THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA DISTRICT REGISTRY

AT MBEYA

PROBATE APPEAL NO. 09 OF 2020

(Arising from Probate Appeal No. 4 of 2019, in the District Court of Mbeya District, at Mbeya, originating in Probate Cause No. 106 of 2019, in the Primary Court of Mbeya District, at Urban).

1. ANNA ITAGATA.....1ST APPELLANT

2. WILSON KAJIGILI MWANDUMBYA.....2ND APPELLANT

VERSUS

GEOFREY KAJIGILI.....RESPONDENT

JUDGMENT

04/02 & 04/03/2021

UTAMWA, J:

In this a second appeal, the two appellants, ANNA ITAGATA and WILSON KAJIGILI MWANDUMBYA (henceforth the first and second appellants respectively or the appellants cumulatively) challenged the

judgment (impugned judgment) of the District Court of Mbeya District, at Mbeya (the District Court), in Probate Appeal No. 4 of 2019. The matter originated in Probate Cause No. 106 of 2019 before the Primary Court of Mbeya District, at Urban (the primary court). The appeal was against one GEOFREY KAJIGILI, hereinafter called the respondent.

The undisputed material facts constituting the background of this matter, according to the record goes thus; back in 2011 the respondent successfully applied before the primary court for being appointed administrator of the estate of the late Angolwisye Kajigili (the deceased). The appointment was made vide the judgment dated 5th December, 2011. Later on, the same primary court made an order (on the 1st April, 2019) revoking the appointment of the respondent at the instance of the first appellant. The order was made in the absence of the respondent. This was for reasons *inter alia,* that he had not filed inventory regarding the admiration of the estate as required by the law. Afterward, and in the presence of the respondent, the primary court appointed the second appellant as the new administrator of the estate vide an order dated the 11th April, 2019.

For purposes of convenient discussions in this ruling, the order dated 1st April, 2019 revoking the appointment of the respondent will be called the revocation order. On the other side, the order dated 11th April, 2019 appointing the second respondent as the new administrator will hereinafter be referred to as the post-revocation order. The branded names of the two orders will also assist in making the distinction between them easier.

On the 9th May, 2019 the respondent lodged an appeal before the District Court. He however, paid the necessary filing fees on the 23rd May, 2019. The appeal was based on four grounds. Such grounds before the District Court essentially challenged the revocation order. They were couched thus, and I quote them for ease of reference:

i. That, the trial court erred in law and facts when revoked *(sic)* the appointment of the appellant to be administrator while the appellant exercised his duties well accordance *(sic)* to the law.
ii. That, the trial court erred in law and facts when revoked *(sic)* the appointment of the appellant to be administrator without strong reason as required by the law.
iii. That, the trial court erred in law and facts wen revoked the appointment of the appellant to be administrator by relying on the weak and unreliable evidence adduced by the 1st respondent.
iv. That, the trial court erred in law and facts when failed *(sick)* to make critical evaluation of the evidence adduced during the hearing of the case.

The District Court allowed the appeal before it through the impugned judgment. It then quashed the proceedings of the primary court and set aside both the revocation order and the post-revocation order. The two appellants were aggrieved by the impugned judgment, hence the appeal at hand.

In their petition of appeal to this court, the two appellants preferred two grounds of appeal. The appeal essentially challenges the impugned judgment for setting aside the post-revocation order. I hereby reproduced the two grounds of appeal for the sake of a readymade reference:

1. The Honourable appellate District Court erred both in points of law and facts when it reversed the sound decision of the trial primary court which appointed the 2nd appellant one WILSON KAJIGILI MWANDUMBYA as administrator of the estate of the late Angolwisye Kajigili.
2. The Honourable appellate District Court erred in both points of law and facts when it acted SUO MOTTO by deciding the issue which was not among the grounds of appeal to wit the disqualification of the new administrator who was the second appellant.

