

**IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA**

PC PROBATE APPEAL NO. 8 OF 2020

*(Arising from Criminal Appeal No. 3 of 2019 of the Bariadi District Court
originating from Probate Cause No. 8 of 2015 at Somanda Primary Court)*

EDWARD STEPHEN NTWALE..... APPELLANT

VERSUS

CHRISTINA STEPHEN NTWALERESPONDENT

JUDGMENT

27th May, & 15th July, 2022

MKWIZU, J:

The Appellant, Edward Stephen Ntwale was on 14/3/2016 in Probate Cause No. 8 of 2016 before Somanda Primary Court appointed the administrator of the estate of the late Stephen Ntwale Masanja died on 19/02/2016. It seems, that the appellant did not perform his duties as an administrator of the deceased's estate as required and no inventory was filed in court. Some of the beneficiaries were incensed by the administrator's procrastination as a result a complaint was filed by the respondent herein before the same probate court in September 2019. The respondent's complaint was that the administrator is benefiting alone from the deceased estate. The Appellant was summoned and the parties, that is the complainant, Christina Stephen Kitwale, and the administrator, Edward Stephen Kitwale were heard. Respondent's complaints were that the administrator was not of the clan

members' choice, that there was no clan meeting held to appoint the appellant an administrator of the deceased's estate, and secondly that he has failed to distribute the deceased property to the heir as required under the law. The appellant's submissions were the opposite. He claimed to have distributed the deceased's estate after he had consulted the clan members and tendered in Court exhibits on how the estate was distributed. The trial court, in the end, ruled in favour of the appellant by declaring the administration of the deceased's estate closed on the reasons that the appellant had already distributed the deceased's estate to the heirs including the complainant and therefore there is nothing more to administer. The respondent was unhappy with the above decision. She successfully filed an appeal to the District Court which culminated in the revocation of granted letters of administration of the deceased's estate to the appellant. Dissatisfied, the appellant has filed this appeal with a total of 8 grounds of appeal to wit;

- 1. That, the first appellate court erred in law by relying on something which was not among the grounds of appeal to be determined. Alternatively, the first appellate magistrate decided upon the issue which was not before him.*
- 2. That, the first appellate court erred in law and fact by creating an issue for determination of which the appellant was not given a right to be heard.*
- 3. That, the first appellate Magistrate erred in law by revoking the appointment of the appellant from administration of the estate while*

he has no such power to do so alternatively, by making orders beyond his powers

- 4. That, the first appellate magistrate misdirected himself by making a ruling instead of a decision/ judgment as per evidence on records*
- 5. That the first appellate magistrate misdirected himself for holding that the appeal District court of Bariadi originates from Probate cause No. 08/2019*
- 6. That, the first appellate court erred in law and fact by failing to take into consideration the issue of limitation of time of appeal by the respondent as per evidence on records*
- 7. That, the first appellate court erred in law and facts by failure to take into consideration the issue of locus stands of the Respondent to lodge the appeal as she was not a party to the original case (probate cause No. 08/2016 at Somanda Primary Court.)*
- 8. That, the first appellate Magistrate erred in both law and facts by creating new things which were not provided for in the trial court decision to be followed by the appellant.*

When the appeal came up for hearing, the appellant was represented by Baraka Dishon learned Advocate, and the respondent was assisted by Mr. Phares Malengo also a learned Advocate.

The Appellant's counsel notified the court of his intention to combine grounds 1 and 2 as one; 4 and 5 and the rest of the grounds were argued one after the other. However, in submitting combined grounds 1 & 2, Mr. Dishoni argued that the District Court erred in law for deciding on an issue

raised by the court suo moto without affording parties an opportunity to be heard. Referring to this court to page 9 of the decision of the district court, the learned counsel contended that the 1st appellate court had raised an issue that the parties' dispute was on how the administrator dealt with the estate and not on the appointment of the administration. This issue was decided upon without the parties' involvement, stated Mr. Dishon. He on this cited to the court the cases of **Anna Hagila & another vs Geoffrey Kajigili**, Probate Appeal No. 9 of 2020, **Florida Emmanuel & others vs Richard Kabyemula & others**, Land Appeal No. 110 of 2020, and **Amiri Rashid Mtambuka & others vs Maulidi Hamadi Mtambuka**, Pc Appeal No. 16 of 2016(All unreported).

Submitting on the 3rd ground, Mr. Dishon argued that the district court gave the decision in excess of its jurisdiction. The revocation of the appellant's appointment as an administrator of the deceased estate was according to Mr. Dishoni the jurisdiction of the primary Court and not the District Court. Having found that the appointment of the administrator was to be revoked then, the District Court ought to have directed the primary court to do what it ought to have done because the administration of that estate was under customary law. He cited the case of **Kwame Makwame Rashidi vs Amina Makwame & others**, Civil Appeal No. 24 of 2019.

He also on grounds 4 and 5, blamed the District Court for indicating that it was dealing with an appeal originating from Probate cause No.8 of 2019 of

Somanda Primary Court which was not in existence. He said the Somanda Primary court never presided over Probate cause No. 8 of 2019.

