

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

**CIVIL APPEAL NO. 140 OF 2020**

(Arising from the Ruling of the District Court of Kinondoni at Kinondoni Civil Application No. 124 of 2019 before Hon. J. Lyimo, **RM** dated 27/02/2020, Original Probate Case No. 01 of 2009 Kawe Primary Court.)

**SAADA JANUARY NYAMBIBO ..... APPELLANT**

**VERSUS**

**DEBORA JANUARY NYAMBIBO..... RESPONDENT**

**JUDGMENT**

20<sup>th</sup> April & 21<sup>th</sup> May, 2021.

**E. E. KAKOLAKI J**

Before this Court the appellant who is dissatisfied with the decision of the District Court of Kinondoni in Civil Application No. 124 of 2019 dated 27/02/2020 which dismissed her application for extension of time to appeal to the District Court against the ruling of Kinondoni Primary Court in Probate No. 01 of 2009, has filed the appeal to this court canvassed with two grounds of appeal as follows:

1. The Honourable Court erred in law by failure to answer the issues which was before the Court hence jump into wrong findings and conclusion.
2. The Honourable Court erred in law for continuing with the hearing of Civil Application No. 124 of 2019 while knowing she had no jurisdiction to entertain the application in the sense that she had never been assigned and appointed for determination of the said application.

The appellant is therefore praying this court to quash the order and set aside the order of Honourable J. Lyimo – RM in Civil Application No. 124 of 2019 delivered on 27/02/2020.

The background story that gave rise to this appeal as discerned from the record can be briefly stated as follows. On 29/04/2009 the appellant before the Primary Court of Kinondoni in Probate Cause No. 01 of 2009 was appointed co-administratrix to the respondent over the estate of the late January Joctan Nyambibo following disqualification of the earlier appointed co-administrator of estate one Misana Nyambibo. Some properties falling under the estate and beneficiaries were also disclosed in the course of the proceedings and administratrixes of the estate were allowed to perform their function and duties in the office. For undisclosed reasons the same never filed the inventory and accounts of estate so as to allow the probate to be closed in accordance with the law. It is interesting to learn however that ten (10) years after her appointment as administratrix of the estate the appellant filed in the District Court of Kinondoni Misc. Application 124 of 2019 for extension of time to appeal against the ruling of the Kinondoni Primary Court of 15/04/2009. On filing the Counter Affidavit in protest of the application

the appellant raised preliminary objection against the said counter affidavit which ended up being struck out by the trial court in its ruling of 17/12/2019 before Hon. L. Silayo, RM. On that premise the application proceeded ex parte before Hon. J. Lyimo, RM who after hearing the appellant dismissed it for want of merits. In his ruling the trial magistrate (Hon. J, Lyimo) reasoned that the appellant had failed to advance sufficient reasons to warrant her extension of time as there was no illegality noted by the court as alleged and she had failed to tell as to why it took her 10 years to note the irregularity. It is from that decision the appellant is before this court protesting its legality.

Both parties are represented as the appellant is represented by Mr. Almas Selemani while the respondent is defended by Ms. Yusta Kibuga both learned advocates. With leave of the Court on 10/03/2021 parties agreed to dispose of the appeal by way of written submission in which filing schedules were issued. The appellant was to file her submission in chief in support of the appeal by 24/03/2021, respondent's reply submissions on or before 08/04/2021 and rejoinder submissions by 15/04/2021. The matter was mentioned on the 20/04/2021 for setting a ruling date.

When the matter came for ruling parties informed the court of their compliance to the court's order by filing the written submission. However when preparing to compose the ruling the court noted that the rejoinder submissions by the appellant was filed on 19/04/2021 four (4) days outside the date scheduled by the court which consequences thereof is to disregard it as no leave of the Court was sought by the appellant to file it outside the prescribed time. I will therefore not consider it in this ruling.

