IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

(PC) PROBATE APPEAL NO 05 OF 2020

(Arising from Probate Appeal No 15 of 2019 of the District Court of Tarime at Tarime Originating from Probate Cause No 129/1993 of the Primary Court of Tarime District at Tarime)

GABRIEL JOSEPH (Administrator of the estates of the late Joseph Chacha Mukohi).....APPELLANT

Versus

AMBROSE GWASI MUKOHI..... 1ST RESPONDENT

CHRISPINUS MASWI MUKOHI ..... 2ND RESPONDENT

FERDINAD JOSEPH MUKOHI ..... 3RD RESPONDENT

JUDGMENT

18th August & 24th September, 2020

Kahyoza, J.

Parties are siblings of **Joseph Chacha Mukohi** who died intestate on the **10th July, 1993**. After **Joseph Chacha Mukohi's** demise, his family members on the **17th July, 1993**, appointed **Gabriel Joseph Mukohi** to apply for letters of administration of the deceased's estate. The respondents went to court to seek the annulment of the appointment of the appellant as the administrator of their late father's estate. The appellant objected to the application arguing that the administration of the estate is closed. Thus, there is nothing to annul.

Briefly the facts, which precipitated to the current appeal are that: The primary court of Tarime district at Urban appointed **Gabriel Joseph Mukohi** (the appellant) to administer the estate of **Joseph Chacha Mukohi**, vide Probate No 126/93 on the 29th October,1993. The deceased was survived by a wife and ten children. During the appointment of the appellant as the administrator, the court listed seven different bank accounts, two houses at Tarime, two, Plots, a shop, a garage, two motor vehicles and other items.

It is not clear what prompted the appellant to file a statement of account, Form No. VI in 2015 after 22 years of his appointment. It seems, despite the appellant filing the statement of account, dust did not settle. The respondents were not content with the distribution of the some of the deceased's estate. They objected to the distribution in the primary through "Pingamizi la Mirathi" No. 3/2018. The primary court dismissed the objection. The respondents appealed to the district court vide Probate Appeal No. 3/2018. The district court nullified the proceedings of the primary court in "Pingamizi la Mirathi" No. 3/2018. It directed the objection to be opened in the main file that is Probate No. 129/93. It stated-

> *"Therefore, for trial court to register probate objection number 3/2018 while it was supposed to be heard within Probate and Administration Cause No. 129/93.....and the whole proceedings and decision of trial court is hereby quashed and set aside and this appeal is hereby dismissed with no cost."*

Following the district court's judgment above quoted, the respondents filed in the primary court on the 20th June, 2019 their objection. Unfortunately, the primary court filed the objection in "Pingamizi la Mirathi" No. 3/2018 and heard the objection. The primary court heard

the parties and gave an interim order prohibiting the appellant to deal with the deceased's property until the objection is determined. It also barred the appellant from evicting the first respondent from the house on Plot No. 6 Block S.

Aggrieved by the interim order, the appellant lodged an application for revision to the district court vide Misc. Application No. 15/2019. The district court accommodated the prayer. It called the primary court's record for examination. The respondents filed a joint counter affidavit. They opposed the application. The appellant filed a reply to the counter affidavit raising a preliminary objection that the respondents filed the counter affidavit out of time. The respondents raised also a preliminary objection with four limbs.

The district court heard the preliminary objection filed by the appellant. In the course of writing the ruling, the district court found that there was no Probate and Administration Cause No. 129/93. It also found out that the application for revision under its consideration emanated from a non-existing record of "Pingamizi la Mirathi" No. 3/2018, which it had quashed vide Probate Appeal No. 3/2018. Basing on its findings, the district court nullified the proceedings from which the appellant based his application for revision. It directed the primary court to rehear the objection vide Probate and Administration Cause No. 126/93.

Aggrieved, the appellant lodged the current appeal, raising six grounds of appeal and the respondents filed a joint reply. The Court heard the appeal orally. At the hearing, Mr. Baraka Mkami and Mr. John Kuyela Kidando, learned advocates, represented the appellant while Mr. Ernest Alfred Mhagama, learned advocate, appeared for the respondents.

