IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

PC. PROBATE APPEAL NO. 4 OF 2021

MWIMBULA ISSA PONDA ..... APPELLANT

VERSUS

OZANA JUMA ..... RESPONDENT

(Appeal from the Ruling and drawn order of the District Court of Mpanda at Mpanda)
(G. B. Luoga, RM)
Dated 22nd day of October 2021
In
(Civil Revision No. 1 of 2021)

JUDGMENT

Date: 19/05 & 22/07/2022

NKWABI, J.:

The trial court entertained a probate and administration cause No. 34 of 2021. The appellant applied for and was granted letters of administration of the estate of the late Ramadhan Ismail Mkojo who died on 21st November 2020. The probate and administration cause was filed by the appellant on 25/05/2021. In the *TAARIFA YA KIKAO CHA FAMILIA YA MAREHEMU NDUGU RAMADHAN ISMAIL MKOJO,* duly filed in the trial court, indicated that Mwimbula I. Ponda, the appellant was proposed by the family members to apply for appointment and grant of letters of administration.

After hearing witnesses, including the respondent who supported the appointment of the appellant, in the probate and administration cause, the trial court was satisfied that the appellant is suitable for administration of the estate. It appointed him administrator of the estate and granted him letters of administration on 30/07/2021. It ordered him to complete the administration by 30th November, 2021 and submit to the court the account of the estate.

It was on 24th August, 2021, the respondent filed in the District Court of Mpanda an application for revision made under section 22 of the Magistrates' Courts Act, Cap 11 R.E. 2019. The application for revision had four prayers as follows:

1. That this Honourable Court call for and inspect the record of the proceedings of Mpanda urban Primary Court in Probate No 35/2021 for purpose of satisfying itself on correctness, legality and propriety of the proceedings and judgment.
2. That the Applicant is the only heir of the deceased entitled to the house on Plot No. 154 Block "Z" Mnazi Mmoja Nsemulwa, one shamba of 6

acres at Kisimba Mpanda Municipality, one shamba of 10 acres at Kambanga Tanganyika District, and vyombo vya ndani.

3. Any other relief(s) fit.
4. Costs.

The reasons behind the Civil Revision in the District Court were outlined in the affidavit of the applicant which apart from the applicant claiming to be the wife of the deceased are:

1. In Probate No. 35/2021 the Court ordered that all the aforesaid assets to be divided among all the heirs of the deceased which is highly unfair and unlawful in that assets acquired by joint efforts of a husband and wife are their only assets to the exclusion of other persons.
2. In event of death of one of the spouse, the remaining spouse becomes the sole heir entitled to inherit the estate left behind.
3. Before the death of the deceased, the deceased left a WILL in which he appointed his young brother CHARLES MBOGO to be the Administrator of the deceased estate but to their surprise the court refused the WILL and appointed the Respondent who is not a relative of the deceased to be the Administrator of the estate of the deceased.

4. That the Respondent being not relative of the deceased cannot administer the estate of the deceased in a manner which could have pleased the deceased.

The respondent rejected the reasons advanced by the applicant stating solemnly that no good and sufficient cause was advanced to warrant revision of the decision of the trial court. He averred that the applicant was not a legal wife of the deceased but was a mere concubine though blessed with issues.

He further stated that the house located at Plot No. 154 Block Z, 10 acres farm at Kambanga and 6 acres farm at Kasimba were proved by the applicant to be the properties of the deceased, in her evidence in the trial court. She also gave her approval for him to be appointed administrator of the estate of the deceased.

As to the WILL the respondent replied that it was brought and it was declared illegal for failure to adhere to laws governing WILLs.

The District Court, after hearing both parties in the application for revision before it was satisfied that the application for revision had merits. It granted it as follows:

> *"I have gone through the law regulating marriage issues to see whether the applicant was a legal wife of the deceased. This doubt was cleared under the provisions of section 9 (1) 27 (1) and 160 (1) of the law of marriage Act (Cap 29 RE 2019) and it has now been discovered that there is no doubt that the applicant was the deceased's wife."*
>
> *Without prejudice to the provisions of Law concerning with probate matters it has been proved by the applicant that she has interests on the deceased's estate.*
>
> *Therefore this court having passed through the facts of the case and the statements of both sides together with the records of the trial court, this court is hereby allow an application with costs."*

Unhappy with the above ruling of the District Court in the revision application, the Appellant through the services of Ms. Sekela Amulike, learned advocate, lodged this appeal in this Court praying this court to allow the appeal, maintain the decision of the trial court in Probate Cause No. 35 of 2021 (which actually is probate and administration cause No. 34 of 2021) and any other relief(s) this Court deems fit and just to grant.

