

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

PC. PROBATE APPEAL NO. 2 OF 2021

ASHA ALLY APPELLANT

VERSUS

TABIBU MAULID ALLY RESPONDENT

(Appeal from the Judgment and decree of the District Court of Mpanda at Mpanda)

(G. B. Luoga, RM)

Dated 27th day of July 2021

In

Probate Appeal No. 1 of 2021, Original Probate Cause No. 94 of 2018 – Mpanda Urban
Primary Court

JUDGMENT

Date: 27/05 & 01/07/2022

NKWABI, J.:

On 26th October 2018, Mwajabu Diwani Maulidi passed away intestate. Then, on 10/12/2018 clan members of the deceased convened a meeting to propose who would be administratrix of the estate of the deceased. It turned out, according to the meeting minutes, that ASHA ALLY MAULID was proposed by the clan. The minutes tells it all:

"Wajumbe baada ya majadiliano marefu walimteua ASHA ALLY MAULID kuwa pendekezo lao."

It is due to that minutes that the appellant promptly filed a probate and administration cause No. 98 of 2018 on 17/12/2018.

The application form for appointment as administratrix of the estate of the deceased was filled in by ASHA ALLY MAULID and reveals the relatives survived the deceased at that time as follows:

1. Fatuma Kasanda.
2. Asha Ally Maulid.
3. Zuhura Maulid.
4. Tabibu Maulid.
5. Rajabu Maulid.

The verdict of the trial court on 07/01/2019 goes like this:

"... imeridhia maombi haya ya mwombaji na imemteuwa Bi Asha Ally kuwa msimamizi wa mirathi ya marehemu Mwajabu Diwani Maulid ..."

The decision of the trial court directed the appellant to submit the account of estate on 08/04/2019 in court when the court would close the probate and administration cause. It was on 03/06/2019 the administratrix of the estate filed in the trial court accounts of the estate where it reveals that the

money that was in an account was to be given to the mother of the parties while the house to remain the property of the family which included the respondent in this appeal, but there is no exchequer receipt for the filing of the account of the estate.

On that very date the probate file was closed. It is unclear after that distribution of the estate, whether the appellant approached the appropriate authority to transfer the ownership of the house to herself first as administratrix of the estate and then to those five persons indicated in the accounts of the estate.

Be that as it may, the respondent brought to the attention of the trial court that the appellant in this appeal, had used the properties of the deceased without the knowledge of the other heirs. Then she asked for assistance from the court as follows:

"Nitashukuru iwapo jambo hili litashughulikiwa na kupata msaada."

The trial court issued summons to the appellant on 24/12/2020. Then the court heard the parties and their witnesses and delivered its ruling on 23/03/2021. It was satisfied with the evidence that the appellant failed to distribute the estate of the deceased, it therefore revoked her from being administratrix of the estate. Then it proceeded to appoint the respondent as administratrix of the estate. The appellant in this court, was aggrieved by the decision of the trial court revoking her appointment. She unsuccessfully appealed to the District Court.

The appellant failed to convince the District Court that she failed to file inventory because she was nursing her mother who is also dead, as she, a resident of Mpanda, would have gone to the trial court and sought extension of time to file the inventory. It was of the considered opinion that the appellant was unqualified administratrix of the estate and held the trial court was justified to revoke the appellant as administratrix of the said estate. It dismissed the appeal.

Seriously aggrieved, the appellant in this court, is relentlessly pounding the decision of the first appellate court in upholding the decision of the trial court with the following grounds of appeal:

1. That the appellate court erred in law and facts by dismissing an appeal disregarding the open fact that application for revocation was raised by the trial court duo motu without being opened by the respondent.
2. That the appellate court erred in law dismissing an appeal by consolidating all grounds of appeal without adjudicating each ground of appeal on its merits as raised by the appellant.
3. That the appellate court erred in law and facts by its failure to narrate what was submitted by parties in all seriatim in its judgment and appreciating that the appellant withdrew one of the grounds of appeal at the date set for hearing of appeal.
4. That, the appellate court erred in law and facts by believing that the appellant has misused deceased properties without any proof.

The appeal was heard by way of written submissions, Mr. Lawrence John, learned advocate argued the appeal for the appellant while the respondent had the services of Ms. Sekela Amulike also learned advocate.

To begin with, in disposing this appeal, I will consider the 1st ground of appeal. It is that the trial court erred in law and fact by entertaining the application for revocation of appellant which was raised sou motu and was not opened by the respondent.

