IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

(PC) CIVIL APPEAL NO. 1 OF 2022

(C/f Monduli District Court Civil Appeal No. 6 of 2021 Original Kisongo Primary Court Probate and Administration Cause No. 11/2021)

BEATRICE JUSTINE TESHA (As Administratrix of the Estate of the late **JUSTINE TESHA) ..... APPELLANT**

VERSUS

MARY JUSTINE TESHA ..... RESPONDENT

JUDGMENT

19/07/2022 & 06/09/2022

KAMUZORA, J.

Before the Primary Court of Monduli at Kisongo the Appellant petitioned to be appointed as an executor of the estate of the late **Justine Augustine Tesha** who died testate. The trial court after issuing a citation and no any objection was entered proceeded and appointed the Appellant as an executrix of the said estate and further directed the Appellant to distribute the deceased estate according to the will. The Respondent being dissatisfied with the said appointment

preferred Civil Appeal No. 6 of 2021 before the District Court of Monduli (the first appellate court) on the following grounds:

1) *That, the learned trial magistrate erred in law and in fact relying on the will that disinherited the deceased's legitimate child without assigning the good reasons.*
2) *That, the trial Magistrate erred in law and fact by not considering that the will was not witnesses by any clan members of the deceased.*
3) *That, the trial Magistrate erred in law and fact in distributing the deceased's estate which was not mentioned in the will.*
4) *That, the trial Magistrate erred in law and fact in deciding in favour of the Appellant while the case was not established in the required standard.*
5) *That, the Honorable trial Magistrate erred in law and fact by relying on insufficient will that do not describe the bequeathed state to lawfully heir.*

The first appellate court found the appeal to have merit and held that, the will was wrongly tendered and admitted by the trial court hence it was expunged from the record. The first appellate also did set aside the findings of the trial court and ordered a re-trial and compliance of proper legal procedures. From the decision of the district court the present appeal was preferred on the following grounds: -

1) *That, the first appellate court erred in law and fact by failure to dismiss the appeal on ground that the Respondent was not a party in the original case thus she had no right to appeal.*
2) *That, the first appellate court erred in law and fact by holding in favour of the Respondent on ground that the will was wrongly tendered and admitted in evidence against the laid down procedure of law.*
3) *That, the first appellate court erred in law and fact by holding that the failure to produce the will as required, blocked cross examination questions.*
4) *That, the first appellate court erred in law and fact by ordering retrial.*

As a matter of legal representation, the Appellant was dully represented by Mrs. Christina Kimale while the Respondent was well represented by Mr. Robinson Makundi. The appeal was argued orally by the counsel for the parties.

Submitting in support of the first ground of appeal, the Appellate counsel argued that, the Respondent had no right to file an appeal as he was not a party at the trial court as it was also admitted by the first appellate court that no any person who appeared to object the appointment at the trial court. That, it was wrong for the first Appellant court the entertain the appeal and expunge the will filed at the trial court.

Mrs. Kimale insisted that, since the Respondent was not a party to a case the proper channel was to file a revision so as to challenge the decision of the trial court. To cement on this, point the counsel cited the case of **Amani Mashaka (applying as an administrator of the estate of Mwamvita Ahmed the deceased) Vs. Mazoea Amani Mashaka and 2 others,** Civil Application No 124 of 2015 CAT at Dar es Salaam (unreported).

On the second ground of appeal the Appellant is challenging the holding of the first appellate court that the will was wrongly tendered and admitted as evidence against the laid down procedures provided under the law. The counsel for the Appellant argued that, in issues concerning probate matters when the party approach the court asking to be appointed the party is normally supposed to produce the will, death certificate and clan meeting if any, and the court normally issue Form No. 1. That, it followed by issuance of notice and publication of the same and after the publication is made and no any objection is raised then, hearing is conducted. She insisted that, the procedures laid down under the CPC Cap. 33 R.E 2019 are not applicable in primary courts as the law applicable is the Primary Court (Administration of Estate) Rules, GN No. 49 of 1971.

