

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IRINGA DISTRICT REGISTRY

AT IRINGA

PROBATE CAUSE APPEAL NO. 01 OF 2019

*(Originating from Iringa District Court at Iringa in Civil Revision No. 01 of 2019,
which arising from Iringa Urban Primary Court in Probate Cause No. 147 of 2008)*

ROBINSON AIMON CHAULA APPELLANT

VERSUS

MONICA CHAULA RESPONDENT

JUDGEMENT

Date of last order: 17/03/2022

Date of Judgment: 25/07/2022

MLYAMBINA, J.

In this appeal, as a general principle, I hold that demeanour of the party or any witness cannot be recorded at appeal stage. It can only be recorded during trial of the case when the witness is under oath. The same can be done when the Court returns the file to the Trial Court for additional evidence. Before going into detailed consideration of the appeal, the facts of the appeal are that: Ms. Robitha Chaula, who is one among the deceased children filed this appeal against the decision of the District Court in *Revision No. 01 of 2019* which was delivered on 7th day of June, 2019. The Respondent herein was the Petitioner before Iringa Urban Primary Court (henceforth Trial Court). She petitioned to be

granted a letter of administration as Administratrix of the estate of her late husband one Robinson Aimon Chaula who died on 6th March, 2008. The Respondent was appointed as an Administratrix of the estate of her late husband on 4th day of December, 2018 (sic).

On 4th day of July, 2018 one of the deceased children on her and 3 Others behalf, filed the complaint against the Respondent who is the Administratrix of the estate of their late father. They alleged before the Trial Court that, since the Respondent was appointed, she distributed nothing in relation to the deceased estate. Further, the Complainants alleged that the Respondent was using the deceased estate for her own benefit. They prayed before the Court to order the Respondent to give them their share from their father's estate, in the alternative, to revoke her letter of administration of the estate of the deceased.

After full Trial, the Court appointed Ms. Robitha Robinson and Ms. Jesca Robinson Chaula to be Co-administratrix of the estate of the deceased together with the Respondent (the wife of the deceased). Being aggrieved with the decision of the Trial Court, the Respondent lodged the application for revision before Iringa District Court at Iringa (herein after referred as the Revisional Court) in which the decision of the Trial Court was reversed. As a result, the proceedings and ruling of

the Trial Court were quashed. The appointment of Robhita Robinson and Jesca Robinson Chaula were nullified. Not being satisfied with the decision of the Revisional Court, Ms. Robhita Robinson Chaula appealed to this Court based on the following grounds:

- 1. That, the Revisional Court erred in law for not considering the jurisdiction of the Trial Court because the estate for a distribution is a registered land under the Land Registration Act.*
- 2. The Revisional Court erred in law and fact by misdirecting itself to decide that the Trial Court did not bother to consider what were asked by ROBITHA ROBINSIN CHAULA without considering the evidence on record and decision of the Trial Court.*
- 3. That, the Revisional Court erred in law and facts by considering that the Trial Court erred by appointing suo motto ROBITHA CHAULA and JESCA ROBINSON CHAULA as Co-Administrators/Administratrix without considering*

the gist of the matter and the discretion of the Trial Court.

4. That, the Revisional Court erred in law and facts by misdirecting itself that the Trial Court was required to consider qualification, capacity and ability of working together of the appointed Co-Administrators without considering the evidence on record.

5. That, the revisional Court misdirected itself by noting the demeanour of the parties at the appeal stage.

6. That, Revisional Court erred in law and facts by deciding that Trial Court erred by granting reliefs which were not prayed without considering the fact of the matter and evidence on record.

7. That, the Revisional Court erred in law and fact by nullifying the pleadings and decision of the Trial Court basing on curable technicalities without considering the substantive justice of the matter.

At the date scheduled for hearing, the parties agreed this appeal to be argued by way of written submission. All parties were represented respectively, Mr. Rutebuka Samson Antony, learned Advocate appeared for the Appellant, while the Respondent enjoyed the service of Mr. Moses Ambindwile, learned Advocate.

In his written submission, the Counsel for the Appellant abandoned the first ground and started to argue the 8th ground. For avoidance of repetition of the words, I will not re-write what was submitted by the parties, rather I will make reference while determining the issue arising in consideration to the grounds of appeal filed by the Appellant.

After carefully consideration of the parties' submission, this Court noted that the main issue for consideration in this appeal is; *whether the revision before the District Court was proper*. Before going to the merit of the appeal, I will make a glance to *section 22 of the Magistrates Courts Act [Cap 11 R. E. 2019] [henceforth the MCA]* which provides:

22.-(1) *A District Court may call for and examine the record of any proceedings in the Primary Court established for the District for which it is itself established, and may examine the records and*

registers thereof, for the purpose of satisfying itself as to the correctness, legality or propriety of any decision or order of the primary Court, and as to the regularity of any proceedings therein, and may revise any such proceedings.

(2) In exercise of its Revisional jurisdiction, a District Court shall have all the power conferred upon a District Court upon a District Court in the exercise of its appellate jurisdiction including the power to substitute a conviction, or a conviction and sentence, for an acquittal; and the provision of paragraph (b) of subsection (1) of section 21 shall apply in relation to an order quashing proceedings and order re-hearing which is made in exercise of a District Court's Revisional jurisdiction as they apply in relation to any such order made in the exercise of its appellate jurisdiction.

(3) In addition to the provision of subsection (2) of this section, no order shall be made in exercise of the Court's Revisional jurisdiction in any proceedings of a

civil nature increasing any sum awarded, or altering the right of any party to this detriment (other than an order quashing proceedings in a lower Court or an order reducing any award in exercise of the jurisdiction or power of the lower Court to the extent necessary to make it conform there to) unless such party has been given an opportunity of being heard.

