

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**  
**IN THE SUB-REGISTRY OF MUSOMA**  
**AT MUSOMA**  
**PC PROBATE APPEAL NO. 7 OF 2021**

**BIKARA ERASTO ..... APPELLANT**

**VERSUS**

**PENINA ERASTO JOSIA (Administrator of the  
Estate of the late Erasto Josia ..... 1<sup>ST</sup> RESPONDENT**

**SALOME ERAST JOSIA (Administrator of the  
Estate of the late Erasto Josia ..... 2<sup>ND</sup> RESPONDENT**

***(Appeal from the decision of the District Court of Musoma in  
Probate Appeal No. 12 of 2020)***

**JUDGMENT**

6<sup>th</sup> September and 2<sup>nd</sup> November, 2021

**KISANYA, J.:**

Bikara Erasto, the appellant filed an objection proceeding before the Musoma Urban Primary Court in Probate Cause No. 17 of 2016. He challenged the competence, propriety or legality of the appointment of the respondents, as administratrixes of the estate of the Late Erasto Josia Toga. His grounds of objection can be rephrased as follows:

1. That the respondents had failed to identify, collect and prepare an inventory and distribute the estate to the heirs.
2. That the respondents had sold some of the estates of the deceased in contravention of the order of the High Court (Mwanza District Registry) in Probate Appeal No. 6 of 2019.

3. That the primary court had no pecuniary jurisdiction to try the probate cause in question.

Upon hearing both parties, the trial court dismissed the objection proceeding for want of merit. Not amused, the appellant appealed to the District Court of Musoma at Musoma in Probate Appeal No. 12 of 2020. He lost the appeal.

Feeling that justice was not rendered to him, the appellant lodged this second appeal. He raised five grounds of appeal to challenge the decision of the District Court. I find no need of reproducing them due to the reason to be noted in this judgment.

It suffices to note here that, in course of reading the record pertaining to this appeal, the Court noticed two irregularities: *One*, the ruling of primary court was not signed. *Two*, the date of delivering the ruling of the primary court is not known.

In view of the said irregularities, when this matter came up for hearing, I invited the parties to address the Court on the competence of the first appeal before the District Court and this second appeal.

The appellant who appeared in person asked the Court to invite the respondents' counsel to react to the issue raised by the Court after which, if need arises, he would make a rejoinder.

Mr. Wambura Kisika, learned advocate who appeared for the respondents conceded that the proceedings of the primary court are tainted with irregularities which goes to the root of the case. The learned counsel pointed out that, it is not known as to when the ruling of the trial court was delivered and that, the original ruling signed by the trial magistrate and assessors is not available.

Referring to section 20(1)(b) of the Magistrates' Courts Act [Cap. 11, R.E. 2019], the learned counsel argued that appeal against the decision of the primary court arises when there is a decision passed by the Primary Court. He went on to argue that in terms of rule 3 of the Magistrates' Courts' (Primary Courts) (Judgment of Courts) Rules, GN. No. 2 of 1988, the judgment of the primary court is required to be signed by the trial magistrate and assessors. That said, he was of the firm view that, since there is no judgment signed by the assessors, the appeal before the District Court and this Court is incompetent.

On the way forward, the learned advocate moved the Court to nullify the judgment of the District Court and remit back the case file to the primary court for purposes of composing judgment.

The appellant supported the submissions by the counsel for the respondents.

On my part, I agree with Mr. Kisika that, an appeal to the district court is premised on the order or decision of the primary court. This is pursuant to section 20(1)(b) of the MCA. The question is whether there is an order or decision passed by the primary court in this case. According to section 7 of the MCA, the assessors who sat with the trial magistrate must take part in the decision making. The way the decision of the primary is arrived at is provided for under rule 3 of the Magistrates' Courts' (Primary Courts) (Judgment of Courts) Rules (supra) as follows:

*"3. (1). Where in any proceedings the court has heard all the evidence or matters pertaining to the issue to be determined by the court, **the magistrate shall proceed to consult with the assessors present, with the view of reaching a decision of the court.***