In this appeal it was Mr. Selemani's submission in support of the first ground that the application before the trial court was uncontested as the counter affidavit by the respondent was struck out and that the appellant's ground for extension of time was premised on illegality in the Kinondoni Primary Court's ruling dated 15/04/2009. The illegalities of the said decision he expounded were, **one**, the act of the trial court to proceed with delivery of the ruling without notice to the appellant and the removal of the beneficiary one Mrs. Rukia Abdalah Kitogo from the list of beneficiaries of the estate without his knowledge something which denied her right to be heard before that removal. **Secondly**, the name of one of the two assessors who appeared in the coram of the proceedings and the ruling differs, as in the proceedings are Hundi and Mbega while in the ruling are Hundi and Hadija. And further that the said ruling was not signed by both assessors something which implies that their opinions were not taken before decision was handed down contrary to Rule 3(1) and (2) of the Magistrates's Court (Primary Courts) Judgment Rules, 1987, GN. No. 2 of 1988. To support his stance he cited to the Court the cases of **Selemani Bakari Vs. Felista Helman**, PC Civil Appeal No. 55 of 1990 (HC-unreported), **Omary Nassoro Mbotto Vs. Abdallah Said Likupila**, PC Civil Appeal No. 156 of 1997 (HC-unreported) where the proceedings of the trial courts were nullified for being illegal after violating Rule 3 above cited. As illegality of the impugned decision is one of the ground for extension of time the District Court was duty bound to grant the application basing on that ground. The court was brought into attention of the case of **Omary Ally Nyamalege (As administrator of the estate of the late Selemani Ally Nyamalege) and 2 Others Vs. Mwanza**

**Engineering Works**, Civil Application No. 94/08 of 2017 (CAT-unreported) where the court of Appeal extended time basing on the ground of illegality. The third illegality according to him is premised on the District Court's ruling where the learned magistrate is accused of predetermining the appeal before even the leave to appeal is granted by extending time. Mr. Selemani lamented the finding by the trial magistrate that if one of the heirs is not reflected in the Probate Cause No. 1 of 2009 the remedy was not to appeal but rather to file the Application before the same trial court as the District Court could not determine the point which was not determined by the trial court, was nothing but predetermination of the appeal which was not before it. He cited the case of **Monica Nyamakare Jigamba Vs. Mugeta Bwire Bhakome (As administrator of the estate of Musiba Reni Jigamba)**, Civil Application No. 48/01 of 2018 (CAT) where a single justice of appeal refused to entertain the issue as to whether the revision had merits or not which was not within his jurisdiction as what was before him was an application for extension of time only and not for revision. It was therefore his submission that the learned magistrate erred to answer the issue which was not before him.

As to the second ground of appeal Mr. Selemani submitted that the District Court proceedings were tainted with illegality for contravening the provisions of Order XVII Rule 10(2) of the Civil Procedure Code, [Cap. 33 R.E 2019] governing the powers of the judge or magistrate to take over and proceed with hearing of the suit from his or her predecessor judge or magistrate. The intention of the provision of the law he argued is to promote transparency and minimize chaos in the administration of justice thus enhance the

integrity of judicial proceedings. He referred the court to the case of **National Insurance Corporation (T) Limited Vs. Jackson Mahali**, Civil Appeal No. 94 of 2011 (CAT-unreported). It was his argument that in this matter Misc. Civil Application No. 124 of 2019 was assigned to Hon. Lihamwike before it was transferred to Hon. Silayo and Kiswaga without assigning any reason and then from Hon. Kiswaga to Lyimo on the reason of clearance of backlog cases. He reasoned that transfer cannot be done suo motto by the court without informing the parties. That, when the appellant appeared in court on the 16/01/2020 for hearing before Hon. Silayo the same was adjourned to 11/02/2020. To her surprise on the said 11/02/2020 she found her matter was before Hon. Lyimo without being informed of the reason for change of the magistrate, which Mr. Selemani submits was an illegality in the proceedings as the trial magistrate ought to have informed her of the reason for change of magistrate. By failure to so inform, the appellant was prejudiced as the successor magistrate did not understand facts of the case whose proceedings were taken earlier by Hon. Silayo. He relied on the cases of **Inter-consult Limited Vs. Mrs. Nora Kassanga and Another**, Civil Appeal No. 79 of 2015 (CAT-unreported) and **Oysterbay Villas Limited Vs. Kinondoni Municipal Council**, Civil Appeal No. 173 of 2017 (CAT-unreported) where the Court of Appeal stressed on the importance of the reasons for transfer of the case file from one judge or magistrate to be reflected in the proceedings of the case file. In view of the decision above it was his submission that Hon. Lyimo was never assigned the case file to determine the application. With all those

