

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY
AT MWANZA**

PROBATE APPEAL NO. 20 OF 2020

*(Arising from Probate Appeal No. 11 of 2020 of the District Court of Nyamagana,
Originating from Probate and Administration Cause No. 103 of 2006 of Urban Primary
Court)*

ADAM AMIN IBRAHIMAPPELLANT

VERSUS

HAPPY IBRAHIM AHMED.....RESPONDENT

JUDGEMENT

Date of last order: 21/05/2021

Date of judgement: 30/6/2021

F. K. MANYANDA, J.

This is a Probate Appeal by **Adam Amin Ibrahim**, whom sometimes in this judgement will simply be referred to as "the appellant", after been dissatisfied by a decision of the District Court of Nyamagana in its appellate jurisdiction in Probate Appeal No. 11 of 2020, delivered by Hon. J. Jagadi, Resident Magistrate, on 09/09/2020.

The Appellate District Court revoked the Appellant's appointment as administrator of the estate of his father, the **Late Amin Ibrahim Ahmed** in



Probate and Administration Cause No. 103 of 2006 by the Urban Primary Court, Mwanza.

This matter stems from the estate of **Late Ibrahim Ahmed Hamza** who died testate on 10/01/1994. The said **Late Ibrahim Ahmed Hamza** was a father of the Respondent and grandfather of the Appellant. After his death, **Zena Yusuph**, the deceased's wife and mother of the Respondent, was, on 03/10/1995, appointed the administratrix of her husband's estate in Probate and Administration Cause No. 102 of 1995. Among of the properties left by Late Ibrahim Ahmed Hamza is a house situated on Plot No. 205, Block "U", Rwagasore Area in Mwanza City which is the subject of controversy in this appeal. The children who survived the Late **Ibrahim Ahmed Hamza** included **Amin Ibrahim Ahmed Hamza**, **Ismail Ibrahim Ahmed Hamza** and, **Happy Ibrahim Ahmed Hamza**.

It is the story by the Appellant that **Zena Yusuph** using a will left by her late husband, distributed the estate giving the house in issue to her son, **Amin Ibrahim Ahamed**, the Appellant's father. Then, it happened that the said **Amin Ibrahim Ahmed** also passed away intestate on 22/09/2004, as a result **Halima Ramadhan** (the Appellant's mother and wife of **Amin Ibrahim Ahmed**), instituted Probate and Administration Cause No. 103 of



2006 in the same Urban Primary Court applying to be appointed administratrix of the estate of husband. She was appointed as such on 31/10/2006. **Halima Ramadhani** listed the house in issue as part of the estate of her demised husband **Amin Ibrahim Ahmed**.

Later on, **Halima Ramadhani** passed away on 23/09/2009 and **Happy Ibrahim Ahmed**, who was **Amin Ibrahim Ahamed's** sister, was appointed the administratrix of estate of her brother the **Late Amin Ibrahim Ahmed** on 28/03/2013 in Probate and Administration Cause No. 103 of 2006. **Happy Ibrahim Ahmed** did not list the house in issue as part of the estate of Late **Amin Ibrahim Ahmed**, the Appellant's father.

The Appellant was dissatisfied by exclusion of the house from the estate of his father, hence, he objected in Probate and Administration Cause No. 103 of 2017 of the same Urban Primary Court, to the appointment of the Respondent and, in lieu thereof, he requested to be appointed the administrator of the estate of his demised father as he has now grown up. On 29/09/2017, the objection was rejected by Hon. Missana, RM, for want of merit.

The Appellant returned again to the Urban Primary Court this time via Probate and Administration Cause No. 103 of 2006 objecting to the



appointment of **Happy Ibrahim Ahmed**. On 29/06/2020 **Happy Ibrahim Ahmed's** appointment as administratrix of the estate of her brother **Late Amin Ibrahim Ahmed** was annulled by the Urban Primary Court in a decision by Hon. Butambala, RM, and the Appellant, **Adam Amin Ibrahim**, was appointed the Administrator of his father's estate, it also ordered division of the house in issue. This decision triggered the appeal by **Happy Ibrahim Ahmed** to the District Court in Probate Appeal No. 11 of 2020.

The District Court in its appellate jurisdiction heard the Probate Appeal and decided in favour of the Respondent **Happy Ibrahim Ahmed**, it found that the will was unchallenged and placed the house in issue per the will under the estate of **Late Ibrahim Ahmed Hamza**, after finding that the appointment of **Zena Yusuph** was still in-force and ordered inventory be filled within 60 days.

