

IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

PC CIVIL APPEAL NO. 5 OF 2021

(Arising from District Court of Lindi at Lindi in Civil Appeal No.6 of 2020 and

Originating from the Lindi Urban Primary Court in Civil Case No.64 of 2020)

RASHID SAID TULLAH.....APPELLANT

VERSUS

ISIAKA HASHIMU TULLAH.....RESPONDENT

JUDGMENT

28th Sept. & 19th Nov., 2021

DYANSOBERA, J.:

This is an appeal emanating from a Probate and Administration cause in respect of the estates of the late Hashimu Said Tullah. The respondent, before Lindi Urban Primary Court vide the Civil Case No.64 of 2020 sued the appellant (who was the administrator of the estate of the deceased before revocation of his letters of administration) over the estates of the late Hashimu Said Tullah. The respondent claimed Tshs. 25,314,104/= from the appellant being the estate of the deceased but was misappropriated by the appellant. After a full trial, the trial court

was satisfied that the respondent proved his claim to the extent of Tshs.23, 409,905/= and ordered the appellant to pay the respondent.

Dissatisfied, the appellant appealed to the District Court of Lindi vide Civil Appeal No.06 of 2020. After hearing the parties the first appellate court dismissed the appellant's appeal for lack of merits and in turn, it upholds the decision of the trial court. Again aggrieved, the appellant has appealed to this court.

Before I embark on the grounds of appeal and it is important know what transpired during the hearing at the trial as follows: On 15/12/2016 the appellant was appointed to be the administrator of the estates of the late Hashimu Said Tullah. The appellant proceeded with his duties of the administrator as enshrined under the fifth Schedule of the Magistrates' Courts Act [Cap 11 R.E. 2019]. Besides, on 04.07.2018 the respondent, the heir and beneficiary of the estates of the late Hashimu Said Tullah applied for revocation of the letters of administration of the estates of the deceased following the misconduct and misappropriation of the estate of the late Hashimu Said Tullah. Thus, the trial court revoked the appellant on 17.07.2018 and reappointed the respondent and granted him the letters of administration for the estates of the late Hashimu Said Tullah.

On 17.08.2020 the respondent filed a civil suit against the appellant. In that case the respondent claimed that in 2016 soon after the appellant had been appointed as the administrator of the estates of the late Hashimu Saidi Tullah collected from the estate of the deceased Tshs.39,314,104/= but there was the deficit of Tshs. 25,314,104/= which the appellant did not surrender to the respondent after being revoked. Seeing that, the respondent sued the appellant for the misappropriation of the collected amount and claimed Tshs. 25,314,104/= from the appellant. After a full trial the trial court was satisfied that the respondent proved his claim to the extent of Tshs. 23,409,905/= and ordered the appellant to pay the respondent.

Aggrieved, the appellant filed `Civil Appeal No.6 of 2020 in the District Court of Lindi whereby he filed three grounds of appeal which are to the following effect: One, that the trial court erred in law and fact by determining the matter while the respondent herein had no locus standi to institute a case against the appellant over the matter in dispute. Two, that the trial Magistrate misdirected himself when and after restrained the appellant from appointed administrator of the estate of the late Hashimu Said Tullah and from own wrong appointed the respondent, the act which had no jurisdiction to try. Three, the trial court erred in law and fact when determined the suit which is bad in

procedural law. The District Court as the first appellate court dismissed the appeal for lack of merits and instead it upholds the decision of the trial court.

Again, dissatisfied with the decision of the District Court the appellant has filed his appeal in this court fronting three grounds which are as follows: -

1. That the magistrate court erred in law and fact by determined (sic) the matter while the respondent herein has no locus standi to institute a case against the appellant over the matter in disputed(sic).
2. That the magistrate court misdirected himself in restraining the appellant from appointed administrator of the estate of the late Hashimu Said Tullah and for own wrong decided and appointed the respondent, the act which has no jurisdiction.
3. That the magistrate court erred in law and fact when determined the suit which is bad in procedural law.

When this appeal was called for hearing on 03.08.2021 the parties appeared in person and unrepresented but they consented, to disposed of the matter by way of written submissions. Indeed, the parties complied with the scheduled order.

