

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(IN THE DISTRICT REGISTRY)  
AT MWANZA**

**PC PROBATE APPEAL NO. 19 OF 2021**  
*(Arising from District Court of Magu at Magu in Probate Appeal No. 3 of  
2021)*

**ANICETH KAFULA & 2 OTHERS----- APPELLANTS**

**VERSUS**

**HOLE MISHAKA----- RESPONDENT**

**JUDGMENT**

*Last Order: 21.07.2022  
Judgement Date: 31.8.2022*

**M. MNYUKWA, J.**

Before this court, the appellants have preferred this appeal which is now a second appeal from the decision of Magu District Court in Probate Appeal No. 3 of 2021 raising 3 grounds of appeal as follows;

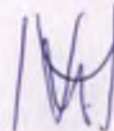
- 1. That the first appellate court erred in law and fact by deciding that there were no reasons for revocation of the Respondent herein as the administrator of Estate of the late MISHAKA MISOMHE @ HOLE while the trial court did*

*not make the said revocation of the Administrator of Estate.*

*2. That the first appellate Court erred in law and fact by entertaining and determines the ground of appeal which were not raised by the Respondent herein and as such denying parties the right to be heard.*

*3. That, the first appellate court erred in law and in fact by entertaining and determines the grounds of appeal rose by the Respondent herein which lacks its basis on the Ruling of the trial Court.*

Before I go further, it is wise to take a glimpse at what transpired in the two lower courts that gave rise to this appeal. The background goes as follows; On April 2021, the Respondent herein petitioned for the letters of Administration of his late father's estate, one Mishaka Masomhe @Hole before Ndigalu Primary Court in Magu District. As there was no objection filed, the respondent was appointed as the Administrator of late Mishaka Masomhe @Hole. On June 2021, the appellants presented their objection, disputing the appointment of the respondent on grounds that, he was not appointed by the clan and so he had no locus stand, that the citation was not issued on 90 days as required by the law, that the deceased name is not Mishaka Masomhe@ Hole, but Madatula Hole Sheka, they disputed



when and where the deceased met his demise, they also disputed the estate left by the deceased.

In determining the objection raised, the trial magistrate did not pronounce to have revoked the respondent's appointment instead the trial magistrate ordered that, the respondent's appointment will only extend to the portion of his father's estate after the distribution of clan properties that will be done in the family meeting.

Dissatisfied with the trial court's decision, the respondent appealed to the District Court of Magu at Magu, raising 3 grounds of appeal as reproduced hereunder; -

- 1. That, the trial magistrate erred in law and in fact for failure to give reason as why the appointment of the Appellant to be administrator of his late father's Estate.*
- 2. That, the trial magistrate erred in law and in fact as she failed to take into consideration on the WILL or TESTAMENTARY left behind by the deceased MISHAKA MASOME HOLE which pointed out the Appellant to stand as the administrator of Estate.*
- 3. That, the trial magistrate erred in law and in fact because she denied the Appellant's right to be appointed to be*



*administrator of the Estate of his beloved the late  
MISHAKA MASOME HOLE.*

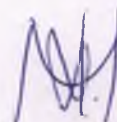
The appellant prayed for the appeal to be allowed, the trial court decision to be quashed and set aside, and the costs of the suit together with any other relief that the court may deem fit and just to grant.

The 1<sup>st</sup> appellate court allowed the appeal and quashed the trial court Ruling dated 29/07/2021 and upheld the trial court's Ruling dated 11/05/2021 on the grounds that, the trial court's revocation of the respondent was not backed with reasons and the will was not given any weight.

The District Court verdict did not seat right with the appellants herein and therefore they have now appealed with three grounds of appeal as reproduced above.

This appeal was argued orally and the appellants were represented by Mathew Kija learned counsel, and the respondent was represented by Maduhu Ngasa also learned counsel.

In arguing this appeal, the appellants' counsel adopted the petition of appeal to be part of his submission. He chose to argue the 1<sup>st</sup> ground separately and the 2<sup>nd</sup> and 3<sup>rd</sup> grounds were argued together. On the 1<sup>st</sup> ground of appeal, he submitted that, the trial court did not revoke the

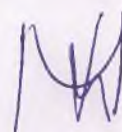


respondent's appointment as in the trial court's decision dated 29/07/2021, there is nowhere the respondent's appointment was revoked.

He added that, when looking at page 9 of the trial court's judgement, the respondent was still recognized as the administrator of the deceased's estate and therefore the District Court erred to say that the respondent's appointment was revoked. He submitted further that, there is no order which required the respondent to return any document which gave him power as the administrator of the deceased's estate, and therefore up to now the respondent is still the administrator of the deceased estate.

On the 2<sup>nd</sup> and 3<sup>rd</sup> grounds of appeal, it was the appellant's counsel's submissions that, the District Court erred in law and in fact for deciding on the matter which was not part of the grounds of appeal by the respondent and therefore denied the appellants the right to be heard, as the court raised issues and decide on them.

