

**IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM
PC CIVIL APPEAL NO. 66 OF 2019**

MOHAMED AHMED SOLI.....1st APPELLANT
**OMARY ABDUL USEJA (The administrators of the Estate
Of the late Mohamed Useja Mwendapole)2nd APPELLANT**
VERSUS
RAJABU SHABANI KINANDE.....1st RESPONDENT
**FARIDA MWINSHEHE (The administrators of the Estate
Of the late Mariam Mohamed Useja)2nd RESPONDENT**

(Arising from the decision of Ilala District Court,)

(Mujaya, Esq- RM.)

Dated 24th January 2019

in

Civil Appeal No. 80 of 2018

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JUDGEMENT

9th February & 18th March 2021

AK. Rwizile, J

This appeal traces its origins from Probate Cause No. 46 of 2015 of Kariakoo Primary Court, and later in Civil Appeal No. 80 of 2018 of Ilala District Court. Factually, in 2015 the respondents applied to the Primary Court of Kariakoo to execute the Will of the estate of the late Mariam Mohamed Useja. The appellants and 17 others objected that, their appointment, on grounds that they were not consulted and made party to the process of appointing them following the family meeting. As beneficiaries of the estate ought to have been party of the process.

The trial court overruled their objection and appointed the respondents as executors of the Will in respect of the estate of the late Mariam Useja. Appellants were aggrieved by the decision of the trial court, they decided to appeal against the same at the District Court of Ilala, the same was dismissed for want of merit. Still aggrieved, they are before this court appealing on the following grounds;

- 1. That the Primary Court and the District Court both erred in law and in fact by appointing the respondents as administrators of the estate of the late Mariam Mohamed Useja without considering the appointment of the appellants as administrators of the estate of the late Mohamed Useja Mwendapole over the same property.*
- 2. That the Primary Court and District court erred in law and in declaring the house on Plot No. 21 located at Lindi Street Kariakoo as personal property of Mariam Mohamed Useja.*
- 3. That the primary court and district court erred in law and in fact by appointing the respondents as administrators of the estate of the late Mariam Useja basing on illegal and unrecognized wills also basing on the Title deed which was illegally obtained.*
- 4. That the primary court and the district court erred in law and in fact in not evaluating properly the objections and evidence adduced by the appellants in the whole process of appointing the respondents as administrators of the late Mariam Mohamed Useja.*
- 5. That the district trial magistrate erred in law and in fact by raising and answering her own issues raised by herself and left the grounds of appeal undetermined resulting into unjustifiable decision.*

They are therefore praying for this court to quash the whole decision, proceedings and orders of the lower courts, to order re-trial on appointment of the administrators of the estate of the late Mariam Mohamed Useja in a court of competent jurisdiction, to declare all acts done by respondents in respects of the estate of the late Mariam Useja null and void and be required to pay costs of this appeal.

At the hearing the appellants were represented by Ms Kaundime learned advocate while for the respondents was Mr Chitale learned advocate. Supporting the appeal

learned advocate argued the first ground that, the respondents are dealing with the house of Kariakoo as the estate of the late Mariam Useja. According to them the house was not owned by Mariam but his father Mohamed Useja Mwendapole. She said the late Mariam was appointed an Administratrix in Probate No. 140 of 2007, was the heir to the said estate but she died before she finished the job, that is why according to her the appellants took over to administer the estate.

It was her submission on ground two that, the house at Kariakoo was not owned by the late Mariam, instead she said, Mariam owned some shares in the house. She added that the respondents had to administer the said shares only. Learned advocate asserted that, the house is owned by three heirs including Mwajuma Seif. She therefore prayed for the house to be divided to three owners and not treated as it was owned by the late Mariam.

As for ground three, Ms Kaundime argued that, there were two Wills which she said one of them could be invalid. She cited paragraph 2 and 3 of the judgement. She said it was wrong for the lower courts to rest the case on two Wills. She added that, the other Will bequeathed property which was not owned by the deceased, according to her that Will is defective as per rule 2 of GN No. 49 of 1971. She claimed as well that, the Will was made when the deceased (Mariam) was of unsound mind. She said, the witnesses to the said Will were not related to the deceased. It was her further submission on ground four that, appellant filed objections at the District Court but the same were dismissed because of the Will. She asserted more that, the court could have called for evidence and make decision on the same.

Finally, she submitted on the last ground that, it was wrong for the district court to raise its own issues and make decision on them, and abandon the grounds of appeal, as per para 10 of the judgement.