Further, it nullified Probate Cause Nos. 106 of 2006 and 103 of 2017 on ground that they were wrongly entertained and validated Probate Cause No. 102 of 1995 which was petitioned by **Zena Yusuph** who is still alive.

The gist of controversy in this matter is that while the Respondent claims that the house on Plot No. 205 Block "U" Rwagasore Area is part of the

estate of her father, **Late Ibrahim Ahmed Hamza** under administration by **Zena Yusuph**, on the other hand, the Appellant claim that the said house belongs to the estate of his father, **Late Amin Ibrahim Ahmed**, after inheriting it from his father **Late Ibrahim Ahmed Hamza**.

With that back ground let me now revert to the appeal. The Appellant has raised the following five grounds of appeal namely: -

1. That, the Appellate Court erred in law and facts by consolidating two different cases of different parties and decided the same without availing the parties the right to address the same to the Court;
2. That, the Appellate Court misdirected itself in law by determining [the] Appeal and order in favour of Respondent herein contrary to evidences (sic) on records which were never challenged by the Respondent;
3. That, the Appellate Court erred in law and facts by nullifying Probate causes number 106 of 2006 and 103 of 2017 which were not an issue before Appellate Court without afforded (sic) parties right to address on the same;



4. That, the Appellate Court erred in law by order (sic) proper division on landed property at Plot No. 205, Block "U" Rwagasore Street, Mwanza while it has no jurisdiction; and
5. That, the Appellate Court erred in law and facts by deciding matter before it relied on document which was never properly tendered and admitted during the trial as well as in first appeal.

Hearing of the appeal was conducted by way of written submissions. The written submissions by the Appellant were drawn by **Mr. Nicolaus Majebele Mayenga**, learned Advocate, but filed by the Appellant in person while the submissions by the Respondent were drawn and filed by **Mr. Constantine Mutalemwa**, learned Advocate.

The Appellant argued grounds number one and three together, grounds two and four together and ground five separately. Arguing in support of grounds number one and three, the Appellant contended that it was wrong for the district court to determine issues other than those it was called for to determine. The district court was called to determine illegality or otherwise of the trial court in determining ownership of the Plot No. 205 lock "U", Rwagasore of which it was not seized with jurisdiction but it ended up



ordering the house in issue to be put under proper division and recognition of legal capacity of **Zena Yusuph** whom it directed to submit inventory within 60 days.

It was the views of the Appellant that those matters were not argued by the parties. He pointed out that though the district court has revisional powers, the same cannot be exercised where there are specific issues calling for determination. He cited the case of **Mwanahawa Muya vs. Mwanaidi Marco**, [1992] TLR 78 where it was inter alia held that it is wrong, indeed improper, for the High Court to resort to its revisional powers where there are specific issues calling for determination by the court.

Moreover, the Appellant argued that the first appellate court denied the parties of their right to be heard when it consolidated and nullified Probate Causes numbers 106 of 2006 and 103 of 2017 without hearing the parties.

On the other hand, the Respondent's Counsel argued opposing grounds one and three of the appeal that the appointment of **Zena Yusuph** in Probate Cause No. 102 of 1995 has never been nullified or revoked to date, therefore, the district court only extended her appointment requiring her to finalize the probate proceedings. The Counsel was of the view that since the house in



issue was not yet transferred to the Appellant's father, the same could not form part of the estate of **Late Amin Ibrahim Ahmed**.

Let me determine the controversy issue in grounds one and three. The complaints in these grounds are premised in two limbs. The first limb is that the Appellate District Court went wrong when it determined issues other than those it was called for to determine such as. It was called to determine illegality or otherwise of the trial court in determining ownership of the house on Plot No. 205 Block "U", Rwagasore of which it was not seized with jurisdiction, but it ended up nullifying Probate Cause No. 103 of 2006, Miscellaneous Cause No. 103 of 2006 and Probate Cause No. 103 of 2017 and ordering the same house to be put under proper division and recognition of legal capacity of **Zena Yusuph**. The Respondent supports the move taken by the district court contending that it only extended the appointment of **Zena Yusuph** in Probate Cause No. 102 of 1995 requiring her to finalize the probate proceedings including distributing the house in issue.

This Court is of opinion that there is merit in this argument. I say so because the Probate Cause No. 103 of 2006, Miscellaneous Cause No. 103 of 2006 and Probate Cause No. 103 of 2017 concern the estate of **Late Amin Ibrahim Ahamed Hamza**, the Appellant's father, about appointment of



administrators rather than inclusion or exclusion of the house on Plot No. 205 lock "U", Rwagasore Area.

