THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY OF MBEYA

AT MBEYA

PROBATE APPEAL NO. 2 OF 2020

(From the decision of the District Court of Momba, Probate Appeal No. 1 of 2019, Original Probate Cause No. 32 of 2014 Primary Court Tunduma)

KHALIFA MOHAMED NOTI .....APPELLANT

VERSUS

BI ASHA RASHID IKAJI .....RESPONDENT

Judgment

Date of last Order: 22/06/2020

Date of Judgment: 02/07/2020

Mambi, J

The appellant in this probate cause was dissatisfied by the decision and order of the District Court of Momba in Probate Appeal No. 1 of 2019, in Probate and Administration Appeal No.1/2019. The decision of the District Court set aside the decision of the Primary Court which earlier granted thc letters of administration to the

appellant in Probate Cause No. 32 of 2014. In other words, the District Court made a decision in favour of the respondent who was among the deceased wives. The Court set aside the decision of the Primary Court ordered that retrial/trial-de-novo while the deceased properties were already distributed by the administrator of the deceased estate.

Aggrieved, the appellant has now appealed to this court against decision of the District Court on the following grounds;

1. That the District Court Magistrate erred in law for nullifying the proceedings and decision of primary court, and issuing an order for retrial without giving valid reasons.
2. That the appeal before the District Court was misconceived as the appellant had already complied with the ruling and orders of the appointing court, and filled the inventory and account of administration of the estates,
3. That no good reason was addressed to justify the revocation of the letters of administration granted to the appellant.

Before the matter was scheduled for hearing, Parties prayed to argue by way of written submissions and court ordered the parties to do so in line with agreed schedules.

Addressing the grounds of appeal, the learned Counsel for the appellant Ms Mary L. Mgaya submitted that, the appeal before the District Court was misconceived on the reason that the appeal was stemmed on the issue which was not determined by the primary

court. She argued that the Respondent had never made any prayer or addressed before the primary court on the issue of revocation of letters of administration, neither did she address the reasons for revocation, thus the primary court did not determine the issues of revocation, and therefore, the respondent's grievances addressed before the district court by way of appeal was a new matter based on afterthought. She submitted that, no evidence was lead on appeal before the district court to justify the alleged revocation. He averred that, it was alleged that the appellant delayed to distribute the assets, however the District court Magistrate did not consider the findings made by primary court with regard to the duties of the administrator and the rights of the beneficiaries. The learned Counsel for the appellant further submitted that none of the property was reported lost or mishandled or misappropriated, or squandered by the administrator. He referred the decision of the Curt in ***HADIJA SAID MATIKA versus AWESA SAID MATIKA PC CIVIL APPEAL NO. 2 OF 2016.*** She thus argued that it was improper for the District court to nullify the proceedings and decision of primary court which had already been complied, performed and implemented by the administrator. He argued that there was no proof of miss-handling of squandering of the deceased properties, all the properties liable for administration were accounted for by the appellant to the satisfaction of the appointing court. He referred the decision of the Curt in **SAFINIEL CLEOPA VERSUS JOHN KADEGHE (1984) TLR PG 198.** The learned Counsel for the appellant was of the view that, the directions issued

by the district court for trial de novo, with suggestive findings for revocation is chaotic to both, the administrator as well as the heirs, the assets had already been distributed. She argued that there is nothing to be re-administered by the newly appointed administrator since the primary court had already determined the respondent prayers for distribution, thus, the primary court will be *functus official.*

In response, the respondent submitted that the appellant filed his submission out of time and thus this court should not take into consideration the written submission filed by the counsel for the appellant for being filed without the leave of the Court. Alternatively, the respondent submitted that it is not true that appellate District Court determined the issue which was not determined by the Primary Court. She argued that the issue of revocation was addressed by the respondent before the trial Court and the trial Court determined the same. She referred page 4 of the typed proceedings of the trial Court. The respondent further submitted that it is clear from the Court record that there was mishandling of squandering of the deceased properties. She averred that this fact is reflected at page 5 of the typed proceedings of the trial Court where the respondent stated that there was some plots which were sold without informing the respondent but the trial Court did not consider.

I have considerably gone through the grounds of appeal by the appellant and written submission by both parties. One of the key

issue is whether there was any justification for the trial court to order the matter be tried de-novo or not. The other issues is whether the appellant filed his submission out of time as claimed by the respondent. It is on the records that the District court made the decision to order the matter be determined afresh by the trial court without justification and reasons. The court also failed to consider the status of the deceased estate before make its decision. The position of the law is clear that that the judgment must show how the evidence has been evaluated with reasons. The record such as the Judgment does not show the point of evaluating evidence and giving reasons on the judgment. It is also the settled principle of law that the judgment must show how the evidence has been evaluated with reasons. It is trite law that every judgment must contain the ***point or points for determination, the decision thereon and the reasons for the decision***. Failure to do so left a lot of questions to be desired. The laws it is clear that the judge or magistrate must show the reasons for the decision in his/her judgment. This is found under ORDER XXXIX rule 31 of the Civil Procedure Code, Cap 33 which provides for the Contents, date and signature of judgment. The provision states that:

> *"The judgment of the Court shall be in writing and shall state–*
>
> *(a)* ***the points for determination****;*
>
> *(b) the decision thereon;*
>
> *(c)* ***the reasons*** *for the decisions; and*

(d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled, and shall at the time that it is pronounced be signed and dated by the judge or by the judges concurring therein".

