

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

PC. CIVIL APPEAL NO. 12 OF 2020

**(C/F CIVIL APPEAL NO. 08 OF 2019, IN THE DISTRICT COURT OF ARUSHA, ORIGINAL,
PROBATE CAUSE NO. 241 OF 2013, ARUSHA URBAN PRIMARY COURT)**

SAADA RASHID.....APPELLANT

VERSUS

ABDALLA RASHID.....RESPONDENT

JUDGMENT___

25/02/2021 & 19/04/2021

M. R. GWAE, J

The appellant, Saada Rashid and the respondent, Abdallah Rashid are sister and brother respectively. The two persons were appointed by the Arusha Urban Primary Court (to be referred hereinafter as the "trial court") as administratrix and administrator of the estate of their late father Rashid Abdallah Rafiq (deceased person) who died on the 29th August 2010 at Mount Meru Hospital in Arusha Region.

Upon the reported completion of the administration of the estate, the administrators filed before the trial court an inventory and final accounts and

subsequently on the **9th March 2013** the Probate and Administration Cause was closed by the trial court on the understanding that the deceased's estate namely; a house situated at Arusha-Majengo area Plot No. 28, Block "F", a house at Block "F" No. 39 at Njiro, a farm at Njiro and a farm at Rombo shall be owned by all deceased's heirs/children, namely; appellant, respondent, Said Rashid and Hassan Rashid but subject to care of the administrators, for sake of clarity, it is prudent to have Form vi presented and duly signed by the trial court and by the parties quoted herein under;

~~"Kiasi. Nyumba 1 Njiro, No. 39 Block 'F', Shamba 1 Oljoro~~

~~Nyumba 1-Mjini Kati No. 28 Block "F", Shamba 1-Rombo~~

~~MALI HIZO ZIBAKI CHINI YA WATOTO WOTE WA MAREHEMU KWA
UANGALIZI WA WASIMAMIZI"~~

Subsequent to the closure of the Cause by the trial court, on the 13th January 2015 a complaint letter written by the appellant was received by the trial court which was all about the complaint on the distribution of the deceased's estate. where the appellant seriously contended that the respondent herein has occupied all the deceased's properties and he is the only one who is benefiting from the same with dominant or overriding decision of the estate of the deceased person. The trial court subsequently summoned the respondent and both parties were given their right to be heard and a ruling was thereafter delivered where

the trial court issued and of re-distribution of the deceased person's estate to the heirs.

The respondent aggrieved by the said ruling appealed to the District Court of Arusha at Arusha (1st appellate court) with a total of five (5) grounds of appeal which in its totality the respondent was complaining that the trial court was functus officio to give an order of re-distribution while the probate cause was already closed by the same court. The District court determined the appeal in favour of the respondent and ordered that the proceedings and the order for the re- distribution were a nullity as the trial court was functus officio.

The appellant was dissatisfied by the first appellate court's decision and has come to this second appellate court with two grounds of appeal namely;

1. That, the first appellate court erred both in law and in fact for clearly disregard the circumstantial evidence that led to the ruling delivered by Hon. T. Sedoyeka, RM on 07/01/2019
2. That, the first appellate court erred both in law and fact by holding that the trial court had revised its decision.

When the matter was fixed for hearing before me, the appellant was under the legal aid from Legal and Human Right Center at Arusha and for the purposes of this appeal, she was duly represented by **Ms. Veneranda Joseph** advocate, whereas the respondent enjoyed legal services from the learned counsel **Mr.**

Asubuhi John Yoyo. With the leave of the court the appeal was argued by way of written submission and both parties filed their respective submissions as directed by the court.

Supporting her first ground of appeal the appellant's counsel submitted that it was necessary for the trial court to give an order for re-distribution taking into account that it was the respondent who was benefiting from the deceased properties and more so the distribution of the deceased assets was ambiguous, therefore in her view, there was a serious need for the administrators of the deceased's estate to re-distribute the estate with clarity. The counsel went on stating that the order by the trial court was essential to them as there was no any other remedy available to them, as they cannot claim the same by filing a civil case. More so the learned counsel was of the view that the order of re-distribution of the deceased properties is justifiable in law through the Primary Courts (Administration of Estates) Rules and The Magistrates Courts (Civil Procedure in Primary Courts) Rules particularly Rule 2 (h) and Rule 3 (1) (h).