From the record of this matter, the controversy originates from Probate and Administration Cause No. 103 of 2006 which was filed by the wife of Late **Amin Ibrahim Ahmed**, namely **Halima Ramadhani** for purposes of protecting the interests of her children as they were minor by then. When the said **Halima Ramadhani** also passed on, the Respondent took over and successfully applied to be appointed administratrix of the estate of her brother **Late Amin Ibrahim Ahmed** for the same purposes of protecting the interests of the children of her demised brother, including the Appellant.

When the Appellant grew up, felt that their interest was not been well taken care, hence, he filed a fresh petition, Probate and Administration Cause No. 103 of 2017 intending to have the appointment of the Respondent, who is his aunt, revoked. His move was not successful as it was dismissed for want of merit. He resorted to Miscellaneous Probate Application No. 103 of 2006 in which he was successful, the appointment of the Respondent was revoked and himself appointed the administrator of his demised father's estate.



It is, therefore, clear that Probate Cause No. 103 of 2006, Miscellaneous Cause No. 103 of 2006 and Probate Cause No. 103 of 2017, all concerned the estate of **Late Amin Ibrahim Ahmed**, the son of the said **Late Ibrahim Ahmed Hamza**. The house on Plot No. 205 Block "U" Rwagasore Street, Mwanza was a subject matter in Probate and Administration No. 102 of 1995 in respect of the estate of Late Ibrahim Ahmed Hamza.

Whether the house on Plot No. 205 Block "U" Rwagasore Street, Mwanza the Probate Cause No. 103 of 2006, Miscellaneous Cause No. 103 of 2006 and Probate Cause No. 103 of 2017 formed a subject matter was not a ground for district court to annul the proceedings and judgements in the Probate Cause No. 103 of 2006, Miscellaneous Cause No. 103 of 2006 and Probate Cause No. 103 of 2017. I say so because, the estate of Late Amin deserved to have an administrator because he died intestate. In order to have a legally qualified person to collect debts and assets and distribute among the heirs was within the legal requirement. Therefore, it was wrong to annul those proceedings. The District Court was derailed due to contest by the Appellant and his mother **Late Halima Ramadhani** of the house on Plot No. 205 Block "U" Rwagasore Street, Mwanza in the Probate Cause No. 103 of 2006 which the Respondent resists. My views are that even in absence of the said house, the estate of **Late Amin Ibrahim Ahmed** required an administrator to deal



with the existing properties because his heirs were still children. The need became even higher after passing on of their mother **Halima Ramadhani**, hence the Respondent took over.

In this case there was a specific issue which the Appellate District Court was required to determine. It was about inclusion or exclusion of the house in issue in the estate of **Late Amin Ibrahim Ahmed**. The Appellate District Court was not justified to annul those proceedings the issue of inclusion or exclusion of the house in issue in the estate of **Amin Ibrahim Ahmed Hamza** was a factual issue which need evidence analysis and evaluation for its determination. This is what was before the Appellate District Court.

In the case of **Mwanahawa Muya vs. Mwanaidi Marco**, [1992] TLR 78 the appellant was granted letters of administration by the Resident Magistrates' Court. Despite this grant, the respondent also successfully petitioned for letters of administration in the High Court in respect of the same estate which granted the same. Dissatisfied the appellant filed an application in the High Court challenging the grant of letters of administration to the present respondent and prayed the same to be revoked. The High Court judge instead of addressing the issue, invoked revisional power *suo moto* and declared the proceedings in the Resident Magistrates' Court null and void. The



Court of Appeal among others looked into the propriety of invoking revisional jurisdiction *suo moto* by the High Court over the proceedings of the lower court. It was held *inter alia* that: -

"it is wrong, indeed improper, for the High Court to resort to its revisional powers where there are specific issues calling for determination by the court."

Relating this authority to the instant matter, the issues which was before the Appellate District Court was specific, it was imperative for it to determine inclusion or exclusion of the house on Plot No. 205 Block "U" Rwagasore Street, Mwanza instead of invoking revisional powers and annul the probate of the estate of **Late Amin Ibrahim Ahmed** which is an independent estate from the estate of **Late Ibrahim Ahmed Hamza**.

