

**AT IRINGA**

*(Arising from Probate Appeal No. 2 of 2019 of the District Court of Iringa  
and originating from Iringa Urban Primary Court and Probate and  
Administration case no.13 of 2018)*

**(Co. Administratrix of the Late THOMAS BWANAHINDI MFYUJI)**

**CHRISTOPHER THOMAS MFYUJI .....1<sup>ST</sup> RESPONDENT**

**GRACE THOMAS MFYUJI** ..... 2<sup>ND</sup> RESPONDENT

### JUDGMENT

10/01 & 25/02/2020

**MATOGOLO, J**

The appellant one Tumaini Thomas Mfyuji being aggrieved by the decision of District Court of Iringa, in probate Appeal No.2 of 2019, which originated from Probate Cause No.13 of 2018 of Iringa Urban Primary Court, appealed to this Court on seven (7) grounds of appeal;

(1) *That the Learned Resident Magistrate of the District court erred in law and fact for its failure to analyze the primary court judgment that was based on the alleged unexisted will from the respondents testimony to bequeathed by their deceased father.*

- (2) *That the learned resident Magistrate of the district court erred in law and fact for its failure to order the proper relief after finding that there was no will alleged to be bequeath to the respondents in the trial court.*
- (3) *That the learned resident Magistrate of the district court erred in law and fact for its findings that the failure of the primary court to draw proper issues occasioned no miscarriage of justice while the appellant and her fellow children of the deceased lost their bequeath to the two respondents taking big lion division of bequeath out of twelve unbequeathed beneficiaries.*
- (4) *That the learned resident Magistrate of the District court erred in law and fact for its failure to order the administrators to re divide equally all the deceased's properties to all legal heirs.*
- (5) *That the learned resident Magistrate of the district court erred in law and fact for blessing sale of house No. 135 Block 'N' while the trial court had no power to order sale of the probate property apart from appointing administrators only.*
- (6) *That the learned resident Magistrate of the district court erred in law and fact for its failure to examine clearly the documents adduced by the respondents used to give them ownership over the deceased's properties leaving other*

*children in dilemma regarding their bequeath from their deceased father properties.*

*(7) That the learned resident Magistrate of the District court erred in law and fact to hold in favor of the respondents without sufficient proof on the balance of probability.*

The brief background of the dispute is that the parties are sisters and brothers from the same father but different mothers. Their father the late Thomas Bwanahindi Mfyuji died on 23<sup>rd</sup> February 2018, leaving 16 children's. The clan meeting was held on 26<sup>th</sup> February 2018, the family members proposed the respondents Christopher Thomas Mfyuji and Grace Thomas Mfyuji to administer the estate.

On 22<sup>nd</sup> March 2018 the application for letter of administration of the estate was lodged in Iringa primary court whereby the application was granted, whereby the respondents and the appellant were appointed for the administration of the estate of their late father.

The administrators performed their duty as directed by the court, but the appellant was aggrieved with the distribution of properties specifically about the allocation of the house on plot No.135 block N, situated at Mji Mwema area within Iringa Municipality. The appellant wanted the said house to be allocated to her and her sister one Rose Thomas Mfyuji, while the respondents were of the view that the said house be sold and the proceeds be distributed equally among the twelve children who had not been given anything. They decided to consult relatives and the matter was not resolved.

There after the matter was filed in court, where after hearing their argument and witnesses the court was of the same view like the respondents.

The appellant being dissatisfied she appealed to the District court of Iringa, whereby he lost hence this appeal.

When the appeal came up for hearing the appellant was represented by Mr. Fortunatus Mwandu Learned Advocate while the respondents enjoyed the service of Mr. Moses Ambindwile learned Advocate. This appeal was argued by way of written submissions.

Submitting on the first ground of appeal Mr. Mwandu stated that the trial court relied on inexistent WILL which raise more questions than answers on its validity, existence and custody at that time the purported will used to direct the mind of the learned trial magistrate and assisted her to conclude that since other houses were already distributed as per WIIL, then the remaining house should be sold and proceeds be divided to the legal heirs equally.

