

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM
PC CIVIL APPEAL NO. 29 OF 2020**

*(Arising from Probate Cause No. 32 of 2019 from Primary Court and Revision
No. 4 of 2019)*

ELIZABETH RAYMOND.....APPELLANT

VERSUS

GEORGE RAYMOND MWANDIKE.....RESPONDENT

Date of last Order: 26/11/2021

Date of Judgement: 13/5/2022

JUDGEMENT

MGONYA, J.

Before this court, is an appeal from Kibaha District Court in **Civil Revision No. 04 of 2019** originating from Mkuza Primary Court in **Probate Cause No. 32 of 2019**. The Appellant being aggrieved with Revision No. 4 of 2019 hence appealed on the following grounds:

- 1. That, the Trial Magistrates has erred in law and fact when she decided in favour of the Respondent contrary to section to section 7 of the Notaries Public and Commissioners for Oaths Act, Cap. 12 [R. E 2002],***

- 2. That, the Trial Magistrate has erred in law and fact when she held that, the Application for revision therein was misconceived,***
- 3. That, the Trial Magistrate has erred in law and fact when she failed to identify the erroneous in procedural and documents for appointment in the Probate No. 32 of 2019 before Mkuza Primary Court which was never followed,***
- 4. That, the Trial Magistrates has erred in law and fact when she failed to consider that, the trial Magistrate was exercised her discretion improper in respect of the estate in dispute,***
- 5. That, the Trial Magistrates has erred in law and fact when she decided this matter without rectifying procedural irregularity of the trial court decision,***
- 6. That, the Trial Magistrates has erred in law and fact when she decided this matter in favour of the Respondent while there was procedural irregularity upon his appointment, and***
- 7. That, the Trial Magistrates has erred in law when it failed to evaluate the evidence presented before it, during the trial and determination of this matter.***

From the above grounds, the Appellant before this court prayed this appeal be allowed with cost and trial court decision be nullified.

At the hearing of this Appeal, the Appellant was represented by Bugeza Mutalemwa learned Advocate while the Respondent appeared in person. Both parties were ordered to file their written submissions for disposition of the instant Appeal.

The counsel for the Appellant submitted on the **first ground of appeal** that the counsel for Respondent **Mr. Frank Andrew Chundu** before subordinate court was required to refrain from representing the Respondent since he attested the Appellant's affidavit, hence he was having a direct interest in the Appellant's case.

The counsel further, submitted on the **second and third grounds of appeal** that the Application for Revision tend to determine legality of proceedings and revise it. The records from trial Primary court revealed that the Respondent has failed to apply six prescribed forms which was provided under **GN 49 of 1971**. The power of the Primary Court in administration of cases are contained under **Rule 2 (a) of the Fifth Schedule**. It was further submitted that, the Fifth Schedule have be read with the **Primary Courts (Administration of Estate) Rules, GN 49**

of **1971** and the **Magistrate Court (Civil Procedure in Primary Courts) Rules GN 310 of 1964 and GN 119 of 1983** where the lacuna is found.

Moreover, the counsel submitting on the **fourth ground of appeal** that they observed serious non direction to the relevant laws and procedure when the trial court failed to exercise its discretion which is provided under **section 22 of the Magistrate Court Act, Cap. 11 [R. E. 2019]**, on the circumstances advanced in support of this application that are matters which could be brought to the court on Appeal and not Revision.

It is the Appellant's counsel submission on the **fifth and sixth ground of Appeal** that the District Court before **Probate Revision No 04 of 2019** was aware of the **Probate Cause No. 7 of 2018** at Mlandizi Primary Court and **No. 32 of 2019** at Mkuza Primary court which both of them dealt with the assets of the deceased who were husband and wife. The Appellant and Respondent being among the children and heirs to the deceaseds estates. It has further been submitted that, the trial court in exercising the revisionary power as provided under **section 22 of the Magistrate Court Act**, has failed to revise properly the proceedings and decisions of the two Primary Courts.