The respondent resisted the appeal. On the hearing, which was conducted through oral submissions, the appellant was represented by Ms. Sekela Amulike, learned counsel. The respondent too was represented by counsel namely, Mr. Elias Julius Kifunda who happened to lodge in the District Court, the application for revision and duly appeared to represent the applicant therein. Ms. Amulike abandoned the 3rd and 4th grounds of appeal and remained with the 1st and 2nd grounds of appeal which both counsel argued on. The grounds of appeal which the counsel argued are:

1. The revision court erred in law by entertaining the revision application which was opened and determined without following legal procedure.
2. That, the revisional court erred in law and fact by entertaining the application which was opened without following legal procedure.

On the 2nd ground Ms. Amulike argued that the revising court used in-applicable law to decide the matter which originated from the Primary Court. The trial court used customary laws and the Magistrate Courts Act and the rules thereto. Where the matter goes to revision or appeal the superior courts have to use those laws. Ms. Amulike pointed out that, that was not done by the District Court. She added, he appointed the administrator under section 74 of Probate and Administration on of Estate Act. He changed himself from revision court to probate court. That law is in-applicable in the Primary Court. In the circumstance, Ms. Amulike contended, the Revision Court had no jurisdiction to entertain the matter. She prayed his decision be quashed and the decision in the trial court be restored.

On the 1st ground of appeal, Ms. Amulike asserted that the revision was opened/filed without following the procedure law and it was also decided without adherence to such procedures. She contended, the original case was a probate case, Mwimbula Issa Ponda was appointed administrator of the estate without objection as Ozana Juma was one of the witness (PW3).
In the circumstances, Ms. Amulike argued, the respondent ought to go to the Primary Court in any question about the property of the deceased and

not revision, as per Rule 8 (d) of the Primary Court Administration of Estate Rule GN. No. 49/1971 and enjoy her right. She referred me to **Civil Application No. 1/2009 Court of Appeal of Tanzania at page 15 available on Tanzilii Ally Omari Abdi V. Amina Khalili Ally Hildid** (As an Administration of Estate of the late Kalile Ally Hildid Civil Appeal No. 103/2016) as it was quoted. Ms. Amulike was also minded to refer this Court to the case of **Mgeni Seifu V. Mohamed Yahaya Khalfani,** Civil Application No. 1/2009, CAT (unreported) to support her arguments.

It was therefore her strong view that the District Court erred in deciding the matter under 22 (3) of the Magistrate Courts Act as that provision does not allow a decision to be given a revision court without parties to be afforded an opportunity to be heard. In this case the District Resident Magistrate decided that all the properties in respect of the probate case were the property of the respondent without calling and hearing the other heirs was illegal and, the power to distribute the property in probate case is the administrator and not a court. For that position of the law, she referred me to the case of **Monica Nyamahare Jigamba V. Mugeta Bwire Bakore,** Civil Application No. 199/2019 Court of Appeal of Tanzania at page 14 – 21.

She prayed the decision of the District Court in revision be quashed.

Mr. Kifunda learned counsel for the respondent replied starting with the 1st ground of appeal that in revision cases, the legal procedure is under section 22 (1) of the Magistrates Courts Act. He pointed out that the District Court has power to call a case file in the primary court. In the premises, the 1st ground of appeal has no merits.

With regard to the 2nd ground of appeal, Mr. Kifunda stated that the District Court used section 22 (2) of the Magistrates Courts Act read together with section 21 (1) and (b). He maintained that the District Court can reverse the decision of the primary court any how it deems fit. Mr. Kifunda further added that the Resident Magistrate in the revision only did not mention the sections. He was further of the firm view that the District Resident Magistrate found that the sole heir entitled is the respondent. Mr. Kifunda stressed that the District Court was perfect in its decision.

Mr. Kifunda urged this Court has power to revisit the record of the primary courts per **Utamwa,** Judge in Land Appeal No. 26/2015 **Daniel Ndegela**

V. Masala Ibeho & Others. He insisted that the decision in probate No. 35/2021 is not maintainable. There were irregularities. The trial court entered into roles which were not its duty. Its role is only to appoint an administrate. Also, Regulation (2) (a) of Part one of the 5th schedule to the Magistrates Courts Act. This was violated to the large extent. See page 17 of the decision of the trial court, he urged. It is only the neighbour of the deceased was appointed administrator. Administrator ought to be blood related, see **Seif Marare V. Medara Salum [1985] TLR 253.** The decision of the District Court is correct, let it upheld, Mr. Kifunda pressed. Mr. Kifunda then invited this Court if it thinks otherwise to quash the decisions of both the Primary Court and the District Court.