Submitting on the 6<sup>th</sup> ground of appeal Mr. Mwandu argued that the second respondent misdirected the trial court by tendering a purported will, because it was a mere document with the title **HATI YA KUMILIKI NYUMBA BLOCK "O" 169** situated at Kijiweni area. It is the argument by Mr. Mwandu that the trial court admitted such a purported will as will while it was just a mere document. And the appellate court misdirected itself because at page 9 of its judgment admits that the trial courts records reveals that there was a will produced and admitted, and it further held that the trial court ought to

have satisfied itself on its validity and authenticity of such a purported will, but doubtful comes on page 9, by saying that the said document is not a will and even the trial court did not treat the same as being the will, the appellate court failed to determine the issue of whether the deceased died intestate or not and if the appellate court determined that the deceased died intestate it finally failed to order the proper relief after finding that there was no will alleged to bequeath the respondents adduced in the trial court.

Submitting on the third ground of appeal Mr. Mwandu submitted that the trial court failed to frame proper and required issues which is contrary to the laws. And the appellate court failed to note that the appellant and her fellow children of the deceased lost their bequeath, by stating that "Therefore, I find no any point indicating that there was injustice occurred in the trial court's decision. dissatisfaction of a party in suit is not an indication that there was injustice in the decision". Mr Mwandu argued that the first appellate court failed to note that, the issue of the appellant and her fellow children of the deceased being lost their bequeath is the one of miscarriage of justice. Mr. Mwandu cited the case ***of General Manager Tanzania CC Ltd vs. Bonimabusi*** (CAT) Revision No.7 of 2014 page 283 (Unreported) in which it was held that

*"..... I find that failure to frame and decided the above issue was material error likely to lead to unjust decision." The court went on that ..... "I find that apart from the issue decided the following key issue should have been specifically framed and decided"*

In regard to ground No.5 Mr. Mwandu submitted that the learned resident Magistrate erred in law and fact for blessing sale of house on

plot No.135 Block "N" while the trial court had no power to order sale of probate property apart from appointing administrators only, the first appellate court has misdirected itself for failure to discover that. He said the Fifth Schedule of Magistrates Courts Act (CAP. 11 R.E 2002) it governs the administration of Estates, Mr. Mwandu argued that the first appellate court ought to order to the administrators to redivide equally all the deceased's properties to all legal heirs, so failure to do so caused miscarriage of justice to the appellant.

To conclude Mr. Mwandu prayed this court to quash the trial court and appellate court judgment and its orders and to order trial denovo against the deceased's distribution of probate properties to his children.

In reply Mr. Moses Ambindwile submitted that the learned counsel for the appellant has grossly misdirected when he was stressing in the first ground of appeal that, the record of the trial court on page 2 indicates the trial court admitted a will, also further the judgment of the appeal concludes that a will was produced and admitted, however, on page 14 of same judgment concludes that, no will was produced nor admitted. It is the argument by the learned counsel for the respondent that there are no contradictions in the judgment entered by the appellate court and also neither does the record of the trial court at page 2 or anywhere else indicated that a will was produced and admitted.

Regarding grounds No.1 and No.2, Mr. Moses submitted that the trial court and appellate court records are clear that the deceased's died intestate and nowhere on face of both records a will was tendered nor admitted. It is the argument by the learned counsel for the respondent

that this is a new matter raised in this appeal which was not canvassed by the trial court or appellate court. To cement his argument Mr. Moses Ambindwile cited the Case of ***Nurdin Musa Wailu vs. Republic, Criminal Appeal No.164 of 2004*** as quoted in ***Galus Kitaya vs. Republic***, Criminal Appeal No.196 of 2015 Court of Appeal of Tanzania at Mbeya (Unreported), whereby it was held that a second appellate court will look on matters which came up in the lower court and decided.

Submitting on grounds No. 7<sup>th</sup> 4<sup>th</sup> and 5<sup>th</sup> Mr. Moses Ambindwile was of the view that the three grounds are absolutely misdirected and misleading because the contentions that the appeal court endorsed the sell order are fabricated for there is nowhere on record the court ordered the sell rather than merely referring to what the heirs of the deceased previously deliberated before institution of the case. Hence the learned counsel for the respondents prays for this court to dismiss this appeal with costs.

In rejoinder Mr. Mwandu reiterated what he submitted in his submission in chief, he submitted further that the trial court erred in law for ordering the sale of the house in dispute while has no such a jurisdiction of selling it. Hence he insisted to quash the trial and appellate court judgments and their order and order trial denovo.

Having read the respective submissions and having passed through the Court records, the issues for determination is whether the grounds of appeal raised have merit. I will not address on every ground of appeal as raised by the appellant because they are intertwined, I will therefore address them generally, for instance grounds 1 and 2 are about the will,

ground 3 is on failure to frame issues by the trial court and the rest are on unfair distribution of deceased properties to heirs.