Owing to these grounds of appeal, the two appellants urged this court to allow the appeal, quash the whole decision of the District Court and restore the decision of the primary court. The respondent contested the appeal at hand and urged this court to dismiss it with costs.

In this appeal, the appellants were represented by Mr. Amani Simon Mwakolo, learned counsel. On the other hand, the respondent was advocated for by Ms. Jenifer Biko, learned counsel. The appeal was argued by way of written submissions, hence this judgment.

It must be noted at this juncture that, when the appeal at hand was called upon for hearing, the learned counsel for the appellants made an express declaration for dropping the second ground of appeal. He also

modified the reliefs sought in the petition of appeal listed above. In his written submissions in chief, he thus, added the prayer for quashing the proceedings of the District Court. He further urged this court to do so without costs since the respondent is a family member.

I have considered the remaining single ground of appeal before me, the record, the submissions by both sides and the law. Indeed, as I hinted earlier, the facts constituting the background of this appeal as narrated previously, are not disputed by the parties. The major issues for determination is therefore, *whether or not the proceedings and the impugned judgment of the District Court are liable to be quashed and set aside respectively as prayed by the appellants' counsel.*

In answering the major issue just posed above, I will keep in mind that, in law, for an appellate court to quash the proceedings of a lower court, the same have to firstly be found tainted with serious and incurable irregularities. Proceedings of this nature are commonly regarded as null and may also be called a nullity. The following sub-issues are thus pertinent in answering the major issue posed abvoe:

a. *Whether or not the proceedings regarding the appeal before the District Court were irregular.*
b. *In case the answer to the first issue will be affirmative, then whether or not the irregularities regarding the proceedings of the appeal before the District Court were fatal enough to render the proceedings a nullity.*

c. Depending on the answer to the second issue, what will be the fate of the impugned judgment of the District Court?

Regarding the first sub-issue, I am of the view that, the circumstances of the matter at hand attract a positive answer to this issue though on slightly different reasons from those advanced by the appellant. In the first place, it must be noted that, the revocation order on one hand, and the post-revocation order on the other, were two distinct and independent orders. Their respective reckoning dates of computing the time limitation for purposes of appealing against each of them were thus, also distinct from each other. It is more so considering the understanding that, sections 20(3) and (4)(a) of the Magistrates Court Act, Cap. 11 R. E. 2002 (Now R. E. 2019) guide on time limitation for appealing against any decision of a primary court to a District Court. They provide that, the time limitation is 30 days computed from the decision or order to be appealed against, unless the District Court concerned extends it.

Again, the two orders were made under different enabling provisions of the law. The revocation order was made under paragraph 2(c) of Part I of the Fifth Schedule to the MCA. This schedule will hereinafter be called the Fifth Schedule in short. This part of the schedule is titled "POWERS OF PRIMARY COURTS IN ADMINISTRATION CASES." The part thus, stipulates various powers of primary court in cases of this nature including the powers to revoke the appointment of an administrator of estate.

On the other hand, the primary court had powers to make the post-revocation order under rule 9(2)(e) of the Primary Courts (Administration

of Estates) Rules, Government Notice (GN) No. 49 of 1971 as correctly argued by the learned counsel for the appellant in his written submissions in chief. This GN was also made under the MCA. The provisions guide that, where any grant of administration is revoked, the court may appoint any other person from amongst the heirs, executors or beneficiaries of the estate to be the administrator of the estate. Certainly, such powers of the primary court to appoint a new administrator/s of the estate even *suo motu* were underscored by this court (Kairo, J) in the case of **Abdulkadiri Seleman Yunusu Ally and another, Probate and Administration Appeal No. 12 of 2016, High Court of Tanzania (HCT), at Bukoba** (unreported), cited by the learned counsel for the appellant in his submissions.

