

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
IN THE DISTRICT REGISTRY OF MBEYA  
AT MBEYA**

**PROBATE APPEAL NO. 09 OF 2021**

(From the District Court of Momba District, at Chapwa in Probate Appeal No. 1 of 2021, Originated in the Primary Court of Momba District, at Tunduma Urban in Probate and Administration Cause No. 08 of 2007)

**KELVIN JOHN MWALINGO.....APPELLANT**

**VERSUS**

**1. RODA JOHN MWALINGO.....1<sup>ST</sup> RESPONDENT**

**2. LEAH JOHN MWALINGO.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

*Date of last Order: 16.2.2022*

*Date of Judgment: 01.4.2022*

**Ebrahim, J.**

The appellant and respondents are blood relatives and all are the administrators /administratrix of the estates of their late father one John Mwalingo. In this second appeal, the appellant is challenging the decision of the District Court of Momba District in Probate Appeal No. 1 of 2021 which confirmed the decision of the Primary Court of Momba District, at Tunduma Urban (the Primary Court).

The background of the matter can be briefly narrated as follows: One John Mwalingo (the deceased) died intestate back in 1992. In 2007 the deceased's daughter one Stella John Mwalingo was appointed as an administratrix of the estates. It is indicated in the proceedings that, Stella Mwalingo was revoked in 2016 for failure to fulfil the obligation of her office (i.e the administratrix office). In 2017 the herein appellant together with the herein respondents vide the same file (probate and administration cause No. 8 of 2007) were appointed as co-administrators of the estate of the deceased.

It seems the administrators did not timely fulfill their obligations until 20<sup>th</sup> March 2019, when the heirs raised some complaints against the administrators in the Primary Court. Upon the said complaints, the Primary Court directed the administrators to collect and distribute the estates among the heirs. They were also directed to file an inventory in the Primary Court.

Again, on 1<sup>st</sup> September, 2020 the heirs lodged another complaint against the appellant who was referred to as the 1<sup>st</sup> administrator. They complained that he was benefiting himself from one of the estates which remained undistributed. The heirs

prayed to the Primary Court to compel him distribute all the properties. Having heard all parties, (i.e, the heirs, the appellant and the other co-administrators) the Primary Court warned the administrators to fulfill their obligation.

On 2<sup>nd</sup> September, 2020 the appellant on behalf of other co-administrators filed the inventory. He also informed the Primary Court that they have remained with two residential houses undistributed on the account that the same are to be sold and the proceeds be distributed among the heirs. The Primary Court further directed the appellant and his co-administrators (i.e the respondents) to accomplish the exercise as complained by the heirs and the inventory regarding the undistributed estates be filed in court.

On 20<sup>th</sup> November 2020, one of the administrators (Leah John Mwalingo, the 2<sup>nd</sup> respondent) lodged a complaint that the appellant was clogging the exercise of selling the property. She complained further that they had got a prospective purchaser. However, the appellant was not co-operating with them (co-administrator) to make the exercise successful. Considering the misunderstanding among the administrators, the Primary Court

ordered them to cooperate in accomplishing the exercise short of that the two administrators excluding one of them (i.e the appellant) sell the property for the interest of the other heirs.

On 23<sup>rd</sup> December 2020 the two administrators (the respondents) filed the inventory in the Primary Court showing that they had sold the property and distributed the proceeds to the heirs. The heirs who were also in court confirmed to have received the said proceeds. Nevertheless, in that same day the appellant raised an objection that he was not aware of the said sale and the distribution of the proceeds. He further objected that; the selling of the property was improper since he did not participate as one of the administrators.

Having heard the objection by the appellant, the Primary Court overruled it on the reason that the two administrators performed the exercise in the interest of the heirs. It further stated that the action intended to end up the dispute among the administrators as well as the heirs which existed for so long. Being discontented by that decision of the Primary Court, the appellant unsuccessfully appealed to the District Court. Further aggrieved,

he filled the instant appeal preferring a total of seven grounds of appeal as follows:

1. That, Appellate Court erred in law and fact by ruling on the sell agreement with a lot of discrepancies.
2. That, Appellate Court erred in law and fact by turning a blind eye on the missing probate records of previous years from 1992 to 2007 which amount to right (sic) other beneficiaries of the deceased who were not included in the inventory to be at stake.
3. That the appellate court erred in law and fact on blessing the decision of the trial court on ruling out on the sell(sic) of the property in dispute which was conducted beyond the market value and agreed able price on the family meeting.
4. That the appellate court erred in law and fact on ruling out that the family meeting minutes was not part of the inventory issue filed and raised at the primary court.
5. That had the appellate court properly directed itself on the evidence adduced by the appellant he could have discovered that he found the judgment at the last stage

hence he had no time to cross check on the defectiveness of the sale agreement.