Submitting in chief and on the first ground the appellant argued that the respondent has no locus standi to institute a case against him. He further submitted that he was appointed as administrator of the estates of the late Hashimu Said Tullah since 05/12/2016 and the respondent instituted the suit against the appellant while he had no letters of administration to sue on behalf of heirs of the deceased. The appellant also submitted that it is a trite law that no person other than the appointed administrator has power to sue or prosecute any suit as a representative of the deceased or be sued in respect of causes of action that survived the deceased as per sections 71 and 100 of the Probate and administration of Estates Act, Cap. 352 R.E. 2002.

The appellant went further and argued that the respondent sued him on his own name and not as administrator of the estate of the deceased hence he had no locus standi to sue him before the trial court. He also argued that the proceedings of the trial court are nullity for failure to observe the locus standi of the respondent. To buttress his argument, he referred this court to the case of **Majid Daud Mbura v. Mansoor Daud Mbura**, Land Appeal No.33 of 2010, High Court at Tanga registry(unreported).In addition, the appellant submitted that the trial court failed to show how the respondent sued on the behalf of the deceased.Thus,the appellant took a view that the respondent lacked

locus standi in that case. To fortify his argument, the appellant cited the case of **Askrifu Tarimo v. Beatus Casmir Njuu**, Land Appeal No.100 of 2007 High Court at Dar es Salaam.

Furthermore, the appellant submitted that the term locus standi is clearly elaborated in the Black's Law Dictionary as well as in the Oxford Dictionary to mean right to appearance in a court of justice or before a legislative body on a given question or can also mean the right or capacity to bring an action or appear in the court respectively. Besides, the appellant argued that the law provides that a person with capacity to institute any civil suit is either a person himself as the owner, his agent or legal representative as an administrator of the estate if the owner is dead. The appellant thus referred this court to the case of **Julius Maganga v. Robert Malando**, Civil Appeal No.112 of 2004 High Court at Mwanza (unreported) as cited in the case of **Zuhura Bakari Mnutu v. Ali Athumani**, Misc. Civil Case No.9 of 2015 High Court at Mtwara.

Submitting on the second ground, the appellant submitted that jurisdiction is a fundamental issue, lack of jurisdiction goes far beyond any error, omission or irregularity, the absence of jurisdiction means absence of a lawful trial. Thus, the appellant argued that the decision of the trial court was delivered under personal whims. He further argued

that the trial magistrate decided to appoint the respondent as an administrator of the estates of the late Hashimu Saidi Tullah contrary to law of the Probate and Administration of Estates Act. In view of that submission the appellant submitted that the respondent is not the administrator of the estate of the deceased.

Apart from that, the appellant submitted on the third ground that as the matter of procedure, the magistrate failed to follow the mandatory procedure under the law. Thus, the appellant was of the view that the suit is incompetent and prayed the appeal be allowed with costs.

In response, the respondent reminded the appellant that law applicable in Probate and Administration of the of estates originated in primary courts is not the Probate and Administration Estates Act, Cap.352 R.E. 2002 but the proper law is the Magistrates' Courts Act, Cap 11 R.E. 2019, the fifth Schedule together with the Primary Courts (Administration of Estates)Rules G.N. No. 49 of 1971.Besides,the respondent cemented his argument by citing the case of **Simba Makongoro v. Magamba Makongoro and 2 Others**, Civil Revision No.10 of 2020 Hight Court at Musoma (unreported) in which this court held that Cap. 352 does not apply in the Primary Courts.

Apart from that, the respondent replied the first ground that he does not dispute the authorities cited by the appellant regarding the meaning

of locus standi although he argued that they bear no novel ideas. He further submitted that when a person passed away only the administrator may bring and defend a suit on his behalf. Furthermore, the respondent argued that he filed and prosecuted the appellant not on his personal capacity but as the administrator in the cause of exercising his duties of an administrator of the late Hashim Said Tullah as derived under paragraphs 5 and 6 of the fifth Schedule. The respondent emphasised that he appeared in both cases as the administrator of the late Hashim Said Tullah.

