IN THE HIGH COURT OF TANZANIA

(DODOMA DISTIRCT REGISTRY)

AT DODOMA

PC. PROBATE APPEAL NO. 6/2019

(From Dodoma District Court in Civil Revision 06/2017, Original Probate Cause No. 119/2015 Dodoma Primary Court)

AZIZI SHAMTE ALLY .....APPELLANT

VERSUS

ABDULMALIK FERUZI & 14 OTHERS .....RESPONDENTS

JUDGMENT

Date of last Order: *16/08/20/21*
Date of Judgment: *18/08/2021*

A. Mambi, J.

This appeal emanates from the revision of proceedings and Judgment of the Primary court made by the District Court of Dodoma through civil Revision No. 06/2017. The District Court nullified the proceedings and Judgment of the Primary court and ordered the matter to be determined afresh (de-novo).

The appellant was aggrieved by the decision of the District Court and filed his petition of the appeal on the following one ground:

That the learned magistrate erred in law and fact when it failed the evidence in record and misinterpreted the responsibilities of an administrator of the deceased estate.

During hearing the appellant was represented by the learned Counsel Mr Msafiri while the respondents were was represented by the learned Counsel Mr John.

Addressing the ground of appeal, the learned Counsel for the appellant briefly submitted that, the District Court wrongly ordered the matter de-novo since it failed to evaluate the evidence tendered at the Primary Court. He argued that since the parties at the primary court did not object the decision of the co-administrator to withdraw it meant that all parties agreed to be represented by one administrator. He averred that, even the subject matter for the beneficiaries was only one house which has already been sold and the money was equally divided to all beneficiaries. He argued that to order the matter to start afresh will cause more injustice.

In response, the respondents' counsel briefly submitted that the District Court was right on its decision since the other beneficiaries were not represented by their administrator.

I have considerably gone through the ground of appeal by the appellant and submission by both parties. I have also gone through the records from both the trial primary court and District court. One of the key issue is whether there was any justification for the trial court to order the matter be tried de-novo or not.. It is on the

records that the District court made the decision to order the matter be determined afresh by the trial court without justification and reasons. The court also failed to consider the status of the deceased estate before making its decision. It is on the records that the deceased estate that is one house has already been sold a long time now and the money was divided to all beneficiaries. In my view it was wrong to order the mater be determined de-novo since this will create more injustice to all parties taking into account that subject matter that is the deceased house was already sold a long time ago. The question to be answered is, was it right for the trial court to order the matter be determined de novo or not?. Indeed there certain principles that guides the court in deciding as whether to order the matter de novo or not. It is trite law that a retrial cam only be ordered when the original trial was illegal or defective. In this regard retrial or de-novo basing on the principle that each case must depend on its particular facts and circumstances. This means that an order for retrial should only be made where **the interests of justice require it and should not be ordered where it is likely to cause an injustice to any party.** This was well articulated by the court in ***Fatehali Manji V.R, [1966] EA 343***, cited by the case of ***Kanguza s/o Machemba v. R Criminal Appeal NO. 157B OF 2013***, where the Court of Appeal of East Africa observed that:

"...in general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which

the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its particular facts and circumstances and an order for retrial should only be made where ***the interests of justice require it and should not be ordered where it is likely to cause an injustice to any party.***

It is on the records that at the beginning there were two administrators but before the matter was determined one administrator withdrew himself and no any party objected until the matter was finally and conclusively decided. This implied that the parties braced one administrator to proceed and indeed there is no mandatory requirement that there must be two administrators. The law allows one or two administrators to administer the deceased estates depending on the agreements of the beneficiaries in their meeting. Indeed even after the house of the deceased was sold all beneficiaries agreed to divided the many and they received the money. If some of the beneficiaries were not satisfied why didn't they object at the primary court and why didn't they object the sale of the deceased estate?. All these circumstances show that the interest of justice did not require the District court to oerder the matter de novo.

My perusal from the judgment of the District Magistrate also reveals that the Magistrate made the decision without reasons contrary to the principles of the law. It is also the settled principle of law that the judgment must show how the evidence has been evaluated with reasons. It is trite law that every judgment must contain the ***point or points for determination, the decision thereon and the reasons for the decision***. Failure to do so left a lot of questions to

be desired. The laws it is clear that the judge or magistrate must show the reasons for the decision in his/her judgment. This is found under ORDER XXXIX rule 31 of the Civil Procedure Code, Cap 33 [R.E2019] which provides for the Contents, date and signature of judgment. The provision states that:

