

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

PC CIVIL APPEAL NO. 03 OF 2021

(Origination from District Court of Njombe at Njombe Civil Revision No. 01 of 2020)

NAUMU HISIMU MUYINGA APPELLANT

VERSUS

HUSSEIN SHAIBU MUYINGA RESPONDENT

Date: 02/11 & 14/12/2021

JUDGMENT

MATOGOLO, J.

This appeal emanated from the decision of the District Court of Njombe in respect of Civil Revision No. 01 of 2020 filed by Naumu Hisimu Zuberi Muyinga the present Appellant which was dismissed by the District Court.

Aggrieved, the Appellant has appealed to this court in which she filed petition of appeal comprising of four grounds as follows:-

1. That, the ruling of the District Court is defective as the presiding Resident Magistrate raised new issues without according the parties with opportunity to argue them.

2. That, the decision/ruling by the learned Resident magistrate is bad in law as it contravened the principle of natural justice.
3. That, the ruling by the learned Resident Magistrate is bad in law because the reliable remedy to challenge a closed and finalized probate matter/case is by way of revision a power within which the district court is vested to.
4. That, the learned Resident Magistrate erred in law and fact by dismissing Application for Revision while the same contained sufficient reasons regarding exiting illegalities of primary court at Makambako proceeding and decision in Probate Case No. 15 of 2018.

The Appellant prays for her appeal to be allowed with costs and the decision of the District Court be quashed and set aside.

In his reply to the petition of appeal, the Respondent Hussein Sharifu Muyinga disputed the grounds of appeal raised by the Appellant. He put the Appellant to strict proof of what he alleged in her grounds of appeal. He said the decision of the District Court Magistrate was based on the jurisdictional limit on revision which survives only for 12 months as provided under Section 22(4) of the MCA Cap. 11 R.E. 2019.

Before this court, the parties were represented. Mr. Lazaro Joseph Hukumu learned advocate appeared for the Appellant while Mr. Cosmas Kishamawe learned advocate appeared for the Respondent. The appeal was argued through written submissions.

In order to appreciate what actually had transpired and that gave rise to the dispute it is important to narrate the background albeit briefly.

The Appellant is the daughters of the late Hisimu Zuberi Munyinga who passed away on 26th day of December, 2017. At that time the Appellant was minor of the age of 16 years. On 26/02/2018, the Respondent filed an application for appointment as administrator of the estates of the late Hisimu Zuberi Musinga (mirathi Namba 15 of 2018). The application was supported by a clan meeting resolution minutes. Upon registration of the petition, the court ordered that the applicant should bring witnesses in court on 28/02/2018, also citation be sent to all concerned. On 28/02/2018, the applicant appeared in court with his witnesses who supported him. He was therefore duly appointed as administrator of the deceased estates of the later Hisimu Zuberi Musinga. He filled all relevant documents as administrator.

In the course of proceedings, it was revealed that the deceased had two children one was a minor and was at school when the probate matter was being instituted.

After this appointment as administrator, the Respondent started collection of the deceased properties paying debts and after he has distributed properties to heirs he remained with Tshs. 24,000,000/= claiming to be expenses in conducting the case. However it is not shown how much each heir, children in particular would get although the Respondent stated that the ratio between heirs is 40% by 60% but how much in cash is not disclosed. The remaining balance of the estates is only

Tshs. 21,000,000/=. There has been complaint by the Appellant that, while at school the Respondent as administrator of the deceased estates did not maintain her in any way such that she was dismissed from school for lack of school fees. At one time she attempted to apply for revocation of the appointment of the responded as administrator of deceased estate. But that application was refused. She applied and was granted extension of time before the District Court of Njombe in order to file an application for revision in order to revise the proceedings of the primary court.

In her submission in support of her appeal the Appellant through her advocate Mr. Hukumu argued grounds 1 and 2 jointly, likewise for grounds 3 and 4. He submitted in respect of grounds 1 and 2 of the petition of appeal that, this court has ruled out in several cases that when in a trial the magistrate or judge raised a matter *suo mottu*, is required to allow parties to argue on it failure of which will lead to detriment right to be heard of parties as it was held in ***Pili Ernest vs. Moshi Mushi***, Civil Appeal No. 39 of 2019 CAT (unreported). He supported his argument by further citing the case of ***DPP vs. Sabina Tesha and Others (1992) TLR 232, Transport Equipment vs. Devram Valambhia (1998) TLR 89*** and ***Mbeya Rukwa Auto Parts and Transport Limited vs. Jestina George Mwakyoma (2003) TLR 251***.

He said the trial magistrate in her ruling went further by questioning the legality of the application for revision for being filed after lapsing of one years and advised the Appellant to pursue the matter by way of appeal and not revision as the Appellant did.

