IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

PC CIVIL APPEAL NO. 5 OF 2020

(C/f Civil Appeal No. 12 of 2009 District Court of Moshi District at Moshi, Original Probate Cause No. 108 of 2018 Moshi Urban Primary Court)

ABDUL ISMAIL BAYUMI ..... APPELLANT

Versus

URSULA CHRISTOS MITROPOLOUS ..... RESPONDENT

10th June, 2020 & 24th July, 2020

JUDGMENT

MKAPA, J:

This is a second appeal emanating from the District Court of Moshi at Moshi in **Civil Appeal No. 12 of 2019** (1st appellate court) which originated from **Probate Cause No. 108 of 2018** in Moshi Urban Primary Court (trial court).

The appellant and the respondent are half sibling as brother and sister. They share the same mother, the late Asha Abdul Ramole but different fathers. Initially, the appellant had filed a **Probate Cause No. 108 of 2018** at the trial court applying for letters of administration of their late mother's estate. The respondent objected by filing **Misc. Application No. 47 of 2018** on the ground that the same had been granted to her by the District

Court of Ilala at Samora Dar es Salaam vide **Probate Cause No. 21 of 2000.** The trial court sustained the objection on the ground that **Probate Cause No. 108 of 2018** was *res judicata* and dismissed it. The appellant appealed to the 1st appellate court through **Appeal No. 12 of 2019**. Before the appeal was heard on merit the respondent raised the preliminary objection similar to the one raised at the trial court to the effect that the appeal was *res judicata*. In determining the preliminary objection the 1st appellate court sustained the same and dismissed the appeal on 16th January, 2020. It is alleged that the 1st appellate court proceeded to determine the appeal without giving parties right to be heard hence this appeal on three grounds which could be summarised into two as follows;

1. That the 1st appellate court erred in law and fact in determining the appeal instead of the preliminary objection thus denied the appellant right to be heard.
2. That the 1st appellate court magistrate erred in law and in fact in establishing evidence of her own in determining preliminary objection without availing the appellant right to address and challenge the said evidence.

From the foregoing grounds the appellant prayed for the appeal to be allowed with costs as well as the decision of the 1st appellate court to be quashed.

At the hearing the appeal was disposed of by way of filing written submissions. The appellant was represented by Mr. Edwin Silayo learned advocate while the respondent was represented by Mr. J. A. Semali also learned advocate.

Arguing in support of the first ground Mr. Silayo submitted that, right to be heard is basic thus denying parties the same is contrary to the rules of natural justice as was held in the case of **Abass Sherally & Another V Abdu S.H.M Fazalboy**, Civil Application No. 33 of 2002 (unreported) that;

> *"...the right to be heard before adverse action or decision is taken against such a party has been emphasized by courts in numerous decision. That right is basic that a decision which is arrived at in violation of it will be nullified even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice"*

He also cited the case of **Yazidi Kassim Mbakileki V CRDB (1996) LTD & Another Civil Reference No. 14/04 of 2018, CAT at Bukoba** to that effect. Mr. Silayo went on arguing that, since parties were not accorded with right to be heard, the decision therefrom was a nullity. Regarding the 2nd ground of appeal Mr. Silayo argued that the appellate magistrate

established her own evidence from which the appeal was decided. It was Mr Silayo's view that, by relying on such evidence the appellate magistrate erred for non- adherence to the guiding principles on preliminary objection as set forth in the famous decision of **Mukisa Biscuits** case. Mr. Silayo finally prayed for the appeal be allowed with costs.

Resisting the appeal Mr. Semali submitted against the 1st ground of appeal that, the 1st appellate court heard and determined the appeal in merit. He went on submitting that the cases of **Yazidi Kassim Mbakileki V CRDB** (supra) are distinguishable as they relate to application unlike in the instant matter which involves an appeal. On the 2nd ground the learned counsel argued that the 1st appellate court considered trial court's records and parties submissions to determine the appeal and did not rely on own evidence.

Mr. Semali finally submitted that the 1st appellate court decision was properly procured and prayed that the appeal be dismissed with costs. In his brief rejoinder Mr. Semali reiterated his stance in his submission in chief.

I have given due consideration to the submissions made by the appellant and the response advanced by the respondent and having perused both courts' proceedings and decisions while bearing in mind the legal position that this court can only

interfere with concurrent findings of the lower courts if there is misapprehension of the evidence, miscarriage of justice or violation of some principle of law or practice as per the case of **Amratlal D. M. Zanzibar Silk Stores vs A. H. Jariwale Zanzibar Hotel** [1980] TLR 1980, I think the following issues need to be determined by this court;

i. ***Whether the appellant was denied right to be heard.***
ii. ***Whether the appeal was res judicata.***

On the first issue, the appellant claimed that the 1st appellate court overruled the preliminary objection raised and went on determining the appeal by dismissing it without availing the appellant the right to be heard. My perusal of the trial court's records the last paragraph of the 1st appellate Court's decision the appellate magistrate had this to say;-

> *"In the foregoing I find the objection made by the respondent worth to have **no** legs to stand. I find the matter res-judicata as the same was already decided by the District Court of Ilala in Probate Cause No. 21/2000, and I therefore dismiss this appeal in its entirely. ..." (Emphasis mine)*

From the foregoing, there are two issues to be discussed here. **First**, it is my considered view that the word '**no**' was just a slip

of a pen as the following sentence negates the magistrates position if at all she meant to overrule the objection. That means therefore she did sustain the preliminary objection raised and not overruled it as alleged by the appellant **Second**, it is a trite principle of the law the fact that when a party raises a preliminary objection all other matters are shelved until the preliminary objection is determined. The rationale behind being the preliminary objection is capable of disposing of the matter.

