

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

CIVIL APPEAL NO. 07 OF 2022

*(Arising from Civil Revision No. 08 of 2021 at Morogoro District and Originating from
Probate No. 91 of 2021 from Morogoro Urban Primary Court)*

ADAM RAJABU SAMATHA.....1ST APPELLANT

**MWANTUMU HASSANI CHANDE (*As an Administratrix of the
Estate of the late Rajab Said Samatha*).....2ND APPELLANT**

VERSUS

ABDALLAH RAJABU SAMATHA.....RESPONDENT

JUDGEMENT

Hearing date on: 09/05/2022

Judgement date on: 31/05/2022

NGWEMBE, J:

The appellants, are in this court challenging the decision of the District Court of Morogoro in Civil Revision No. 08 of 2021. Such revision originated from Probate and Administration cause No. 91 of 2021 decided by Morogoro Urban Primary Court.

In brief, this matter traces back to year 2021 when Mwantumu Hassan Chande (2nd Appellant) successfully applied for letters of administration of the estate of late Rajab Said Samatha who died

intestate at Morogoro Urban Primary Court. After appointment of the 2nd appellant, Adam Rajab (1st Appellant) successfully objected inclusion of three houses in the estate of the deceased Rajab Said Samatha. Those houses were built in Plot No. 461 Block "A", Tabata Ilala Municipality at Dar-es-salaam, Plot No. 18 Block "I" Cheyo Tabora Municipality at Tabora and Plot No. 635 situated at Kihonda, Morogoro. In his objection he argued that, those houses are not properties of the deceased Rajab Said Samatha, rather belonged to himself and Mwantumu Hassan Chande (2nd appellant). That the house situated at Kihonda Morogoro is his property while the remaining two at Dar-es-salaam and Tabora belong to the 2nd appellant. Justified his assertion that the deceased before his death while having of sound mind, transferred those houses to them through Deed of Gift on 08/11/2016.

Proceeded to submit that the 2nd appellant, after being forced by the deceased's relatives before Primary Court included those Houses in the estate of the deceased, while knowing that the deceased himself already transferred them the appellants. To substantiate his assertion, he justified by stating that even the certificates of ownership of those houses are in their custody. More so, the 2nd appellant was forced to include another child called Abdallah Rajab Samatha (respondent) among heirs of the deceased estate, while he was not a child of the deceased.

At the end and after determination of those objections, the trial court (Morogoro Urban Primary Court) excluded those three houses from the list of properties of the deceased estate.

Aggrieved therein, respondent challenged such exclusion of those houses, hence filed Civil Revision No. 8 of 2021 before the District Court of Morogoro inviting the Court to call upon and examine the records of primary court of Morogoro with a view to satisfy on correctness and legality of the proceedings or propriety of the decision of probate and administration cause No. 91 of 2021. The District court was satisfied that the three houses should be included in the deceased's estate and went further to distribute those houses to the heirs. That the respondent was given a house located at Dar-es-salaam and the two appellants were given houses located at Tabora and Morogoro.

The District Court was satisfied that there was no transfer of those houses to the appellants. That even the titles bore the names of the deceased, Rajab Said Samatha, thus, proved no transfer to the appellants. In regard to other properties, it was ordered same be divided by the administratrix of the deceased estate as the law so requires because there was no dispute among the heirs.

Such decision of the District Court aggrieved both appellants, hence they exercised their rights to appeal to this Court grounded with five grievances namely:-

- 1) That, the District Court grossly erred in law by distributing the house situated at Dar-es-salaam to the respondent.*
- 2) That, the District Court grossly erred in law and facts by distributing a house suo motto while the Respondent herein did not pray for the said order.*



3) *That, the District Court grossly erred in law and facts by holding that, proof of transfer of the property is when the same is registered.*

4) *That, the District Court erred in law and facts by holding that, caveats are to be entered prior to the appointment of the administratrix.*

5) *That, the District Court erred in law by making a finding like it is a trial court while it was a revisional court*

When this appeal came for hearing both parties were represented by learned advocates. While the appellants were represented by Mr. Asifiwe Alinanuswe, the respondent was represented by Mr. Thomas Mathias. With appreciation, both counsels were prepared and forcefully argued the appeal professionally, with reference to relevant authorities. This court recognize their effort made by each counsel.

