

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IN THE DISTRICT REGISTRY OF DAR ES SALAAM)**

AT DAR ES SALAAM

(APPELLATE JURISDICTION)

CIVIL APPEAL NO. 260 OF 2021

(Appeal from Probate and Administration of Estate No. 8 of 2019 in the District Court of Kinondoni at Kinondoni (Lyamuya, RM) dated 16th of June, 2021.)

HYASINTA PETER MOSHA APPELLANT

VERSUS

JOHN PETER MOSHA 1ST RESPONDENT

CATHERINE PETER MOSHA 2ND RESPONDENT

JUDGMENT

16th March, & 27th April, 2022

ISMAIL, J.

This appeal arises from the decision of the District Court of Kinondoni at Kinondoni which presided over probate and administration proceedings in respect of Probate and Administration Cause No. 8 of 2019. The proceedings were initiated by the appellant, the petitioner then, who moved the court to grant probate of the will left by Peter John Mosha, her deceased husband.

The petition was objected, to vide a caveat which was jointly filed by the respondents, both of whom alleged to be beneficiaries of the deceased's estate whom they alleged was their putative father. After a hearing which drew into participation a number of witnesses for both sides, the petition was refused, primarily on account of the anomalies in the will on which the petition was premised. Instead, the respondents were appointed as administrators of the estate. The respondents were also included in the list of beneficiaries of the deceased's estate.

The decision by the court has drawn a criticism from the appellant, hence her decision to institute the instant appeal. The appeal had five grounds of appeal but ground two was abandoned. That left the appeal with four grounds of appeal which are reproduced as hereunder:

- 1. That the Honourable Court erred both in law and fact to entertain this matter while it has (sic) no jurisdiction;*
- 2. That the proceeding of the trial court is bad in law and in fact as were prepared, presented and defended by an advocate who is barred to practice;*
- 3. That the trial court erred in law and fact for appointing Peter John Mosha and Catherine Peter Mosha as the administrator (sic) of the estate of the late Peter John Mosha without considering the interest of other legal issues;*

4. That the trial court erred in law and fact for appointing a person who did not wish to administer the estate of the late Peter John Masha.

5. That the trial court erred in law and fact for failure to evaluate evidence before it.

Hearing of the appeal took the form of written submissions. Mr. Michael Nyambo, learned counsel, represented the appellant. With regards to ground one of appeal he submitted that, since the petitioner did not state the value of the estate as required by section 55 (1) (c) of the Probate and Administration of Estates Act, Cap. 352 R.E. 2019, then jurisdiction of the court was merely inferred. Learned counsel argued that the estate being in the category of small estates whose pecuniary limit is capped at TZS. 100,000,000/-, it was critical that value of the estate be disclosed to help in gauging if the court had requisite jurisdiction.

Mr. Nyambo further contended under section 5 (2) (b) of Cap. 352, the power of the district delegate is limited to matters whose value does not exceed TZS. 15,000/- in case of a contentious matter, unless consent of the High Court is obtained for any higher amount.

Regarding ground three, the argument is that appointment of the respondents as administrators did not consider the interests of legal

daughters of the deceased. In his view, the court ought to have given the reason for the decision that left other beneficiaries. Ideally, learned counsel contended, the court ought to have ordered that the appointment be of a mixed nature, involving those who are from another womb.

On ground four, the argument is that Catherine Peter Mosha who was appointed as a joint administrator did not wish to be appointed as such. The appellant also argued that the reason cited for the appointment i.e. uniting the family, was not correct. Learned counsel contended that the wisest of the decisions would be to order that the parties go back and sort out the matter as a family.

In his submission on the last ground of appeal, the appellant's counsel argued that wrong findings were arrived at because the trial court did not evaluate the evidence adduced by the parties. In the appellant's thinking, a proper evaluation would not have left out the appellant from including her as one of the beneficiaries of the deceased's estate.

For their part, the respondents poured cold water on the appellant's argument. On ground one, Mr. Jerome Jeremiah, learned counsel, submitted that the petition was lodged by the appellant who did not plead that the value of the subject matter exceeded the pecuniary jurisdiction of the court. He took the view that the court was properly seized with jurisdiction to

preside over the matter. Mr. Jeremiah added that the respondents see nothing wrong with the court's power to entertain the matter, and that the rest is a mere afterthought and an act of attempting to benefit from his own wrong.

With regards to ground three, learned counsel's view is that the desire of the clan meeting was to appoint three administrators who would adequately represent the interests of the beneficiaries. Mr. Jeremiah argued that it is not a matter of necessity that every beneficiary should be appointed as an administrator of the estate, and that it is enough if interests of other beneficiaries are taken care of by the administrators. He urged the Court to find no merit in this ground of appeal.

Regarding ground four of the appeal, the view taken by the respondents' counsel is that the will of the respondents to administer the estate is manifested by the proposal made by the clan that the duo should apply for administration. They termed the appellant's assertion as baseless.

With regards to ground five, the argument by Mr. Jeremiah is that this ground is hollow, the reason being that the evidence adduced by the parties was very well evaluated and that the decision was well reasoned. Learned counsel argued that, in the absence of particulars of which evidence was

evaluated and which one was not, it is difficult to make sense of the appellant's contention. He held the view that this ground too is baseless.