(4) No proceeding shall be revised under this section after expiration of twelve months from the termination of such proceedings in the Primary Court and no proceedings shall be further revised under this section in respect of any matter arising thereon which has previously been the subject of a Revisional order under this section.

(5) Without prejudice to the provision of subsection (1) of this section a District Court may exercise its power of revision in any case where an offender is committed for sentence, or a sentence is submitted for confirmation, under the Primary Courts criminal procedure code.

Basing on the above quoted provision, the law clearly states that the revisional power will be exercised *suo motto* and not upon application as the Respondent did in this case. From the record, it is evident that the Respondent herein moved the Revisional Court with an application made under *section 22 (1) and (2) of the Magistrate Courts Act (supra)* and it was supported with an affidavit sworn by Monica Chaula, which was contrary to the law. This Court subscribes with the submission of the Appellant's Counsel that *section 22 (1) and (2) of the MCA*, do not provide for a party to move the Court to exercise its revisional power. The same position is reflected in the case of **Veneranda Mbwirwa and Furaha Vedastus Msomi v. Nickson Samwel Muyemba**, PC Probate Appeal No. 1 of 2021 at Musoma (unreported) and the case of **Jamila Augustine Ilomo v. Victoria ILOMO and Mary Ilomo**, Civil Appeal No. 14 of 2018 (unreported).

Notwithstanding the afore mentioned position, regardless of being moved by a party or *suo motto*, it is a cardinal principle of the law that, if a party have the right to appeal against any decision, finding or order, he can not opt for revision as an alternative for the right to appeal. Reference may be made to a dozen of authorities including the case of **Independent Power Tanzania Limited and Another v. Mechmar**

Corporation (Malaysia) Berhad (in Liquidation) and 2 Others, Civil Application No. 247 of 2016, Court of Appeal of Tanzania at Dar es Salaam (unreported); **Abdul Hassan v. Mohamed Ahmed** [1989] TLR 181; **Hallais Pro-Chemie v. Wella A. G** [1996] TLR 269. In the case of **Israel Mwakalabeya v. Ibrahim Mwaijamba**, Miscellaneous Civil Application No. 21 of 1991, High Court at Mbeya, the Court held that:

The right to invoke the Court power of revision is not an alternative to appealing, where the order complained against is appealable, the Court will not use its Revisional powers, for the right to appeal is a remedy open to the aggrieved party.

The District Court having Jurisdiction to revise the Primary Court decision or findings has to adhere to the requirements of the law. Exercising power conferred without adherence to the procedure is abuse of the Court process.

Apart from that, there are must be an exceptional circumstance which marks as an exception to the general rule where a party to a proceeding can move the Court to exercise its Revisional power. The Court of Appeal of Tanzania in the case of **Independent Power**

**Tanzania Limited and Another v. Mechmar Corporation
(Malaysia) Berhad (in Liquidation) and 2 Others**, has this to say:

*Whether or not, notwithstanding that the order is
appealable, there existed good and sufficient cause
for...option to prefer revision instead of appeal.*

In the afore mentioned case, the Court of Appeal allowed the revision on ground of having illegality which was termed as special circumstance, though the right to appeal was available. The Respondent preferred the revision as an alternative for her right to appeal, but from the record, I see no any special circumstance (s) to warrant her to move the Court for exercising its Revisional power. Therefore, it is the findings of this Court that the revision before the District Court was misplaced and improper.

At large, I agree with the Appellant that Robitha and Jesca Chaula are biological children of the deceased and this is enough qualification for them to be appointed. The same is justified under paragraph 2 (a) (b) and (c) of the 5th Schedule to MCA.

I further agree with the Appellant that demeanour refers to the non verbal cues given by a witness while testifying, including voice tone,

facial expressions, body language, and other cues such as the manner of testifying and the witnesses' attitude while testifying. With that in mind, demeanour must be noted at trial by the Trial Court. It can be noted too during taking additional evidence by the trial Court at the order of the Appellate Court. Therefore, there was no way the District Court could have noted the demeanour of the parties. Neither of the parties gave evidence before the District Court. The arguments by the Respondent that the hearing on application for revision before the District Court was verbal arguments and that it was easy for the Magistrate to see their demeanour as they were too emotional is a very misleading. Emotional talking or gesture that is done not under oath is nothing under the eyes of the law. It cannot be relied by any Court worth of its meaning.

As regards the issue of confusion of names, I find the same will be addressed during retrial of the matter following the consequential orders of this appeal as registered in the preceding paragraph.

Needless, it must be recalled that, among other responsibility, the administratrix has to distribute the estate to the legal heirs of the deceased subsequent to the collection and repaying debts if any. Failure to comply with her responsibility for ten good years proves that the administratrix failed to fulfil her responsibility and that disqualify her

for being the administratrix anymore. As for the misuse of the estate of the deceased for her benefit, the Appellant have to follow proper forum for the right of the heirs to be regained.

At this juncture, I allow this appeal, the proceedings and the judgement of both lower Courts are hereby quashed and the order thereof are nullified. The parties may start afresh if they may wish. No order to costs. It is so ordered.



Y. J. MLYAMBINA

JUDGE

25/07/2022

Judgement pronounced and dated 25th day of July, 2022 through Virtual Court in the presence of Counsel Lutebuka Samson for the Appellant and Mosses Ambindwile for the Respondent. All Parties were stationed at the High Court of Tanzania Iringa Registry's premises. Right of Appeal rully explained.



Y. J. MLYAMBINA

JUDGE

25/07/2022