THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
MBEYA DISTRICT REGISRTY
AT MBEYA
CIVIL REVISON NO. 07 OF 2017
(Originated from the decision of the District Court of Mbeya, Probate Appeal No. 13 of 2016 and Probate and Administration of the Estate Cause No. 02/2015, Mbalizi Primary Court)

JACOB KAHEMELE.....1ST APPLICANT
WILLIE HOWARD.....2ND APPLICANT
VERSUS
IRENE S. KAHEMELE (The Administratix of the Estate of the Late SIMON SAMWEL KAHEMELE).....RESPONDENT

RULING

Date of last order: *10/07/2020*
Date of Ruling: *21/08/2020*

NDUNGURU, J.

In this application the applicants seek to move the court to exercise its revisional jurisdiction by calling, examining the proceedings and ruling of the District Court of Mbeya dated 7th September, 2017 in Probate Appeal No. 13 of 2016 as to its correctness and irregularities thereupon.

Further the honorable court be pleased to quash the proceedings and decision of Mbeya District Court for failure to exercise jurisdiction

vested on it and for its failure to properly interpret the law. The applicants again pray for the costs of this application and any other relief (s) or Order this honourable court may deem fit and just to grant.

The application is by way of Chamber Summons which is brought under the provisions of Section 44 (1) (b) and 43 (3) of the Magistrates' Courts Act Cap 11 (Revised Edition 2002). The application is supported by joint affidavit of the applicants Jacob Kahemele and Willie Howard.

The application is resisted by the respondent through an affidavit in reply (counter affidavit), which is accompanied by a Notice of preliminary points of objection which go thus:

(1) The application is terribly bad and incompetent in that it was brought under wrong and inapplicable provisions of Law as well as non-existent provisions.

(2) On 08/09/2017 the Applicants issued Notice of Intention to appeal against the impugned decision which is still there. An application for Revision cannot be taken as a substitute for an appeal.

(3) That this application is incompetent in that it was filed hopelessly out of time. Thus the counsel for respondent prayed the application be dismissed in its entirety with costs.

Before I address and determine the foregoing so-called preliminary points of objection, I think it is necessary to explore, albeit in a nutshell, the background giving rise to the application at hand. That before Mbalizi Primary Court in Probate and Administration of Estate Cause No. 2 of 2015 the respondent applied for appointment administratix of the estate the late Simon Samwel Kahemele and was appointed for. Following the complaint and request of revocation filed by the deceased clan members on allegation of mal-handling and misappropriation of the deceased fund and properties alleged not to belong to the deceased and that the deceased was a mere supervisor, the respondent's appointment was revoked and the 1st applicant one Jacob Kahemele was appointed to fill in the vacancy. This is according to the court records available. It is alleged by the applicants that the Primary court recorded the 1st applicant and left the 2nd applicant as objector of the administritix and further allowed the respondent to file inventory.

Being uncomfortable with the decision of the primary court, the applicants filed an appeal to the District court of Mbeya Probate Appeal No. 13 of 2016. The respondent being served with the appeal raised two preliminary points of objection. One of the limbs of objection was to the effect that the appeal stood incompetent in law as the 2nd appellant (the

2nd applicant in this application) was not a party to the original proceedings. The court sustained the objection and consequently struck out the appeal for being incompetent. The applicants were irritated by the order of the court thus this application for revision.

When the application was placed before me for hearing, the applicants had a service of Mr. Alex Mgongolwa Senior learned counsel assisted by Rose Kayumbo and Constancia Sospeter while the respondent enjoyed the service of Mr. Mbise learned senior advocate.

Submitting for the first objection Mr. Mbise was of the argument that the application is made under section 44(1) (b) and section 43(3) of the Magistrates Courts Act Cap 11 R.E 2002. That the Chamber summons shows that the application was intended to be heard ex parte against of the respondent but the applicant never cited the enabling provision to move the court to proceed ex parte. In the alternative and without prejudice, Mr. Mbise was of the submission that the cited provisions are provided for under Part 1V (b) of the Act. The provisions relate to the appellate and revisional jurisdiction of the High Court in matters originated from the District Court and Resident Magistrates Court. He said as the Chamber summons reads; the matter arose from Mbalizi Primary Court in Probate Cause No. 2 of 2015. The counsel was of the position that the cited provisions are totally inapplicable. Mr.

Mbise was of the position that in such a circumstance the court was not properly moved. It was the counsel's argument that, application brought under wrong or inapplicable law is incompetent thus the only remedy available is to be struck out. He cemented his argument by citing the case of **Edward Bachwa and 3 others vs. A G**, Civil Application No 128 of 2006, **Jimmy Iugendi vs. CRDB Bank Limited**, Civil Application No. 171/01/2017 and **Leila Meghid Trading as Lee House vs. NBC (T)** Ltd (2016) TLS 332. He therefore prayed the application be struck out because there is no room for the principle of overriding objective to apply. The counsel invited the court to refer the case of **Mandorose Village Council & Others vs. TBL Ltd**, Civil Appeal No. 66 of 2017