Starting with the complaint on failure by the trial court to frame issues, this was raised at the first appellate court which decided that such failure did not occasion injustice. Framing of issues is the requirement in the Civil Procedure Code under Order XIV. But failure to frame issues is a procedural irregularity which may not be fatal to the proceedings. It will be fatal when an appellate court forms an expression that the failure has occasioned injustice to one of the parties. In the case of ***Norman V. Overseas Motor Transport [1959] EA 131***, it was held:

*"The failure to frame issues is an irregularity, the question would appear to be whether notwithstanding the failure to frame issues the parties at the trial knew what the real question between them was, that the evidence on the question had been taken and the court duly considered it"*

Failure to frame issues is fatal only when parties to the case did not know what the real issue was between them. This could not be the case in the present matter. The parties were very aware of what they were litigating for and what was in dispute. The 1<sup>st</sup> appellate court was right in its decision regarding failure to frame issues by the trial court.

From the court record it is undisputed fact that the Probate Cause No 13 Of 2018 was heard and conclusively determined whereas Christopher Thomas Mfyuji, Grace Thomas Mfyuji and Tumaini Thomas Mfyuji without any objection were appointed as joint administrators of the



deceased estates. But before his death, the deceased had transferred some of his properties to some of his children, that is four children namely Bryton Thomas Mfyuji and Baraka Thomas Mfyuji who were given the house on plot No 159 Block O. Paulo Thomas Mfyuji and Elisha Thomas Mfyuji were given the house on plot No 259 Block O. The remaining 12 children did not get any property from the deceased estates. The house now in dispute located at Mjimwema on plot No 135 Block N remained in the deceased name. The family members agreed that the same should remain in the deceased name and the remaining widow will continue occupying the same. However the present appellant lodged complaint in court claiming the said house to be given to her together with her sister one Rose Thomas Mfyuji who were born from same mother. But before the matter was filed in court, clan members convened a meeting to deliberate on the issue and proposed that the house should be sold and the proceeds to be divided to all 12 children who did not get anything from their deceased father properties. But that was not accepted by the appellant who lodged complaint in court. Admittedly powers of the primary court in administration cases are provided under rule 2(a) to the fifth schedule of MCA (CAP 11 R.E. 2002). And the functions of primary court are spelt there under that is; to appoint administrator, to hear objections to appointment, to receive the report of the administrator and hear objections to the report. It can revoke the appointment on successful objection based on good cause.

The functions of administrator are provided for under rule 5 of the fifth schedule to the MCA, that is:

*"An administrator appointed by a primary court, shall with reasonable diligence, collect the property of the deceased's and the debts that were due to him, pay the debts of the deceased and the debts and costs of administration and shall, thereafter, distribute the estate of the deceased's to the person or for the purposes entitled thereto, and in carrying out his duties, shall give effect to the directions of the primary court"*

The provision above was interpreted in the case of ***Naftal Joseph Kalalu vs. Angela Mashirima, Pc Civil Appeal No.145 of 2001 HC Dar (unreported)***.at 243 in which it said;

*".....the duty of the administrator is to make a collection of the deceased's property and distribute it to heirs"*

There is complaint by the appellant that the primary court erred to order sale of the house now in dispute. The primary court usurped powers not vested to it. The duty to distribute deceased properties to heirs is of the administrator. The complained of order reads:

*"AMRI: Nyumba iuzwe, mapato wagawane watoto 12 wa marehemu"*

Basing on the quoted order of the trial court it is the appellant's complaint that the trial magistrate stepped in the shoes of the

administrators and done the job of the administrators, as the magistrate has no legal mandate to sell or order sale of properties of the deceased's estate. There is one thing the appellant did not appreciate. It is on the trial court proceedings that among the three deceased houses located at Iringa, two were transferred by the deceased himself to his four children during his life time, that is way back on 20/6/ 1991 and on 23/01/1992 for plot No 259 Block O and Plot No 169 Block O respectively, and the transfer deeds were tendered in court and admitted as exhibit "A" collectively. This is not in dispute. But it is also undisputed fact that the house now in dispute was in the deceased name at the time deceased passed away. It is in that house the deceased was living together with the surviving widow. It was agreed at the family meeting that the said house would remained in the deceased name and the widow will continue living there. It is therefore inconceivable for the appellant to allege that the information relating to that house was concealed. It is clear from the evidence on record that for the first time it was agreed by family members that the house to remain in the deceased name and the widow to continue living in that house. However after the present appellant who was the co-administratrix of the deceased estates, who was added to avoid misunderstanding which might crop up and for the purpose of smooth administration of the estates and maintaining peace among family members. But after the appellant has demanded to be given the said house herself and her sister one Rose Thomas Mfyuji who were born from the same mother, that idea was not accepted by other heirs who did not get anything and other family members. It is when it was resolved that the said house be sold and the proceeds be divided to all