The counsel for the Appellant was of the view that, the first appellate court was wrong to hold that the tendering of the will did not comply to the provision of order XIII Rule 1, 2 and 4 (1) of the CPC. She maintained that, no procedural irregularities were committed by the trial court as a copy of the will was tendered in court by the second witness and whoever was interested had right to inspect the same.

On the third ground of appeal, the Appellant is challenging the holding of the first appellate court in which it was said that failure to produce will as required blocked cross examination questions. Mr. Kimale submitted that, from the primary court proceedings no objector who filed an objection. The court recorded evidence made by the Appellant and his two witnesses who signed the WILL and court assessors and the Appellant were given right to cross- examine the witnesses. She maintained that, the production of WILL did not block cross-examination as held by the first appellate court thus prayed for this ground of appeal to be allowed.

Regarding the fourth ground of Appeal the Appellant is faulting the decision of the first appellate court which ordered the matter to start afresh. The counsel for the Appellant submitted that, the order for re-trial was unjustified. She explained that, the matter can be remitted

back for re-trial if it is proved that there exists procedural irregularity which cause injustice to the parties. She was of the view that, in this matter there was no irregularities on the procedure adopted by the trial court which could force the court to order re-trial. She referred the cases of **Fatuma Awad Said Hindi vs. Salim Ally** [1987], **Rashid Hassan Vs. Mrisho Juma** [1987] TLR 134 and prayed for the Appeal to be allowed.

In reply submission the counsel for the Respondent argued that, section 20 (1)(b) of the MCA provides for the right to appeal to the district court if a party is aggrieved with the decision of the primary court. The counsel does not dispute the fact that the Respondent was not a party to the original proceedings before the trial court. He however argued that, the Respondent was denied her right to be party of the trial court proceedings by the trial magistrate as she appeared before the trial magistrate to contest the appointment of the Appellant to be the executrix of the estate of the deceased Justine Tesha but, the trial court refused to record the appearance of the Respondent and directed the Respondent to appeal if aggrieved. He maintained that, the Respondent wanted to be a party to the suit but that intention was denied.

The counsel for the Respondent argued that, the right to be heard is the paramount right and he referred the case of **Abasi Sheral and Meharunisa Abas Sheral Vs. Abdul Sultan Haji Mohamed Fazalboy,** Civil Application No. 133 of 2002 and Article 107A (2) (e). He insisted that, the decision made in violation of the right to be heard is null and void.

The Respondent further submitted that, the case of Amani Mashaka referred by the Appellant is distinguishable as in that case the Respondent never appeared before the trial court but in the present case, the Respondent appeared before the trial court but her right to be heard was not exercised.

Replying on the second and third ground of appeal, the counsel for the Respondent submitted that, the second witness at the trial court one Santurine Christopher Masawe when testifying before the trial court never tendered or applied to tender the will as an exhibit but the trial court suo moto received the said will as per page 5 of the trial court proceedings. The counsel referred the court to Rule 11 (2) of the Magistrates Court Act (Rule of Evidence in Primary court) Regulation, GN No. 431 of 1996 and insisted that, since neither the petitioner nor her

witnesses tendered the will at the trial court it is as if there was no will in the eye of the law.

On the fourth ground of appeal, the counsel for the Respondent replied that, the records show irregularity from the production of the will to the appointment hence, the proceedings were tainted will procedural irregularities. That, the will being the centre of the dispute, and the same being not properly tendered in accordance with the law, the order for re-trial was proper. He concluded that, the appeal be dismissed and the order for re-trial be maintained so that the parties can be heard inter-parties for substantive justice to be reached.

In a brief rejoinder the counsel for the Appellant stated that, on the first ground of appeal the counsel for the Respondent framed a new ground of appeal which was not raised at the first appellate court as the judgment of the first appellate court is centred on the irregularities in production and admission of the will and the alleged blocked cross-examination. That, since there is no even any letter addressed to the trial court stating that the Respondent was denied of his right to be heard then the same should be ignored

Regarding the admission of the will the counsel for the Appellant added that, the will was not suo moto received by the court and since

there was no any objector, the same was not supposed to be read hence the trial court simplified the procedure in appointing the Appellant. As for the third and fourth grounds of appeal, the Appellant maintained that, there is no any justification of the order for re-trial made by the first appellate court hence, the appeal be allowed.