The learned advocate for the appellants argued convincingly on the first ground that distribution of deceased estate is the sole duty of an administrator or administratrix. Courts have no jurisdiction to distribute the deceased estate. Referred this court to item five of the Firth Schedule to **Magistrate Court Act** and in the case of **Samson Kishosha Vs. Charles Kingongo Gaba [1990] T.L.R**, page 133 to page 136. Insisted that the court wrongly stepped in the shoes of the administratrix.

Submitting on the second ground, briefly argued that the court distributed those houses *suo motto* without inviting the respective parties to argue on same. He further stated that, if the court raises an

issue *suo motto* it has a duty to afford parties a right to be heard. Buttressed his argument by referring this court to article 13 (6)(a) of the Constitution of the United Republic of Tanzania and supported it by citing the case of **Deo Shirima and Others Vs. Scandinavian Express Services [2009] 1 East African** Page 127. That it is basic that no person shall be condemned unheard. Added that, there was no prayer that the respondent should be given one of those houses and concluded in this ground by insisting that courts can only grant reliefs which are prayed for. He cited the case of **George Mtikila Vs. Registered Trustees of Dar-es-salaam Nursery School and International School of Tanganyika [1998] T.L.R 513**. Therefore, the court may be pleased to nullify the whole decision of the District Court.

Arguing on the third ground, submitted that the District Court grossly erred in law and facts by holding that, proof of transfer of the property is when the same is registered. Insisted that gift was given while the deceased was alive and same has never been challenged anywhere. Moreover, he submitted that, this is a land matter and it was not for the District Court to decide on land matters. Buttressed by referring this court to the case of **Salum Mateyo Vs. Mohamed Mateyo [1987] T.L.R 111** where it was held:-

"Un-qualified gift sui juris, out of love and affection passes the property absolutely"

On ground four, the advocate submitted that the law is clear that objections and caveats are to be issued after appointment of the

administrator as per the **Primary Courts [administration of Estates] Rules GN. No. 49 of 1971.**

On the last ground the counsel for the appellant submitted that the court at page 9 decided to interfere and divide the properties as if, it was a trial court. In conclusion he prayed this court to quash the decision of the District Court for it is tainted with irregularities and remit the file to the trial court for the administratrix to continue with her duties.

In response thereto, the learned counsel for the respondent argued jointly grounds 1, 2, and 5 because they are similar in contents. He submitted that the District Court has unqualified powers to examine the legality and correctness of the decision of the trial court as per section 21(1)(2) of the **Magistrate Court Act**. Stood firm that the respondent in the District court prayed for inclusion of those houses, and it is reflected into his chamber summons. He cited the case of **International Commercial Bank Ltd Vs. JadeCam Real Estate Ltd, Civil Appeal No. 446 of 2020** at page 30-31. He prayed that grounds 1, 2 and 5 be dismissed.

Replying on ground three, the counsel insisted that all three houses are still properties of the deceased and that there was no proof of transfer of those houses as gifts to appellants. Referred this court to section 2 of the **Land Registration Act CAP 334 R.E 2019** which defines who is the land owner, to mean in relation to any estate whose name to that estate is registered. That there was no transfer of the said houses because the process did not meet the legal requirements as per section 61(1), 62(1)(2) of the **Land Act**. He substantiated his argument by referring this court the case of **Jane Kimaro Vs. Vicky Adili, Civil**

Appeal No 2012 of 2016 at Page 13. He submitted that the matter was not land matter, but rather a probate one.

Replying on ground four, the counsel for the respondent submitted that, the District Court was right to decide that caveat should be entered prior to the appointment of the administrator. He concluded inviting this court to dismiss all grounds of appeal for lack merits.

In brief rejoinder, the appellant's advocate submitted that, the District court has no jurisdiction to distribute the estate of the deceased. Insisted that, ownership of those houses was yet to be passed to the appellants.

Having briefly, summarized the rival arguments of the learned counsels, I find the first issue is more calling to begin with for obvious reason that it touches the court's jurisdiction which is statutory. Since this matter commenced from Primary Court, then, the law applicable is as provided fifth Schedule to ***The Magistrates' Courts Act [CAP. 11 R.E. 2019]***, for under read together with ***The Primary Courts (administration of Estate) Rules***. Among many other things, the law sets out the jurisdictional powers of the primary court, general duties of the administrator, proceedings, distribution of assets, accounts and many other issues related to the administration of deceased estate.