In rejoinder submission Ms. Amulike prayed the revision decision be quashed since there were procured illegally as the district court acted as administrator. She added that there was no any illegality in the decision of the primary court. She also stressed that an administrator only ought to be faithful one else Administrator General could be appointed. She thus prayed the decision of the district court be quashed and the decision of the primary court be upheld.

I have seriously considered this appeal, in my considered view, the same is merited. The authority that makes me think so is the case of **Monica Nyamahare Jigamba V. Mugeta Bwire Bakore,** Civil Application No. 199/2019 where it was stated:

> *"It follows then that it is the duty of the administer to collect the properties of the deceased and the debts, pay the debts, identify the rightful heirs of the deceased, to whom the amount of residue of the proceeds of the deceased's estate should be distributed and at what percentage each heir will be entitled to get depending on the law applicable in the administration of the estate."*

In this case, the respondent was not objected by anyone including the respondent in this appeal. The alleged WILL was held by the Trial Court to be illegal with reasonable ground. So, the appointment of the respondent as administrator of the estate was legal because the trial Court found him not only a neighbour but also a relative. I have nothing to fault the decision of the trial court on that. As such I uphold the decision of the trial court as to the appointment of the administrator of the estate of the deceased. On this

decision of mine, I hope, I am well guided by the decision in **Monica's case** (supra) where it was held:

> *"Of course, there could not be a hearing of the evidence because of the approach taken by the 2nd respondent. In our respective opinion, both common sense and logic dictate that, the 2nd respondent ought to have traced the title form the administrator for a gentleman's agreement with the administrator. In case, the administrator refused to recognize her then she ought to have filed a suit against him where the applicant could have had a chance to be impleaded as a party therein."*

See also the case of **Salima Moshi Athuman v Asha Kimolo,** [2010] TLR 367 (CAT) where it was held inter alia:

> *"We have had occasion to consider the case between Ibrahim Kusaga v. Emmanuel Mweta [1986] TLR 26 at p. 30 referred to us by Mr. Mchome (with leave as it was not listed in the list of authorities submitted). Though this is a High Court decision by which we are not bound, we however find*

the principle laid there in to be sound. In that case the learned Judge observed:-

> *I appreciate that there may be cases where the property of a deceased person may be in dispute. In such cases all those interested in determination of the dispute or establishing ownership may institute proceedings against the Administrator or the Administrator may sue to establish claim of deceased's property.*

We are of the settled mind that the above is the approach that ought to have been taken in the circumstances of this particular case."

and the case of **Fatma Fatehali Nazarali Jinah v Mohamed Alibhaai Kassam,** [2016] 1 T.L.R. 262 where it was held:

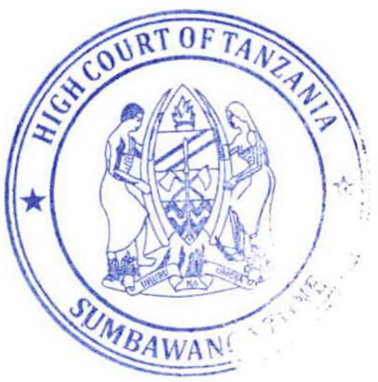
> *"We are aware of the Appellant's strong point that she bought the house which forms part of the estate of the late Kulsum Velji or Kulsum Kachra from the previous administrator of that Estate, one Firozali Rawji Kachra, and that she has been in occupation of that house for not less than 22 years.* ***In our view however, much as the point appears attractive, the remedy to her claim may be***

realized in a separate suit, and not in an application for annulment of the grant." (Emphasis mine)

In this case, I am satisfied that the trial court ought to have dwelt on the suitability of the person who applied for appointment as administrator and letters of administration. It ought not to have gone as to identify what were the properties of the deceased (determination what entails the estate of the deceased) and who ought to be the lawful heirs as such were the duties of the administrator. The findings of the trial court as to what was the estate of the deceased and who were the lawful heirs of the estate of the deceased are quashed. Appeal of the appellant is allowed to the extent the decision of the District Court is quashed and its orders set aside. Each party shall bear their own costs.

It is so ordered.

DATED at **SUMBAWANGA** this 22nd day of July, 2022



J. F. NKWABI

JUDGE