Opposing the appeal, Mr Chitale learned advocate argued that, the late Mariam owned 40% share on the house, plot no. 8 Kariakoo. He added that, the said house was not owned by the late Mwendapole. He said there was no proof to that effect. He asserted that, in 2008, shares of the late Mohamed Useja were sold to an investor and he said

the 40% shares were owned by Mariam. He added that appellants were never appointed as administrator of the estate of Mohamed Mwendapole.

It was his submission on ground two that, the heirs of Mohamed useja sold out their shares, evidence to that effect was adduced and accepted. He therefore said the lower courts were right in their decision since they were dealing with the shares of the late Mariam Useja.

As for ground three, learned advocate submitted that, there was no two Wills, he said, the district court confirmed the same in its judgement. He added that, a Will was witnessed by two people and it did not contravene any law. According to him, there was no proof that the will was made by a person of unsound mind. The allegation, he vehemently commented were unjustifiable. The Will, according to him, was valid and dealt with the property of Mariam Useja.

Mr Chitale argued further on ground four that, the District court was right in dismissing the respondent's objection. He said, the same were overtaken by event since the executors were appointed by the Will.

Lastly, he submitted on the last ground that, the district court made points of determination. According to him the court was not legally bound to follow what was in the grounds of appeal. He then said this ground was baseless. He added that, even the appellant's prayers were contradictory. He then prayed for this appeal to be dismissed with costs.

When re-joining, Ms Kaundime argued that there were two cases dealing with the same property, she mentioned them to be Probate No. 140 of 2007 and Probate No. 46 of 2017. He said the house was not owned by Mariam, but she said the same was divided to five children. She then said the 40% belonged to the late Mariam and Mwajuma. She submitted further that, the Will named one person but the two were appointed, she then said where did the other person come from. She asserted that, the primary court had recognised shares of Mwajuma. She then prayed for this appeal to be allowed with costs.

Having considered the contending submission of the parties and records of the lower courts, I have noted an irregularity on the pleadings on the first appeal. It has to be noted that, the appellants and respondents properly addressed in this appeal are administrators of the same estate. The respondents were appointed administrator of the estate of Mariam Mohamed Useja in Probate Cause No. 46 of 2015, both from Kariakoo Primary Court. The appellants however were appointed administrators of estate of the late Mohamed Useja Mwendapole in Probate cause No. 140 of 2007. The same happened to deal with the same property. it is therefore settled that parties to this appeal are not standing in their own capacity and/or names, but as administrators of the estate. The appeal before this court is clear and has it all in proper form.

But before the district court all parties that is the appellants and respondents were sued in their own names. It means, parties before the district court are different from the same before this court. The appellants advanced their appeal in their own name as well as the respondents. Considering the same, it goes without saying that, parties in the first appeal and this appeal are different, which renders this appeal incompetent. In the case of **Abdullatif Mohamed Hamis vs Mehboob Yusuph Osman and Another**, Civil Revision No. 06 of 2017 the Court of Appeal stated that;

When all is said and applied to the situation at hand, as already mentioned, it is beyond question that the 2nd respondent was, at all material times, the administratrix of the deceased's estate. The life of her legal representation with respect to the estate was still subsisting at the time of her transaction with the 1st respondent just as the suit land was vested in her capacity as the legal administratrix. But, as we have also hinted upon, the 2nd respondent was not sued in that capacity. Instead, the 1st respondent sued her in her personal capacity and, for that matter, no executable relief could be granted as against her personally with respect to the suit land which, as it turns out, was vested in her other capacity as the legal representative.

For the foregoing reasons and the decision of the Court of Appeal, I dismiss this appeal in its entirety. I further, therefore invoke revisionary powers of this court as per section 44 of the Magistrate's Court Act, [Cap 11 R.E 2019] to quash the proceedings and

decision of the district court in Civil Appeal No. 80 of 2018. The district court in order to deal with the matter before it properly ought to have directed parties to amend the pleadings to reflect their position or capacity to sue and be sued on the estate in question as administrators, which cannot be done now. The appellants if they so wish, may reinstate a fresh appeal before the district court. I order no costs.

AK Rwizile
JUDGE
18.03.2021

Judgement delivered in the presence of the appellants' and respondents' advocates, this 18th day of March 2021

AK Rwizile
JUDGE
18.03.2021

 Recoverable Signature

X 

Signed by: A.K.RWIZILE