Moreover, the Appellant argued that the first appellate court denied the parties of their right to be heard when it consolidated and nullified Probate Causes numbers 106 of 2006 and 103 of 2017. The Respondent did not say a word about this issue. It is true from the record, that the district court raised this issue *suo motu* and using its revisional powers nullified the same. In its words, it stated as follows: -

"It was in my surprise that all these multiple probate causes were seeking new appointment letter of

administration, but undisputed facts that Zena Yusuph was legally appointed by the court of competent jurisdiction and still alive, though the learned counsel for the respondent submitted on Cause No. 102 of 1995 that its decision was nullified by the High Court, nevertheless, I find no record to the averments, subject to this view, probate causes No. 106 of 2006 and 103 of 2017 were wrongly entertained by the court, it is my considered opinion that both cases are hereby nullified. I therefore validate the decision on probate cause No. 102 of 1995."

Sure, as it can be seen from the above excerpt, the Appellate District Court decided to curtail Probate and Administration No. 103 of 2006 and No. 103 of 2017 which concerned with estate of **Late Amin Ibrahim Ahmed** basing on appointment of **Zena Yusuph** who was administratrix of the estate of **Late Ibrahim Ahmed Hamza** Probate and Administration Cause No. 102 of 1995.

He did so *suo motu* without summoning the parties to address him on the relations between Probate and Administration Causes No. 103 of 2006 and No. 103 of 2017 on one side and Probate and Administration Cause No. 102 of 1995 of the other hand.



The right to be heard is a basic and constitution right, violation of which vitiates the proceedings and judgement. There is plethora of authorities on this principle of law. In the case of **Hai District Council & Another vs Kilempu Kinoka Laizer & Others**, Civil Appeal No.110 of 2018 (unreported) insisting on the said principle the Court of Appeal of Tanzania has recently in its judgement delivered on stated as follows.

*"Since that is a fundamental right, its breach had the effect of vitiating the proceedings because it offended the principle of natural justice. In the case of **Abbas Sherally and Another v. Abdul Fazalboy** Civil Application No. 33 of 2002 (unreported), the Court observed as follows:*

'The right of a party to be heard before adverse action or decision is taken against such party has been stated and emphasized by the courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice.'



See also the cases of **DPP v. Sabinis Inyasi Tesha and Another** [1993] TLR 237 and **Mbeya - Rukwa Auto Parts & Transport v. Jestina George Mwakyoma** [2003] TLR 251. In the latter case, the Court had this to say:

*'It is a cardinal principle of natural justice that a person should not be condemned unheard but fair procedure demands that both sides should be heard, **audi alteram partem**. In **Ridge v. Baldwin** [1964] AC 40, the leading English case on the subject it was held that a power which affects rights must be exercised judicially, i. e. fairly. We agree and therefore hold that it is not a fair and judicious exercise of powers, but a negation of justice, where a party is denied a hearing before its rights are taken away. As similarly stated by Lord Morris in **Furnell v. Whangarei High School Board** [1973] AC 660, 8natural justice is but fairness writ large and juridically.'*

In yet another recent judgement of the Court of Appeal of Tanzania delivered on 30/04/2021 of **Hassan Kibasa vs Angelesia Changa**, Civil Appeal No. 405.13 of 2018 where the High Court, at first, dismissed the

preliminary objection on the ground that it was misconceived, then, proceeded to raise the question of incompetence *suo motu* in the course of composition of the ruling and ultimately struck out the matter on that ground without hearing the parties. The Court of Appeal citing with approval the case of **OTTU on Behalf of P.L. Assenga and 109 Others vs. AMI (Tanzania) Ltd**, Civil Application No. 44 of 2012 (unreported) held that:

"We think the course taken by the Court in raising and deciding a point of law when composing the ruling which affects the rights of the parties without affording them opportunity [to be heard] is a violation of one of the principles of natural justice, namely, the right to be heard - audi alterem partem."

In the above decision, the Court referred to the holding in its earlier decision in **Abbas Sherally and Another v. Abdul S.H.M. Fazalboy**, Civil Application No. 33 of 2002 (unreported) that:

"The right of a party to be heard before adverse action or decision is taken against such a party has been stated and emphasized by the courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard,



because the violation is considered to be a breach of natural justice".

See also: **National Housing Corporation v. Tanzania Shoe Company and Others** [1995] TLR 251; and **Director of Public Prosecutions v. Sabinis Inyasi Tesha and Another** [1993] TLR 237 on the right to be heard as a peremptory principle.

On the basis of the above stated position, it follows therefore that, based on the above premise, there is merit in grounds one and three of the appeal, the Appellate District Court was not correct in law to nullify probate causes which were related to estate of **Late Amin Ibrahim Ahmed Hamza**.

In respect of grounds two and five the complaint is that the Appellate District Court erred in law and facts in determining the appeal in favour of the Respondent contrary to evidence and relying on will which was improperly tendered and admitted. The Appellant not only that he did not elaborate where the Appellate District Court went wrong in law but also did not elaborate how was a will admitted and how it was wrong.