It must also be noted here that, in the post-revocation order, the trial court indicated that it appointed the second appellant as the new administrator under paragraph 2(b) of the Fifth Schedule to the MCA. In fact, these provisions give general powers to primary courts to appoint an administrator of a deceased's estate *suo motu* or upon an application by an interested person. Certainly, though in the matter at hand the primary court did not indicate expressly that it was exercising its powers under rule 9(2)(e) of the GN No. 49 of 1971 (supra) in appointing the second appellant as new administrator, that could not erode its powers to do so. The omission did not thus, negatively affect the order itself since the truth remained that, the primary court had the requisite jurisdiction to act as it did under rule 9(2)(e) of the GN No. 49 of 1971.

Furthermore, the nature of the two orders were different. The remedies available to the respondent regarding each order were thus, also different. This view is based on the following facts: that, according to the proceedings of the primary court dated 1st April, 2019, the revocation order was made in the absence of the respondent. Now since it was made *exparte* against him, the remedy available for him would have been to apply for setting it aside. He would have done so under rule 30(1) of the Magistrates' Courts (Civil Procedure in Primary Courts) Rules, GN. No. 310 of 1964 as amended from time to time. These provisions entitles a party to primary court proceedings to apply for setting aside any decision made against him in his absence.

The provisions of law just cited above, empower the primary court to set aside its *ex-parte* decision. The provisions of the GN. No. as 310 of 1964 which usually apply to other normal civil claims also apply to matters related to administration of estate. They are so applicable by virtue of rule 11 of the GN. No. 49 of 1971 (which carters for procedure related to administration matters). These provisions guide that, in relation to all matters not provided for in the GN. No. 49 of 1971, the provisions of the Civil Procedure Rules (GN. No. as 310 of 1964) shall apply as they apply to other proceedings of a civil nature. Indeed, the provisions of the GN. No. 49 of 1971 do not provide for any remedy where a decision is made *ex-parte* regarding matters on administration of estate. This thus, attracted the applicability of the GN. No. as 310 of 1964 in the matter at hand as shown above.

On the other hand, the post-revocation order was made *inter partes.* Both sides were heard before the order appointing the second appellant as new administrator was made. Its remedy could have thus, been an appeal since the respondent was aggrieved by that order.

Now, owing to the nature of the grounds of appeal before the District Court, it is clear that, the respondent had appealed to it against the revocation order only. However, in my view, since the revocation order was made *experte* against the respondent, he could not have appealed directly to the District Court as he did before he could exhaust the procedure for setting aside the *experte* order as guided under rule 30(1) of the GN. No. 310 of 1964 discussed earlier. Otherwise, these provisions of the law would be rendered nugatory or merely cosmetic in the list of our written laws. These said results could not be the objectives of such provisions of the law. This is so because, it is an obvious principle of law that, every provision of law is made for a purpose and is intended to be enforceable.

Furthermore, one cannot appeal to a higher court against a decision to proceed exparte where the court which made the exparte decision is legally empowered to set it aside and it is in possession of the record thereof. Otherwise, the course will amount to a needless prolongation of the process for seeking justice, which will involve more costs and time. This absurd result could not also be the objective for putting in place the provisions just cited above. Moreover, one cannot appeal against the merits of an *ex-parte* decree/order without his defence case being firstly heard by the court making the *ex-parte* decision. Otherwise, an appellate court will be getting into the shoes of the lower or trial court in considering

the defence case at the first instance. This again, could not be the legislative purpose of the law cited above.

The position of the law that one cannot appeal against an expert decisions has been underlined by numerous decisions of various courts of this land. In the case of **Asha Hassan Almas and another v. Bernard Mugeta Manya, Civil Appeal No.17 of 2002, HCT at Mwanza** (unreported Judgment dated 13th August, 2004) this court (Mihayo J, as he then was), held that, an appeal cannot lie against an experte decision before one firstly applies to set it aside. The position was underscored later in the case of **Managing Director of NITA Corporation v. Emmanuel L. T. Bishanga [2005] TLR. 3378** (Luanda, J as he then was, in the judgment dated 29th April, 2005). The CAT cemented this position in the case of **MIC Tanzania Limited v. Kijitonyama Lutheran Church Choir, Civil Application No. 109 of 2015, CAT at Dar es Salaam** (unreported). The CAT held in that precedent that, since District Court had made an ex-parte decision/decree, the first option to the judgment debtor was to set it aside before he could appeal to the High Court.