The appellant's rejoinder did not introduce anything new with respect to other grounds of appeal. With regards to ground one, the appellant's counsel implored the Court to follow the route taken by the Court in its decision in ***Ashura M. Masoud v. Salma Ahmad***, (HC) PC. Civil Appeal No. 213 of 2004, in which probate and administration proceedings were nullified on the ground that the District Court did not have jurisdiction to handle the matter which exceeded the pecuniary jurisdiction of the court in small estates. Learned counsel urged the Court to follow the path taken in the cited decision.

The broad question to be resolved in this appeal is whether the same is meritorious.

I will start with ground one in which the question of jurisdiction of the trial court has taken a centre stage. The contention that is hotly contested by the respondents is that the trial court's jurisdiction was not ascertained as no value of the estate was established.

As I tackle this issue, it behooves me to state the general principle on jurisdiction, and I propose to do so by quoting a couple of decisions on the subject. These decisions point to the general principle that matters relating

to jurisdiction are too important that they must be ascertained at the commencement of the proceedings. This was underscored in the case of **Fanuel Mantiri Ng'unda v. Herman M. Ng'unda**, Civil Appeal No. 8 of 1995 (unreported), cited by the appellant's counsel. In this decision, the Court of Appeal of Tanzania laid down the following key principle:

*"The jurisdiction of any court is basic, it goes to the very root of the authority of the Court to adjudicate upon cases of different nature ... the question of jurisdiction is so fundamental that courts must as a matter of practice on the face of it be certain and assured of their jurisdictional position at the commencement of the trial. **It is risky and unsafe for the court to proceed on the assumption that the court has jurisdiction to adjudicate upon the case.**"*[Emphasis supplied]

This excerpt lays down an imperative requirement of ensuring that courts' powers to handle proceedings instituted by the parties are apparent and not assumed. Jurisdictions are conferred, not by the parties' consensual decisions, but by statutes that either establish the courts or those that create rights or offences, in the case of criminal cases. Thus, in **Shyam Thanki and Others v. New Palace Hotel** [1972] HCD No. 97, this Court warned against possible 'conspiracy' by the parties to consent to give jurisdiction to a body that has none. It was held:

"All the courts in Tanzania are created by statutes and their jurisdiction is purely statutory. It is an elementary principle of law that parties cannot by consent give a court jurisdiction which it does not possess."

It is beyond controversy that the instant matter was instituted in a court that is designated as a District Delegate within the meaning section 2 of Cap. 352, and whose jurisdiction is spelt out in section 5 (2) which provides as follows:

"A District Delegate shall have jurisdiction in all matters relating to probate and administration of estates with power to grant probate and letters of administration of estates if the deceased, at the time of his death, had his fixed place of abode within the area for which the Delegate is appointed—

(a) in non-contentious cases;

(b) in contentious cases, if the Delegate is satisfied that the gross value of the estate does not exceed fifteen thousand shillings, or the High Court authorises the Delegate to exercise jurisdiction in such circumstances as are specified in subsection (3).

(3) No act of a District Delegate exercising jurisdiction in probate or administration of estates shall be invalid by reason only that it is afterwards discovered that the gross value of the estate exceeded fifteen thousand shillings, but where the District Delegate becomes aware of such

circumstances in any contentious case, he shall report the matter to the High Court which shall either direct the transfer of the proceedings to itself or authorise the Delegate to exercise jurisdiction therein."

Gleaning from the proceedings in the trial court and the appeal before me, it is hardly disputable that the matter became contentious the moment the respondents filed a caveat, challenging the appellant's proposed appointment. This meant that pecuniary jurisdiction of the court became an issue which required clarity and resolution, noting that the cap, which has since been increased to TZS. 100,000,000/-, was at stake. This would be done by reviewing the petition and see if it complied with the requirements of section 25 (1) (c) of Cap. 352 that requires that there be a disclosure of the amount and nature of assets which are likely to come to the petitioner's hands.

While it is an overstatement and an act of creating an unwarranted conclusivity to contend that the value of the estate, the subject of the appeal, was in excess of TZS. 100,000,000/- set by law, it is also irrational to contend or assume that the value of the estate was in the south of the ceiling set by the law. The incontrovertible fact is that jurisdiction of the court which is pegged on the value of the estate was an inconclusive matter when the court presided over the proceedings, meaning that the court ***"proceeded on the***

assumption that the court has jurisdiction to adjudicate upon the case” while nothing lent credence to that assumption.

It is in view thereof that I find convergence with the position held by the appellant, albeit partly, that jurisdiction of the court, in the absence of any semblance of evidence, is suspect and it was quite improper for the trial court to entertain the petition and the proceedings that followed subsequently.

On this ground alone, I allow the appeal. I find and hold that the proceedings in the trial court were a travesty of justice and a nullity. Consequently, I quash them, set aside the ensuing decision, and order that the parties go back to the drawing board and file a fresh petition that states the actual value of the estate to enable a court assess its powers to handle the matter. I make no order as to costs noting that this a probate and administration cause.

Order accordingly.

DATED at **DAR ES SALAAM** this 27th of April, 2022.



M.K. ISMAIL

JUDGE

27/04/2022