*(2) If all the members of the court agree on one decision, **the magistrate shall proceed to record the decision or judgment of the court which shall be signed by all the members.***

*(3) For the avoidance of doubt a magistrate shall not, in lieu of or in addition to, the consultations referred to in sub-rule (1) of this Rule, be entitled to sum up to the other members of the court."*

According to the above provisions, the trial magistrate and the assessors consult each in order to arrive at the decision of the primary court. Thereafter, the trial magistrate records the decision or judgment of the court if the members agree on one decision. In any case, the decision or judgment recorded

by the trial magistrate shall be signed by all members. Any decision which is not signed by the assessors who heard the matter cannot be termed as decision of the primary court.

Apart from being signed, the decision of the primary court is required to be pronounced in open court and dated as of the date it is delivered. This is pursuant to rule 53 (2) of the Primary Court Civil Procedure Rules, GN No. 310 of 1964 which provides:

*"Every decision shall-*

- (a) be in writing;*
- (b) be signed by the magistrate who heard the proceedings;*
- (c) be pronounced in open court; and*
- (d) be dated as of the day on which it is pronounced."*

The above cited provisions of the Magistrates' Courts' (Primary Courts) (Judgment of Courts) Rules and the Primary Court Civil Procedure Rules are couched in mandatory terms. Therefore, they must comply with by the primary court rules.

In the instant case, the objection proceedings were heard by a resident magistrate who sat with two assessors, namely, Mecky and Riziki. After hearing both sides on 3<sup>rd</sup> September 2020, the learned trial resident magistrate fixed the matter for ruling on 21<sup>st</sup> September 2020. It is on record that the judgment was not delivered on 21<sup>st</sup> September 2020 on the ground that the assessors were attending criminal sessions case at the High Court. The matter was then

fixed for ruling on 24<sup>th</sup> September 2020. The record does not show as to when the said ruling was delivered. However, the copy of judgment appended to the petition of appeal filed in the District Court displays that the judgment was read on 21<sup>st</sup> September 2020. This contradicts the proceedings which are to the effect that the ruling was adjourned to 24<sup>th</sup> September 2020.

I have noted further that the judgment appended to the petition of appeal filed in the District Court is alleged to have been signed by the trial magistrate and two assessors on 21<sup>st</sup> September 2020. Since the assessors were recorded absent, it is doubtful on whether they signed the ruling. Even if it is considered that they signed the ruling on 21<sup>st</sup> September 2020, the ruling duly signed by the assessors as members of the primary court is not in the case file.

From the foregoing, I am of the considered view that there is no decision passed by the primary court. For that reason, I agree with Mr. Kisika that the appeal before the District Court of Musoma could not arise for want of the decision of the primary court. This position was stated in **Patrick Boniphace vs R**, Criminal Appeal No. 2/2017 (unreported), when the Court of Appeal held as follows in a situation akin to this case:-

*"In the matter at hand, since the judgment of the trial court was not signed and dated by the trial magistrate who conducted the trial, there was no judgment to be appeal against before the High Court."*

Guided by the above position, the appeal before the District Court was incompetent. So is the present appeal which stems from the decision of the District Court. That is why I did not find it necessary to restate and consider the grounds of appeal.

To this end, I nullify the proceedings of the District Court of Musoma in Probate Appeal No. 12 of 2020, quash and set aside the judgment and decree thereon. As to the way forward, it is ordered that the case file to be is remitted back to the trial magistrate, Bwire- RM who is directed to compose and deliver the ruling after consulting the assessors (Mecky and Riziki). This being a probate matter, the Court makes no order as to costs.


It is so ordered.

DATED at MUSOMA this 2<sup>nd</sup> day of November, 2021.



  
E.S. Kisanya  
JUDGE

Court: Judgment delivered this 2<sup>nd</sup> day of November, 2021 in the presence of the appellant and in the absence of the respondent with notice of absence.

  
E.S. Kisanya  
JUDGE  
02/11/2021