illegalities established it was Mr. Selemani's prayer that this appeal be granted.

In her reply submission Ms. Kibuga argued on the first ground of appeal that since illegality was the only applicant's ground for extension of time all the points relied on needed proof of evidence thus the same could be discovered by long drawn argument or process. On that argument she invited the court to make reference to the case of **Ngao Godwin Losero Vs. Julius Mwarabu**, Civil Application No. 10 of 2015 (CAT-unreported) where the Court of Appeal insisted that a point of illegality should be apparent on record and not one that would require long argument or process to discover it. On the 1<sup>st</sup> assertion of removal of one of the beneficiary Mrs. Rukia Abdallah Kitogo from the list of beneficiaries she said, that required evidence for the District Court to appreciate it as all beneficiaries were listed in Form No. 1 and that the said Mrs. Rukia was divorce long ago 1997, and further that the said complaint was never raised before the trial court for determination. Therefore it could not be said to be illegality to the proceedings of the lower court. As to the issue of composition of assessor he countered the coram was properly constituted as per the requirement of section 7(1) of the Magistrates Courts Act, [Cap. 11 R.E 2019. On the issue of statement of the learned magistrate alleged to have predetermined the appeal which was not before her, she countered the statement was not a decision at all but rather used to assess the importance of the alleged illegality in the ruling of the Primary Court as required by the case of **Ngao Godwin Losero**.

On the contention of lack of jurisdictional by Hon. Lyimo to entertain the application for want of proper assignment it was Ms. Kibuga's argument that

the appellant failed to substantiate her claims as in paragraph 3.7 at page.... of her submission she noted the advanced reason of such transfer to be backlog of cases thus there was no contravention of the law. She had it that even the cited cases of **National Insurance Corporation** (supra) and **Inter-consult Limited** (supra) relied upon by the applicant are distinguishable from the facts of this matter in that in those cases the duty to assign reasons is pressed on the successor magistrate who is taking conduct of the partly tried case while in the present matter Hon. Lyimo was assigned the matter for hearing and conducted it. Therefore there was no illegality and therefore the ground is baseless. In view of the above submission Ms. Kibuga invited this court to dismiss the appeal for want of merits. As alluded to herein above I am not going to consider the rejoinder submissions for being filed out time without leave of the court.

I have keenly travelled through both District and Primary Courts record and the submissions by both learned legal minds for the parties. In determining this appeal I will start with the 2<sup>nd</sup> ground of appeal where the jurisdiction of the learned magistrate Hon. Lyimo to entertain the application is put to question for want of proper assignment of the case file to him in accordance with the requirement of Order XVII Rule 10(2) of the CPC. Mr. Selemani's lamentation on this point traces its way back from the time of the first assignee Hon. Lihamwike whom according to the typed proceedings at page 1 on 05/08/2019 was assigned the case file Civil Application No. 124 of 2019 by Hon. F.L. Mushi and came for mention before him on 09/08/2019 before it was transferred to Hon. L. Silayo on 06/09/2019 without assigning any reason for so doing. That later on the file moved to Hon. Kiswaga and finally



landed in the hands of Hon. Lyimo who heard and determined it without informing the parties reasons for the transfer, as the reason depicted in the proceedings is that it was for clearance of backlog case. Ms. Kibuga is of the contrary view that the provision of the law was complied with as in this matter no hearing had taken place before Hon. Lyimo took over the application for its hearing and determination as the law refers to matters which are partly heard. Even though still the reasons for re-assignment to Hon. Lyimo was well stated to be due to clearance of backlog which the appellant also acknowledged in her submission. Order XVIII Rule 10 of the CPC alleged to be infringed refers to powers to deal with evidence taken before another judge or magistrate. It provides thus:

