

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IN THE DISTRICT REGISTRY OF BUKOBA)
AT BUKOBA

CIVIL APPEAL NO. 33 OF 2020

(Arising from Muleba District Court Civil Revision No. 01 of 2019 Originating from Kashasha Primary Court Probate Cause No. 34 of 2014)

BUCHARD BATUNIKA.....APPELLANT

VERSUS

RICHARD BATUNIKA.....RESPONDENT

JUDGMENT

Date of Judgment: 14.12.2021

Mwenda, J.

Before this court is an appeal with five grounds drawn by Mr. Mathias Rweyemamu, Learned Counsel for the Appellant. He is faulting, among other things, the District Court's failure to revise illegal proceedings commenced at Mubunda/Kashasha Primary Court Civil Case No. 34 of 2014. Before the District Court of Muleba at Muleba, filed Civil Application No. 1 of 2019 applied and prayed for among other things calling for records of Kashasha Primary Court's Civil Case No. 34 of 2014 and its execution proceedings for the purpose of revision and final disposal of the same. After the hearing of submissions by the parties and analysis of the records of the said application, the Honourable District Magistrate decided in the respondent's favour in that Probate and Administration Cause No. 34 of 2014 is

not res judicata and as a result Hon. District Magistrate declined to exercise its revision powers.

As stated earlier the learned counsel for the appellant preferred five grounds of appeal which can be summarized into one ground in that the District Court ought to have nullified the probate and Administration Cause No. 34 of 2014 which was res-judicata to Rukindo/Kashasha Primary Court Original Civil Case No. 1 of 1979.

When this matter came up for hearing, the appellant was represented by Mr. Mathias Rweyemamu, learned Counsel and the Respondent enjoyed the services of Mr. Mbekomize, learned counsel.

When invited to submit in support of grounds of appeal Mr. Rweyemamu argued the third ground of appeal which in essence, summarizes the remaining grounds as I have pointed above.

In support of this grounds, Mr. Mathias Rweyemamu submitted that the respondent filed Probate Cause No. 34 of 2014 before Kashasha Primary Court while he knew the said Probate matter was also filed in Civil Case No. 1 of 1979 at Lukindo Primary Court which was later on, Hon. Munyere, J nullified and ordered the deceased's estate to be remitted to the clan council. He said, following the said order by Hon. Judge, the clan council convened and on 2/8/2000 the properties of the deceased were distributed. He further said, the appellant challenged the respondent's act of filing Probate Cause No. 34 of 2014 and for that matter

Kashasha Primary Court ought to have dismissed or struck out the matter as the respondent conceded that by that time the clan council had already distributed the deceased's estate.

Mr. Rweyemamu further submitted that later on the deceased's wife filed Probate Cause No.22 of 2001 before Kashasha Primary Court where she complained against Richard Butanika and Constantine Alfred and succeeded to be appointed as administratrix of the deceased's estate. Aggrieved, the respondents appealed vide Civil Appeal No. 47 of 2003 and thereby lost. They however preferred the second appeal before the High Court, Civil Appeal No. 2 of 2005 where Hon. Lyimo, J discovered that the widow's complaints were in contempt against the orders by Hon. Munyere, J and declared the deceased's will as null and void, quashed the proceedings and decision of both lower court and ordered trial de novo before the competent court. According to Mr. Rweyemamu this order left Civil Case No. 34 of 2014 intact and therefore filing a fresh suit was res judicata or res sub judice.

Mr. Rweyemamu averred further that following that order, the file was remitted before Kashasha Primary Court for assignment to a competent court but no one filed any suit and therefore Probate Cause No. 22 of 2001 rested.

He concluded his submission with prayers that Probate Cause No. 34 of 2014 be nullified for being superfluous as Mnyara J, and Lyimo J, dealt with that matter and filing of a fresh suit created multiplicity of matters. He said if this matter is nullified then Civil Revision No. 01 of 2019 should also be nullified.

In response to the submissions by Mr. Rweyemau, Mr. Mbekomize, learned counsel for the respondent submitted that in Civil Appeal No. 205 of 1988 (before the High Court, Mnyera J), both proceedings of the lower courts were nullified and ordered the issue of inheritance to be referred to the clan council. For that matter, he said, Civil Case No. 1 of 1979 of Rukindo Primary Court and Civil Appeal No. 20 of 1980 of Muleba District Court was set aside. He said, following that order the clan council had to convene and commence the process of administration of the deceased's estate.

Mr. Mbekomize further submitted that following that decision by Mnyera J, Christina Batunika filed Civil Case No. 22 of 2001 before Kashasha Primary Court craving to be appointed administratrix of the estate of her late husband and she won. However, he said, Buchard Batunika and Alfred Constantine were aggrieved and preferred Civil Appeal No. 47 of 2003 before the District Court Where they lost. They filed PC Civil Appeal No. 2 of 2005 before the High Court. In the said appeal, Lyimo J, quashed both lower court's proceedings and ordered trial de novo before a magistrate with competent jurisdiction. The learned advocate further submitted that following that order the administration process had to start a fresh and that is the reason the clan council convened on 10/12/2014 to appoint the respondent as the administrator of the deceased's estate who in turn filed Probate Cause No. 34 of 2014.