> *"The judgment of the Court shall be in writing and shall state–*
>
> *(a) **the points for determination**;*
>
> *(b) the decision thereon;*
>
> *(c) **the reasons** for the decisions; and*
>
> *(d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled, and shall at the time that it is pronounced be signed and dated by the judge or by the judges concurring therein".*

Under that section the word **"shall"** according to the law of Interpretation Act, Cap1 [R.E.2019] implies mandatory and not option. This means that any judgment must contain point or points for determination, the decision thereon and the reasons for the decision. See also the decision of the court in ***Jeremiah Shemweta versus Republic [1985] TLR 228,***

Indeed my finding reveals that the administrator properly filed the inventory and the deceased properties were already distributed and nothing left. It is on the records that the primary court properly appointed the administrator of the deceased estate after the clan meeting decision which involved all parties. The respondents and

other beneficiaries never objected earlier when the other administrator withdraw from his duties at the earliest stage until the remaining administrator had already distributed the deceased properties to the deceased heirs including the respondents. Looking at the judgment made by the District Court, it is clear that the Court did not properly go through the judgment made by the primary and just rushed to make the decision of ordering trial de novo without reasons. It should be noted that the decision to order trial de novo must be judiciously made without causing any injustice to any party. The court may only make that decision of trial de-novo if such decision can lead to injustice to the parties especially beneficiaries in the matter at hand. Each case must depend on its particular facts and circumstances and an order for retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause an injustice to any party. There are various authorities that have underlined the principles and circumstances to guide the court in determining as to whether it is proper to order retrial or *trial de novo* or not. See the decision of the court in ***Fatehali Manji V.R, (supra).***

..."

I have no reason to depart from the above authorities since an order for retrial can only be made where the interests of justice requires it and should not be ordered where it is likely to cause an injustice to any party. In my considered and firm view, in our case at hand any order for trial de novo will end up defeating the justice since all

deceased properties were already properly distributed to the beneficiaries. Ordering trial de novo will mean ordering the beneficiaries to return back all properties divided to them which in my view will end up with chaos among the beneficiaries rather than maintain harmony among them while still having grieves of loss of their head of the family (the deceased). I am of the settled view that it was improper for the District Court to order for retrial and the interests of justice did not require to the court to does so, since doing so will in my view create more likelihood of causing an injustice to the beneficiaries and I hold so.

In the absence of the evidence to show that the administrator misused and mishandled the deceased estate, I am of the considered view that decision of the District Court was wrongly made. I entirely agree with the appellant's Counsel that there was no need of ordering the trial de novo since making so will create more injustice. Indeed it has now taken a long time before the respondents disputed the appointment of the administrator. The administrator at the District Court did not show any evidence that the remaining administrator misused the deceased estates and there is no any other beneficiary who has ever claimed any allegation on the misuses of the deceased properties. The Court in ***NATIONAL BANK OF COMMERCE LTD Vs DESIREE & YVONNE TANZAIA & 4 OTHERS, Comm. CASE NO 59 OF 2003( ) HC DSM,*** had once observed that:-

"The burden of proof in a suit proceeding lies on their person who would fail if no evidence at all were given on either side."

Ordering the matter be freshly determined by the Primary court would mean that the new administrator or administratix will be appointed to administrate the properties that were already distributed and used by the beneficiaries a long time. This means that there will be nothing to be re-administered by the newly appointed administrators since the deceased estate has already been divided.

It is trait law that before any appellate court makes an order for retrial or trial de novo, the court must find out as to whether the original trial order was illegal or defective and whether making such order (retrial or trial de novo) and will create more injustice to any party. In the matter that was at the District, I have not seen the reasons advanced by the Court to justify the matter to be re-determined by the Primary court.

It should also be noted that the matter has taken a long time since the properties such as money were distributed by the administrator who was legally appointed by the beneficiary and approved by the Primary Court, and since this court has uphold the decision of the primary court, it means that the status of an administrator stands valid. For reasons I have given above, I am of the settled view that the ground of appeal before hand is meritorious. I thus allow the appeal basing on reasons I have stated. The proceedings,

Judgement and any other order of the District Court are set aside. The Decision of the Primary court is upheld.

Since the Parties are related, this court orders no cost and each party to bear their own cots. It is hereby so ordered.

Dr. A. J. MAMBI

JUDGE

18/08/2021

Judgment delivered in this 18th day of August, 2021 in presence of Mr Paschal Msafiri Advocate for the Appellant who also hold brief for Mr. John Kidando Advocate for the Respondent.

Dr. A. J. MAMBI

JUDGE

18/08/2021

Right of appeal explained.

Dr. A. J. MAMBI

JUDGE

18/08/2021