

IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

PROBATE APPEAL NO. 14 OF 2021

(Appeal from judgment of the District Court of Misungwi District at Misungwi (E.R. Marley, SRM) dated 28th of May, 2021 in Probate Appeal No. 2 of 2021)

BENARD SERIKALIAPPELLANT

versus

VALERIUS THOMAS MUNEGENARESPONDENT

JUDGMENT

9th & 30th September, 2021

RUMANYIKA, J.:

The 2nd appeal is with respect to decision of Misungwi district court dated 28/5/2021 on an estate (23 acres of land) of the late Nkudugwa Malangahe Ngelela (the deceased), the court having had upheld decision of Bukumbi primary court (the probate court) dated 24/3/2021 but Benard Serikali (the appellant) is aggrieved.

Unlike the appellant who had service of Mr. Nasimire learned counsel, Valerius Thomas Munegena (the respondent) appeared in person. I heard them by way of audio teleconference through mobile numbers 0755 329 001 and 0754 389 820 respectively.

The appellant had one ground namely; the learned senior resident magistrate improperly confirmed appointment of the respondent as administrator of the estate.

Mr. Nasimile learned counsel submitted; **(a)** that if anything, the letters granted by the probate court on 3/1/2020 to the respondent only concerned with estate of Mnegeni Nkundugwa and not that of Nkundugwa Malagahe Ngelela **(b)** having visited the locus in quo (the respective grave yard), the probate court had reduced itself into a witness rather than an adjudicator (case of **Nazar M.H. Ladak v. Gulamal Fazal J. Mohamed** (1980) TLR 29. Leave alone the doubts as to who between Mnegeni Nkundugwa and Nkundugwa Malagahe Ngelela was buried there **(c)** during his testimony the respondent did not swear/affirm therefore the omission vitiated the evidence (case of **Catholic University of Health and Allied Sciences (CUHAS) vs Epiphania Mkunde Athanase**, Civil Appeal No. 257 of 2020 (CA) unreported **(d)** the rules of procedure were not complied with it contravened the provisions of Item 2 Part II of the Magistrate's Court Act Cap 11 RE. 2019 (the MCA). That the 1st appeal court should have ordered for additional evidence much as also contrary to section 7 (2)

of the MCA and Rules 3 and 4 of the GN No. 2/1988 the probate court did not invite assessors to give opinion. That is all.

In reply, the respondent submitted that the deceased died on 13/12/1996 therefore one and the same deceased and estate irrespective of variation of the names. That counting from 13/12/1996 he applied for letters say 25 years later, he was properly appointed and granted the letters therefore there was nothing upon which to fault the 1st appeal court much as the alleged Nkudugwa never ever existed save for the alleged alterations of the names on the tombstone.

Be it 1/7/1948 as alleged by the appellant or according to the respondent on 13/12/1996 yes, one and the same deceased, granted. But all the same by 2020 the probate cause was but instituted far beyond the prescribed limitation period by all standards. It is very unfortunate that in any case no extension of time was sought and granted. Had the 1st appeal court asked the parties to address it on the crucial issue the court would have arrived at a different conclusion much as it is settled principle of law that limitation period goes to jurisdiction of the court. Now that without extension of time being sought and granted to parties the probate court

had no jurisdiction, it therefore goes without more words that the first appeal court acted on a nullity suffices the point to dispose of the appeal.

Without prejudice to the aforesaid however, now that rightly or wrongly, deliberately or otherwise they had alleged two different death dates, the parties may have been referring to one and the same deceased yes, but until such time any one of them was proved wrong, common knowledge would tell that a deceased could not have died twice sometime in 1948 and, say 48 years later in 1996! On the tombstone the names of the deceased may have been altered may by unknown people yes, but with greatest respect on this one the two courts assumed both the role of expert of hand writing and archaeologist much as whoever human remains in the grave might be, no DNA analysis was carried out and reported to say the least. It follows therefore, unless the circumstances compelled presumptive death which is not the case here, essential as it was the role of any potential administrator of the estate was first of all to establish name of the deceased, with 100% certainty establish death and date then proceed to identifying the estate. It is very unfortunate that no one of the parties met the threshold suffice the 2 points to dispose of appeal.

In the upshot, the appeal is allowed. Decision and orders of the 1st appeal court are quashed and set aside respectively. The parties may wish to do the needful and start all over again. They are accordingly advised and orderd. It is so ordered.

Right of appeal explained.

S.M. RUMANYIKA
JUDGE
24/09/2021

Judgment delivered under my hand and seal of the court in chambers this 30/09/2021 in the absence of the parties.

S.M. RUMANYIKA
JUDGE
30/09/2021