The appellant's advocates abandoned the second and fifth grounds of appeal and argued the 3rd,4th and 6th grounds of appeal jointly and the first appeal separately.

Did the district court raise the issue of competence of the proceedings *suo motu* and decide it without hearing the parties?

The appellant's advocates submitted that the applicant, the appellant before this Court raised a preliminary point of law that the respondent filed the counter affidavit out of time. They averred that instead of determining the preliminary objection, which they argued, the district court perused the record, detected defects, and dismissed the application based on its findings. It did not hear the parties. They submitted that the district court committed a fatal error. In support of their contention, the appellant's advocate cited the case of **Christopher Humprey Kombe V. Kinondoni Municipality Council** Civ. Case No. 81/2017, where the Court of Appeal held that-

> *"we are certain in our mind that the High Court erred in basing the decision of the case on the issue raised **suo motu** without according the parties the right to be heard on that issue."*

They concluded that the district court erred to raise the issue of aptness of the primary court's record *suo motu* and deciding it without hearing the parties.

In his reply, the respondent's advocate contended that the decision of the district court was proper. He submitted that the district court gave it decision and adduced reasons for its decision.

I will not belabor on this issue. It is now settled that failure to invite parties to address the court on jurisdiction issues raised by a court *suo*

motu vitiates the proceedings and the judgment therefrom. See the **Dishon John Mtaita v. The Director of Public Prosecutions,** Criminal Appeal No. 132 Of 2004; **Kluane Drilling (T) Ltd v. Salvatory Kimboka,** Civil Appeal No. 75 of 2006; and **Margwe Erro, Benjamin Margwe & Pater Marwe V. Moshi Bahalulu,** Civil Appeal No. 111 / 2014. In **Margwe Erro, Benjamin Margwe & Pater Marwe v. Moshi Bahalulu,** the Court of Appeal held that-

> *"The parties were denied the right to be heard on the question the learned judge had raised and we are satisfied that in the circumstances of this case the denial of the right to be heard on the question of time bar vitiated the whole judgement and decree of the High Court. Without much ado, we find there to be merit in this appeal which we accordingly allow. We find the judgment of the High Court to have been a nullity for violation of the right to be heard."*

In yet another case of **EX- B.8356 S/SGT SYLVESTER S. NYANDA VS THE INSPECTOR GENERAL OF POLICE & THE ATTORNEY GENERAL,** CIVIL APPEAL NO. 64 OF 2014 (unreported) in which the High Court raised jurisdictional matters *suo motu* and determining them without hearing the parties. The record showed that three issues were framed for determination by the trial High Court. But, while preparing its judgment, the trial court abandoned all the three issues and framed a completely new issue upon which it based its decision. Before revising and quashing the entire proceedings of the trial High Court, the Court observed:

> *"There is similarly no controversy that the trial judge did not decide the case on the issues which were framed, but her*

*decision was anchored on an issue she framed **suo motu** which related to the jurisdiction of the court. On this again, we wish to say that it is an elementary and fundamental principle of determination of disputes between the parties that courts of law must limit themselves to the issues raised by the parties in the pleadings as to act otherwise might well result in denying of the parties the right to fair hearing."*

The record speaks for itself. The district heard the parties orally regarding the preliminary objection raised by the applicant on the 19th March, 2020 that the respondents filed the joint counter affidavit out of time. Instead of determining the preliminary objection, the district court perused the record and found it defective. It dismissed the application without hearing the parties. Thus, it was wrong for the district court to raise the issue whether proceedings before it, were competent *suo motu* and determined the same without inviting the parties to address it.

In the upshot, I uphold the 3rd, 4th and 6th grounds of appeal.

Was it appropriate for the district court to order the rehearing of application seeking to remove the administrator?

The appellant contended in his first ground of appeal that the district court erred for ordering the rehearing of the application for removal of the administrator whilst the said application had already been determined.