In the present appeal it is unfortunate that the preliminary objection raised at the 1st appellate court related to a contentious issue to be determined in the appeal in challenging the decision from trial court hence determining the same obviously disposes the appeal automatically. In the circumstances in my view, the appellate magistrate neither erred nor denied the appellant right to be heard in defending his appeal as there was no appeal to be determined after it was declared that the matter was *res judicata*

Turning to the 2nd issue, the contentious matter which had cropped up in both lower courts is the fact that, this matter is *res judicata*. The law is settled on what constitutes a plea of *Res Judicata* namely;

i. there must be two suits, the former suit and the subsequent suit;

ii. the former suit must have been between the same litigating parties or between parties under whom they or any of them claim;

iii. the subject matter directly and substantially in issue in the subsequent suit must be the same matter which was directly and subsequently in issue in the former suit either actually or constructively;

iv. the party in the subsequent suit must have litigated under the same title in the former suit;

v. the matter must have been heard and finally decided;

vi. that the former suit must have been decided by a court of competent jurisdiction;

The case of **Umoja Garage V National Bank of Commerce Holding Corporation** [2003] TLR 339 is informative on the fact that a plea of Res Judicata is meant to ensure finality in litigation and protect an individual from endless litigations. See also **George Shambwe V Tanzania Italian Petroleum Company LTD** [1995] TLR 21.

In the present appeal the respondent objected to both lower courts that they are barred to entertain this matter since the same had already been determined to its finality by other courts with competent jurisdiction. It is on record the appellant's prayers in **Application No. 108 of 2018** at the trial court was in respect of letters of administration of the late Asha Adbul

Ramole. However, his sister, the respondent had already filed granted letters of administration in respect of the same deceased person in **Probate Cause No. 21 of 2000** at District Court of Ilala at Samora, Dar es Salaam.

Furthermore, after she had successfully collected and distributed deceased properties, the respondent filed inventory and account of the estate in the same court and the probate was marked "closed" on 3rd June 2009. The order reads;

> *"Following the inventory herein filed by the administratix then the Probate and administration cause is hereby marked closed'*
>
> *Sgd: S. L. Maweda – RM*
>
> *3/6/2009"*

Since then the matter went under the carpet until 2018 when the appellant filed **Misc. Civil Application No. 98 of 2018** in this Court Dar es Salaam Registry seeking for extension of time so that he can lodge revision against decision and proceeding in respect of **Probate Cause No. 21 of 2000**. Hon. **J. A. De-Mello, J.** dismissed the application on 20th June, 2019 for being severely and horribly out of time. Surprisingly, the appellant emerged through the back door and lodged **Probate Cause No 108 of 2018** at the trial court whose decision is the subject of this appeal.

Since the matter had already been determined by Hon. De-Mello's had the appellant been aggrieved by her decision the appropriate way would have been to appeal to the Court of Appeal instead of lodging another application on the same cause of action and the same subject matter. The Court in the case of **Kamunye and Others V The Pioneer General Assurance Society Ltd** (1971) EA 263 had this to say on the principle of *res judicata*:-

> *"The test whether or not a suit is barred by res judicata seems to me to be; is the plaintiff in this second suit trying to bring before the Court, in another way and in the form of a new cause of action, a transaction which he has already put before a Court of competent jurisdiction in earlier proceedings and which has been adjudicated upon. If so the plea of res judicata applies not only to points upon which the first Court was actually required to adjudicate but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time."*

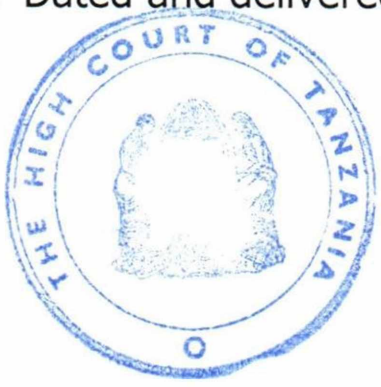
From the foregoing I am in agreement with the trial court's and the 1st appellate court decision to the effect fact that, the matter at hand is *res judicata* as the same had already been determined

to its finality by District Court of Ilala at Samora in **Civil Case No. 20 of 2000**.

For the reasons discussed, I find this appeal lacks merit, therefore I sustain the decision of the 1st appellate court and proceed to dismiss this appeal at its entirety with costs.

It is so ordered.

Dated and delivered at Moshi this 24th day of July, 2020.



S.B. MKAPA

JUDGE

24/07/2020