6. That had the appellate court properly directed itself on the proceedings recorded on 23<sup>rd</sup> December 2020 and judgment it could have seen that such decision had a driven force behind which intended to deprive the rights of the beneficiaries for the enjoyment of the few.
7. That had the appellate court properly directed its mind on trial court records it could have discovered that there was fabricated evidence which was not signed by the appellant.

The appeal was heard by way of written submissions. Advocate Neema Saruni represented the appellant whereas the respondents were advocated for by advocate Moses Mwampashe.

I need not reproduce the submissions by counsel for the parties on the reasons to be apparent soon in this judgment. However, I have passionately considered their rival submission. In essence, the grounds of appeal in the instant appeal are potentially similar to those presented before the District Court in the first appeal. Equally to the arguments by the appellant's

counsel. The act which has been forcefully challenged by the respondents' counsel.

Counsel for the respondents has challenged the appeal on the reason that an appellate court cannot decide on the matters which were not raised, discussed and determined in the lower court. To support his contention, he cited the case of **Elisa Mosses Msaki vs Yesaya Ngateu Matee [1990] TLR 90.**

Having carefully gone through the record, I noted that counsel for the respondents raised the same concern before the first appellate court (District Court). The District Court thus, declined deciding on other grounds of appeal on the reason that they were indeed not dealt with before the Primary Court.

I am also persuaded by the contention of the respondents' counsel that the appellant has raised the matters which were neither the issue nor discussed by the Primary Court. As I have hinted hereinabove on the background of the matter, obviously, the appellant was aggrieved by the ruling of the Primary Court dated 23<sup>rd</sup> December 2020 in which the court overruled the objection raised by the appellant in relation to the inventory filed

by the respondents. The objection by the appellant only based on the fact that the sale of the property was not proper since he was not involved as one of the administrators. Under such circumstance, in my view the area for consideration was only on the legality or the illegality of the inventory filled by the respondents without involving the appellant as the co-administrator. This piece of complaint is drained from the first ground of appeal.

It was contended by the appellant's counsel that the sale agreement affixed to the inventory filed in the Primary Court was void since the appellant was not involved. She argued that the law requires where there is more than one administrator, any decision should be reached mutually. That in case of disposing of the deceased's property all administrators are required to consent on the same. Counsel for the appellant supported her contention with the case of **Abdallah Said Massoud vs Gharib Suleiman & Others, Land Appeal No. 398 of 2016 High Court of Tanzania, at Dar es Salaam** (unreported).

Replying on this regard, counsel for the respondents argued that the two lower courts were proper in deciding that the sale



agreement entered by the respondents in exclusion of the appellant as the co-administrator was right. Relying on the decision in the case of **Joseph Simon Woisso vs Priva Simon Woisso, Misc. Civil Application No. 308 of 2019 HCT at Dar es Salaam** (unreported), counsel for the respondents argued that action of one administrator binds the other since co-administrators are considered as one and the same.

Counsel for the respondents also argued that, in the present case the respondents sold the property of the deceased and distributed the proceeds to the heirs since there was a dispute among the administrator and the heirs. He contended that in such dispute the respondent could not tolerate the habit of the appellant of delaying the sale. He thus prayed for this court to dismiss the appeal for want of merits.

The legality or the illegality of the sale which was part of the inventory filed by the respondents in the Primary Court was well dealt by the Primary Court and the District Court in the first appeal. The two lower courts observed that the act of the respondents of selling the property forming the estates of the deceased was proper since it was for the interest of the heirs and it marked the

end of endless probate appeals and application which have been benefiting few, the administrators. The two lower courts blessed the action taken by the respondents with the decision in the case of **Mohamed Hassan vs Mayese Mzee and Mwanahawa Mzee [1994] TLR 225**. In that case it was held that an administrator is not bound to obtain consent of all heirs before selling the deceased's house.