With regard to the second ground of appeal the counsel submitted that the trial court was justified to review its decision taking into consideration nature of the claim brought up by the appellant regarding possession of the deceased's properties by the respondent.

Mr. Asubuhi, on the other hand, vehemently resisted the appellant's arguments and was of the opinion that, **firstly**, that, the laws cited by the counsel to justify the trial court's order do not support the same as the rules cited in particular do not give powers to the trial court to order for re-distribution of the deceased properties where the probate is closed, **secondly**, that, once the matter is closed by the court the same cannot be reopened as the court is functus officio. The counsel cited a decision of the Court of Appeal sitting at Tanga in the case of **Ahmed Mohamed Al Laa Mar vs. Fatuma Bakari & Asha Bakari**, Civil Appeal No. 71 of 2012 and **thirdly**, that the 1st appellate court was correct in holding that the trial court wrongly revised its decision as the trial court was functus officio to give the order after the matter had been closed.

In rejoinder, the learned counsel had nothing more to add from her submission in chief. Briefly, this is what the parties' advocates had argued for and against the appeal.

I have meticulously considered the parties' submissions together with laws referred by the appellant and a judicial authority cited by the respondent. Having done, I am of the considered view that the main controversial issue to be determined by this court is whether the primary court was legally justified to give an order for re-distribution of the deceased's estate when the probate had already been closed by the same court.

From the outset, I feel bound to uphold the 1st appellate court's decision for the reasons that I shall give here under. It is a settled position of the law that in probate matters when the inventory has been filed in court by the administrator or executor as the case may be and the probate or administration cause has been closed the court that has closed the same becomes functus officio with regard to all matters that shall be brought up before it after the closure of the cause. This position is supported by the case cited by the respondent counsel Mr. Yoyo of **Ahmed Mohamed Al Lamaar** where the Court of Appeal of Tanzania had the following to say;

"Given the fact that the appellant had already discharged his duties of executing the will, whether honestly or otherwise, and had already exhibited the inventory and accounts in the High Court, there was no granted probate which could have been revoked or annulled in terms of section 49 (1) of the Act. As the appellant was already functus officio....."

In the matter at hand the records are to the effect that, on 09/03/2015 the appellant and the respondent presented the inventory before the trial court and on the same date the administrators prayed for the closure of the case in the presence of two witnesses namely; John Charles and Hassan Rashid. There after the trial court formally closed the case.

On the 13th January 2015 the appellant vividly wrote a letter to the office of Resident Magistrate in-charge of the District Court titled "Ombi la kubatilisha Ufungaji wa mirathi ya marehemu Rashidi Abdala Rafiq Mirathi No. 241/2013". In the said letter, the appellant was plainly complaining that there was an error in the distribution of the deceased's properties which led to the denial of inheritance by the deceased's heirs of the deceased's assets and squander of the same by the respondent alone.

The 1st appellate court on 26th January 2016 wrote a reply letter to the appellant's letter directing her to open a civil case on the reason that the Probate and Administration Cause that was before the trial court had already been closed. The records further reveal that the appellant and one Hassan Rashid (4th child to the deceased) filed a suit against the respondent vide Civil Case No. 40 of 2018 in the Resident Magistrate Court on the breach of the agreement through the Administration Cause No. 341 of 2013. However, the suit was finally struck out on the 4th December 2018 a preliminary objection raised by the respondent on defective verification.

On 05/12/2018 the appellant wrote a letter to the RM in-charge of the Arusha Urban Primary Court (the trial) with the same title to the letter written to the RM in-charge of the Arusha District Court who thereafter opened up the closed Probate and Administration Cause, heard the parties and on 07/01/2019 gave an

order of re-distribution of the deceased's estate. It is at this juncture the parties here in are in dispute as to whether, after what has transpired as explained above, the trial Resident Magistrate of the Arusha Urban Primary Court was justified to re-open the probate and Administration cause and order for the re-distribution of the deceased properties.

