

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOSHI DISTRICT REGISTRY
AT MOSHI

CIVIL APPEAL NO. 6 OF 2020

(Arising from Probate Appeal No.12 of 2020 before District Court of
Moshi at Moshi and Originating from Probate Cause No. 232 of
2005 before Moshi Urban Primary Court)

AISHA JUMA LEMA APPELLANT

VERSUS

LUCY EDWARD LEMARESPONDENT

JUDGMENT

MUTUNGI .J.

The genesis of the dispute is that, on 23rd March 2005 Lucy Edward Lema, successful petitioned for administration of the estate of the late Zubeda Seleman at Moshi Urban Primary Court through Probate No 232/2005 despite the objection from Fatuma Rajabu and Hamad Ramadhan Msuya (who later on abandoned the objection).

Through Civil Application No 1/2008 Aisha Juma Lema surfaced at the District Court of Moshi claiming among other things that the administrator (Lucy Edward Lema) fraudulently distributed the deceased estate to herself. The

District Court on **22/6/ 2009** dismissed Lucy Edward Lema as administratrix and the estate was ordered to be distributed to her next of kin one Mwanaisha Seleman (*sister of late Zubeda Seleman*).

Lucy Edward Lema successful appealed to the High court where on **23.10.2015** Hon. Mingwa, J vide Civil Revision No. 3 of 2015 quashed the decision of Moshi District court on grounds that it was not proper for the District Court to distribute the estate of the deceased and it was wrong to invite the stranger (Aisha Juma Lema) in the proceedings while she was not a party thereto. The only available remedy was for her was to either file a caveat at the primary court or apply to be a party before the Primary Court. The High Court Judge proceeded to order the restoration of the decision of Moshi Urban Primary Court after quashing the decision of Moshi District Court

On **5/09/2019** Aisha Juma Lema approached the same court (Moshi Urban Primary Court) applying to be recognized as one of the beneficiaries/heirs of the said Estate. She was claiming for inheritance in the house left behind by the deceased (Zubeda) in 1969. The trial court decided that Aisha Juma Lema had a right to inherit Zubeda's properties. Aggrieved by the Primary Court

decision, the respondent appealed to the District Court where the Appellate Honourable Magistrate ruled, the application filed by Aisha Juma Lema before the Primary Court was res judicata to Probate Cause 232/2005.

It is upon the above decision that the appellant knocked at the doors of this court under the following grounds: -

1. *That the trial Magistrate erred in law and fact to hold that Shauri la Mirathi No. 232/2005 at Moshi Urban Primary Court is res judicata.*
2. *That the trial magistrate erred in law and in fact to hold that the subject matter in issue between the former application and subsequent application are the same.*
3. *That the trial magistrate erred in law and fact when she failed to note that, the former application was for revocation of appointment of respondent as administratrix of late Zubeda Seleman and the current application was Respondent to be included as heir of estate of late Zubeda Sulemani.*
4. *That the trial magistrate erred in law and fact to decide in favour of Respondent while she failed to prove the case on balance of probability.*

5. *That the trial magistrate erred in law and fact when she failed to properly re-evaluate the evidence.*

When the matter came for hearing both parties agreed to proceed by way of Written Submissions. The appellant opted to submit only on the 1st ground of appeal with some modification and the same is as hereunder: -

"That the trial appellate magistrate erred in law and in fact when she held at pg 9 of the typed judgement that, "this court finds that the matter that was re-instituted in the primary court and its decision being delivered by Hon Claudi on 20th August,2020 is res judicata and therefore this appeal has merits and hereby allowed."

Submitting on the same, the Appellant subdivided her submission into two limbs. **First**, she submitted no competent court has heard and determined the issue as to whether the Appellant is the heir in the said estate. For this she stated it is only the Moshi Urban Primary court through its decision dated 20th August 2020 which decided on whether the Appellant is the heir for the first time. She further stated, the first appellate court at page 8 of the typed judgement made a false statement by stating that, the respondent instituted a fresh case with the same

complains for revocation of the appellants based on the same ground. In her firm view what the Moshi Urban Court did was to recognize her as the heir in the said estate. The court was not dealing with the revocation of letters of administration as stated by the first Appellate Court. On the same footing holding that the issue of her recognition as heir was *res judicata* is completely erroneous.

Under the **2nd limb** she claimed *the application by the Appellant before the Moshi Urban Primary Court was as a result of the decision of this court in Civil Revision No. 3/2015*. She submitted it was rightly observed and opined by the first appellate Magistrate that on 10th March 2008 Hon. Kidini dismissed the objection and appointed the respondent the administrator but the court misinterpreted this decision to mean that the appellant was also not the heir in the said estate.

Further, the Appellant invited the court to page 7 and 8 of Hon. J. Mingwa's judgment which ruled that, the District Court of Moshi erred to invite the Appellant who was not a party to the probate cause No. 232 of 2005. For that the Hon. Judge found the appellant was to be either a caveator but not to file an application for the court to

compel the administratrix to distribute the estate of Zubeda Seleman.