The learned counsel argued that, what was stated in the ruling were raised *suo mottu* by the trial magistrate and throughout the trial court proceedings they were not discussed or argued/raised by any party. He said they did affect rights of the Appellant as what was intended by her was not fulfilled by the court for reasons stated above and thus prejudiced her right to be heard as it was held in ***Pili Ernest vs. Moshi Mushi*** (supra) at page 5.

Arguing on grounds No. 3 and 4 of the petition of appeal Mr. Hukumu submitted that, the trial magistrate grossly erred in dismissing the Application for revision for reasons of being bad in law while the same contained sufficient ground of illegalities ought to be delivered. He argued that Section 22(1) and (2) of the MCA confers revision jurisdiction to the District Court to examine records of any proceedings in the Primary court to satisfy itself on the correctness, legality or impropriety of the decisions of the primary court. He said the decision and proceedings that was subject to the trial court application for revision is tainted with lot of illegalities, incorrectness and impropriety because the general citation as it was ordered by the trial Primary court magistrate was done in one time day which is not a reasonable time in the eyes of the law. He said the order was made on 26/02/2022 and the matter was scheduled for hearing on 28/02/2018. The same date the respondent was granted letters of appointment as administrator of the estates of the late Hisimu Zuberi Muyinga without proof of the said general citation being submitted before the trial court contrary to the period prescribed by law regarding citation. He submitted further that the period provided under the citation was

insufficient for anyone interested in the mentioned probate cause to be informed of the same and take legal steps upon it.

The learned advocate submitted further that the expenses incurred for administrator of the estate specified by the Respondent together with the debts have been inflated too much with no justification and no reasons were advanced to that effect. On top of that the beneficiaries of the estates of the late Hisimu Zuberi Muyinga including the Appellant have legal rights for conducting inspection to the inventory and account of the deceased estates filed by the Respondent as an administrator were denied right to do so.

He submitted further that the proceedings of the Primary court in Probate Cause No. 15 of 2018 are nullity for failure to avail the Appellant with an opportunity to be heard by its denial to accept Appellant's application for revocation or even responding to some of the complaint letter filed in the court. Also the inventory and accounts filed in court are fraudulently made as there is no any beneficiary or member of the family who was involved by the Respondent in allocating and distributing the applicant's father's estates. He said the inventory and account indicate different number of beneficiaries as in the account it is indicated that beneficiaries of estates of the late Hisimu Zuberi Muyinga are mentioned to be two known as Naumu Hisimu Muyinga and Nasreen Hisimu Muyinga. But in the inventory beneficiaries listed are three namely Naumu Hisimu Muyinga, Nasreen Hisimu Muyinga and Baraka Hisimu Muyinga. He said the difference of number of beneficiaries over the same estate proved that the administrator of the estates appointed by the Primary court obtained

letters of appointment fraudulently thus he was not worth granted letters of administration.

Mr. Lazaro Hukumu learned advocate submitted that, the Appellant by virtue of being minor and a school girl she was unaware of anything in relation to the procedures for administration of the estates of her late father but she knew of her legal right to benefit from the estates of her late father. After attaining age of majority, she has now discovered that the whole proceedings pursuant to the filing of inventory and closure of the administration of her fathers' estates by the Respondent are amenable for revision so that the court can satisfy itself as to the correctness and legality of the same. With that submission, the Appellant prayed for her appeal to be allowed with costs, the ruling and proceedings of the trial court be quashed and set aside.

On his part in a reply to the submission supporting the appeal, Mr. Cosmas Charles submitted that the learned counsel for the Appellant cited Section 22(1) and (2) of the MCA as the section which empowers the District Court for Revision jurisdiction to examined record of any proceedings in the Primary court. However the learned counsel purposely tried to mislead this court by not citing the whole section 22 since it is the one which explains how the revisional jurisdiction is conferred to the District Court.

He said subsection (3) is very relevant to the matter at hand. It does not provide for a party to the proceedings to move the court by way of application, it is the court suo motto which can call for the records of any

decisions or order and see if there is any illegality, as it was explained in the case of ***Jamila Augustine Ilomo vs. Victoria Ilomo, and Mary Ilomo***, Civil Appeal No. 11 of 2018 H/Court at page 18. He also said subsection (4) of the Section 22 of the MCA provides for a time limit that no proceedings shall be reversed under this section after the expiration of twelve months from the determination of such proceedings in Primary court. He said the contested application was time barred since twelve months had already expired. As to the issue of extension of time to file Revision in the District Court of Njombe, Mr. Cosmas Charles argued that after reading the whole section 22 of the MCA, the trial magistrate erred to allow such an application since the law forbids any application of that nature from the parties despite the facts that the trial magistrate in her judgment advised the Appellant to use other channels since her application is time barred. The trial magistrate was bound by law to reject such application. He said that was clearly explained in ***Jamila Augustine Ilomo case*** (supra) at page 15.