The appellant's advocate Mr. Mkami submitted that it is in the interest of justice that litigation should come to an end. He averred that the district court and the primary court mislead themselves on the matter. He added that it all started at the district court which ordered the

objectors to file the matter in the primary court when the administration of the estate was already concluded. He submitted that even if the appellant had misused the estate of the deceased, revocation was not a proper remedy. He submitted that there are authorities explaining what ought to be done when complaints regarding mismanagement of the deceased's estate arise after the administration of the estate is complete. In support of his position he cited **Ahamed Mohamed Al Laamar V Fatuma Bakari and Asha Bakari** Civil Appeal No 71/2012 (CAT unreported). The Court of Appeal held that-

> *"In our respectful opinion, both common sense and logic dictate that one can only annul, repeal, vacate, put to an end, etc. what was previously granted or passed and still operative or existing. Nothing which has already come to an end can be put to an end or vacated."*

The appellant's advocate submitted that the administrator concluded the administration of the deceased's estate in 2015 when he filed the statement of account in the primary court. He concluded that revocation of the administrator can be done when the administration is still pending and that the administrator allocated the properties to the deceased' heirs including the respondents.

The appellant's advocates prayed this Court to invoke section 44 of the **Magistrates Courts Act** [Cap 11 R.E 2019] (the **MCA**) to quash the district court's order directing the respondents to apply for revocation of the administrator. He insisted that there is nothing to administer. He added that should the order of revocation be granted, the newly appointed administrator will have nothing to administer.

The respondents' advocate Mr. Mhagama strongly opposed the first ground of appeal and the submission in support thereto. He argued that the Probate and Administration Cause No. 126/93 was not yet closed. There are no records of distribution of the deceased's estate and the appellant, the administrator, has also not filed an inventory and final accounts. He averred that the district court stated in its ruling in Miscellaneous Civil Application No 15/2019 that there are no records that the administrator did discharged his duties.

The respondent's advocate further argued that the administrator did not comply with the law especially rule 10(1) (2) of the **Primary Court (Administration of Estates) Rules** G.N. No 49/1971, which requires an administrator to file a statement of account and inventory within four months. There is no record showing that the administrator filed an inventory and final accounts within the time provided. The remedy for an administrator who failed to discharge his duties is to be revoked as it provided in the case of **Daudi Mahende Kichonge V Joseph Mniko and Others.** Probate and Administration cause No 48 of 1996 (HC DSM Unreported).

The respondents' advocate further submitted that the administrator transferred Plot No 6 Block "S" to his own name and sold it. He submitted that Plot No 6 Block "S" was a matrimonial property and that the rights of ownership passed to the deceased's wife. It was therefore, wrong to include it in the estate of late **Joseph Chacha Mukohi.**

The respondents' advocate requested this Court to revoke the appellant's appointment as the administrator and appoint the respondents to administer the estates of the late **Joseph Chacha Mukohi**. The

respondents' advocate added that the appellant, the administrator, filed the final statement of account in 2015 long time after the expire of the time within which he was required to do so. He added that the magistrate who endorsed his signature on the final statement of account, Ms. Lilian Gimonge, was employed in 2015. She could not have signed the statement before that time.

I passionately considered whether the administration of the estate of the late **Joseph Chacha Mukohi** was closed. There is no doubt that the primary court appointed the appellant to administer the deceased's estate on the 29th October, 1993. The administrator had a legal duty to exhibit an inventory in **Form V** of a true and complete statement of all the assets and liabilities of the deceased's estate **within four months of his appointment**. This duty is in accordance to rule 10(1) of the P**rimary Courts (Administration of Estates) Rules** G.N. No. 49 of 1971. It states-

> *10 (1) Within four months of the grant of administration or within such further time as the liabilities court may allow, the administrator shall submit to the court a true and complete statement, in Form V, all the assets and liabilities of the deceased persons' estate and, at such intervals thereafter as the court may fix, he shall submit to the court a periodical account of the estate in Form VI showing therein all the moneys received, payments made, and property or other assets sold or otherwise transferred by him.*

The appellant did not file an inventory in Form V within four months from the date of his appointment as required by law. The appellant was duty bound to file the inventory in Form V on or before **29 February,**

1994. He defaulted. There is no record that the appellant ever filed an inventory in Form V. It is my firm view that there is no way the administrator worthy his name would bring to an end the administration of the estate without filing Form V. The law imposes a mandatory duty upon the administrator to file an inventory.