He further submitted that, the grounds of appeal appearing on a petition of appeal are different from the grounds which the District Court based its decision. He claimed that, on page 3 of the District Court judgement, the court framed issues for determination as the first ground of appeal which was not raised by the appellant, thus denial of the right to be heard and therefore they did not get the right to argue the appeal.



It is the appellants' counsel submission that, that was a grave error as the District Court was supposed to determine what is before it and not to raise its own ground of appeal.

The appellants' counsel cited the case of **Amos Alexander @ Marwa vs R**, Criminal Appeal No. 513 of 2019 insisting on the principle that, the court must consider the grounds of appeal presented before it. He rested his submission by praying to quash and set aside the 1<sup>st</sup> appellate court's decision and the trial court decision to be upheld. He also prayed for the costs of the suit.

Responding to the appellant's submission, he started by supporting the District Court's decision to be correct. He then agreed that there was no reason for the revocation of the appointment of the respondent. He further argued that, the trial court's decision was full of contradictions. He pointed out such contradictions to have appeared in the 1<sup>st</sup> paragraph of the 1<sup>st</sup> page of the trial court's judgement where she stated that, the appellants objected the revocation of the appointment of the respondent. On pages 8 and 9 of the same judgement, it was concluded that the respondent was not qualified to be the administrator and on page 9 of the trial court's judgment, the appointment of the respondent was stayed while it was not an issue and the court did not determine what it was before it.



He further analysed that, on page 9 of the judgement, the court declared the appellants to be the winner and states that the appointment of the respondent will proceed after the family meeting. He submitted that, the trial court's decision was not correct in the eyes of the law as first, it did not determine the grievances brought by the appellants against the respondent.

Secondly, the court ordered the appellants to go and distribute the estate of the deceased while the same responsibility is for the administrator of the deceased, and therefore the court revoked the appointment without giving reasons for the revocation while revocation has to be done on reasonable grounds stated by the law.

On the 2<sup>nd</sup> and 3<sup>rd</sup> grounds, he opposed the appellants' submission that the grounds were raised *suo moto*. He was of the view that the grounds presented were heard and determined. That, the court went further for the purpose of doing justice and identified some other illegalities. That, since the grounds of appeal were raised by the respondent who is satisfied by the decision of the District Court in its determination, therefore, it is not for the appellant to lament on whether or not the respondent was denied his right to be heard. The respondent counsel distinguished the cited case and submitted that in our case at hand the grounds of appeal were heard. He finalised by submitting that,



the District Court was correct and therefore prayed for the appeal to be dismissed with costs.

Re-joining, the appellant reiterates his submission in chief and further argued that, the court did not give orders to the appellants to distribute the deceased's estate. The court just gave its decision as it is shown on page 9 of the judgement. That marks the end of the submission. I thank both counsels for their valued submissions.

From the fronted grounds of appeal and the arguments of both parties, the question for determination is whether the appeal has merit. After a careful perusal of the trial court's decision, my view is that, the dispute lingers on the wording of the trial court's decision on the objection raised. I find it necessary to reproduce the same for ease of reference, as it appears on page 25 of the handwritten judgement which reflects to what appears on the last paragraph of pages 8 up to 9 of the typed judgement;-

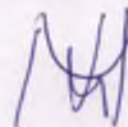
*"kwamba mjibu pingamizi alileta muhtasari wa kikao cha ndugu wa upande wa mama yake pekee, kwa madai kuwa ndugu wa marehemu walisusia kikao bila kuonyesha kielelezo toka hata kwa kiongozi wa Serikali za mtaa. Jambo hilo linapunguza uzito katika uteuzi wake vilevile mjane wa marehemu alikubali kuondoka katika eneo hilo kwa kuelewa ukweli kuwa eneo hilo lilikuwa la ukoo wa marehemu na siyo*



*mali ya marehemu; pia mahakama imejihoji kuhusu eneo la shahidi namba 5. Aitwa Kilugala ni kwamba halikuzungumziwa kabisa ndani ya karatasi ya wosia hivyo mahakama imeshindwa kupata ukweli na hivyo kumtaka mlengwa aendelee kufuatilia katika ofisi za ardhi Wilaya. Kwa maoni hayo sasa, mahakama hii imewapa ushindi wapingaji na kuagiza kuwa usimamizi wa mteuliwa bwana Hole Mishaka utaendelea mara baada ya ndugu wa pande zote kuketi na kufanya mgao wa mali hiyo ya ukoo, naye msimamizi wa mirathi atasimamia mgao atakaokuwa amegawiwa marehemu baba yake....”*

From the wording of the Ruling by the trial magistrate, first of all, I must ask myself whether the respondent's appointment was revoked or not.