On this first ground of appeal, Mr. Lawrence argued that it is mundane law that all the proceedings in primary court are initiated by application as per the Magistrates Courts (Civil Procedure in Primary Courts) Rules GN No. 310 of 1964 Rule 5 (1) and 5(2) which explain that application may be oral or in writing signed by the applicant.

Mr. Lawrence asserted that in the case at hand, the respondent didn't apply for revocation of the administratrix in the trial court vide her letter dated 16/12/2020 which initiated the proceedings before the trial court, worse

enough such letter initiating the proceedings was not addressed to the Mpanda Urban Primary Court and in her letter the respondent was only complaining about the act of administratrix to use the properties of deceased without her knowledge what went on before the trial court has grossly violated the cherished principle of law that parties are bound by their pleadings. He referred me to the case of **James Funke Ngwagilo v. AG** [2004] TLR 161. He stressed, it was wrong for the learned magistrate to entertain the application which was not presented by the respondent before the Honourable court and in other view the trial court acted without jurisdiction because the letter initiating the proceedings was not addressed to the trial court.

Additionally, though opened in 2020, it was given the old number which is Probate Cause No. 94 of 2018 while it was a different application. Secondly, the respondent in her letter dated 16/12/2020 was complaining about administratrix Asha Maulid Ally and not Asha Ally who is the appellant. He added, the proceedings were incompetent and this court has the duty to put the record correct. He cited for me the case of **Moremi Mangángo v. Susan Mahimbo & 2 others**, Misc. Land Case Appeal No. 57 of 2021 (HC) (unreported).

He further argued that the respondent did not comply with Rule 9(1) of the Primary Court (Administrator of estates) Rules GN NO. 49 of 1971 which provides:

"Any creditor of the deceased person's estate or any heir or beneficiary thereof may apply to the court which granted the administration to revoke or annul the grant in the following grounds ..."

Further, parties were not given a right to be heard against the case law **Kumbwandumi Ndemfoo Ndosì v. Mtei Bus Services Limited**, Civil Appeal No. 257 of 2018 (CAT) (unreported).

In the 1st ground of appeal, Ms. Amulike for the respondent contended that the trial court rightly and in accordance with the law revoked the appointment and the same was not raised sou motu by the court but the respondent herself. She added, the rule does not specify on what way one may apply for revocation or annulment, the rule only mentions grounds or circumstances on which one may apply for the same. The respondent being

one of the beneficiaries of the estate of Mwajabu Maulid had the right to complain to protect her interest.

Ms. Amulike added that the trial court summoned both parties and heard them and rightly revoked the appellant as administratrix of the estate and appointed a new administratrix as per Rule 2 (c) of Fifth Schedule of the Magistrate's Courts Act, Cap. 11 and Rule 2(a) of the Fifth Schedule of the Magistrate's Courts Act, Cap 11 respectively.

She further asserted that in the letter dated 16/12/2020 the respondent refers to the appellant with the name Asha Maulid Ally who is the administratrix of the estate of Mwajabu Maulid, and Asha Ally and Asha Maulid Ally refer to the same person that is why the appellant responded to the letter naming her and appear before the court and defended her appointment as administratrix of the estate of late Mwajab Maulid.

She stressed, the fact that the appellant appeared and defended in course before the trial court proved that Asha Maulid Ally and Asha Ally refer to one person and thus appellant. She cited **Christina Mrimi v Coca Cola**

Kwanza Bottlers Ltd, Civil Application No. 113 of 2011 (CAT) and **Chang Qing International Investment Limited v. Tol Gas Limited**, Civil Application No. 292 of 2016 to the effect that in both cases the Court of Appeal of Tanzania allowed application even though there were difference in parties' names, the Court overlooked the errors and allowed the matters to proceed on merit.

She distinguished the case of **James Funke Ngwagilo v. AG**, [2004] TLR 161 as that case was a Civil Appeal which originated from the High Court whereas it is well known that the principle governing procedures and laws in the High Court in entertaining original cases in original jurisdiction is different from procedures applied in Primary Courts as such it is incorrect to refer the case in this case.

In rejoinder, Mr. Lawrence maintained that the respondent never filed any application for revocation and worse enough no any exchequer receipt which proves filing the application for revocation, such decision be held

incompetent as per **Romania Malingumu v Melkio Kilika**, Misc. Land Appeal No. 7 of 2021 HC (at Sumbawanga) (unreported).

Mr. Lawrence too pointed out that the respondent did not reply on the issue of Misc. Application being opened by her without being numbered or given its separate file but the same was given the old probate file number i.e. Application No. 94 of 2018 which the appellant used when granted the letters of Administration. In their view they termed it as admission hence maintained that the proceedings of the trial court were null and void from the beginning and the same deserves to be quashed by this Court.