On my part, I join hands with the two lower courts in blessing the action taken by the respondents. This is because, the record shows that there were complaints raised by the heirs regarding the dealings of the administrators. For example, on 1<sup>st</sup> September 2020 the heirs complained before the Primary Court that the appellant was collecting rents from the undistributed property and use for his own benefit. The appellant admitted on the complaint, but raised the defence that he had faced some problem which made him use all the rent.

Another example is on 20<sup>th</sup> November 2020 when the respondents raised the complaint against the same appellant on his reluctance to cooperate with them in the exercise of searching for the purchaser and selling the property. The appellant denied

that complaint. As the result, the Primary Court directed all administrators to cooperate or the two administrators who were cooperating sell the property and distribute the proceeds to the heirs. It is my opinion thus, it was that order which the respondents acted on. The appellant never challenged that order. Under all these circumstances, this court finds no reasonable ground to fault the decisions of the two lower courts since they were for the ends of justice.

I may add here for the sake of argument that the objection by the appellant and the consequential appeals are untenable. This is because, after the sale which the respondents collected a sum of Tanzania Shillings 150,000,000/= the same was distributed to the heirs where each received Tshs. 25,000,000/=. The record also shows that the heirs appeared before the Primary Court and confirmed to have received the sum. Thus, if this court would overturn the decision, the same would result into adding petrol fuel in a burning fire. The court would thus be the source of the endless disputes instead of adjudication of cases in the ends of justice.

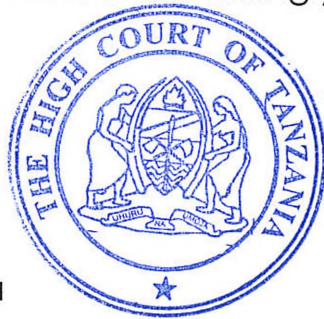
Under the 5<sup>th</sup> ground of appeal there is also a concern raised by the appellant and argued by his counsel. The concern raised is relating to the 1<sup>st</sup> ground of appeal is thus worth for determination. It is thus; that the appellant was not present in court on 20<sup>th</sup> November 2020 when the primary court gave the order for the administrators to sell the property and distribute the proceeds. I hastily resolve that the complaint is baseless. This is because the record shows that the appellant was in court and he gave his defence concerning the complaint against him. Besides, the law is trite that, court records are presumed to be serious and genuine documents that cannot be easily impeached unless there is evidence to the contrary; see **Halfani Sudi v. Abieza Chichili, [1998] TLR. 527**. However, there is no scintilla of evidence in the matter at hand to challenge the record of the Primary Court.

Having said as above, I decline dealing with other grounds of appeal since are not related with the matter determined by the Primary Court. As correctly argued by the respondents' counsel, and as a matter of general principle, an appellate court cannot allow matters not taken or pleaded in the court below, to be raised on appeal; see **Hotel Travertine and Others vs NBC Ltd**

[2006] TLR 133, **Elia Mosses Msaki vs Yesaya Ngateu Matee** [1990] TLR 90, **James Funke Gwagilo vs Attorney General** [2004] TLR 161 to cite but a few.

Owing to the above reasons, I hereby dismiss the entire appeal with no order as to costs following the relationship between parties.

Ordered accordingly.



A handwritten signature in blue ink, appearing to read "R.A. Ebrahim".

**R.A. Ebrahim**

**Judge**

**Mbeya**

**01.04.2022**

**Date:** 01.04.2022.

**Coram:** Hon. A.E. Temu -DR.

**Appellant:** Present.

**For the Appellant:**

**1<sup>st</sup> Respondent:**

**2<sup>nd</sup> Respondent:**

**For the Respondents:**

Grace Sweetbert h/b of Moses Mwampaka.

**B/C:** P. Nundwe.

**Grace Mwampashi:**

This appeal is coming for Judgment today and we are ready.

**Court:** Judgement delivered in open chamber court in the presence of the appellant and in the presence of Grace Sweetbert for respondents.



A.E. Temu

Deputy Registrar

01/04/2022