On the second limb of objection Mr. Mbise told the court that the application for revision has been preferred as a substitute of an appeal which is not proper in law. He submitted that the matter being probate which originated from the primary court then went to the District court by way of appeal being dissatisfied by the decision the applicant had the right to appeal to this court not to file application for revision. He said the applicant was aware of the procedure that is why he filed the notice of appeal. It was the counsel's submission that the applicant could follow the appeal course not to circumvent it. He referred to this court

the case of **Hailes Pro Chamie vs. Wella & AG [1996] T.L.R 269** where citing with approval the case of **Moses Mwakibete v. the Editor Uhuru and Others [1995] T.L.R 134** the Court of Appeal was of the position that except under exceptional circumstances a part to the proceedings can resort to the revision instead of appeal. Mr. Mbise was of the contention that there are no such circumstances in the case at hand which could justify the applicant to file revision instead of appeal. He again invited the court to visit the case of **Said Ally Yakuti & Others v. Feisal Ahmed Abdul**, Civil Application No. 4 of 2014 Court of Appeal of Tanzania (unreported)

On the last point of objection, Mr. Mbise submitted that, the application intends to modify proceedings of Mbalizi Primary Court which was delivered on November, 2016. The said decision was appealed to the District Court within 30 days. The decision of the District court was delivered on 7th November, 2017. If aggrieved by such decision, the applicant had to appeal to the High Court within 30 days as per requirement of section 25 of the Magistrates' Courts Act Cap 11 R.E 2019.

Responding to the submission Mr. Mgongolwa, the learned counsel was of the argument that hearing the parties interparties is the fundamental procedure, the court has powers to summon the other part

even if the chamber summons is titled ex parte. He said the applicant never intended the application be heard ex parte. Even if it were the intention the same has been overtaken by event by the issuance of summons to the respondent.

Mr. Mgongolwa was of the submission that the provisions under which the application is brought (sections 43(3) and 44(1) of MCA) empower this court to revise proceedings of the District and the Court of Resident Magistrates on application by the part when it appears there is an error material which cause miscarriage of justice. He concluded that the objection is misconceived and does not qualify to be a point of objection as per landmark case of **Mukisa Biscuits Manufacturing Ltd. vs. West Ends Distributors Ltd.** (1969)E.A 696.

On the second point of objection, the counsel for the applicant was of the contention that the enabling provisions cited give the court the wider powers. He said the section begins with the statement in additional..... which means the court has the supervisory powers.in this aspect marginal notes are of assistance. The counsel said, it is the jurisprudence that in preliminary objection, the objection must particularize in order not to prejudice the parties. He invited the court to refer the case of **James Burchard Rugemalila vs. The Republic and**

Harbinder Singh Seth (as necessary party), Criminal Application No. 59/19 of 2017.

Mr. Mgongolwa went further saying, apart from section 44 of the MCA, section 78 of the Civil Procedure Code, Cap 33 where there is more than one applicable law if one is cited is enough. He said the sections cited ate satisfactory and the authorities cited are inapplicable. He went further saying the counsel for the respondent has misconceived the term originating from and emanating from. As regards the notice of appeal alleged to have been issued, the counsel submitted that it is the matter of evidence. The same cannot be tendered by the advocate from the bar. He said even if it were the fact, the notice filed to the District court does no initiate the appeal to this court.

The counsel went on saying the 2nd applicant could not file an appeal because he was not a part the only remedy available is revision because he was impeded by the judicial process. He referred the court to the case of **Halais Pro Chamie (supra)** and **Yahaya Mgeni Seif vs. Mohamed Khalfan**, Civil Application No. 104 of 2008.

The counsel for the applicant went on to say the revisionary powers of this court and of the District court are known. The purpose is not to condone the illegality because the court cannot validate something which is invalid. He cemented his argument by citing the case

It is evident from the affidavit of the applicants, the record and submissions made by the counsel, that that the applicants having been dissatisfied with the decision/ ruling of the District Court of Mbeya in Probate Appeal No. 13 of 2016 dated 7th September, 2017, were minded to challenge it by way of appeal. They on 8th September, 2017 lodged a notice of appeal to the District Court which was copied to the respondent as well. The applicants did not pursue that course further. They opted to challenge that decision by filing this application for revision. Though I am aware that such notice did not initiate the appeal but it was served to the respondent who was therefore aware of the intended appeal but to change the course is to ambush the respondent as well. No reason is advanced why they could not challenge the ruling through the appeal while the right of appeal is there. See **Halais Pro Chemie vs. Wella A.G [1996] T.L.R 269** where the Court of Appeal relied on its two previous decisions in **Moses Mwakibete vs. the Editor - Uhuru and Two others [1995] T.L.R 134** and **Transport Equipment Ltd vs. Devram Valambia [1995] T.L.R 161**.

If I have to agree with the counsel for the applicants that the second applicant was impeded by judicial process as provided in the **Hassan Ng'anzi Khalfan** (supra) and in the case of **Mgeni Seif vs. Mohamed Yahaya Khalfan**, Civil Application No. 104 of 2008

(unreported) that the only venue open to the part who was not in the prior proceedings is revision, but in the instant case as it appears, the 2nd applicant was not recorded in the primary court proceedings thus the proper court where the revision could lie is the District court where such defect could have been cured, but that was not the issue in the grounds of appeal raised before the District court to say the least.

On the authorities cited above, I am inclined to agree with Mr. Mbise that the course taken by the applicants to invoke revisional jurisdiction of the court was uncalled for. It has been taken as an alternative to an appeal.

The above said, it is my position that the impugned decision/ ruling of the District court could be challenged by way an appeal. Thus, the application before me is incompetent and bad in law for being preferred as an alternative to available appeal process. For the reasons I have endeavoured to assign, I strike out this application with costs.

Order accordingly.

THE HIGH COURT OF TANZANIA

D. B. NDUNGURU
JUDGE
21/08/2020

Right of Appeal explained.