He further argued that Rule 2(c) of the Fifth Schedule of the Magistrates Courts Act Cap 11 is highly distinguishable in the circumstances at hand because the respondent's letter was not even addressed to Mpanda Urban Primary Court rather it was addressed to *Hakimu Mahakama ya Mwanzo* in his personal capacity which is also unclear which primary court the respondent is referring to, also the letter did not mention Application No. 94 of 2018 which was the root of the appeal before the 1st appellate court. He

added as no application was opened in the trial court, the trial court lacked the jurisdiction to revoke the appointment of the appellant as administratrix of the estate.

Stressing his argument on confusion on names between Asha Ally and Asha Maulid Ally, the counsel for the appellant reminded this court that the administratrix who was appointed by the trial court vide Shauri la Mirathi Namba 94/2018 was Asha Ally. Asha Maulid Ally who was referred by the respondent in a letter dated 16/12/2020 was a new party to the proceedings who was not found anywhere in the Probate Cause No 94/2018 before Mpanda Urban Primary Court.

Mr. Lawrence sought to distinguish the cases of **Christina Mrimi v Coca Cola Kwanza Bottlers Ltd**, Civil Application No. 113 of 2011 and **Chang Qing International Investment Limited v TOL Gas Limited**, Civil Application No. 292 of 2016 (CA) (unreported) because the cases are overruled by recent case of Court of Appeal of Tanzania in **CRDB Bank PLC**

(Formerly CRDB 1996) Ltd v. George Mathew Kilindu, Civil Appeal No. 110 of 2017 (CAT) (unreported):

"We thus find the notice of appeal bearing the name of a stranger invalid and has rendering the entire appeal incompetent liable to be struck out."

He also referred to the case of **Interconsult Limited v. Mrs. Nora Kassanga & Another**, Civil Appeal No. 79 of 2015 CAT (unreported):

"Be it as may, we agree with Mr. Vedasto that substitution of the appellant name from International Engineering Consultancy Services Ltd to Inter Consult Co. Ltd without any specific order of the trial court was an irregularity which was fatal."

Mr. Lawrence, therefore, vigorously maintained that Asha Maulid Ally who was not an administratrix who was referred by the respondent in her complaint dated 16/12/2020 bad enough the trial court decided itself and of course without any court order to substituted it with Asha Ally something which made the application and proceedings of the trial court and those of the 1st appellate court incompetent.

I have closely considered the arguments of both counsel on the 1st ground of appeal. With the profound respect to Mr. Lawrence, I do not find fault in the decisions of both the trial court and the District Court which dismissed the appellant's appeal.

It is clear law that the trial court may revoke the appointment of the administrator or administratrix of an estate or even executor of a will sou motu or by application made by an interested person to the estate of the deceased. I am of the view that the trial court opened the revocation proceedings sou motu after it received the complaint from the respondent and decided to entertain it. The claim that the initiating letter was not addressed to the trial court but to the magistrate in his personal capacity is misconceived due to the fact that parties who appear in the primary court, most of them are illiterate so the trial court has to assist them in accordance with the permitted limits. See **Sabayaga Farmers' Cooperative Ltd v. Anyony Mwita, [1968] HCD no. 354**, Seaton J.

Held: (3) In the present case the written statement of defence was curable as is shown by paragraph 5 of the memorandum of appeal, which would have satisfied the

requirements of Order 8, rules 3, 4, or 5 of the Code. Defendant's officer was a man of limited education and with no legal experience, and in these circumstances, the trial court erred in striking the written statement of defence. Ex parte judgment set aside, and case remanded to trial court for amendment of the written statement and trial of the case on its merits.

That complaint fails.

As to the complaint that the application was not given a new number, again, with respect, the submission by the learned counsel for the appellant does not find purchase with me. This is because, and in my view properly so, the matter was re-opened for it was not properly closed. In fact, in the eyes of the law, the probate and administration cause was not closed. It was not properly closed because the appellant had not filed any inventory contrary to the law. So, the case file was subject to being reopened and it was reopened. In the circumstances, it had to maintain its number which is probate cause No. 94 of 2018. Therefore, there was no need of opening another file and assign it another file number. So, there was no need of payment of court fee while the matter was opened sou motu.