The appellant submitted further, the above decision resulted in her filing an application to be recognised as heir in order to be a party to Probate No. 232/2005 and on 20th August 2020 Hon Claudi pronounced her the heir. In that regard the subsequent application cannot be res judicata because she was moved by the judgement of Hon. Mingwa J. in Civil Revision No. 3 of 2015.

The Appellant contended further that, the respondent has bequeathed all the properties to herself while she has no blood relation with the deceased. She tried to cement this by drawing the family tree. She further submitted the respondent cannot inherit in the said estate on the ground Christians cannot inherent in an Islamic probate.

It was further submitted by Appellant, the Respondent has decided to tell lies knowing that the court won't make investigations. She prayed this court does investigate and find out the truth. It should not merely rely on the parties' evidence, in doing so there is a likelihood of miscarriage of justice.

In conclusion, the Appellant prayed for the appeal to be allowed with costs and uphold the decision of Moshi Urban Primary Court dated 20th August 2020.

Responding to the submission by Appellant, the Respondent argued this court has no jurisdiction to investigate as prayed by the Appellant in her submission. She clarified criminal investigation is done by the Police force and for that she had to proceed before a proper forum if at all there are things to investigate or there is fraud.

Submitting in reply to the 1st limb that no competent court has heard and determined the issue on whether the Appellant can inherit, the Respondent stated, this is to mislead this court. She was successfully appointed as administrator on 22th March 2006. On 10th March 2008 the Appellant unsuccessfully brought complains that the administratrix had failed to distribute the deceased estate and prayed to be included as the heir. She quickly challenged that decision at the District Court and the Respondent successful challenged the same at the High Court vide Civil Revision No. 3/2015. Surprisingly the appellant on 5th August 2019 filed fresh claims complaining, she was the sole heir and the administratrix had distributed the deceased estate to herself.

The respondent further submitted that Zudeda's estate had already been distributed after the appellant had through Civil Appeal No. 1/2008 successful made an application to compel the administratrix to distribute the estate of Zubeda Seleman of which Hon. D. Mpelembwa redistributed the estate to Mwanaisha Seleman. The decision which was successful appealed against by the Respondent in the High Court. It was the respondent's submission that the matter has been adjudicated upon by a competent court where Hon. Mingwa J. in Civil Revision No. 3 of 2015 confirmed the same.

The Respondent averred further, the appellant (as administratrix of late Mwanaisha Seleman) unsuccessful instituted Land case No. 17/2015 at the High Court suing the Respondent and Lodrick Emanuel Uronu. The appellant aggrieved by that decision before Hon. Fikirini .J. Dated 5th March 2018 Appealed to the Court of Appeal while at same time appealed to this court to be declared the heir of the estate of the late Mwanaisha Seleman. It was the Respondent's settled opinion that, the liar in this case is the appellant who claims to be the heir and legal representative of the same deceased at the same time.

All in all the Respondent concurred with the decision by Hon. J. E. Edward that, the matter before Hon. Claudi at Moshi Urban Primary Court is res judicata and she prayed for dismissal of this appeal with cost.

In rejoinder the Appellant expounded on the issue of investigation by stating that, she meant this court should investigate the proceedings and records as there is fraud. The Respondent is lying knowing that the court will not go deep to dig up facts subject of the probate.

As to the submission that the properties have already been distributed and the matter is closed, the Appellant submitted this cannot bar subsequent probate proceedings, the said distribution is subject to be challenged. She contended further that, it is trite procedure that a probate matter comes to an end when the court marks it closed. She cited the case of **Hadija Said Matika vs Awesa Said Matika PC Civil Appeal No. 2 of 2016** at page 17 and 22 to cement her stance. In light of the proceedings in Probate Cause No. 232/2005 the probate is yet to be closed.

Emphatically the appellant claimed her actions are a result of the advice given by this honourable court in **Lucy Edward vs Aisha Juma Lema, Civil Revision No. 3 of 2015** at

page 17, where the court stated if at all she was aggrieved was to go before the trial court which appointed the administratrix. Worse off she was not a party in Probate Cause No. 232 of 2005 hence she had to be made a party.

As for the matter before the Court of Appeal the appellant submitted, it is purely a matter of law which has nothing to do with the probate cause. Alternatively if at all it had impact in the probate, then the Respondent would have raised it at the Primary or District Court. All that the respondent is trying to do is to mislead the court.

In conclusion the Appellant reiterates that the matter is not res judicata because the appellant has never been a party to the Probate Cause No. 232 of 2005 and no court has made a decision of her right to inherit.

I have given due consideration to the submissions made by the parties and the trial court's records, the issue for determination is obvious, whether the subsequent application entertained by the Primary Court is res-judicata to the probate matter originally filed (former application).