I am certainly live of the fact that, in the three precedents just cited above, the respective decisions were based on the provisions of Order 9 rule 13(1) the Civil Procedure Code, Cap.33 R. E. 2002 (Now R. E. 2019) hereinafter called the CPC. In my view, however, the principle applies *mutatis mutandis* to the case at hand though the expert decision of the primary court under discussion was not governed by the CPC. This is because, the provisions of rule 30(1) of the GN. No. 310 of 1964 discussed earlier have almost similar wording to the wording of Order 9 rule 13(1) of

the CPC. The provisions of these two pieces of laws are thus, in *pari material*. It is trite principle that, in common law jurisdictions statutes which are in *pari materia* are interpreted similarly; see the guidance by the CAT in case of **Tanzania Cotton Marketing Board v. Cogecot Cotton Company SA [1997] TLR 165.**

Indeed, I am also aware of the decision of this court (my brother Kakolaki, J.) in the case of **Maxinsure (Tanzania) Limited v. Simon W. Ngowi, Misc. Civil Application No. 46 of 2020, HCT, at Dar es Salaam** (unreported ruling dated 7th August, 2020). In that precedent, it was held that, in case of an ex-parte decision/decree by a District Court, the judgment debtor can choose one of the two options, i. e either to appeal against it to the High Court or to apply for setting it aside before the same District Court. That decision was also trying to construe the holding of the CAT in the **MIC Tanzania case** (supra). I however, depart from the construction shown above.

The reasons for my departure from the construction made in the **Maxinsure (Tanzania) case** (supra) regarding the holding of the CAT in the **MIC Tanzania case** (supra) are these: in that, case (the **MIC Tanzania case**) the District Court made and exparte judgement/decree in favour of the plaintiff therein, Kijitonyama Lutheran Church Choir (the Choir) and against the defendant before it, MIC Tanzania Limited (henceforth MIC in short). MIC could not take the necessary steps timely. It thus, applied before the High Court (Commercial Division) for extension of time to file a notice of appeal and an appeal out of time against the *ex-parte* decree to the High Court. The application for extension of time was

dismissed. MIC thus, applied before the CAT for revision, hence the decision of the CAT discussed above.

It is apparent that, this court in the **Maxinsure (Tanzania) case** (supra) pegged its construction on page 16 of the typed ruling in the **MIC Tanzania case.** The wording of the pertinent paragraph goes thus, and I quote it for a quick reference:

> "Nevertheless, in the circumstances of this case, **the applicant should have applied to set aside the ex-parte judgment.** However, the remedy of setting aside ex-parte judgment could only have ceased if the applicant could have appealed and the appeal determined conclusively. This option has not been exhausted since the applicant has not appealed to the High Court. **Besides, the District Court would have been better placed to hear the arguments on non-appearance than the High Court**." (bold emphasis is min).

In my concerted view, by this paragraph, the CAT did not mean that the judgment debtor in that case (MIC) had an option to appeal against the exparte decree or to set it aside before the District Court. What it meant was that, since MIC had taken some initial steps for appealing to the High Court, but such steps had failed, then there was no any appeal and she was duty bound to seek for setting aside the decree before the District Court. The CAT also meant that, had the process of appeal been exhausted and the appeal determined finally, then the option for setting aside could not be available.

In my further view, the above highlighted particular observation by the CAT did not at all, mean that it was proper for MIC to take that course of appealing. It only meant that, had MIC successfully appealed against the exparte decree as it had planned earlier (whether the course was wrong or

right), and had the Choir taken no steps to challenge the intended appeal, then the option for setting aside the exparte decree could no longer be viable. In other words, this particular observation by the CAT connoted that, had the intended appeal been finally determined (whether or not the appeal was a proper course), then the matter could have been closed and the District Court could not entertain it again for want of powers to challenge what the High Court could have decided. The CAT thus, in my considered view, was basically meant that, the first remedy for MIC was to set aside the *ex-parte* decree before planning to appeal to the High Court.

