

**IN THE HIGH COURT OF TANZANIA**  
**(DAR ES SALAAM DISTRICT REGISTRY)**  
**AT DAR ES SALAAM**

**PC CIVIL APPEAL No. 103 OF 2020**

**AIDA ASWEGEN MAGAMBO..... APPELLANT**

**VERSUS**

**LEXFORD ASWEGEN MAGAMBO .....RESPONDENT**

(Appeal from the decision of the District Court of Ilala at Samora Avenue)

**(Lukumai- Esq, RM.)**

Dated 28<sup>th</sup> February, 2020

in

Civil Appeal No. 119 of 2019

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**JUDGEMENT**

18<sup>th</sup> November & 8<sup>th</sup> December 2020

**AK. Rwizile, J**

In Probate Cause No. 242 of 2017, the appellant was appointed an administratrix of the estate of the late Aswegen Wilson Magambo. An objection was raised which its determination prompted the first appeal to the District Court. This was done in Appeal No. 74 of 2018.

Upon hearing the same, the District Court (Kiyoja-RM) directed that the appellant should remain an administratrix of the estate but should within six months, file an inventory. The appellant in compliance to the order filed an inventory and exhibited final accounts at the same time. The trial court, directed him to file final accounts and distribute the amount of 101, 025, 722.08/= equally to the beneficiaries of the estate. This order angered the appellant who preferred an appeal to the District Court. This was in the second appeal, now Civil Appeal No. 119 of 2019, (the impugned appeal). The District Court dismissed it by reason of *res judicata*, and termed it an abuse of court process. It did so with costs. The appellant was aggrieved.

Being represented by Mr. Jackson Liwewe learned counsel, three grounds of appeal were preferred, to wit; **one** that the first appellate court misdirected itself by deciding that the appeal was a *res judicata* while it was not, **second**, that the court failed to entertain the appeal due to misconception and **third**, that it was not proper to order costs on the matter raised by the court *suo motto*.

Mr. Liwewa submitted on the first two grounds together that it was a misconception to treat the impugned appeal as *res judicata*. In his view the impugned appeal was challenging the order of the court which directed the appellant to distribute 101,025,422.08/= equally to all beneficiaries including the amount of 6,692,157.07/= which is a liability without justification. He was therefore challenging powers of the Primary Court to order such division contrary to the wishes of the estate itself.

In Civil Appeal No. 74 of 2018, he went on stating that, two orders were made by the District Court.

**One**, that the appellant was to remain the sole administratrix of the estate and, **second**, that the inventory be filed in six months' time. After complying with orders given by the court. It was to be held, according to learned counsel, that the two appeals were not similar, to invite the *res judicata* issue. To substantiate his argument, it was his view that the trial court exceeded its powers by ordering equal distribution of the estate to heirs. This duty, it was submitted, is reserved to the administratrix of the estate as held in the case of **Hadija Saidi Matika vs Awesa Said Matika**, PC Civil Appeal No. 2 of 2016 HC (Unreported).

Supporting the last ground of appeal, the learned counsel pointed out that costs are awarded at the discretionary powers of the court, under section 30 of the Civil Procedure Code. The learned counsel concluded that the appellate courts have always declined to award costs in matters raised by the court *suo motto*. This court was therefore invited to hold as it was in the case of **Dr. Masubuko Lamwai vs Venance Francis Nguha and AG**, Civil Appeal No. 56 of 1997

Mr. Bernad Ngatunga of GKM Attorneys, stated for respondent that both Civil Case No 74 of 2018 and 119 of 2019 originated from the Probate cause No. 242 of 2017. He went on submitting, the same were on the same parties and similar subject matter. This is therefore *res judicata*, the learned counsel pointed out. In respect of the decision of the case of **Hadija Matika** (supra), the learned counsel was of the view that it is distinguishable from the case

at hand. He went on saying, since the court properly analysed the two appeals thereby arriving at a proper finding. According to him, this was enough to dispose of the 1<sup>st</sup> and 2<sup>nd</sup> grounds of appeal.

Submitting on the last, it was his view that section 30(1) of CPC is clear on costs. This point he said, is sufficient to dismiss this ground of appeal, based on **ULC(Tanzania) Ltd vs National Insurance Corporation and Another** [2003] TLR 2012, where it was held that a winning party, should be entitled to costs. In his considered opinion, the case of Dr. **Masumbuko Lamwai** (supra) is not applicable in the circumstances of this case.

Having gone through the record of appeal and pondered submissions of both parties, I think I have to deal with the first two grounds of appeal together. The term *res judicata* as I know it, denotes a matter adjudicated. According to **Black's Law Dictionary**, 10<sup>th</sup> Ed. at page 1504, it has been defined as; An affirmative defence barring the same parties from litigating a second law suit on the same claim, or any other claim arising from the same transaction or series of the same transactions and that could have been -but was not - raised in the first suit. There are three essential elements; **first**, an earlier decision on the issue, **second**, a final judgement on the merit, **third**, the involvement of the same parties, or parties in privity with the original parties. The above is in line with section 9 of the CPC which states as follows;

*No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim litigating under the same title in a court*

*competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court.*

In principle therefore, before the matter is held to be *res judicata*, it has to be litigated by the same parties. In the instant appeal, it is indeed true that impugned appeal and appeal No. 74 of 2018 are originating from the same matter, that is Probate Cause No. 242 of 2017. In probate causes, the duty of the court is to appoint the administrator and or administratrix as it was in the matter. The court has powers also to hear any matter that arises from the estate itself. Any issue raised and finally determined, if it is conclusively determined and has the effect of finality may be appealed against.

It was submitted by the appellant that the impugned appeal dealt with different issues. The same was directly and substantially connected with each other. Its decision is what triggered this appeal. What the court decided is that the appellant should complete the task of administration of the estate. That task is completed by filing final accounts. If that is properly done, then it is clear that the case is closed as held in **Hadija Matika** (supra). In my view what was decided in the first appeal and the impugned one are two different issues. If am to add, each had its bearing in the estate and its administration process, each was conclusive in its own right. The appellant in the impugned appeal is challenging powers of the trial court to poke its nose into the estate by ordering equal distribution of the already collected properties of the estate. Worse still without being asked. In this, I think I am bound to hold that it was the issue not determined before.

The court was required as a matter of fact to determine the same. For the foregoing reasons, I hold, the two ground have merit.

On the third issue, it is as submitted by the appellant that costs are awarded at the discretion of the court.

Indeed, it has been the practice of this court that matters raised by the court of its own motion should not attract costs. Having believed that the appeal was an abuse of court process, the trial court awarded costs. With respect, I hold a different view. Having considered the law, I held, it was not an abuse of court process. The third ground of appeal has merit. The appeal is therefore allowed. The decision of the District Court is quashed. Based on the nature of the case, I order no costs.

**AK Rwizile**  
**JUDGE**  
**08.12.2020**

Delivered in the presence of the parties and their advocates, this 8<sup>th</sup> day of December 2020

 Recoverable Signature

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Signed by: A.K.RWIZILE