12 children of the deceased who did not get anything. But those who were given houses should not get anything from the proceeds. It is from that family members' resolution, the order of the trial court was based. The court just endorsed what family members have agreed. It is not correct to allege that the trial court assumed the duty of the administrators. The trial could not keep silent while it was moved by the appellant to consider that issue of house now in dispute neither did the appellant challenge the appointment of other administrators. In its decision the trial court considered interest of all heirs. And endorsed what was agreed by family members. One may wonder as to why the appellant and her sister only wanted to be given the house in isolation of other legal heirs. I have gone through the trial court proceedings concerning the appellant's objection. In her evidence she asserted that the said house was built by the joint efforts of the deceased and her mother who contributed substantial part. But she did not tender any evidence to substantiate her assertion. But again she alleged that the house was built by the money from the estates of her two siblings. However she is also not certain if their deceased father had filed probate causes for the appellants siblings in 1994, and if so how much was realized from their probate causes, and if the disputed house was built from that probate causes. To the contrary there is evidence from the 2<sup>nd</sup> administrator that the house was built by the late Thomas Mfyuji and her wife, the mother of the 2<sup>nd</sup> administrator, the latter tendered even an offer of the plot where the house was built even the letter deceased was given by the land office reminding him to develop the plot, No 135 Block N. It is the evidence by 2<sup>nd</sup> administrator that construction of that house commenced in 1972. After the deceased was transferred to

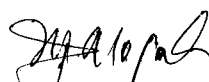
Njombe, her mother is the one who was supervising its construction up to the end. There is also another complaint by the appellant that the trial court relied on an invalid will in its decision. This argument is misconceived, there is no evidence to show that the deceased left a will, nor is there in its ruling that the trial court relied or based on the deceased will. The deceased transfer deeds of his two houses to his four children cannot be said as the will, what he did is by love and affection and he did so with sober mind to transfer his two houses to his four children. The appellant might be misled by what was stated by some of the witnesses on the deceased will to transfer his two houses to some of his children. But going through the court record there is no any will tendered and received at the trial. Having so explained, I'm of the considered view the appellant either misconceived the trial court proceedings and the order made thereof or deliberately raised the objection for her own interests. As the administrator to the deceased estate the appellant was not expected to bring such a state of affairs by claiming to be given one of the deceased estate alone and her sister. She was supposed to sit together with other administrator and find a best way of distributing the deceased properties to deserving heirs. Otherwise as pointed out above her complaint is misconceived and the court decisions cited in support of her arguments are irrelevant and distinguishable to the matter at hand.

Although the function of the primary court is to appoint the administrator and sit down wait for the report of the administrator to be filed as it was held in a case of ***Hadija Said Matika vs. Awesa Said Matika HC Mtwara Civil Appeal No. 2 of 2016***. But I view the

circumstances of this case are different. Distribution of the deceased properties was already done as to what family members have agreed. That is why the appellant is claiming to be given the house in dispute for unjustifiable reasons. It is my opinion that it was not proper for the appellant to do so. The sale of the disputed house in my view is the best option for the interest of all heirs. The surviving heirs cannot question the deceased act of disposing of his properties by transferring to some of his children, that was in his mandate. What can be looked at the moment is the properties he left behind which were still in his possession or name. In my considered opinion both lower courts were correct in their findings, I have no reason to disturb them. The trial primary Court entertained the appellant objection as one of its functions provided under the law. This appeal lacks merit the same is dismissed with costs.

**DATED** at **IRINGA** this 25<sup>th</sup> day of February, 2020.



  
**F.N. MATOGOLO**  
**JUDGE**  
**25/02/2020.**

Right of further appeal explained.



  
**F.N. MATOGOLO**  
**JUDGE**  
**25/02/2020.**