I have also closely considered the complaint by Mr. Lawrence that the letter was complaining about Asha Maulid Ally and not Asha Ally claiming that it was a different person from the appellant fortifying his complaint by the decision of **CRDB Bank PLC Formerly CRDB 1996) Ltd v. George Mathew Kilindu** (supra) among others. With respect to Mr. Lawrence, the case of CRDB and that of **Interconsult Limited** (supra) are distinguishable with the present case on two grounds. First, the cases cited by Mr. Lawrence are in respect of legal persons (companies) as opposed to the appellant who is a natural person and secondly and probably more importantly, in the cases cited by Mr. Lawrence, the proper names of the companies were not reflected anywhere in the pleadings or proceedings. But the name of the appellant as Asha Maulid Ally or Asha Ally Maulid was reflected in the application form for being appointed as administratrix of the estate, in the minutes of the clan and even in the evidence of her witness Zuhura Ally. The complaint is therefore unmerited as the appellant cannot reject her own name which she even indicated in her pleading and is reflected even in the evidence of her witness. The complaint is dismissed.

Submitting on the 2nd and 3rd grounds of appeal which are that the appellate court erred in law dismissing an appeal by consolidating all grounds of appeal without adjudicating each ground of appeal on merits as raised by the appellant, and that the appellate court erred in law and facts by its failure to narrate what was submitted by parties in all seriatim in its judgment and appreciating that the appellant withdrew on of the ground of appeal at the date set for hearing of the appeal. It was unclear as to which ground the first appellate court was adjudicating. I was referred to the case of **Hassan Said Lambikamo v. Ndalagaye Daud Nzimbor**, Misc. Land Case Appeal No. 4 of 2019 (HC). Mr. Lawrence argued that that was an error which went to the root of the matter and it prejudiced the right of the appellant as she failed to know which was the standing of the first appellate court on each of her ground of grievances raised.

On these two grounds of appeal, the counsel for the respondent replied that there is no law which requires every ground of appeal raised to be determined on merit because some grounds of appeal have the same effect despite being wordy different. She added, the first appellate court did not consolidate all grounds of appeal but determined what transpired before it

and made its judgment. She sought to distinguish the case of **Hassan Said Lambikamo v. Ndalagaye Daud Nzimbor**, Misc. Land Case Appeal No. 4 of 2019 in that in Hassan's case a point was raised *sou motu* without parties afforded an opportunity to address and the chairman of the District Land and Housing Tribunal failed to discuss all the grounds of appeal.

In rejoinder, the counsel for the appellant contended further that the counsel for the respondent did not provide any substantial reply on the 2nd and 3rd grounds of appeal. He stated, the attempt to distinguish the case of **Hassan Said Lambikamo** (*supra*) by the counsel for the respondent is not allowed in law as she did so by challenging the decision delivered by Hon. Bahati, Judge as if she is appealing against such decision, he stressed that, that is not acceptable at all.

With respect, the complaints by the appellant in the 2nd and 3rd grounds of appeal are unmerited. This is because, even the counsel for the appellant in discussing the 2nd and 3rd grounds of appeal combined the same by submitting on them together. A court could do the same. What is important

is that just has to be dispensed. Even if that were not the case, this court is seized with the jurisdiction to even appraise the evidence of the lower courts and come to its own conclusion, see **Ahmed Said v Republic, Criminal Appeal No. 291/2015** CAT (unreported). See also **Neli Manase Foya v. Damian Mlinga [2005] T.L.R 167**. I have gone through the proceedings and the evidence in the trial court's record, I have found nothing to fault. The complaints in ground 2 and 3 of the petition of appeal are meritless and are dismissed.

On the last ground of appeal, which is the appellate court erred in law and facts by believing that the appellant has misused deceased's properties without any proof, it was the submission of Mr. Lawrence that the party who brings allegations must prove as per **East African Road Services Ltd v. J.S. Davis & Co. Ltd [1965] EA 676** to the effect that:

"He who makes an allegation must prove it. It is for the plaintiff to make out a prima facie case against the defendant."

Mr. Lawrence proceeded lamenting against the decision of the 1st appellate court that it was illegal for the 1st appellate court to believe that the respondent has squandered 28 motor cycles without proof where it observed:

"According to the Respondent the appellant failed to account for the said estate, she has squandered it she has sold 28 motor cycles without involving other heirs, she has failed to account for the money which was at the bank when she closed the account. In my opinion she has no qualification to administer the said estate."

He moreover maintained that worse enough the issue of squandering 28 motor cycles was a new issue which was neither canvassed nor being adjudicated upon in the trial court hence it was wrong for the first appellate court to entertain it without even inviting the appellant to comment on the same. He pointed out that the allegations that were levelled against the appellant were not proved by the respondent at the threshold of being believed by the first appellate court hence in his view, it was illegal for the

appellate court to buy such story and endorse the same at the detriment of the appellant. He urged I find this appeal meritorious and the same be allowed.