The reasons adduced above for my construction (of the decision of the CAT in the **MIC Tanzania case**) are supported by the bold text in the quotation set above (from the said **MIC Tanzania case**) which go thus; "*...in the circumstance of this case, the applicant should have applied to set aside the ex-parte judgment...Besides, the District Court would have been better placed to hear the arguments on non-appearance than the High Court.*" My reasons are also supported by the prior observation of the CAT before the one quoted above. At page 13 (of the **MIC Tanzania case)** for example, the CAT discussed on the course which the counsel for MIC were intending to take upon the exparte decree being made and prior to the filing of the application for extension of time before the High Court. The CAT observed thus, the crucial issue was to lodge an application before the trial court and explain why the former advocates were prevented from appearing up to the time the judgment was delivered ex-parte.

Furthermore, I find that, the reasons I adduced above are supported by other decisions of this court in the **Asha Hassan case** (supra) and the

Managing Director case (supra). They thus, entitle me to differ from the decision in the **Maxinsure (Tanzania) case** (supra). Besides, under the doctrine of precedent (*stire decisis*) my brother Judge who decided that case and I enjoy concurrent jurisdiction. I am not thus, bound by his construction owing to the reasons I gave earlier.

Owing to the reasons shown above, the District Court in the matter under discussion, could not have properly entertained the appeal against the revocation order since it had been made *ex-parte*. The appeal before the District Court was thus, incompetent for being prematurely preferred to it.

Another factor contributing to the impropriety of the appeal before the District Court in the matter under discussion is that, as hinted before, the appeal before it was against the revocation order. This fact is evidence from the grounds of appeal listed earlier. The respondent did not, at all, complain against the post-revocation order in his petition of appeal before the District Court. Nonetheless, the District Court permitted him to address it on both the revocation order and the post-revocation order though the post-revocation order had not been appealed against. The District Court ultimately reversed both orders and nullified the proceedings of the primary court as hinted previously. In my view, for the distinction between the two orders discussed earlier, and for their independence from each other, it was a serious blunder for the District Court to permit the respondent make his grievances against the post-revocation order dependent and parasitic on the appeal against the revocation order at that first appellate stage.

Owing to the reasons adduced above, I answer the first sub-issue positively that, the proceedings regarding the appeal before the District Court were in fact, irregular. This finding attracts the examination of the second sub-issue.

Regarding the second sub-issue, my task is to assess the effect of the irregularity of the proceedings of the appeal before the District Court. In my considered view, the abnormality in such proceedings caused confusions to the parties, especially the appellants and the District Court itself. The confusions resulted to a serious effect on the rights of the parties.

The serious confusions caused to the District Court by the irregularities in the proceedings were that, they made it decide on the post-revocation order, a matter that had not been appealed against. This course indeed raised a jurisdictional issue. This is because, the District Court could not have exercised its appellate jurisdiction against the post-revocation order since no appeal had been preferred against it. In law, a District Court exercises its appellate jurisdiction on a matter only when a person is aggrieved by a decision of a primary court and accordingly appeals to it (the District Court) under section 20(1)(b) of the MCA. However, that was not the case in the matter under discussion. It is also our trite principle of law that, jurisdiction is a fundamental issue, and a decision of any court without jurisdiction is a nullity.

Moreover, the irregularities in the proceedings caused the District Court to decide on the revocation order that had been made by the

primary court *exparte.* That course was wrong because, the remedy to the respondent could have been to firstly apply to the primary court to set it aside, and not to appeal against it directly to the District Court as discussed earlier. The decision of the District Court thus, violated the law.