Regarding grounds No. 1 and 2, Mr. Cosmas Charles responded brief that the cases cited are distinguishable to the circumstances of our case since there is no any proof as to how the raised issue *suo mottu* has affected their application. The trial magistrate was trying to give her view but also as a matter of fact the court gave a chance to all parties to argue on their pleadings. He said he believed that the Appellant's counsel is misconceived and prayed for the appeal to be dismissed with costs.

In rejoinder, Mr. Lazaro Hukumu did not agree with Mr. Cosmas Charles in his reply submission, he disagreed with him on the contention

that the District Court has no jurisdiction to entertain on application for revision by a party unless the court itself *suo mottu* calls for the record, he said even where 12 months has elapsed section 14(1) and (2) of the Law of Limitation Act Cap.89 R.E. 2019 permits a party to seek to the court extension of time. He supported his argument by citing the case of ***Saasaba Malembo Matage vs. Elias Joshua Muganda***, Probate Appeal No. 4 of 2020 H/Court at Musoma.

On the argument that the court ought not to entertain the application for extension of time as the same was bad in law Mr. Lazaro Hukumu countered that by citing the case of ***Juma Jaffer Juma vs. Manager Cavarán Ltd and Said Khamis Hemed Ghaity***, Civil Appeal No. 7 of 2002 CAT at Zanzibar (unreported) and ***Yara Tanzania Limited vs. Charles Aloyce Msemwa t/a Msemwa Junior Agrovét and Others***, Commercial Case No. 57 of 2013 H/Court Dar es Salaam. Mr. Hukumu insisted for this court to dismiss the appeal with costs.

I have carefully gone through the rival submissions from the learned counsel of both sides. I have also gone through the court records both of the Primary court and that of the District Court, it appears that the Resident Magistrate of the District Court Njombe observed the irregularities committed by the Primary court Makambako which call for revision. However what she said is that, the District Court could not revise that decision on simple reasons that 12 months have elapsed from the date the decision and order of the Primary court was made. But she went further by saying even the extension of time made by her fellow magistrate was not proper. It is trite law that where there is time limitation set for taking

certain action, before a party takes such step after the time provided has been expired, where a party is desirous of taking such step or action must seek leave of the court. This would be by applying for extension of time in order to take such step or action outside the period provided. That is what the present Appellant did before he has lodged his application for revision before the District Court of Njombe.

Now the issue to be resolved here is whether or not the District Court was right in the approach it took. The reasons given by the learned Resident Magistrate in dealing with the application by the applicant, now the Appellant is that, the applicant had no right under the law to file an application for revision of the decision of the Primary court by the District court, such prohibition is provided under Section 22(3) of the MCA. The prohibition is further provided for under subsection (4) of the Section 22 of the MCA, where twelve months from the determination of the Primary court proceedings have expired.

However it appears in rendering her ruling in civil Revision No. 1 of 2020 the learned Resident Magistrate did not discover or notice that, the Appellant was not a party to the Probate cause proceedings in the Primary court. It is perhaps upon such lapse the presiding magistrate ruled basing on the prohibition indicated above.

Having so observed, I will now go to the grounds of appeal as raised by the Appellant. The first ground is that, the presiding Resident magistrate erred to raise new issues without according parties opportunity to argue them. But this grounds was argued together with ground No. 2 that, the

presiding Resident magistrate contravened the principle of natural justice. This complaint is also hinged on the fact that the new issues raised were not put to the parties for them to address the court.

I have taken note of the complaint raised by the Appellant in as far as this appeal is concerned. I agree with the Appellant that, where a court in the course of its decision finds new issues worth to be adjudicate in a case, but which were not raised before and argued; the procedure is to give the parties opportunity to address the court on those issues as it has been held in various court decisions including those cited by the Appellant that is ***DPP vs. Sabina Tesha and Others(1992) TLR 232 and Transport Equipment vs. Devram Valambia (1998) TLR 89***. The respondent did not adequately respond to this, the Appellant's counsel has argued that by not affording them such right to address the court, the Appellant was prejudiced. However the learned counsel did not explain to what extent the Appellant alone was prejudiced in comparison to the Respondent. I have carefully read the impugned ruling of the District Court to some extent I agree with the Respondent's counsel that, what was raised by the presiding magistrate was her view in furtherance of what has been decided by the trial Primary magistrate. The presiding Resident Magistrate appreciated the complained of illegalities committed by the trial Primary court, but what she did not agree with the Applicant /Appellant is for the District Court to revise such a decision and based her decision under Section 22(4) of the MCA. The learned Resident magistrate said the Appellant had no right to file an application for revision in the District court that is why in her decision advised the Appellant to pursue another avenue