The Respondent in replying the Appellant's grounds of Appeal on Revision has denied all grounds of appeal raised on the view that the trial District Court was not misdirected when reached decision on Revision. Responding to **the first ground of appeal** which referred this court to the paragraph 2 and 3 of the judgement in revision where the court states that:

*"...in this Application, the **Applicant was represented by Mr. M Buzza** learned counsel and **the respondent was not represented...**";*

It is the Respondent's stand that the quoted paragraph was clear that the said Advocate **Frank Andrew Chundu** did not represent any of the parties before the trial court and no conflict of interest was raised.

Further, submitting to the **second and third grounds of appeal** that the Application for Revision is purposely for determination of legality and irregularities of proceedings and revise it, and that the Appellant complained of infringement of the **GN 49 of 1971** by failing to comply with six forms; it is the Respondent's response that the Appellant failed to state which forms were not complied of and how the same occasioned the miscarriage of justice. It was further submitted that, the appellant had denied her right to prove before the Revisionary

court that there were identified irregularities on her affidavit of which the court was invited to correct.

On the **fourth ground of appeal**, where the Appellant complained on the improper use of discretionary power by the trial District Court on improper re-evaluation of the evidence and question of legality including the assets listed in the Probate cause **No. 07 of 2018**, However, it is the Respondent's reply that the Appellant failed to point out the evidence which was omitted or disregarded by the court. Further that, it is cardinal principle of law that he who alleges must prove, and that this was the only way that a court can be moved by the evidence produced before it.

Lastly, the Respondent asserted on the **fifth and sixth grounds of appeal** that the District Court did not misdirect to entertain the issues of assets which were listed in the **Probate Cause No. 7 of 2018** at Mlandizi Primary Court which involved the estates of the Late Raymond George Mwandike and **Probate Cause No. 32 of 2019** at Mkuza Primary court for the late Rose Michael Mbonde. Further that, the Appellant did not disclose how does listing of properties could have caused miscarriage of justice.

After having read both parties' respective submissions, in determining the appeal, this court have focused on issue as to

whether an appeal has merit or not. This court was also invited to pay attention on the instant controversy between the siblings from the family of late Mr. Raymond George Mwandike and Mrs Rose Michael Mbonde who were husband and wife. In dealing with Probate of the above deceased's, both parties filed applications for Letters of Administration of estates of late Mr. Raymond George Mwandike and Mrs Rose Michael Mbonde in different primary courts of Mlandizi and Mkuza respectively.

Referring to the **first ground of appeal** on whether **Mr. Frank Andrew Chundu** acted on both parties attestation of their documents. The records of the trial District Court proves the facts that the said learned Advocate indeed acted both sides on attestations of their documents. This was seen in an Affidavit and Counter Affidavit of the parties when were before the District Court for Revision.

It was fatal for the Learned counsel to attest for both parties, it was contrary to law and raising the issue of conflict of interest. This is very clear and the same is provided under **section 7 of the Notary Public and Commissioners for Oaths Act, Cap. 12 [R. E 2002]** which provides that:

"No Commissioner for Oaths shall exercise any of his powers as a Commissioner for Oaths in any

proceedings or matter in which he is Advocate to any of the parties or in which he is interested”

The counsel **Mr. Frank Andrew Chundu** who has been seen before in the subordinate’s court documents required to abstain from exercising his power over the Respondent since he also attested the Appellant’s Affidavit. Therefore, the Counsel showed a direct interest in the case on both sides.

With this ground alone of which is goes to the root of the appeal as the same is sensitive and substantial, I am of the firm view that, there is no need to proceed with other grounds of appeal as the error made the proceedings fatal.

Consequently, this **Appeal is hereby allowed and the trial court’s decision is hereby nullified.**

No order as to costs.

It is so ordered.

Right of appeal explained.



L. E. MGONYA

JUDGE

13/05/2021

Court:

Judgment delivered before Honourable **J. Luambano**
DEPUTY REGISTRAR in the presence of the
Applicant and the Respondent both in person and Mr.
Richard RMA on 13th May, 2022.




L. E. MGONYA

JUDGE

13/05/2022