*"10. Power to deal with evidence taken before another judge or magistrate*

*(1) Where **a judge or magistrate is prevented by death, transfer or other cause** from **concluding the trial of a suit**, his successor may deal with any evidence or memorandum taken down or made under the foregoing rules as if such evidence or memorandum has been taken down or made by him or under his direction under the said rules and **may proceed with the suit from the stage at which his predecessor left it**". (Emphasis added)*

For the above provision to apply in my formed opinion two conditions must exist. **One**, the trial judge or magistrate must have been prevented from continuing with the proceedings by either death, transfer or other cause. **Secondly**, there must be pending suit partly tried by the predecessor judge

or magistrate. The definition of the term suit is not provided under the CPC. The **Black's Law Dictionary**, Bryan A. Garner, (2004) 8<sup>th</sup> Ed at page 4499, defines the term suit to mean:

*"Any proceeding by a party or parties against another in a court of law."*

In the light of the above definition suit includes also an application which is competent before the court of law. It follows therefore that the application which was heard and determined by Hon. Lyimo was a suit thus the provision of Order XVIII Rule 10(2) of the CPC is applicable to this case. The circumstances under which this provision can be applied, duty imposed on the successor judge and magistrate and the reasons thereof were well articulated in the case of **M/S. Georges Centre Limited Vs. The Honourable Attorney General**, Civil Appeal No. 29 of 2016 (CAT-unreported) where the Court had this to say:

*"The general premise that can be gathered from the above provision is that once the trial of a case has begun before one judicial officer that judicial officer has to bring it to completion unless for some reason he/she is unable to do that. The provision cited above imposes upon a successor judge or magistrate an obligation to put on record why he/she has to take up a case that is partly heard by another. There are a number of reasons why it is important that a trial started by one judicial officer be completed by the same judicial officer unless it is not practicable to do so. For one thing, ...the one who sees and hears the*

*witness is in the best position to assess the witness's credibility. Credibility of witnesses which has to be assessed is very crucial in the determination of any case before a court of law. Furthermore, integrity of judicial proceedings hinges on transparency. Where there is no transparency justice may be compromised."*

In view of the above cited case it is evident to me that it is very important for the judicial officer who started the conduct of any suit to finalize it, but once the case file of partly heard suit is transferred to another judicial officer, the successor judge or magistrate is duty bound to assign the reasons for him/her to take over the suit. And the reason for such requirement is very simple, it is to make sure that the credibility of the witness and integrity of the proceedings are maintained with transparency. So assignment of reasons for taking over by the successor judge are so vital for avoidance of chaos in the administration of justice as it was held in the case of **Priscus Kimaro v. Republic**, Criminal Appeal no. 301 of 2013 (CAT-unreported) where the Court observed:

*"...where it is necessary to re-assign a partly heard matter to another magistrate, the reason for the failure of the first magistrate to complete the matter must be recorded. If that is not done it may lead to chaos in the administration of justice. Anyone, for personal reasons could just pick up any file and deal with to the detriment of justice. This must not be allowed"*