The 1<sup>st</sup> ground of appeal tackles the same question, the first appellate court erred by deciding that there was no reason for revocation while the trial court did not make the said revocation. It is the appellant's submission that the trial court did not revoke the respondent's appointment and it still recognizes his appointment as the administrator of the deceased's estate. The respondent, although he supports the District Court's decision, he agrees that the trial court decision was contradictory as on pages 8 and 9 the trial court's Ruling concluded that the respondent was not qualified to be the administrator and later on the



trial court stayed the appointment. And further, the trial court declared the appellants to be the winner while saying that the appointment will proceed after the properties are being distributed and the respondent will only administer the properties bequeathed to his father.

At this point, I agree with the respondent's counsel that, the trial court's decision was a bit contradictory. However, on its contradictory wording, there is no point when the trial court's decision revoked the respondent's appointment. From the trial court's records, as I quoted above, the trial court's magistrate, was of the view that, failure of the respondent to produce the evidence that the appellants' refused to attend the clan meeting draws suspicion on his appointment, however, the trial courts magistrate never revoked his appointment.

It is my understanding that, the appellants presented their objection basing their grounds on the absence of clan meeting, locus stand of the respondent, the names, place and date of death of the deceased, time for citation and the properties of the deceased. It is my considered view that, when the trial court's decision pronounced the appellants to be the winner, it was in respect of the clan properties only. That is why the trial magistrate decided that, the appointment of the respondent will proceed after the clan properties were distributed among the heirs and the



respondent's administration will only administer the properties bequeathed to his father.

From this point of view, then the respondent's appointment was never revoked but there were conditions set regarding the properties to be administered. This is to say, the respondent herein misinterpreted the trial court's decision and hence appealed to the District Court, disputing his revocation which was not there in the first place. The 1<sup>st</sup> appellate court also failed to properly analyse what was decided by the trial court ended up allowing the appeal on the ground that the trial court did not give reasons for his revocation. Up to this point I will have to allow the 1<sup>st</sup> ground of appeal to the extent explained herein.


However, going further to the records of the trial court, I agree with the respondent's counsel that, the trial magistrate did not tackle the grievances advanced by the appellants as I have pointed out that, the appellants objected on the following grounds, the absence of family clan, citation on 90 days, locus stand of the respondent and deceased properties. From the trial court's decision, it only decided on the matter of the properties, to the extent of directing the properties to be distributed to the family clan, while avoiding settling the dispute as to whether the listed properties were owned by the clan or by the respondent's father. The trial court was well vested with the jurisdiction to hear and determine



the same. As it is a settled principle of law that the probate and administration court have jurisdiction to determine the ownership of the properties, as it was held in the case of **Meherun Jinat Kassam & Another vs Bahadur Abdallah Hirji**, HC Land Case Appeal No. 3 of 2019, when citing with approval the case of **Mgeni Seif v Mohamed Yahya Khalfan**, Civil Appeal No. 1 of 2009(CAT) at Dar es Salaam.

Therefore, it is my considered view that, if the issue of properties is not settled then the dispute will still prevail. In that regard, the trial court did not properly dispose of the objection as argued. Let it be remembered that, the court is duty bound to deal with each issue argued by the parties, failure to do so, it is a misapprehension of justice. (See the case of **Alisum Properties Limited vs Salum Selenda Msangi (As Administrator of the Estate of the Late Selenda Ramadhani Msangi)** Civil Appeal No. 39 of 2018).

To this end, I am compelled to invoke my revisionary powers in terms of section 31 of the Magistrate Courts Act Cap 11 (RE: 2022) and set aside both the 1<sup>st</sup> appellate court decision as well as the trial court decision and the trial court is ordered to make another Ruling that will tackle all issues raised and argued by parties, and if the need arise to take additional evidence.

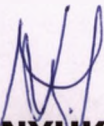


On the 2<sup>nd</sup> and 3<sup>rd</sup> grounds of appeal, the appellant is of the view that, the 1<sup>st</sup> appellate court decided the matter that was not argued by the parties. I do not subscribe to the same opinion as, it is my considered view that, the 1<sup>st</sup> appellate court's decision is based on the raised grounds of appeal. I agree that the 1<sup>st</sup> appellate court before reaching its decision, succumbed to different points, but in the end, he decided on the grounds raised as it is shown on pages 5, 6 and 7 of the typed judgement as the 1<sup>st</sup> appellate court decided on reasons for revocation, the issue of will and appointment of the respondent. And therefore, there was nothing new that was decided beside the raised grounds of appeal. Therefore, these grounds have no merit.

In the upshot, the appeal is partially allowed to the extent shown, but as pointed out to the shortcoming of the trial court's Ruling, the appeal is bound to fail, and the matter is remitted back for the trial court to properly decide on the matter raised and if desired, to take additional evidence.

It is so ordered.



  
**M.MNYUKWA**  
**JUDGE**  
**31/8/2022**

Right of appeal explained to the parties.

  
**M.MNYUKWA**

**JUDGE**

**31/8/2022**

**Court:** judgement pronounced today on 31<sup>st</sup> August 2022 in presence of both parties.

  
**M.MNYUKWA**

**JUDGE**

**31/8/2022**