Item 5 of the fifth schedule to the **Magistrates Courts Act, [Cap. 11 R.E 2019]**, sets out the general duties of an administrator as quoted hereunder:-

Item 5 *"An administrator appointed by a primary court shall, with reasonable diligence, collect the property of the deceased and the debts that were due to him, pay the debts of the*



*deceased and the debts and costs of the administration and shall thereafter **distribute the estate of the deceased to the persons** or for the purposes entitled thereto and, in carrying out his duties, shall give effect to the directions of the primary court"*

As rightly submitted by the learned advocate for the appellants the power to distribute estate of the late Rajab Said Samatha is vested to the administratrix and not to the Court. The section above quoted is clear like a brightest day light that the duty to distribute assets of the deceased lies to the hands of the administrator/administratrix. Therefore, without labouring much on this point, the District Court assumed the role of an administratrix by engaging into distribution of those houses. I have no slight doubt, the District court misdirected in considering that it has jurisdiction to district those houses. Part of the District court's judgement is quoted:-

"...but the Court can interfere if the parties failed to negotiate themselves. For that reason, this court can decide to interfere in and order that among the three houses, the applicant to be given one house which is situated at Dar-es-salaam and the respondents to remain with two houses of Tabora and Morogoro."

Such findings is contrary to the prevailing legal position pronounced by Courts of last instance including in the case of **Ibrahim Kusaga Vs. Emmanuel Mwita (1986) TLR 26** where this court held:-

(a) A primary Court may hear matters relating to grant of administration of estates where it has jurisdiction, i.e., where the law applicable is Customary Law or Islamic Law.

(b) A Primary Court ought not to distribute the estate of the deceased; that is the job of an administrator appointed by court;

It is an elementary legal knowledge that, courts must exercise jurisdiction provided for by the statute. The Court of Appeal in **Fanuel Mantiri Ng'unda Vs. Herman M. Ng'unda & Others [1995] TLR 155(CAT)** held:-

"The question of jurisdiction of any Court is basic, it goes to the very root of the Court to adjudicate upon cases of different nature. The question of jurisdiction is so fundamental that courts must as matter of practice on the face of it, be certain and assured of their jurisdictional position at the commencement of the trial. (at p.159)."


In the case of **Shyam Thanki & Others Vs. New Palace Hotel Ltd (1972) HCD No. 20 at p 23** the defunct East African Court of Appeal stressed that, all courts in Tanzania are creatures of statute and their jurisdiction is purely statutory.

As rightly stated in those old precedents, I would just insist that the question of jurisdiction is sacrosanct that no decision will stand if the court which made it had no jurisdiction. In respect to this appeal, it goes like a day followed by night that the District Court of Morogoro



assumed jurisdiction to distribute assets left by deceased to the heirs, which powers are solely vested to an administrator or administratrix.

The question now is what is the effect, when the court assumes jurisdiction and steps into the role of an administrator/administratrix in a probate case like this one? The answer is simple like water flowing from the mountain into a valley, whatever done by a court lacking jurisdiction renders the entire process, proceedings and judgement null and void abinitio. Accordingly, what was decided by the District court of Morogoro on 20/01/2022, on civil revision No. 8 of 2021 was nullity.

In the light of what I have already decided, this ground alone is sufficient to dispose of the appeal. Considering the remaining grounds will be for academic purposes, while this court is not an academic institution. Accordingly, I proceed to quash and set aside the entire proceedings and judgement of the District Court and order the respective file be remitted back to the Primary Court. Any objection therein may be raised and determined by that court. If the respondent was not heard, the law allows him to apply to set aside such exparte judgement so that an interparte hearing may be ordered. The right to be heard is a natural right which is preserved in our constitution. Therefore, to speed up the ends of justice bearing in mind this is a probate matter, I find justice will be done and seen to be done if this court may proceed to nullify the ruling of the trial court made on 01/09/2021. Thus, parties are at liberty to commence a fresh objection in respect to the properties of the deceased estate. 

I accordingly Order.

DATED at Morogoro this 30th May, 2022



**P.J. NGWEMBE
JUDGE**

30/05/2022

Court: Judgement delivered at Morogoro in Chambers on this 30th day of May, 2022 in the presence of Mr. Elipidi Tarimo Advocate for Asifiwe Alinanuswe Advocate for the Appellants and Mr. Thomas Mathias Advocate for the respondent.

Right to appeal to the Court of Appeal explained.



**P.J. NGWEMBE
JUDGE**

30/05/2022