Concerning the effect of the irregularities on the parties, one can detect the same in the record. It is clear for example, that, the respondent introduced the challenges against the post-revocation order for the first time before the District Court when arguing his appeal against the revocation order. Indeed, in her reply, the first appellant reacted against the arguments on the revocation order only. She did not direct herself to the challenges related to the post-revocation order. On his part, the second appellant only informed the District Court that he was ready to administer the estate. The trend shows that, the two appellants were ambushed by the respondent's act of introducing the challenges against the post-revocation order at that stage of the hearing. They did not thus, have ample opportunity to give adequate replies against the respondent's arguments in relation to the post-revocation order. Their respective rights to be heard regarding the challenges against the post-revocation order were thus, impaired. They were therefore, in my view, denied of their right to fair trial.

The right to fair trial just mentioned above is fundamental and well enshrined under article 13 (6) (a) of the Constitution of the United Republic of Tanzania, Cap. 2 R. E. 2002. This right is very significant for administration of justice in both civil and criminal proceedings. The CAT described it as one of the cornerstones of any just society. It is also an

important aspect of the right which enables effective functioning of the administration of justice; see in **Kabula d/o Luhende v. Republic, Criminal Appeal No. 281 of 2014, CAT, at Tabora** (unreported). The right to fair trial cannot thus, be interfered by any court of this land.

Indeed, the effect of the confusions caused to the parties by the anomalies in the proceedings before the District Court is also notable in the appeal at hand. By assessing the petition of appeal lodged by the two appellants before this court, it is clear that they were challenging the decision of the District Court regarding the post-revocation order only. They did not challenge its decision against the revocation order. Nevertheless, the submissions by the learned counsel for the appellants, clearly showed that, he is challenging the decision of the District Court regarding both the revocation order and the post-revocation order. On his part, the respondent in her replying submissions, focused mainly on the protection of the decision of the District Court regarding the revocation order only.

Owing to the reasons shown above, I find that, the irregularities in the proceedings before the District Court caused a serious injustice to the parties and are incurable. I consequently answer the second sub-issue affirmatively that, such irregularities were fatal enough to render the proceedings before the District Court a nullity. This finding demands the testing of the third sub-issue.

In relation to the third sub-issue, my views are that, owing to the finding I have made on the second sub-issue that the proceedings

regarding the appeal before the District Court were a nullity, I am compelled to declare that, the impugned judgment of the District Court cannot be saved by the provisions of section 37(2) of the MCA. These provisions essentially guide that, no decision or order of a primary court or a district court shall be reversed or altered on appeal or revision on account of any abnormality, unless the same occasions injustice. I therefore, classify the impugned judgment as a nullity. This is because, nullity proceedings results to nullity decision in law. It is more so considering that, the impugned judgment was reached without jurisdiction, in breach of the fundamental right to fair trial and through offending the law as demonstrated previously. I thus, find that, the impugned judgment cannot also stand and is liable to be set aside. This finding constitutes an answer to the third sub-issue.

Now, having made the above findings regarding the three sub-issues posed herein above, it is legally inevitable to answer the major issue affirmatively. I therefore answer it thus, the proceedings and the impugned judgment of the District Court are in fact, liable to be quashed and set aside respectively.

Owing to the above findings, I accordingly, make the following orders: I quash the entire proceedings regarding the appeal before the District Court. I also set aside its impugned judgment. If the respondent still wishes, he is advised to seek remedies according to the law as highlighted above. This will however, be subject to the law on time limitation. Each party shall bear his own costs since the District Court was also instrumental in causing the irregularities that have led to the

nullification of its proceedings and setting aside of its impugned judgment. It is so ordered.

J.H.K. UTAMWA

JUDGE

04/03/2021.

04/03/2021.

CORAM; JHK. Utamwa, J.

Appellants: Mr. Amani Mwakolo, advocate.

Respondent: present in person.

BC; Ms. Gaudensia, RMA.

Court: Judgment delivered in the presence of Mr. Amani Mwakolo, learned advocate for both appellants and the respondent, in court, this 4th March, 2021.

JHK. UTAMWA.

JUDGE.

04/03/2021.