On ground 6, Mr. Dishon challenged the district court for failure to detect that the appeal before it emanated from time-barred proceedings. His contention was that the objection filed before the primary court three years after the appointment of the administrator was time-barred. He argued that the appropriate procedure was for the interested party to file a case impeaching the administrator of the estate but not to object to the appointment after the lapse of 30 days after the publication of the notice. The case of **Sabasaba Malembo Matege vs Elias Joshua Muganda**, Probate Appeal No 4 of 2020 was also cited on this aspect.

On the 7th ground, the counsel submitted that the respondent had no locus stand to appeal to the district court as she was not a part of the Primary court proceedings. He was specific that, trial court records bear no name of the respondent, Christina Stephen Ntwale in Shauri la Mirathi No. 8/2019. He added that, after the decision of the objection proceedings, any person who is not a party could not appeal against that decision, the proper remedy was to file revision proceedings. He supported his submissions by the decision of **Afred Mawiri Odi vs Isack Onyango Ochuodho**, Misc. Land Case Appeal No. 69 of 2021. He lastly prayed for the court to allow the appeal.

Responding to grounds 1,2 and 8, Mr. Malengo said, it is apparent on the trial court's records that the deceased's estate was yet to be distributed, and instead of requiring the administrator to explain why he did not discharge his duty within four months after his appointment as per the Probate rules, the appellant was given 14 days to distribute the estate contrary to the probate rules. He was of the view that the District Court had jurisdiction to revoke the appointment because the issue was clearly reflected in the primary court proceedings. He on this point, cited the case of **Stella Teno V TRA**, (2005) TLR 186.

And on whether parties were afforded an opportunity to be heard, Mr. Malengo argued that they were because the issue had cropped from ground two of the appeal challenging the distribution done after the lapse of 4 months after the administrator's appointment.

On ground 8, where the district court is blamed for creating new issues which were not decided upon by the primary court, Mr. Malengo said the case of *Amiri Mtambuka (supra)* is distinguishable as the court was referring to section 99 of the Probate and administration of estate Act which is not applicable in the matter at hand. He said the respondent was supported by Rule 9 (1) (e) of the Primary Court (Administration of the estate) Rules, G.N 49 of 1971 which deals with revocation or nullification of the grant of administration. He relied on the case of **Beatrice Briton Kamanga & others vs Zainbu William Kamanga**, Civil Revision No. 13 of 2020 page 23(unreported). He stressed that the District Court has power under section

21 (b) of the MCA, to revise, confirm, amend, or vary any decision or order of the primary court appealed against.

On the issue of locus stand by the respondent, the respondent's counsel was of the view that the respondent came into the proceedings after her complaint against the distribution of the deceased estate at the primary court, and therefore had locus.

Regarding the issue of citation of a wrong original case number and titling the decision ruling instead of a judgment, Mr. Malengo said it was a typographical error and has prejudiced no party.

Clarifying the issue of time limitation raised on ground 6, Mr. Malengo contended that, the Primary court ruling was decided on 19/11/2019 and an appeal to the district court was filed on 25/11/2019 well within 30 days required by law under section 20 (3) of the MCA. And seemingly in the alternative, Mr. Malengo added that Rule 9 (1) (e) of Probate Rules allows the heirs /beneficiaries or any interested party to the deceased's estate to query the conduct of the administrator at any time and therefore much as the administrator had not distributed the deceased estate, then it was lawful for the respondent to seek the revocation of the appellant administration. He was of the view that the cited cases are distinguishable because they were filed after the appointment and distribution of the deceased estate which is not the case. He prayed for the dismissal of the appeal with costs.

In rejoinder, Mr. Dishon submitted that the revocation of the grant of administration by the district court was without jurisdiction as powers of revocation and appointment on issues relating to customary laws is vested to the primary court. He opposed the claim that 2nd ground of appeal in the district court was about the distribution of the deceased estate as framed in the judgment. He said even the decision itself is clear that no evidence was adduced by the parties to that effect and therefore parties were denied their right to be heard on that point.

During the composition of the judgment, the court realized that the trial courts proceedings is not reflective of the objection to the administration of the deceased's estate filed by the respondent in September 2019 and proceedings thereafter though the decision was so elaborate on the same save for the issues raised by the parties after the alleged extension of 14 days granted to the appellant to distribute the estate to the heirs necessitating summoning of the parties to address the court on the regularity or otherwise of the said proceedings and the resultant decision on 29/6/2022 and a plan was made for the hearing of the parties' submissions on the point on 4/7/2022.

Both parties were all present in court on 4/7/2022 with their advocate. Submitting for the appellant Mr. Baraka Dishoni readily conceded that the proceedings are irregular. He said page 2 of the trial court's decision shows that the objection on the misappropriation of the deceased's estate was made to the trial court and the appellant(administrator) was given 14 days'

time to complete the distribution but there was no recording in the trial courts proceedings of both the objection preferred, deliberation by the parties, the ruling on the extension of time and the reasons thereof. Mr. Dishon was of the view that that was fatal as the trial magistrate was under the law required to record the objection, summon parties, conduct a proper hearing on the presented objection and record the decision and the reasons for the decision. He, on that ground, invited the court to nullify the entire proceedings with respect to the objection proceedings and remit the file back for further steps.