This Court agrees with the submissions by the Counsel for the Respondent that the Appellate District Court after analyzing the evidence before it, and properly found that although there was a number of probate causes involving the parties. However, it was not its duty to nullify them because they concerned a different estate as explained above. This Court agrees also with the submissions by the Counsel for the Respondent that the will forms the basis of distribution of the house in controversy which **Zena Yusuph** is required to execute. The Appellant argues that it was wrong for the Appellate District Court to act on the 'will' because it was improperly admitted but at the same time, the Appellant is arguing that the house was allocated to his father **Late Amin Ibrahim Ahmed Hamza.** by **Zena Yusuph** using the same 'will'.

This Court fails to associate with the Appellant on that contention; this Court finds as argued by the Respondent's Counsel, that legally, the house in issue, did not pass to the estate of **Late Amin Ibrahim Ahmed Hamza.** The reason is that **Zena Yusuph**, the administratrix of the estate of **Late Ibrahim Ahmed Hamza** has not completed executing administration of the estate as Forms V and VI have not been filed in the appointing court. The argument by the Appellant is that, the said Zena Yusuph distributed the house in issue to **Late Amin Ibrahim Ahmed Hamza** is unsupportable in law. This



Court is of firm opinion that the Appellate District Court rightly held that the house in controversy was still under the hands of **Zena Yusuph**. It may be true that **Zena Yusuph** might have distributed the house to Late Amin Ibrahim Ahmed Hamza yes, but if there was any such distribution, the same was still at family arrangement which is not legally recognized until inventory forms V and VI for true account of statement are filed in the court which appointed her or him.

Equally, this Court finds that the Appellate District Court rightly extended the time for 60 days within which **Zena Yusuph** was required to complete distributing the estate, in case she already distributed, as contended by the Appellant, then she is to complete the exercise by filing Forms V and VI according to the law. Consequently, the act of the Appellate District Court directing division of the house, meant that **Zena Yusuph** must complete her duty. The Appellate District Court reached that decision after analyzing the evidence before it. Grounds two and five have no merit.

The last ground is number four which questions the jurisdiction of the Appellate District Court contending that it erred in law to order proper division of the house at Plot No. 205, Block "U" Rwagasore Street, Mwanza while it has no jurisdiction. As submitted above, the Appellate District Court did not



assume jurisdiction of the Primary Court which handled the original Probate Cause but placed the house in issue in hands of **Zena Yusuph**, the administratrix of the Estate of **Late Ibrahim Ahmed Hamza** which is in the Probate Cause No. 102 of 1995 of the Urban Primary Court of Mwanza. Primary Courts have the jurisdiction in matters of administration of estates as provided by Paragraph 2(a) and (b) of the Fifth Schedule to the Magistrates' Courts Act, [Cap. 11 R. E. 2019]. This ground has no merit also.

In the upshot, this appeal partly succeeds as far the act of nullification of Probate Cause No. 103 of 2006, Miscellaneous Cause No. 103 of 2006 and Probate Cause No. 103 of 2017, an act which this Court holds that it was illegal. Otherwise, the Appellate District Court acted rightly in law and the circumstances of this case when it placed the house in issue in hands of **Zena Yusuph**, the administratrix of the Estate of **Late Ibrahim Ahmed Hamza** which is in the Probate Cause No. 102 of 1995 of the Urban Primary Court of Mwanza for completion of execution of administration by the said **Zena Yusuph** and file Forms No. V and VI.

Consequently, I make the following orders: -

1. The appeal is partly allowed;



2. The order by the Appellate District Court which nullified Probate Cause No. 103 of 2006, Miscellaneous Cause No. 103 of 2006 and Probate Cause No. 103 of 2017 is hereby quashed and set aside;
3. The order of the Appellate District Court which placed the house on Plot No. 205 Block "U" Rwagasore Street, Mwanza in hands of **Zena Yusuph**, the administratrix of the Estate of **Late Ibrahim Ahmed Hamza**, in the Probate Cause No. 102 of 1995 of the Urban Primary Court of Mwanza is hereby upheld;
4. **Zena Yusuph**, the administratrix of the Estate of **Late Ibrahim Ahmed Hamza**, is directed to comply with order of the Appellate District Court which required her to finalize execution of the pending administration of Probate Cause No. 102 of 1995 of the Urban Primary Court of Mwanza by filing Forms V and VI within 60 days from the date of this judgement.
5. Each party to bear its costs

Order accordingly.




F. K. MANYANDA,
JUDGE
30/06/2021

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