

IN THE HIGH COURT OF TANZANIA
AT DAR ES SALAAM
CIVIL APPEAL NO. 76/2021
(Originating From Probate Appeal no. 1/2021 Kibaha District Court)

KASSIM MAGANGA KANUNGU.....APPELLANT

VERSUS

RUKIA ATHUMANI MSABAHA.....RESPONDENT

JUDGMENT

22/9/2021 & 10/11/2021

E.B. LUVANDA, J.

This is the second appeal after the appellant above named unsuccessful appealed to the district court. Essentially the appellant is unhappy with the decision of the district court affirming appointment of the respondent mentioned above as the administratrix of the estate of the late Catherine Malunguja Mvumbi.

In the memorandum of appeal the appellant raised five grounds of appeal, but technically the appellant is challenging the appointment of the respondent. The appeal was argued by way of written submission.

The first appellate court posed a point for determination being whether the respondent was properly appointed. The district court then held among others, I quote for appreciation, at page six of the typed judgment third paragraph in descending order,

'I have passed through the record of the primary court I have observed that the respondent applied to the court through filling a form No. 1 which is the requirement of the law Rule 3 of the Primary Courts Administration of Estate Rules GN No. 49 of 1971...'

With due respect, the learned resident magistrate did not glance properly the records of the primary court. Admittedly, on 2/10/2020 the respondent had filled form No. 1. But this was instigated by the fiat of the primary court magistrate who ordered the respondent to file an application Form No. 1 after sustaining the objection by the respondent. Part of the order of the learned resident magistrate-primary court read, I quote,

'Amri.

Ombi katika pingamizi limepokelewa kwa upande mmoja na Rukia Athumani anapewa nafasi ya kuleta maombi yake ya kuomba kuteuliwa kuwa msimamizi kama mwombaji No. 2"

This procedure is novel. The alleged rule 4(1) of The Primary Courts (Administration of Estates) Rules, GN. No. 49/1971, under which the above order was made, has nothing to do with the situation at hand. The said rule is all about filing of will by the applicant. But herein, a document

which was tendered by the respondent during hearing of her objection opposing the appellant to be granted administration, the trial court ruled that nowhere the deceased had expressed her wish that the respondent should be her executor or administer her estate. In other words, the deceased died interstate. To my view, after appearance by the respondent, the matter ought to proceed pursuant to the provisions of Rule 2 of GN No 49/1971, which provide, I quote,

"contention" in relation to a grant of administration, means the appearance of any person to oppose the application for the grant'

As such the proceedings ought to have been attended as contentious proceedings, on which the respondent could have been taken as an objector, and not to align the rival parties as claimant or applicant. Seemingly this was the reason as to why the appellant had boycotted to adduce evidence on 2/10/2020. This triggered the primary court to twist the proceedings without stating the reasons for departure to the well-known procedure under rule 45(1) of GN. No. 119/1983 (infra), and allowed the respondent to commence to testify as claimant witness number two (SM2) followed by her witness one Joram Juma Maro who testified as plaintiff/claimant witness number three (SM3). I am aware that the primary court has discretion to direct as to the order of speech as

to who should start producing evidence. But herein the primary court allowed the respondent to start in order to salvage the impasse situation after the appellant had boycotted to start adducing evidence.

It is to be noted that on 22/10/2020 the appellant had testified as plaintiff/claimant witness number one (SM1), after the court had threatened to proceed to make an *ex parte* judgment, by the order dated 15/10/2020. SM1 was followed by his witness Amina Kassim Maganga (SM4), Magreth Sizya Makinga (SM5), Saida Abasi Maganga (SM6). Wolfram Kopatu Chuwa who was the court witness, also testified on the side of the plaintiff/claimant case, as witness number seven (SM7). This was yet another mistake, as the case now was heard like both rival parties were applicants/claimant, while in actual fact the respondent was the objector. Probably the primary court plunged into this difficulties situation after allowing the respondent to present her form requesting to be appointed an administratrix of the deceased estate.

Another anomaly, SM3 who is the husband of the respondent and who was not a party to the proceedings, featured a lot in the proceedings, and was allowed to cross examine all witnesses brought by the appellant. The impression suggest that proceedings were hijacked by one party and the court did not discharge properly its noble duty to control proceedings

impartially and accord fair trial and hearing to both parties. Equally Amina Kassim (SM4) and Saida Abasi (SM6) were allowed to cross examine SM2 and SM3.