To counter the submissions of Mr. Lawrence, Ms. Amulike responded that section 21 (1) (b) of the Magistrates Courts Act Cap 11 provides for powers bestowed upon the District Court in exercise of its appellate jurisdiction which are to confirm, reverse, amend or vary in any manner the decision or order appealed against whether or not additional evidence is heard or taken. She was of the view that the District Court was perfectly entitled to confirm the decision of the trial court. She pressed that the decision of the 1st appellate Court be maintained.

Adding some force to his earlier submission in chief in an attempt to melt down the reply submission by Ms. Amulike, Mr. Lawrence contended that the counsel for the respondent did not provide substantial submission to reply the fourth ground of appeal. He stressed that the court has to act on evidence, be it affidavit, oral or documentary as per **Delifina Kibomba v.**

Luca Bernard, Civil Appeal No. 3 of 2022 HC Sumbawanga, (unreported). He stressed, the Honourable Magistrate of the 1st appellate court acted wrongly and without evidence to remark that the appellant squandered the deceased's estate, sold 28 motorcycles without involving heirs and also, she failed to account for the money which was in the bank. Since there was no prove, Mr. Lawrence observed, that was at the detriment of the appellant and the same resulted into miscarriage of justice and the same was new matter which was not canvassed by parties before it.

Mr. Lawrence was also of the view that, section 21(1)(b) of the Magistrates' Courts Act Cap 11 cited by the counsel for the respondent is distinguishable in the circumstances because the appellant did not complain about the issues of additional evidences neither did the 1st appellate court take any additional evidence so the cited section is irrelevant.

The counsel for the appellant is of a further view that section 37(2) of the Magistrates Courts Act, Cap 11 that was cited by the Respondent is inapplicable because the errors, irregularities and omissions complained by

the appellant has occasioned failure of justice on part of the appellant in two manners one by making her to attend the proceedings which were incompetent from the beginning, and two by condemning her unheard as intimated above and also hence they humbly, with all respects, request this Court not to leave the illegalities and omissions done by the trial court and blessed by the 1st appellate court not to go unchecked as it is a duty of this Court to put the records clear as stated in the case of **Moremi Mang'ango** (supra).

Once more, and with respect to Mr. Lawrence, this ground of appeal is misconceived. There is evidence that the trial court acted upon to revoke the appointment of the appellant as an administratrix of the estate of the deceased because witnesses were sworn or affirmed. And in fact, the appellant did not challenge seriously the grave allegations raised in the evidence on the respondent's side that the appellant did not file any inventory or account and did not close the probate cause and actually admitted it alleging that she was nursing her late mother. I have gone through the record and indeed as I have indicated before, the appellant did not file any inventory, in my view, even if an account of the estate was filed

in court the same cannot stand as in my view, it cannot be valid without the inventory being filed in court.

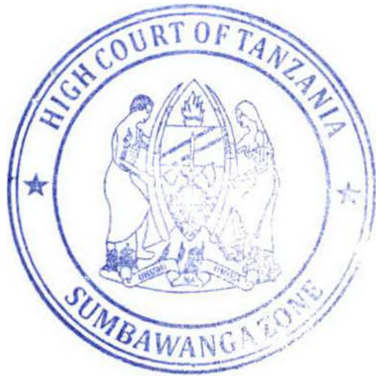
As to the alleged sold 28 motorcycles, I agree, that that is not borne by the evidence on the respondent. Despite the misdirection to the evidence on the 28 motor cycles, the misdirection did not occasion miscarriage of justice. In the circumstances, the cited case of **Delifina** (supra) is distinguishable to the case at hand. In delifina's case, the District Court did not receive any evidence. In my view, the decision of the trial court, the subject of this appeal is supported by the decision of the Court of Appeal in **Mohamed Hassani v Mayasa Mzee and Mwanahawa Mzee [1994] TLR 225** (CA), Kisanga JJA, Mnzavas JJA and Mfalila JJA:

It is up to the person challenging the validity of appointment of an administrator by the court to show that the person so appointed does not have the required qualifications to administer the estate.

In fine, I find that the first appellate court was correct in upholding the decision of the trial court. The appeal is dismissed. Each party, however, has to bear their own costs.

It is so ordered.

DATED at **SUMBAWANGA** this 1st day of July, 2022



J. F. NKWABI

JUDGE