Lord Somerveil in **Breenhalgh Mallard [1947]2 All E.R p. 255** said: -

“Res judicata for this purpose is not confined to issues which the Court is actually asked to decide but that it covers issues or facts which are so clearly part of the subject matter of litigation and clearly could be raised that it would be an abuse of the process of the Court to allow a new proceeding to be started in respect of them.”

The reasons behind the principle of *res judicata* are to ensure finality in litigation and protect an individual from endless litigations. See **Umoja Garage vs National Bank of Commerce Holding Corporation [2003] TLR 339** and the case of **Gerald Chuchuba vs. Rictor Itaga Seminary [2002] TLR 213**. Borrowing leaf from the cited cases, in order for the principle of *res judicata* to successfully operate, the following conditions must be proved, namely;

- i. There must be two suits, the former and 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 District Court found the matter is res judicata because the parties in Probate Cause No. 232/2005 and the parties in the present application are the same. Secondly, the subject matter is the same on the ground that the former subject matter was brought by Aisha Juma Lema to revoke the appointment of the respondent as administratrix and to be given a share in the deceased's estate. Further, they are litigating under the same title which is the estate of the deceased ZUBEDA SELEMAN.

Coming to the appeal at hand, the court directs its mind to ***whether the claim to be included as heir in the probate filed by the appellant had already been entertained in any court of law.***

The Appellant challenged the impugned decision on the grounds that, the matter is not res judicata because, ***first***, it

is only the Primary court through its decision dated 20th August 2020 that Hon. Claudi made a decision on whether she is to be recognised as heir and it was not on the issue of revocation of administratrix. **Secondly**, the first appellate court misinterpreted the decision by Hon. Kidini to mean that it was also recognizing the Appellant as the heir and **thirdly**, the Appellant's application at the primary court was a result of the decision by Hon. Mingwa J, where the Judge lamented, the appellant was a stranger to the matter.

The answer to the posed issue by this court is definitely a "NO". As earlier summarised the Appellant approached the District Court with Application (No.1/2008) after the respondent had been duly appointed by the trial court to be the administratrix of the estate of the late Zubeda Seleman. The appellant claimed the respondent being the administrator fraudulently distributed the deceased's estate to herself as if was the lawful or sole beneficiary thereto. The District Court in view thereof revoked the respondent's administrator and stated: -

"Therefore I hereby declare that, the properties of the late Zubeda Seleman, has not yet get administrator"

The court had also ruled: -

"Therefore I hereby dismiss Lucy Edward Lema of being the administrator of the estate and she should not interfere the estate of the deceased or by his agent, and everything she contributed or developed by the respondent should be their own costs."

This decision was overturned by the High Court (Civil Revision No. 3/2015) which among other things declared the appellant a stranger to the proceedings.

On the other hand the decision by Hon. Claudi dated 20/08/2020 which I wish to quote the first paragraph for ease reference states: -

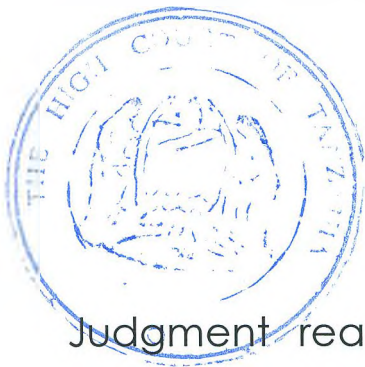
*"Shauri hili linatokana maombi yaliowasilishwa mbele ya Mahakama hii na mleta Maombi **Aisha Juma Lema** dhidi ya msimamizi wa mirathi ya marehemu **Zubeda Selemani** ambaye ni **Lucy Edward Lema** akiomba na yeye atambulike kama mmoja wa mrithi wa mali ya marehemu **Zubeda Selemani**."*


It is thus obvious that in the subsequent application the applicant (now appellant) was beseeching the trial court to be recognised heir of the deceased (Zubeda Selemani) properties.

For that the decision of the Hon. Claudi dated 20/08/2020 cannot be res judicata because the subject matter was different with the previous one in the same probate.


As for the claim that the administratrix has already distributed the estate, it does not bar the appellant from claiming to be recognized one of the heirs of the said estate. More so upon perusal of the record, there is no order suggesting the probate matter has been closed.

Since the raised issue has been answered in negative, I proceed to allow this appeal, quash and set aside the judgment, order and decree of the District Court in Appeal No. 12/2020. Considering the nature of the parties I make no orders for costs.





B. R. MUTUNGI
JUDGE
27/5/2021

Judgment read this day of 27/5/2021 in presence of Fatuma Haji (the appellant's aunt) and the respondent in person.


B. R. MUTUNGI
JUDGE
27/5/2021

RIGHT OF APPEAL EXPLAINED.


B. R. MUTUNGI
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27/5/2021