No. 55/2004 because the Probate has never been nullified nor is the sale thereunder.

As I have found, having been listed under Probate No. 55/ 2004, It was not proper to include the same property that is house No. 65 Block "T" in Probate No.176/2016. That said, I thus revise the proceedings in Probate No. 176/2016 to the extent of excluding a house on Plot No. 65 Block "T" for the reasons given.





It is so ordered.

**DATED** at **MWANZA**, on 27<sup>th</sup> day of July, 2020.

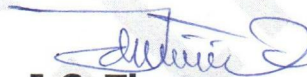
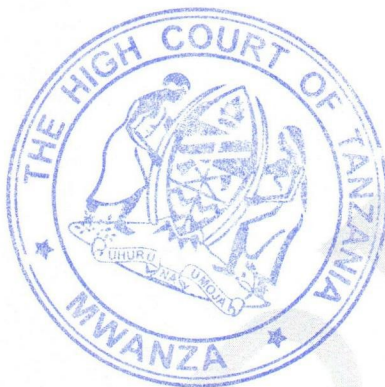


**J.C. Tiganga**

**Judge**

**27/07/2020**

Judgment delivered in the open chamber in the presence of respondent and his counsel who is also holding brief of the counsel for the applicant. Right of appeal explained and guaranteed.



**J.C. Tiganga**

**Judge**

**27/07/2020**