I wish to go back to the case of **Ahmed Mohamed Al Laamar**, in this case as already elaborated earlier the Court maintained on the trial court to be *functus officio* to determine a matter which has already been closed however the court went further to elaborate the remedies available to parties whoever wishes to challenge the probate and stated as follows;

“...**One**, if the respondents genuinely believe that the appellant acted in excess of his mandate or wasted the estate and / or subjected it to damage or occasioned any loss to it through negligence, they are free to sue him. **Two**, if they are also convinced that he either fraudulently converted some properties forming part of the estate, and / or that he deliberately exhibited a false inventory or account, they are equally free to institute criminal proceedings against him in accordance with the provisions of the governing laws”.

This position was also stated by the Court of Appeal in the case of **Hadija Masudi as the Legal Representative of the late Halima Masudi vs. Rashid Makusudi**, Civil Appeal No. 26 of 1992 where the court had the following to say;

"This state of affairs does not however mean that a person who claims to be an heir of Salima Makusudi and who has not got his or her rightful share of the deceased's estate, has no remedy at law. Far from it. The remedy for such person, like the respondent, is to sue for the recovery of his or her share of the estate of the deceased, Salima Makusudi from any person who is in possession of it."

~~Given the chronological background of the case at hand and the principles established in the cited cases it is with no doubt and as correctly decided by the~~ 1st appellate court, the trial court having closed the probate case it became functus officio to determine any complaint arising from the already procedurally closed Probate and Administration Cause by any means. More so, I do not support the submission by the appellant's counsel that there is no any other remedy available to the appellant except re-opening the closed Administration Cause and it was thus necessary for the court to give that order.

From the authorities above, the Court of Appeal of Tanzania gave clear remedies to the parties who have claims in the deceased person's estate where the case is closed. Provisions of law cited by the appellant's counsel (Rule 2 (h) & 3 (1) (h) of the Fifth Schedule of the Magistrates Courts' Act (Supra), in my

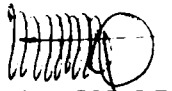
view, do not vest the trial court with jurisdiction to re-open the already closed Probate and Administration Cause as the Form vi and the order closing the Probate and Administration Cause were clear and effective that, the deceased's properties aforementioned have been distributed to all deceased's heirs and that such estate shall remain under the care of both administrators. Hence, if any of the beneficiaries or administrators does anything contrary to what was mutually agreed by the deceased person's heirs and the same being duly recorded by the trial court, may institute a civil case or criminal case depending on the nature of disputable act (s).

In the case at hand the appellant through the letter written by the Resident Magistrate in charge of the Arusha District Court dated 26/01/2016 directing the appellant to open a civil case for the reason that the Probate and Administration Cause had already been duly closed. The records reveal that the appellant subsequently filed a suit against the respondent through Civil Case No 40 of 2018, however, the same was struck out, and it is when the appellant decided to go back to the trial court with the same letter as the one written to the RM in charge of the District Court. Given the circumstances of the case it suffices to say that the appellant in this case is trying to ride two horses at the same time since she had already exercised her right of filing a suit against the respondent even though the same was struck out. Therefore, it was improper for the appellant to go back

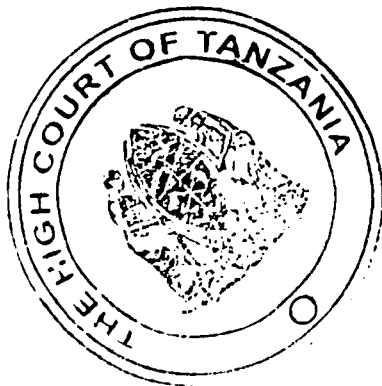
to the trial court instead of correcting the error which her suit to be struck out and then re-file the same.

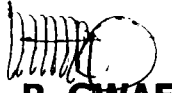
That being said and told, I hereby sustain the 1st appellate court's decision, consequently, the appellant's appeal is dismissed for lack of merit. Considering the parties' relationship, I make no order as to costs of this appeal and those at courts below.

It is ordered.


M. R. GWAE
JUDGE
19/04/2021

Right of appeal open




M. R. GWAE
JUDGE
19/04/2021