to search for her right by way of an appeal. There is no doubt by the provision of Section 22(3) of the MCA bars a party who is aggrieved with a decision of the Primary court to file an application for revision in the District Court. But the District court *suo mottu* can call for a record of any proceedings in the primary court and examined it for the purpose of satisfying itself as to the correctness, legality or propriety of any decision or order of the Primary court. But that right is not accorded to a party to move the District court by way of an application for revision. It is unlike in the High Court. However that requirement of the law binds only a person who was the party in the proceedings intended to be challenged. In this case it appears the learned Resident magistrate of Njombe District Court misdirected herself to rule that the applicant had no such right to file an application for revision, she had that right as she was not a party to the proceedings in the Primary court. The court records reveal that, she attempted to challenge the Respondent's appointment as the administrator of the deceased estates. However her attempt was not accommodated by the trial Primary court. That is why she opted for revision application. The applicant had that right because she was not a party to the proceedings and decision which aggrieved her. The case ***Jamila Augustine Ilomo vs. Victoria Ilomo, and Another***, Civil Appeal No. 11 of 2018 cited by the Respondent's counsel is distinguishable to the circumstances of this case as it that case the applicant in revision application was a party to the lower court proceedings. It was therefore not proper for the District court to dismiss the application for revision on the ground that no application for revision lies to the District Court but an appeal. But as the

Applicant/Appellant was not a party to the Primary court proceedings, she had no right of appeal. In the case of **Augustino Lyatonga Mrema vs. Republic and Another (1999) TLR 273**, the Court of Appeal held:-

"To invoke the Court of Appeal's power of revision, there should be no right of appeal in the matter, the purpose of this condition is to prevent the power of revision being used as an alternative to appeal".

The Appellant in this appeal delayed to file her application for revision. She was bound to apply for extension of time the act which she did vide Miscellaneous Application No. 01 of 2020. As the Appellant was not a party to the proceedings in the Primary court of Makambako she had the right to file an application for revision in the District Court of Njombe. In the case of **Ancopart (O.M) SA VS Harbert Marwa and Family Investments Co. Ltd and 3 Others**, Civil Application No. 94 of 2013 the Court of Appeal of Tanzania at page 7 referred its previous decision in the case of **Ahmed Ally Salum vs. Ritha Bajwali And Another**, Civil Application No. 21 of 1999 (unreported) in which it was held that, as the applicant who was not a party to the proceedings below could not have right of appeal, revision was his only remedy. The court further referred to its previous decision in the case of **Khalifa Selemani Saddof vs. Yahya Juma and Four Others**, Civil Application No. 20 of 2003 (unreported), in which the court said:-

"Here, the applicant could not have appealed because he was not a party to Miscellaneous and Application No. 16 of 2000. Hence he rightly brought the application for revision under Section 4(3) of the Appellate Jurisdiction Act 1979 as amended by Act No. 17 of 1993. That being the case this application for revision is properly before us".

This applies to the case at hand. The appellant was not a party to the proceedings in the Primary court, her attempt to seek the appointment of the Respondent be revoked was not entertained as she was just replied through correspondences that, the appointment had already be made, this was therefore a fit case for revision by the District Court but which was dismissed.

As pointed out above, in dismissing the application for revision, the District Court purported to have been dealing with an application filed by a person who was a party to the proceedings in the trial Primary court which was not, the act which renders the whole proceeding in the District Court and the decision thereof a nullity. Having so discussed, all grounds of appeal have been covered. I therefore allow this appeal. But what is the way forward. Ordinarily I would invoke powers of supervision conferred to this court by section 30 of the MCA by quashing the decision of the two courts below and give direction. However as the decision of the District Court turns out to be a nullity for reasons I have explained above, taking that course I will be doing without jurisdiction. I order that the matter be

sent back to the District Court of Njombe where the application for revision will be heard on merit but before another magistrate with competent jurisdiction.

Ordered accordingly.




F. N. MATOGOLO
JUDGE

14/12/2021

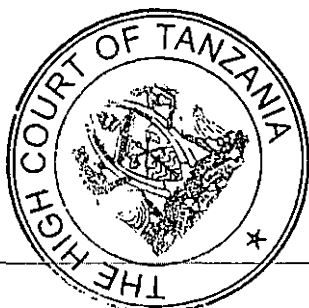
Date: 14/12/2021
Coram: Hon. F. N. Matogolo – Judge
Appellant: Absent
Respondent: Present
C/C: Grace

Mr. Lazaro Hukumu – Advocate:

My Lord I am appearing for the appellant, I am also holding brief for Mr. Cosmas Kishamawe advocate for the Respondent who is present in court. The matter is for judgment. We are ready.

COURT:

Judgment delivered.




F. N. MATOGOLO
JUDGE
14/12/2021