Meanwhile, he argued that he was appointed to be the administrator by the trial court on 17th day of July 2018 by Hon. F. Jamadary (RM) after revoking the letters of administration of the estate of the late Hashimu Said Tullah granted to the appellant. The respondent went further and argued that the appellant desists to concede to the step taken by him following misappropriation of funds of the deceased's estates. To substantiate his argument the respondent made reference to paragraph 8 of the Fifth Schedule of the MCA. He further argued that the suit against the appellant was on recovery of the misappropriated funds from the estate of the late Hashimu Saidi Tullah something which was acknowledged by both courts and reference was made by the first appellate court by referring to the case of **Safiniel Cleopa v. John**

Kadeghe [1984]TLR 198. At last but not least, the respondent argued that he had locus standi when he instituted the matter against the appellant and the trial court correctly to determine the matter likewise the first appellate court in dismissing this ground.

Also, submitting on the second ground of appeal the respondent argued that this ground is misconceived by appellant and suggested that misconception snared the appellant down to self-perplexing. He further contended that the true facts are that the respondent was not appointed by the trial court in Civil Case No.64 of 2020 which is being appealed against, but was appointed vide Probate and Administration Case No.77 of 2016 on 17/07/2018 under paragraph 2(a) and (c) of the Fifth Schedule to MCA and the appellant never appealed against that decision as the records clearly shows. In addition, the respondent submitted that the appellant was sued for claiming Tshs.25,314.104/= and the court awarded Tshs.23,409,905/= which was proved. He emphasised that there was neither revocation nor appointment of any administrator in Civil Case No.64 of 2020 as it was purely civil matter. He further submitted that the trial court had jurisdiction as provided under the MCA Cap 11 under section 18(1) as the case was a civil matter not a probate case.

As to the third ground, the respondent argued that the appellant did not point any specific procedure that was not adhered to. He stressed that no rule of procedure was flawed by the trial court. He went further argued that the proceedings and exhibits clearly shows that no error whatsoever was committed by either court which prejudiced the appellant. Before he closed his submission, the respondent argued that this court should take heed that the estate connected to Civil Case No. 64/2020 is the Probate case which is yet to be closed awaiting execution of Civil Case No.24/2020. Besides he argued that this court should take note that the appellant is not among the heirs of the estate of the late Hashimu Said Tullah who is not affected by delay rather the respondent and three others. Thus, he submitted that it is the interest of public that litigation should come to an end as stated in the latin maxim "interest reipublicae ut sit finis Litium". He finally argued this court to dismiss this appeal with costs.

The appellant re-joined by submitting that in the trial court the respondent failed to show how he sued him on behalf of the heirs of the late Hashimu Saidi Tullah. He further argued that in the original suit the respondent sued him on his own name and not as the administrator of the estate of the deceased hence he had no locus standi to sue him. Thus, he referred to the case of **Askri fu Tarimo v. Beatus Casmir**

Njuu (supra). He also contended that the proceedings of the trial court are nullity for failure to observe locus standi of the respondent as it was stated in the case of **Majid Daud Mbura v. Mansoor Daud Mbura**.

Regarding the attachment of the letter of administration, the appellant submitted that is not a proof since it was not certified and had no picture of the respondent. The appellant went on and argued that the respondent sued him on his name and not administrator of the estate of the deceased. Therefore, the appellant was of the view that the respondent had no legal capacity to sue on the behalf of the other either of the late Hashimu Said Tullah as there was no proof of legal representative of the deceased. At last, the appellant submitted that the suit is incompetent which should be dismissed with costs.

Upon my perusal of the trial court and first appellate court records, the memorandum of appeal and written submissions thereof by both parties from the very outset it is imperative to tackle each ground of appeal as raised by the appellant. Before going to the grounds of appeal it is important to remind the parties that the laws applicable in the primary courts in matters of Probate and administration are the Magistrates' Courts Act, [Cap. 11 R.E. 2019] and the Primary Courts (Administration of Estates) Rules, G.N. No.49 of 1971 and not the Probate and Administration Act (supra). Apart from that, I will start

evaluating the second ground whereby the appellant disputes the appointment of the respondent on the ground that the trial court had no jurisdiction and it restrained him from his former appointment. At this juncture it is important to know which law gives powers the primary courts to deal with the Probate and Administration of the estates. As I have already said above it is the Magistrates' Courts Act, Cap 11 R.E. 2019 under section 19(1)(c) which provides: -

"(c) in the exercise of their jurisdiction in the administration of estates

By the provisions of the Fifth Schedule to this Act, and, in matters of practice and procedure, by rules of court for primary courts which are not inconsistent therewith; and the said Code and Schedules shall apply thereto and for the regulation of such other matters as are provided for therein."