He said, it seems the argument by Mr. Rweyemamu, learned counsel for the appellant that by the time Probate Cause No. 34 of 2001, was filed, the respondent acknowledged that the administration of the deceased's estate had already been undertaken, is based on a letter KGR/MLK 50/TN VOL.XI/43 from District Councillor for Muleba dated 2/8/2006 which made reference to Civil Case No. 1 of 1979. Mr. Mbekomize said, the said letter was making reference to the case which was already nullified on 17/8/1989. He said the deceased's estate was not administered as alleged. He said further that it is not true that Civil Case No. 22 of 2001 is pending in the court's registry as it was quashed when the court clearly stated that the lower court's decisions are nullified and quashed.

The learned advocate for the respondent prayed this appeal to be dismissed with costs.

In rejoinder, Mr. Rweyemamu submitted that the principle of estoppel should apply as against the respondent as he acknowledged to have administered the estate by the time he filed Probate and Administration Cause No. 34 of 2014.

Further he submitted that since Hon. Munyera J, ordered the clan council to convene then Civil Case No. 1 of 1979 still exist. He also submitted that even Hon. Lyimo J, did not say or issue an order for a fresh suit to be filed and therefore Kashasha PC Civil Case No. 22 of 2001 was ordered to be tried de novo. He concluded his submission by repeating his previous prayer in that this appeal be allowed with costs.

Having summarized submissions by the learned counsels for both parties, the issue for determination is whether Probate Cause No. 34 of 2014 was res judicata to Kashasha Primary Court's Original Civil Case No. 1 of 1979.

The principle of res judicata is defined and discussed in a number of ways. Section 9 of the Civil Procedure Code, [Cap 33 R.E 2019] describes res judicata in the following words and I quote:

S.9 "No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties and between parties under whom they or any of them claim litigating under the same title in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court."

This principle was also discussed in the case of **Tanzania Women Lawyers Association vs. The Attorney General. Misc. Civil Cause No. 22 of 2019**, where the court citing the case of **Peniel Lotta vs. Gabriel Tanaki and Others, Civil Appeal No. 61 of 1999** (Court of Appeal of Tanzania at Arusha) held inter alia that:

"The doctrine of res judicata is provided for in S. 9 OF Civil Procedure Code, 1966. Its object is to bar multiplicity of suits and guarantee finality to litigation. It makes conclusive a final judgment between the same parties or their privies on the same issue by a Court of competent jurisdiction in the subject matter of the suit"

In the same case the court stated that:

"The court implied further that:

"the scheme of S. 9 therefore, contemplates five conditions which, when co-existent, will bar subsequent suit. The conditions are; (i) The matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit. (ii) The former suit must have been between the same parties or privies claiming under there. (iii) The parties must have litigated under same title in the former suit. (iv) The court which decided the former suit must have been competent to try the subsequent suit and (v) The matter in issue must

have been heard and finally decided in the former suit.” [emphasis added].

Guided by the principle above this court is not in agreement with Mr. Rweyemamu’s contention that Civil Application No. 34 of 2014 is res judicata. It is crystal clear from the records that the issue of administration of deceased’s estate was before filing Civil Application No. 34 of 2014, never heard and finally determined.

From this courts records, it is evident that Civil Application No. 34 of 2014 was filed following the orders of this court where Lyimo, J nullified and quashed the proceedings of Civil Case No. 2 of 2001, Kashasha Primary Court and District Court Civil Appeal No. 47 of 2003. The Hon Judge also ordered trial de novo.


Mr. Rweyemamu counsel for Respondent was of the view that Probate and Administration Cause No. 34 of 2014 was res judicata to Kashasha Primary Court’s Original Civil Case No. 1 of 1979. This court went through the record and noted that by the time Probate and Administration Cause No. 34 of 2014 was filed, Original Civil Case No. 1 of 1979 ceased to exist. This is so due to the order of the High Court, Munyera J, in (PC) Civil Appeal No. 205 of 1988 which set aside the judgment of Muleba District Court in Civil Appeal No. 20 of 1980 and Original Civil Case, No. 1 of 1979. The Court also ordered the inheritance to be referred to the clan council. This meant the process had to start afresh.

That being said, this court conclude that Probate and Administration Cause No. 34 of 2014 was not res judicata and I find this appeal lacks merits.

I hereby dismiss this appeal and uphold the decision of the District Court in Civil Application No. 1 of 2019. The appellant shall pay costs of this appeal.


It is so ordered.




A.Y. Mwenda
Judge
14.12.2021

This Judgment delivered in chamber under the seal of this court in the presence of the appellant Mr. Buchard Batunika and his learned counsel Mr. Mathias Rweyemamu and in the presence of the respondent Mr. Richard Batunika.




A.Y. Mwenda
Judge
14.12.2021