I have considered the arguments by the parties and the records of this case. On the first ground, it is the contention by the Appellant that the the first appellate court entertained the appeal while the Respondent here in was not a party in the original case and had no right to appeal. I agree with the submission made by the Respondent that a party aggrieve with the court decision has right to appeal. This is subject to the provision of section 20(1)(b) of the Magistrates courts Act Cap 11 R. E 2019 which reads: -

> *"(b) in any other proceedings, any party, if aggrieved by an order or decision of the primary court, may appeal there from to the district court of the district for which the primary court is established".*

From the wordings of the above provision, an appeal from a decision or order issued by the Primary court lies to the district court and can be filed by the aggrieved party. The question that follows is that, can any aggrieved person file an appeal to the district court? The

answer is obvious NO. The above provision specifically gives automatic right of appeal to the parties to the case.

There is no dispute that the Respondent in this appeal was not a party to the original proceedings before the trial court and for that matter she had no automatic right to file an appeal against the decision of the trial court. It is the claim by the counsel for the Respondent that the respondent was denied right of appearance at the trial court.

I have revisited the trial court records and find the allegation that the Respondent was denied right of appearance wanting. The trial court records are clear as they do not indicate if the Respondent entered appearance or raised any objection before the trial court. The Appellant filed a petition and presented her witnesses in court and as there was no caveat filed, the court appointed her executrix of the estate of the deceased. The Respondent's appeal before the district court was faulting the trial court's decision on account that there was error committed by the trial court in admitting the will in court, there was defects in the will and that the case was not proved on the required standard. Nothing was raised by the Respondent regarding the denial of her right to be heard. Thus, the contention by the counsel for the Respondent at this stage, that the Respondent was denied her right to fair hearing is wanting.

Again, there is no records showing the respondent's appearance or a letter addressing the court on the matter. It is also my view that, the claim that she appeared but was not recorded by the trial court or made party to the proceedings if true, could have been raised before the first appellate court. Raising the claim of denial for right to be heard at this stage is considered as an afterthought.

As there is no dispute that the Respondent was not a party to the original case, the only remedy available for her was to lodge a revision application and not an appeal. An Appeal is a right exercised only by a person who was a party to the case. The Respondent herein preferred to file an appeal to the district court instead of exhausting the remedy for revision to which she has right to pursue. That is the settled position of law as it was also enunciated in a number of cases including the case of **Yara Tanzania Limited Vs. DP Shapriya & company limited,** Civil Application No. 345/16 of 2017 CAT at Dar es Salaam (unreported) which cited with approval the case of **Moses Mwakibete Vs. the Editor, Uhuru, Shirika la Magazeti ya Chama and National Printing Company Limited** [1995] TLR 134 where the Court stated that: -

"The revisional powers conferred to the Court under the then section 2 (3) (now section 4 (3) of the AJA are not meant to be used as an alternative to the appellate jurisdiction of the Court Accordingly, unless acting on its own motion, the Court cannot be moved to use its revisional jurisdiction under section 2 (3) in cases where the applicant has the right of appeal with or without leave and has not exercised that right."

In considering to the holding in the above case, it equally applies that an appeal cannot be an alternative to revision and vice versa. Thus, the Appeal filed at the district court was incompetent for being filed by a person who was not a party to the original proceedings who in fact had remedy to file revision application. I therefore find the whole proceedings, judgment and decree or order arising from that decision to be nullity.

From the above reasons, I find the first ground of appeal suffices to dispose off the whole appeal. As the judgment by the first appellate court emanated from nullity proceedings, there is nothing left for this court to determine and the remaining grounds of appeal becomes irrelevant.

In the upshot and in considering what has been stated above, the proceedings, judgment and decree or orders of the first appellate court are hereby quashed and set aside. The Appeal is therefore allowed with costs.

DATED at **ARUSHA** this 6th September, 2022.

D.C. KAMUZORA

JUDGE