The appellant's advocates submitted that the appellant filed a statement of final account in 2015 for that reason the probate cause was closed. Duties and functions of an administrator are clearly elaborated in **Hadija Saidi Matika and Awesa Saidi Matika**, PC Civil Appeal No. 2 of 2016 [H/C Mtwara Unreported] as-

> *"**One**, collecting the assets of the deceased. This include both fixed and movables. It also involves going to the bank and collecting what might be there. He can also sue people who may refuse the requests.*
>
> ***Two**, to identify the heirs. It is now generally accepted that the heirs under customary law are the spouse or spouses of the deceased and his or her children. Uncles, aunts, sisters and brothers are not heirs. In the absence of a WILL, they should not be given anything save at the free will of the heirs.*
>
> ***Three**, to identifying and pay the debts of the deceased.*
>
> ***Four**, to distribute the assets to the heir; and*
>
> ***Five**, to file inventory and statements of accounts (forms V and VII)."*

There is no evidence that the appellant discharged all the above functions and duties of an administrator. The appellant's advocates averred the appellant did file final statement of account of the deceased's

estate in 2015. The appellant filed the same after the expiry of the period within which he was required to file. In addition to the fact that the appellant delayed to file the a final statement of account by filing it in 2015, that is after 22 years of his appointment, there is no record in the primary court to support that contention that the appellant did file the statement. Not only that there is no record how did the magistrate (Ms. Lilian Gimonge) took the conduct of the case. She was not a former trial magistrate hence; the records of the primary court should have shown that the probate and administration cause No. 126/93 was re-assigned to her. There is no such record.

In addition to the above, it is a good practice that once the administrator lodges a statement of final account, i.e. Form VI, the court has to make it know to the heirs, debtors and creditors and ask them to file objections against, if they so wish. See the decision in the case of **Nuru Salum and Husna Ali Msudi Juma**, PC Probate Appeal No.10 of 2019 (Rumanyika, J.) and **Hadija Saidi Matika and Awesa Saidi Matika (supra).** It was held that

> *"In practice, in a good system of administration of justice, once they are filled, the court must cause the same to be known to heirs, debtors and creditors and ask them to file objections against them, if they so wish. If there is an objection, the court will be at liberty to return them to the administrator for rectification as was said by this court in or proceed to hear the parties and make a ruling on the matter."*

It is also a practice that the probate and administration cause comes to an end after filling of Forms No. V and VI and after the court makes an

order closing the matter. It is the closing order that discharges the administrator of his functions and duties. See the **Beatrice Brighton Kamanga & Amanda Brighton Kamanga v. Ziada William Kamanga** Civ. Rev. No. 13/2020 (unreported) H/C Dar es salaam. In that case, the court held that

> *"There is an end in probate and administration matters. The matter comes to an end on filling of Forms No. V and VI and after the order of the court closing the matter. The emphasis here is that, the administrator must present his reports to the court in time which will proceed to put the matter to an end. The position the High Court and primary court on this aspect is the same. Inventories and statement of accounts must be filled within the period stipulated under the law so that the matter may come to an end"*

As pointed out above, the appellant, the administrator, did not file Forms No. V. I am of the view that there is no way the administrator can legally and properly file Form VI which shows the distribution of the estate without first exhibiting the assets and liability of the deceased's estate in Form V.

Even, if for the sake of argument, I hold that it was proper for the administrator to file a final statement of account, i.e. Form VI without first filing Form V, Form VI filed by the appellant is defective. It lacks essential information, **one**, it was not properly filed as it is not in the primary court's record; **two**, the primary court did not let the heirs know that the administrator had filed it and give them time to object or otherwise. **Three**, worse still, the appellant filed Form No. VI out of time without applying for extension of time to do so. This Court (Mlacha J.) held in

Beatrice Brighton Kamanga & Amanda Brighton Kamanga v. Ziada William Kamanga (supra) that if the administrator fails to file Form V and Form VI within four months the administrator's activities become null and void. I associate myself with that interpretation. The duty to file Form V and Form VI within four months is mandatory. The administrator has no choice but to comply.

