IN THE HIGH COURT OF TANZANIA

(IN THE DISTRICT REGISTRY)

AT MWANZA

HC. CIVIL APPEAL NO.54 OF 2019

(Arising from Probate Revision No. 01 of 2019, Originating from Probate Cause No. 01 of 2019)

NKAMBA SAYI SITTA ..... APPELLANT

VERSUS

NEEMA SAYI SITTA .....RESPONDENT

JUDGMENT

Last Order: 15.06.2020

Judgment date: 24.07.2020

A.Z.MGEYEKWA, J

The appeal centered on probate whereas the appellant is disputing the decision of the District Court of Geita for declining to include the appellant among the legal heirs of the deceased estate the late Sayi Stepheno Sitta.

Given the nature of the controversy, I am compelled to preface the background of the matter in order to appreciate the facts leading to this appeal. At the Primary Court of Katoro, the respondent had instituted a Probate Cause No. 01 of 2019 for the administration of the estate of the late Sayo Stephano Sitta (deceased) who died in December, 2018. Before hearing the case the appellant objected that she did not participate in the clan meeting which listed the deceased beneficiaries. She further lamented that she was not recognized among the deceased beneficiaries while the deceased was her father.

During the hearing of the objection, the appellant side had four witnesses who testified for the appellant that they recognized the appellant and testified that the appellant is their late brother's child who was born out of wedlock. The appellant mother testified that she lived with the deceased in Urambo, Tabora from 1982 to 1989 but they were not married and the appellant was born in 1987. The appellant tendered a copy of a certificate of birth to prove that she was a true daughter of the late Sayi Sitta.

The respondent side, Neema Sayi denied having known the appellant. She narrated that they had four children with his late husband. The respondent informed the trial court that the deceased left a WILL and named his five children namely; Kwilabya Sitta, Salome Sitta, Baraka Sitta, Mariamu Sitta, and Judith Sitta as beneficiaries under the supervision of their Mother. The respondent insisted that for 31 years the respondent has never heard about the appellant.

The trial court determined the objection to ascertain whether the appellant was a true heir of the deceased the late Sayo Stephano Sitta. The trial court ended up recognizing the respondent as a true heir of the late Sayo Stephano Sitta. Aggrieved the respondent successfully filed a Revision before the District Court of Geita which set aside the decision of the trial court and gave ruling in favour of the respondent.

The appellant was dissatisfied with the decision of the District Court of Geita hence this appeal before this court. The appellant has in the Petition of Appeal raised five grounds of appeal as follows:-

1. *That, the Magistrate erred in law and in fact to rely on the false evidence on records of the respondent and her witness as a result reached into unfair judgment.*

2. *That, the Magistrate erred in law and in fact for failure to revise and evaluate properly the evidence on record.*

3. *That the Magistrate failed to exercise properly his power on revision by relying on a minute of the meeting alone to dismiss the objection.*

4. *That, the Magistrate erred in law and in fact for denying birth certificate while it was strong evidence to prove her birth.*

5. *That, the Magistrate erred in law and in fact for ignoring the historical background which proves the appellant to be the daughter of the deceased.*

The hearing was done by way of written submission whereas, the applicant filed a written submission as early 3rd June, 2020 and the respondent filed a reply as early as 10th June, 2020 and a rejoinder was filed on 15th June, 2020. Both parties complied with the court order.

In his submission on the first and second grounds of appeal, the learned counsel for the appellant submitted that the respondent had a chance to appeal instead of filing a Revision. He added that where there is a chance to appeal no revision power can be exercised as an alternative to appeal. The learned counsel went on to argue that the revisional jurisdiction shall be used when there is a right to appeal if there is

sufficient reason amounting to exceptional circumstances and that they did not find anything to support so. To fortify his argumentation he referred this court to a plethora of authorities to the effect that revisional powers of the court can only be invoked where there is no right of appeal. Some of the cases are **Moses J Mwakibete v The Editor-Uhuru Magazeti ya Chama & Another** [1995] T.L.R 134, **Halais Pro-Chemie v Wella A.G [**1996] T.LR. 269, **Transport Equipment Ltd v Devram P Valambhia** [1995] T.L.R 161 and **Felix Lendita v Michael Long'idu,** Civil Application No.312/17 of 2017.

The appellant further stated that the alleged papers do not show the "intentions of the testator concerning his property, which he desires to be carried into effect after his death". The learned counsel added that the papers were neither signed nor mentioned any property and from that, the District Court erred to admit them as a WILL.

She continued to argue that exercising revisional power was not considered the evidence such as a Marriage Certificate and the purported WILL which were not in the court record. She went on to argue that the appellant was not allowed to cross-examine hence her rights to be heard

was violated contrary to section 22 (3) of the Magistrate's Courts Act, Cap.11 [R.E 2019] which provides that:-

> " *In addition to the provisions for the provisions of section 2 of this section, no order shall be made in exercise of the court's revisional jurisdiction in any proceedings of civil nature increasing any sum awarded, or altering the right of any party to his detriment (other than order quashing proceedings in a lower court or an order reducing any award over the jurisdiction powers of the lower court to the extent necessary to make it conform thereto) unless such party has been given an opportunity of being heard."*

It was the respondent's further submission that the respondent did not hear that his father was ill because the respondent cut off all communication to other family members.