Now the issue before the court for determination is whether the re-assigned magistrates Hon. Silayo, Kiswaga and Lyimo were required to assign reasons

for transfer of the case file? And if yes at what point of time? As per the case of **M/S. Georges Centre Limited** (supra) reasons could be assigned if the successor magistrate succeeded a partly heard suit. As alluded to herein above when the case file moved to Hon. Silayo the trial had not yet started as parties were still in the process of filing pleadings. The record shows that he proceeded with hearing of the preliminary objections raised by the appellant/applicant against the respondent's counter affidavit which were sustained by striking it out in his ruling dated 17/12/2019. He thereafter ordered for hearing of the application exparte. It follows therefore that the application before Hon. Silayo was yet to be heard on merit until when the same was set for exparte hearing on 11/02/2020. However before that date the typed proceedings at page 11 shows that on 27/01/2020 the case file was placed before Hon. F.L Kiswaga who re-assigned it to Hon. Lyimo for continuation with hearing on the reason of disposal of backlog cases. For easy of reference I quote the said order by Hon. Kiswaga, RM:

***27/01/2020***

*Corum: F.L. Kiswaga – RM*

*Pros:*

*Accused*

}

*Absent*

*CC. Mwailubi*

***Court:*** Due to efforts of combating with backlog of cases in our station this case file is hereby re-assigned to Hon. Lyimo –RM the matter be placed before her immediately for further orders.

***Sgd: Lyimo –RM***

***27/01/2020***

In view of the above excerpt one would have held that since no trial had started there was no need for the successor magistrate to assign reasons for transfer of the case file or in alternative that the same was assigned as stated above and proceed to dismiss the ground but for the reasons to be stated soon hereunder I refrain from so doing. Looking at the cited excerpt from the typed proceedings it will be noted that the re-assignment of the case file was effected by Hon. Kiswaga whose name appears in the coram but the signature is of Hon. Lyimo something which creates confusion on who exactly executed the re-assignment on the 27/01/2020. To clear this confusion which might have occurred due to typing error I resorted to the original proceeding of the same date which to my surprised created not only confusion but also suspicion on the integrity of the proceedings from that date. Whereas the coram in the typed proceedings shows it the Hon. Kiswaga who re-assigned the case file to Hon. Lyimo his name is cancelled in the original proceedings and replaced with that of Hon. Lyimo as assigning magistrate. My deep eye of the signature of the assigning magistrate revealed it differs materially to that of Hon. Lyimo as it resembles that of Hon. Mushi who assigned the case file to Hon. Lihamwike earlier on. As if that is not enough, even the order itself bears hand writing of unknown

person who is neither Hon. Kiswaga, nor Mushi or Lyimo. With all that confusions and doubts on who exactly made the re-assignment order to Hon. Lyimo reduces the order to nothing but a nullity as the integrity of the proceedings therefrom are questionable. I would therefore shoulder up with Mr. Selemani's submission that the said Hon. Lyimo was never assigned the alleged case file of Misc. Application No. 124 of 2019 to hear and determine it. It follows therefore and I hold the proceedings before Hon. Lyimo, ruling and orders thereof were a nullity as she lacked jurisdiction to proceed with the trial of the application for want of proper assignment. This ground of appeal is sustained and suffices to dispose of the appeal and I see no reason to labour efforts on the second ground for avoidance of academic exercise.

In the light of the above findings and in the exercise of revisionary powers vested on me under section 44(1)(b) of MCA I proceed to quash the proceedings and set aside the ruling and orders thereto. The appeal is allowed to that extent. I remit the case file to the District Court of Kinondoni for continuation of the trial before Hon. Silayo from where she ended. Should it be for any reasons she is prevented from continuation then the matter be properly re-assigned by the Resident Magistrate incharge and reasons for transfer be assigned in the proceedings.

Costs to follow the event.

I so order accordingly.

DATED at DAR ES SALAAM this 21<sup>st</sup> day of May, 2021.



E. E. KAKOLAKI

**JUDGE**

21/05/2021

Delivered at Dar es Salaam in chambers this 21<sup>st</sup> day of May, 2021 in the presence of the appellant, Mr. Yusta Kibuga advocate for the respondent, the respondent in person and Ms. Asha Livanga, court clerk.

Right of appeal explained



E. E. Kakolaki

**JUDGE**

**21/05/2021**