The Court in **Beatrice Brighton Kamanga & Amanda Brighton Kamanga v. Ziada William Kamanga** (supra) stated-

> *"There is no endless administration or a Life administrator in our laws. My interpretation of rule 10 of GN 149 of 1971 is that if the administrator does not submit to the court a true and complete statement in form V within 4 months, containing all the assets and liabilities of the deceased persons' estate and does no submit a periodical account of the estate in form VI showing therein all the moneys received (if any), payments made(if any) and property or other assets sold or otherwise dealt by him within such period as directed by the court, his existence is rendered illegal and his activities after the expiration of 4 months becomes null and void.*
>
> *And if the matter remains pending for a longer period, let's say 3 years, without such a report or extension from the court, the appointment cease to exist by operation of the law for as I have pointed above, there is no life administrators in our schemes."*

I have no good words to add to the excerpt above. I fully subscribe to it. It is clear from the record that the late **Joseph Chacha Mukohi** left behind a number of items as the primary court depicted in its order dated 29th October, 1993. One would have expected those assets to feature in Form VI and the appellant ought to have given a statement of *all the*

assets and liabilities of the deceased persons' estate and how he distributed them. I am of the view that since the appellant omitted to file **Form V and failed to file Form VI according to law, Probate and Administration Cause No. 126/93 is not yet closed.** Thus, the Court of Appeal holding in **Ahamed Mohamed Al Laamar V Fatuma Bakari and Asha Bakari** is distinguishable from the present case.

This Court held in **Beatrice Brighton Kamanga & Amanda Brighton Kamanga v. Ziada William Kamanga** that-

> *And if the matter remains pending for a longer period, let's say 3 years, without such a report or extension from the court, the appointment cease to exist by operation of the law for as I have pointed above, there is no life administrators in our schemes.*

In this case, the administrator failed to file Form V and Form VI within four months as required by rule 10 of G.N. No. 49 of 1971 (supra). He purpoted to file Form VI after the expiry of 22 years from the date of his appointment. And since there is no life administrator, the appellant's mandate to administer the deceased's estate came to an end long time ago after the expiry of the four months and upon his failure to apply for extension of time to file Form V and VI. Thus, all acts he purported to act as an administrator without legal mandate are a nullity.

In the upshot, I invoke my revisionary powers under section 44 of the **MCA,** to declare all acts done by the administrator a nullity. I quash the records of the primary court in "Pingamizi la Mirathi" No. 3/2018 and the district courts records emanating therefrom. I also find that the appellant does no longer qualify to administer the deceased's estate for his

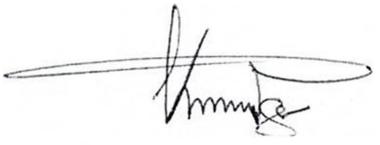
failure or delay to exhibit an inventory of all assets and liabilities, and for failure to properly file a statement of final account, in Form V and Form VI respectively. I set aside his appointment.

The respondents' advocate requested me to appoint the respondents as administrators of the deceased's estate. It is my considered view that to do will cause more delays for everything will have to commence afresh including collection of properties and liabilities. Consequently, I appoint the appellant and the respondents to administer the deceased's estate. They will be required to cooperate and file a true account of the deceased's estate in Form V within two months from today and a statement of final account in the next two months. The primary court will supervise the administration of the estate via Prob. and Admin. Cause No. 126/93.

I am aware of the fact that there appellant and the respondents might not come face to face, I direct them to cooperate and bring the administration of the estate of their late father to rest or else they will be removed from the administration and a neutral person appointed.

Given the nature of the appeal, I will make no order as to costs.

It is ordered accordingly.



J. R. Kahyoza J.

24/9/2020

Court: Judgment delivered in the presence of the parties. B/C Catherine Tenga present.

J. R. Kahyoza, J.

24/9/2020