

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(SUMBAWANGA DISTRICT REGISTRY)**

**AT SUMBAWANGA**

**PC. CIVIL APPEAL NO. 2 OF 2022**

**ADAMU MWANDU GIBALYA ..... APPELLANT**

**VERSUS**

**MALANGWA MWANDU ..... 1<sup>st</sup> RESPONDENT**

**SHIJA MWANDU GIBALYA ..... 2<sup>nd</sup> RESPONDENT**

**GIBALYA MWANDU GIBALYA ..... 3<sup>rd</sup> RESPONDENT**

(Appeal from the Judgment and Decree of the District Court of Mlele at Inyonga)

(A. R. Ngowi, RM)

Dated 4<sup>th</sup> day of November 2021

In

(Probate Appeal No. 1 of 2021)

**JUDGMENT**

Date: 24/06 & 01/09/2022

**NKWABI, J.:**

The appellant was appointed by the trial Primary Court administrator of the estate of the deceased one Mwandu Gibalya Nyawela on 17/11/2020. There was no any objection to the application for appointment as administrator. The deceased died intestate on 21/11/2014. The appellant was directed by the trial court to file inventory within 4 months of the appointment and file a true account of the estate in court by 17/03/2021. According to the record, the account of the estate was exhibited in court on 22<sup>nd</sup> day of February, 2021.

It was on 23<sup>rd</sup> day of February, 2021 the respondents in this appeal, lodged an application for revocation of the appellant from being administrator of the estate. The respondents advanced the reasons for the revocation are: 1. They were not involved in the proposing the appellant to be administrator, 2. The appellant failed to list all the estate and failed to distribute it fairly, 3. No family meeting was called to distribute the estate and 4. The appellant had failed to distribute the estate of the deceased to the beneficiaries. After hearing both parties, the trial court dismissed the application for being unmerited for it was brought after the appellant had filed account of the estate and the probate and administration cause having been closed. The respondents had no clan minutes that proposes them. It also observed that the appellant had all the qualifications for being administrator of the estate.

The respondents successfully appealed to the district court. The district court found that and I quote:

*"I went through the trial court records specifically probate Cause No. 3 of 2020 and observed that Rule 10 of GN 49 f 1971 was not complied with. There were*

*no such forms like Form No. V & VI, instead I found two pieces of exercise book papers purporting to distribution of assets. So, the trial court contention that the respondent had filed inventory was wrong. For that reason, I allow this ground of appeal."*

After that it went on and nullified the appointment of the appellant as administrator and advised anyone interested should apply to be appointed administrator by complying to the procedures.

The decision of the District Court aggrieved the appellant. He lodged this appeal in this court having seven grounds of appeal. While submitting on the appeal, the appellant's counsel dropped two and remained with five. For reasons that will be apparent shortly, I will not list all the ground of appeal. Rather, I will deal with the 4<sup>th</sup> ground of appeal which disposes this appeal. That ground of appeal is that the appellate court erred in law and fact to raise other issues on its suo motu without affording right to both parties to be heard on the same.

On the above ground of appeal, Mr. Laurence contended that the right to be heard is fundamental before any decision is taken and any decision taken in violation of this right will be null and void. He referred me to the case of **Mbeya Rukwa Autoparts Ltd vs. Jestina George Mwakyoma** [2003] T.L.R. 251. He added that in this case, the judgment of the 1<sup>st</sup> appellate court erred to dwell on the presence of exercise book paper as inventory filed by the appellant as the same was not canvassed by the respondents in their grievances.

In reply submission Mr. Simon Buchwa maintained that they believe that the appellate court did was right and is within the ambit of law citing section 20 (1) (b) of the Magistrates Courts Act Cap 11 R.E. 2019 and section 21(1) (b) & (c) of the Act. Mr. Buchwa further argued that the appellate court cannot be condemned by raising an issue suo motu. It is empowered by law to do so. It was supervisory role over the legal business of the Primary Court. It cannot act blindly over the illegality of primary court proceedings.

In rejoinder submission, Mr. Laurence claimed that the powers of the district court under section 20(1)(b) of the Magistrates' Courts Act, Cap. 11 R.E. 2019 were not powers which were invoked by the 1<sup>st</sup> appellate Court to decide the case before it even in the judgment of the 1<sup>st</sup> appellate court there is nowhere the use of purported powers was shown, so this assertion of the respondents is an afterthought and the same have no legs to stand. He further maintained that the issue of exercise book papers was raised suo motu by the 1<sup>st</sup> appellate court contrary to the governing law and precedents shown in their submission in chief and the same have prejudiced the appellant herein because the appellant did not have the chance to comment on the alleged exercise book papers.

Without much ado, I totally agree with the submission of the counsel for the appellant. The counsel for the respondents admits that the 1<sup>st</sup> appellate court raised an issue suo motu while writing the judgment and decided on it without inviting parties to address it on it. That was a fatal error and cannot be cured by the provisions of section 20 (1) (b) of the Magistrates Courts Act Cap 11 R.E. 2019 and section 21(1) (b) & (c) of the Act. This is the position clearly stated by the Court of Appeal of Tanzania in

**Kumbwandumi Ndemfoo Ndossi v Mtei Bus Services Limited, Civil**

Appeal No 257 of 2018 (unreported) CAT where it was stated:

*"Basically, cases must be decided on the issues or grounds on record and if it is desired by the court to raise other new issues either found on the pleadings or arising from the evidence adduced by witnesses or arguments during the hearing of the appeal, those new issues should be placed on record and parties must be given an opportunity to be heard by the Court."*

For that reason, I allow the appeal. The judgment of the District Court is quashed and its decree and orders are set aside. The decision of the trial Court is restored. For avoidance of waste of the estate of the deceased, I order that the appellant to accordingly close the probate and administration cause in accordance with the law, in the trial court. Each party shall bear their own costs.

It is so ordered.

**DATED at SUMBAWANGA** this 1<sup>st</sup> day of September, 2022



*J. F. Nkwabi*

**J. F. NKWABI**  
**JUDGE**

Date - 01/09/2022

Coram - Hon. M.S. Kasonde - DR

Appellant - Absent

For appellant - Mr. Peter Kamyalile, Advocate holding brief for  
Mr. Laurent John, Advocate

1<sup>st</sup> Respondent - Absent

2<sup>nd</sup> Respondent - Present in person

3<sup>rd</sup> Respondent - Absent

B/C - A.K. Sichilima – PRMA

**Mr. Peter Kamyalile, Advocate:** This matter comes for judgment and we are ready.

**2<sup>nd</sup> Respondent:** I am prepared too.

**Court:** Judgment delivered this 1<sup>st</sup> day of September, 2022 in the presence of Mr. Peter Kamyalile, Learned Advocate holding brief for Mr. Laurent John for the plaintiff and in the presence of the 2<sup>nd</sup> Respondent but in absence of the 1<sup>st</sup> and 3<sup>rd</sup> Respondents.



**Sgd: M.S. Kasonde**

**Deputy Registrar**

**01/09/2022**

Right of appeal fully explained.



A handwritten signature in black ink, appearing to read "M.S. Kasonde", with a long horizontal line extending to the left.

**M.S. Kasonde**

**Deputy Registrar**

**01/09/2022**