GN No. 49/1971 is silence as to who has the right to cross examine witnesses. However, rule 11 of GN No 49/1971 which is all about application of Civil Procedure Rules, provides I quote,

'In relation to all matters not provided for in these Rules, the provisions of the Civil Procedure Rules shall apply to proceedings under these Rules as they apply to other proceedings of a civil nature'

If I borrow rule 47 The Magistrates' Courts (Civil Procedure in Primary Courts) Rules GN No. 119 of 1983 with its marginal notes, examination and cross-examination, provide

'(1) ...inapplicable...

(2) Each party shall be entitled to cross-examine the witnesses called by the other party'

It is not the rule that everyone who participate in the proceedings as witness or spouse of a party enjoy the same right to cross examine witnesses for opposite party.

For another thing, I wonder as to why the primary court relied heavily on the evidence of SM2 to rule that the appellant and his team were fake or dummy relative of the deceased and ignored or turned blind to the testimony of SM7 who was a very neutral person. Also ignored allegation that SM2 cheated mourners that SM4 is died, while is still alive.

Also there were some strange facts which were introduced in the judgment of the primary court, example at page 19, I reproduce, a version of a story for appreciation,

'...kwa kua MKABIDHIWA mwenyewe anakubali kupewa zawadi hio akimsikia bibi yake hadi kusema na kumuona marehemu kuandika ukutani mwa nyumba ya Mlandizi walipokuwa wanaishi kwamba nyumba ni mali ya INNOCENT JUMA...'

This version of the story is not reflected anywhere in the proceedings of the primary court. Indeed, a passage suggest like those words were adduced by the said Innocent Juma who nevertheless is a minor and was not summoned.

Also, the primary court at its own motion *proprio motu* made an order evicting the appellant and his team, while there is no evidence in record

that they are living therein and there was no any prayer made by the administrator for vacant possession.

The primary court also turned blind to a fact that a document exhibit MR A, is a photostat for a house at Tabata. The original document, including a title deed for a house at Mlandizi, its where about is unknown. But still the primary court heaped blame to the appellant and his team that they don't have even title deed or documentations for impugned properties.

The primary court also did not deliberate the implication of the statement by the respondent who alleged that the deceased had made oral declaration that if she fall sick should not be taken to hospital (only administered herbal), if she die her body should not be taken to morgue, if she die in the morning should be buried on the same date in the afternoon, if she dies at night should be buried early in the morning the following day and should not be buried on public graveyard: vis-à-vis statement by the appellant and his team who generally were discontented by the death of the deceased and alleged to had reported matter to police.

An alert is also made to the trial court, that according to rule 2 G.Ns. Nos. 436 of 1967 and 219 of 1967, of the Local Customary Law (Declaration)

(No. 4) Order, indicate scope of the areas which fall under jurisdiction of schedules to that GN, that is paragraph one of the Second Schedule. For appreciation, I quote

*'The declarations set out in the First, Second and Third Schedules to this Order are hereby directed to be the local customary law in respect of the subjects contained therein in the areas subject to the jurisdiction of the **Chunya, Dodoma, Kasulu, Kibondo, Kigoma, Kondoa Manyoni, Maswa, Mbeya, Mpwawa, Ngara, Njombe, Shinyanga, Singida, Songea, Ufipa, Ukerewe and Pangani District Councils'** bold added*

Therefore this order should not be applied blindly. In other words its application is not cutting across everywhere.

In view of above, the proceedings of the primary court cannot sail through no matter how parties are inconvenienced. In the resultant I make the following orders:

1. The ruling, judgment with its subsequent orders and proceedings of the court of first instance/primary court are quashed including proceedings which terminated in a decision of a district court confirming an appointment of the respondent by a primary court.

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2. The case to be heard de novo before another resident magistrate-primary court of the court of first instance or primary court with competent jurisdiction.
3. Appointment of the respondent is revoked.
4. The respondent is ordered to surrender Form No. 4 before the primary court.
5. Application Form No. 1 filed by the respondent on 2/10/2020 is expunged from the records of the primary court.
6. The new assigned resident magistrate-primary court to hear and determine all questions or issues pertaining to this probate in compliance with the rules and regard should be on fair trial, on which the appellant herein will remain the applicant and the respondent herein will assume her position as objector.
7. Given the stance of the matter, the appellant and team are hailing upcountry from Geita, the matter should be heard continuously and concluded within a very short period of time as practicable.

Appeal allowed. Every party to shoulder its costs, because this is a probate matter.



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Judge
10/11/2021

Date: 10.11.2021

Coram: E.B. Luvanda, J

Appellant: present in person

Respondent: present in person

B/C: Auleria

Court: Judgment delivered at chamber court.



E.B. Luvanda
Judge
10.11.2021