Mr. Phares Malengo's counsel for the respondent had the same view. He like the appellant's counsel urged the court to nullify the objection proceedings, directing the respondent to file a fresh objection which is to be heard by a different magistrate.

My objective reading of the proceedings reveals that the appellant was on 14/3/2016 appointed administrator of the deceased's estate but could not distribute the estate resulting in the filing of the objection by the respondent. The Appellant was summoned and both parties heard on 12 /11/2019 and a decision subject to this appeal was rendered.

The trial courts' decision however contain information in respect of the objection by the respondent that is not reflected in the trial court proceedings. Page 1 of the trial courts proceedings reads:

"Katika shauri hili la mirathi Na 08 /2019 ndugu Edward s/o Stephen " Ntwale aliteuliwa kuwa msimamizi wa mirathi ya marehemu Stephen Ntwale mnamo tarehe 14/3/2016 na baada

*ya msimamisi kuteuliwa akawa hajafunga jalada hili na pia akawa hajagawa mali za marehemu kwa warithi wake **ndipo ilipofika mwezi 9/2019 alifika ndugu Christina Stephen Ntwale kuieleza Mahakama hii kuwa msimamlzi ananufaika yeye mwenyewe na maii za marehemu, ndipo baada ya mahakama kupokea maialamiko hayo, mahakama hii illtoa hati ya kuitwa shaurini kwa ndugu Edward s/o Stephen @ Ntwale ... na kumpa mud awa siku 14 ili aweze kukaa na kugawa mali za marehemu iii kiia mrithi aweze kupata haki yake na jaiada hili iiweze kufungwa. Tarehe 12/11/2019 ndugu Edward s/o Stephen @ Ntwale alifika mbele ya mahakama hii na kueleza kuwa wameshaka na kugawana hivyo anaomba kufunga ...ndug christina Stephen alipinga"***

According to the trial court's decision above, the respondent had in September 2019 filed an objection, which was attended to, and the appellant(administrator) was given 14 days' time for him to distribute the deceased estate and file the required information before the court. This part of the trial court's decision is not supported by the proceedings.

The filing of an objection to the administration of the deceased's estate, be it in respect of the appointment of the administrator or the administration of the estate itself is a clear notice to the court of a contentious matter that needs to be determined. See for instance Rule 2 of the Primary Court (administration of Estate) Rules, GN No 49 of 1971. The objection is normally, if made in writings, filled in the court records, and where it is orally made the substance of it is recorded by the magistrate. The administrator is then notified of the objection, and the court proceeds to hear the parties

for and against the objection and make a ruling on the matter. All this must be reflected in the court's records short of which renders the entire proceedings a nullity. This procedure was evaded by the trial court in this matter and went ahead to decide upon matters which were not either recorded or not presented by the parties.

Elaborating on the fate of the decision with matters which are not reflected on the proceedings, the Court of appeal in **Lucas Venance @ Bwandu and Another v. The Republic**, Criminal Appeal No. 392 of 2018 CAT (unreported) held.


*"... those cases, we warned trial courts against including in their judgments facts which are not reflected in the recorded evidence in the proceedings. In **Shija s/o Sosoma** (supra), we followed our earlier decision in **Athanas Julias v. Republic**, Criminal Appeal No. 498 of 2015 (unreported) where we held **the act of the trial resident magistrate to include in his judgment facts which are not reflected in the record is an incurable irregularity on the following reasoning:***

***"The implication here is that, either, in his judgment, the trial resident magistrate did include extraneous matters which did not completely feature in the evidence of the witnesses who were called to testify, or, the trial resident magistrate did omit to record a number of facts that were said by the witnesses in their testimonies. In either case, we are inclined to join hands with the contention of the learned counsel for both sides that, the irregularity occasioned is fatal and did vitiate the entire proceeding of the trial court"**(emphasis added)*

It is certainly, therefore in this appeal that, the inclusion in the decision by the trial court of the matters not borne out of record is a nullity. Neither the first appellate court nor this court was made to appreciate what exactly transpired in court and whether the extension of time to the administrator was justified or not. And it is more serious here because even the nature of the complaint filed by the respondent is contested.

Given the explained circumstances above, this court is of the view that the omission is fatal, and it renders the proceedings emanating therefrom a nullity. The proceedings of the Somanda primary Court in Mirathi No 8 of 2019 from 28/10/2019 and all the Bariadi District court's records in probate Appeal No 3 of 2019 and all the resultant orders are quashed and set aside under section 44 of the MCA. Any fresh complaint should if filed be determined by another magistrate.

Given the nature of the appeal and the relationship of the parties, I make no order as to costs.

 **DATED** at **Shinyanga** this **15th** day of **July** 2022.
COURT: Right of appeal explained


E.Y. MKWIZU

JUDGE

15/07/2022


E.Y. MKWIZU

JUDGE

15/07/2022