Under that section the word **"shall"** according to the law of Interpretation Act, Cap1 [R.E.2002] implies mandatory and not option. This means that any judgment must contain point or points for determination, the decision thereon and the reasons for the decision. The record such as the Judgment does not show the point of evaluating evidence and giving reasons on the judgment. See also the decision of the court in ***Jeremiah Shemweta versus Republic [1985] TLR 228,***

Indeed my finding reveals that the appellant properly filed the inventory and the deceased properties were already distributed and nothing left. It is on the records that the primary court properly appointed the appellant who is the brother of the deceased to be the administrator of the deceased estate after the clan meeting decision which involved the respondent and the other wife of the deceased. The respondent never objected earlier until the administrator had already distributed the deceased properties to the deceased heirs including the respondent. Looking at the judgment made by the District Court, it is clear that the Court did not properly go through the judgment made by the primary and just rushed to make the decision of ordering trial de novo without reasons. It should be noted that the decision to order trial de novo must be judiciously

made without causing any injustice to any party. The court may only make that decision of trial de-novo if such decision can lead to injustice to the parties especially beneficiaries in the matter at hand. Each case must depend on its particular facts and circumstances and an order for retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause an injustice to any party. There are various authorities that have underlined the principles and circumstances to guide the court in determining as to whether it is proper to order retrial or *trial de novo* or not. I wish to refer the case of ***Fatehali Manji V.R, [1966] EA 343,*** cited by the case of ***Kanguza s/o Machemba v. R Criminal Appeal NO. 157B OF 2013***, where the Court of Appeal of East Africa restated the principles upon which court should order retrial. It said:-

> *"...in general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its particular facts and circumstances and an order for retrial should only be made where* ***the interests of justice require it and should not be ordered where it is likely to cause an injustice to the accused person****..."*

I have no reason to depart from the above authorities since an order for retrial can only be made where the interests of justice requires it and should not be ordered where it is likely to cause an injustice to

any party. In my considered and firm view, in our case at hand any order for trial de novo will end up defeating the justice since all deceased properties were already properly distributed to the beneficiaries. Ordering trial de novo will mean ordering the beneficiaries to return back all properties divided to them which in my view will end up with cause among the beneficiaries rather than maintain harmony among them while still having grieves of loss of their head of the family (the deceased). I am of the settled view that it was improper for the District Court to order for retrial and the interests of justice did not require to the court to does so, since doing so will in my view create more likelihood of causing an injustice to the beneficiaries and I hold so.

In the absence of the evidence to show that the appellant who was the administrator misused and mishandled the deceased estate, I am of the considered view that all grands of the appeal at the District Court were devoid of merit. I entirely agree with the appellant's Counsel that there was no proof of mishandling of squandering of the deceased properties, all the properties liable for administration were accounted for by the appellant to the satisfaction of the appointing court. Indeed it has now taken a long time before the appellant disputed the appointment of the administrator. The Respondent at the District Court did not show any evidence that the appellant misused the deceased estates and there is no any other beneficiary who has ever claimed any allegation on the misuses of the deceased properties. The Court in

NATIONAL BANK OF COMMERCE LTD Vs DESIREE & YVONNE TANZAIA & 4 OTHERS, Comm. CASE NO 59 OF 2003( ) HC DSM, had once observed that:-

> *"The burden of proof in a suit proceeding lies on their person who would fail if no evidence at all were given on either side."*

Ordering the matter be freshly determined by the Primary court would mean that the new administrator or administratix will be appointed to administrate the properties that were already distributed and used by the beneficiaries a long time. This means that there will be nothing to be re- administered by the newly appointed administrator since the primary court had already determined the respondent prayers for distribution

It is trait law that before any appellate court makes an order for retrial or trial de novo, the court must find out as to whether the original trial order was illegal or defective and whether making such order (retrial or trial de novo) and will create more injustice to any party. In the matter that was at the District, I have not seen the reasons advanced by the Court to justify the matter to be re-determined by the Primary court.

With regard to the claim that the appellant filed his submission out of time as claimed by the respondent, I don't see if this complaint has merit since the records are clear that the appellant filed his submission as per the court order. Indeed the appellant filed his submission both physically and electronically in time and the same was done by the respondent.

It should also be noted that the matter has taken a long time since the properties such as money were distributed by the appellant who was legally appointed by the Primary Court, and since this court has uphold the decision of the primary court, it means that the status of the appellant as an administrator stands valid. For reasons I have given above, I am of the settled view that the grounds of appeal beforehand are meritorious. I thus allow the appeal basing on reasons I have stated.

Since the Parties are related, this court orders no cost and each party to bear their own cots. It is hereby so ordered.

A. J. Mambi

Judge

02/07/ 2020

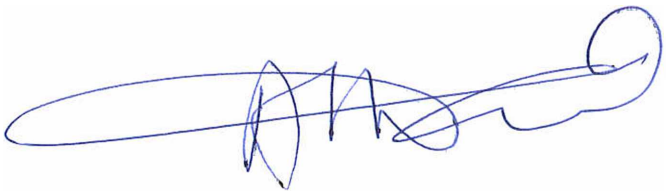
Judgment delivered in Chambers this 2nd day of July, 2020 in presence of both parties.

A. J. Mambi

Judge

02/07/ 2020

Right of appeal explained.



A. J. Mambi

Judge

02/07/ 2020