In respect to the third ground of the appeal, the appellant argued that the minutes of the meeting which was taken as key evidence by the District Court in its decision making was fraudulently obtained by the respondent since other members signed it without knowing the intention rather it was a funeral attendance hence it was *void abnitial.*

As to the fourth and fifth grounds of the appeal, the respondent faulted the District Court for not considering the birth certificate and the appellant's Mother evidence. To support her argumentation, she cited section 66 of the Evidence Act. Cap. 6 [R.E 2019] that provides that:-

"Documents must be primary evidence except as otherwise provided in this act."

To support her submission she went on to cite section 67(1) of the Evidence Act Cap.6 [R.E 2019] which provides that:-

"Secondary evidence may be given of the condition when the original has been destroyed or lost or when the party offering evidence of its contents cannot, for another reason not arising from his own default or neglect produces it in reasonable time."

The appellant blamed the respondent that she destroyed the original birth certificate, which showed that the respondent had bad intentions. She went on to argue that the District Court was biased because it did not consider the appellant's educational background which had a connection with her late father.

In conclusion, the respondent insisted that the District Court wrongly invoked the revisional power and therefore she urged this court to allow

the appeal with costs, and quash the Ruling of the District Court and sustain the judgment of the trial court.

Responding on the first and the second grounds of appeal, the learned counsel for the respondent forcefully argued that the appellant's submission regarding filed revision in the District Court is misplaced and total misdirection because the respondent filed a complaint letter, complaining of the conduct of proceedings at the primary. Mr. Akram referred this court to Revision Case No.1/2019 which was filed before the District Court of Geita. He added that for that reason the appellant's submission is misplaced and distinguishable to the present matter as the applicant in the cited case made a formal application by way of chamber of summons and affidavit.

Mr. Akram went on to submit that the appellant's argument cannot hold water as the revision court never admitted into evidence but rather it was the holding of the court that the appellant was not listed in the minutes of the meeting as stated on page 7 on the last paragraph. He added that the Magistrate decision was never biased and the WILL was not discussed because the Magistrate's decision relied solely on the minute's letter.

It was Mr. Akram's further submission that the marriage certificate was important and credible evidence adduced by both parties when called on by the court on when required to revise the matter was of high importance to resolve the case. He went on to argue that the District Court found that the birth certificate which was admitted at the trial court was a photocopy not original hence the respondent contested and disputed the tendering of the birth certificate.

On the third ground of appeal, the learned counsel for the respondent argued that the meeting was valid as the member signed the attendance sheet. He refuted that one witness signed the document without knowing. He added that there was deliberation of the meeting agenda on the minute's letter therefore they cannot deny now that the meeting was not valid.

Mr. Akram continued to submit that the Magistrate was right not to consider the birth certificate as it was acclaimed by the appellant witnesses that the respondent destroyed the original birth certificate, while the respondent did not tender any lost report nor criminal report against the respondent hence the same is a mere allegation. He went on to argue that the birth certificate was wrongly admitted into evidence as

the same was an official document issued by RITA and a certificate from the registrar was required before submitting the document as evidence.

Mr. Akram further argued that the Magistrate was right to deny the appellant's educational background as the same was never supported by documentary evidence. He went on to argue that the deceased's brother did not mention the appellant as a daughter of their late brother at the meeting thus the appellant's claim is an afterthought, which cannot be relied on. Mr. Akram supported his submission by citing the case of **Asha Jackson And 3 Others v Sofia Miraji,** Probate Appeal No.5 Of 2012, Hc Of Tanzania (Mwanza) (Unreported).

In conclusion, the learned counsel for the respondent argued that the appellant cannot be termed as a beneficiary of the Estate of the deceased. He prays this court to dismiss the appeal with costs.

Rejoining, the appellant argued that the respondent entered a notice of motion through a letter which was contained as grounds that resulted in revision and the court proceeded with determining the revision whilst knowing that there was room to appeal considering that the grounds were pure for appeal. She insisted that the District Court did not consider the birth certificate copy. She continued to insist that the

appellant was not even given a chance to cross-examine the new evidence and the respondent used this chance to patch weak parts of their case which is not acceptable.

She argued that the appellant misleads the court by saying that RITA always remains with the document. She insisted that the validity of the birth certificate was not disputed at the trial court and she was not cross-examined therefore the District Court was not correct to disturb the trial court findings. To support her submission she cited the case of **Maganga Lusinde v Republic** Criminal Appeal No.6/201. High Court at Shinyanga.

In conclusion, the appellant prays this court to allow the appeal with costs, quash the ruling of the District Court and sustain the findings and judgment of the trial court.