Also, it is the Fifth Schedule to the MCA particularly paragraph 1(1) provides:

"1-(I) The jurisdiction of a primary court in the administration of deceased's estates, where the law applicable to the administration or distribution or the succession to, the estate

is customary law or Islamic law, may be exercised in cases where the deceased at the time of his death, had a fixed place of abode within the local limits of the court's jurisdiction:

Provided that, nothing in this paragraph shall derogate from the jurisdiction of a primary court in any proceedings transferred to such court under Part V of this Act.

(2) A primary court shall not appoint an administrator of a deceased's estate Cap. 352 Cap.27 (a) in respect of an estate to which the provisions of the Probate and Administration of Estates Act are applicable or of which a grant of administration has been made under that Act, or of which the administration is undertaken by the Administrator-General under the Administrator-General (Powers and Functions) Act; or (b) where the gross value of the estate does not exceed Shs.1,000/- unless the court is of the opinion that such an appointment is necessary to protect the creditors or beneficiaries."

The above provisions of the law are the ones which provides jurisdiction to the trial court to determine the matter of probate and administration of estates of the deceased. Also, under paragraph 2(a) of

the Fifth Schedule the primary court is mandated to appoint any party interested to the estate of the deceased Suo motto or on an application by any party interested in the administration. In the present case the appellant was an administrator of the estate of the late Hashimu Said Tullah whose appointment was revoked following the application made by the respondent vide paragraph 2(c) of the Fifth Schedule of the MCA. Thereafter the trial court reappointed the respondent on its own motion as enshrined under paragraph 2(a) of the Fifth Schedule. Therefore, in the light of that observation I am of the settled view that the trial had jurisdiction to reappoint the respondent following the proof of the allegations against the appellant. Thus, I decline to concede with the appellant that the trial court appointed the respondent on personal whims rather it abided with the dictates of the law as shown herein above. Also, the appellant was restrained dealing with the administration of the estate of the late Hashimu Said Tullah because the respondent proved misappropriation of the estate against him. Therefore, the second ground fails hence dismissed.

As to the first ground, I find that the respondent had *locus standi* to sue the appellant on recovery of money which is part of the estate of the late Hashimu Said Tullah. I am saying so because the original file of the trial court is entitled the following: -

"MDAI – ISIAKA HASHIMU TULLA [MSIMIZI WA MIRATHI YA MAREHEMU HASIMU (sic) SAIDI TULLAH, UMRI 22, KABILA MYAO, MAKZ: DAR ES (sic) DINI- MUISLAMU ...
MDAIWA: RASHIDI S. TULLAH, UMR 43, DINI: MUISLAMU KAB:MYAO, MAKZ LINDI.
MADAI YA FEDHA TSHS. 25,314,104/= TAREHE YA KUPOKEA SHAURI: 17.08.2020]"

Despite that, the typed proceedings of the trial court reads as follows:

"ISIAKA TULLAH.....MDAI
DHIDI YA
RASHIDI SAIDI TULLAH.....MDAIWA"

As to what is appearing in the original file of the trial court that is the truth which should stand and be recognised that the respondent filed the suit claiming Tshs. 25,314,104/= as part of the estate of the late Hashimu Said Tullah under the capacity of the administrator and not at his personal capacity as claimed by the appellant. Indeed, the anomaly which persists in the typed record of the trial court in Civil Case No. 64 of 2020 and Civil Appeal No. 6 of 2020 before the first appellate court has no any legal effect rather it can be resolved by inverting the application of the Principle Overriding Objective. As the regards to the

circumstances of this case, typing errors were committed by the trial court should transferred to the parties and also affect substantial justice. As already depicted above the respondent filed the suit against the appellant with locus standi hence the first ground by the appellant fails for lack of merit.

More so, since the first and second grounds are answered in affirmative, the third ground dies a natural death. The appeal is, therefore, dismissed for lack of merits.

Costs are awarded to the respondent.

It is so ordered.



W.P. Dyansobera

Judge

19.11.2021

This judgment is delivered under my hand and the seal of this Court this 19th day of November, 2021 in the presence of both parties who have appeared in person and unrepresented.

Rights of appeal to the Court of Appeal explained.



W.P. Dyansobera

Judge