I have thoroughly gone through the grounds of appeal raised by the appellant and the submissions of both learned counsels, and I am of the opinion that the crux of the appellant centers on the following issue, ***whether or not the present appeal is meritorious***.

Addressing the 4th and 5th grounds of the appeal. The appellant is faulting the District Court of Geita for denying to rely on a copy of certificate of birth for the reason that it was uncertified, the clan minutes I have perused the court records and found the first appellate court made its decision by relying solely on minutes of the clan meeting and the WILL. However, the minutes of the clan meeting do not in anyway state that the appellant is not the deceased child. The one to prove that she is the deceased child is the appellant.

The records reveal that the appellant tendered a copy of a certificate of birth before the Primary Court the same was considered d by the trial court and she was recognized as one the deceased child. I have scrutinized the certificate of birth and found that it contains the name of the child, the name of his father; Sayi Sitta, his occupation; Prison Officer, and her mother's name; Grace D/O Henery, her occupation; Prison Officer. The certificate of birth also contained the date of birth 15th August, 1987, and the place of birth, Urambo. However, the same was not considered by the District Court for being an uncertified copy.

In my found opinion, the trial court was justified that the said certificate of birth although uncertified but the court took judicial notice

that it was a public document, and the contents of the certificate of birth remain unchallenged taking to account that the same was issued by RITA a Government authority which is entrusted to issue a certificate of birth in our country. I have considered that the appellant's rights were at stake, therefore, she is the one who was required to prove her case in accordance to section 110 and 112 of the Evidence Act, Cap.6 [R.E 2019], and she proved that she is the deceased daughter by tendering the said certificate of birth.

Additionally, apart from tendering a copy of a birth certificate, the appellant's evidence was corroborated by her mother's testimony who testified to the effect that the deceased was the father of the appellant. She testified that she lived with the deceased in Urambo for five years before he decided to marry another woman. She also testified that the deceased is the one who paid for her school fees.

Moreover, the trial court records reveal that the appellant was introduced to the deceased relatives, on page 8 of the typed trial court proceeding, one Benjamin Matanga 81 years old (SM2), the uncle of the late Sayi Sitta testified to the effect that in 2005 he was introduced to the appellant that she is the child of his late nephew. He went on to testify that he came to learn that the widow did not accept the appellant.

The records further revealed that SM3, one Ngollo Benjamin, the brother of the late Sayi Sitta confirmed that the appellant is the child of the late Sayi Sitta. SM3 went on to testify that in 2005 his late brother introduced the appellant to him. It is my considered opinion that the deceased relatives were aware that the deceased had a child out of wedlock and some of them have admitted that the deceased introduced the appellant to them. Therefore, the appellant has proved that she is the daughter of the late Sayi Sitta.

I Have noted the assertion made by the learned Advocate for the respondent that the appellant cannot inherit anything from his late father's the estate because she was not mentioned in the WILL. To some extent I do agree with the Advocate;s submission because it is trite law that when a person dies testae, the executor has to execute the WILL as per the wishes of the deceased which are evidenced in the WIL.

In the present case the WILL has just metntioned the executor, some of the heirs and is bequithing only the house to his mother. The other beneficiaries have not been assigned any property. It is also not in doubt that the appellant is the deceased's daughter thus eligible to inherit. The

fact that the WILL does not assign all properties to heirs, the appellant is entitled to be among heirs of the properties which have not been bequeathed by the WILL. Therefore, these grounds of appeal have merit.

Having considered the above grounds, it is evident that the appellant proved that she is the daughter of the late Sayi Sitta therefore, I find no any justifiable legal reasons to deal with other grounds of appeal, as it will not reverse the decision made above.

For the aforesaid reasons, I allow the appeal and order the appellant to be included in the beneficiaries list since she is entitled to inherit the deceased probate. I remit back the file before the Primary Court of Katoro and the matter to continue where it ended and Neema Sayi Siita, the administrator of Estate of the late Sayi Sitta to recognize Nkamba Sayi Sitta as a beneficiary of the late Sayi Sitta Estate.

Order accordingly.

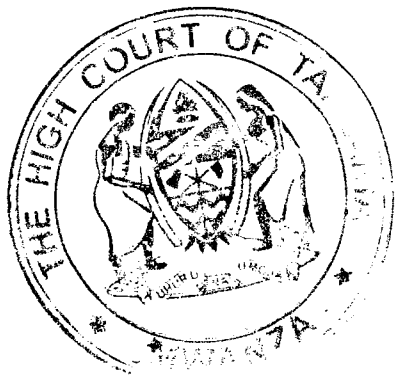
Dated at Mwanza this 24th day of July, 2020.

A.Z.MGEYEKWA

JUDGE

24.07.2020

Judgment delivered on 24th day of July, 2020 via audio teleconference, and both parties were remotely present.



A.Z.MGEYEKWA

JUDGE

24.07.2020

Right to appeal full explained.