

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

MISC. CIVIL APPLICATION NO. 19 OF 2021

MABETE MASELE.....APPLICANT

VERSUS

MASENGWA LIFA.....RESPONDENT

[Application from the Decision of District Court of Kishapu at Kishapu.]

(Hon. Oguda, RM)

dated the 5th day of January, 2016
in

Probate and Administration Cause No. 1 of 2015

RULING

17th May & 17th August, 2022.

KULITA, J.:

This is an application for revision. It has been filed by the Applicant by way of chamber summons in terms of the provisions of sections 30(1)(a) of the Magistrates' Courts Act [Cap 11 RE 2019]. In the chamber summons, the Applicant prays for this Court to revise the proceedings and judgment of Probate and Administration No. 1 of 2015 Kishapu District Court by declaring it *res judicata* and to restore the

Probate Appeal No. 4 of 2014 of Shinyanga District Court that appointed the appellant as administrator of the estates of one Holo Madito. This application is supported with an affidavit sworn by the applicant on 11th June, 2021.

In a nut shell, information as can be gathered from the records, following the demise of Holo Madito (deceased), the respondent herein, who is also the child of the said deceased applied to be appointed administrator of the deceased's estates. The application was made at Isungang'holo Primary Court through the Probate and Administration Cause No. 4 of 2013. Consequently, on 30th October, 2013 the respondent was appointed the administrator of the estates of the deceased, Holo Madito.

That decision aggrieved the applicant herein, as the Kishapu District Court was not yet established, the applicant herein appealed at the District Court of Shinyanga through Probate Appeal No. 4 of 2014. Due to non-appearance of the respondent on the date that was fixed for hearing, the application was heard *ex-parte* against the respondent. Consequently, the *ex-parte* judgment was delivered on 15th July, 2015. This *ex-parte* judgment of Shinyanga District Court, first nullified the

appointment of the respondent and it appointed the applicant herein as administrator of the estates of the deceased Holo Madito.

That decision too aggrieved the respondent herein. As the District Court of Kishapu had already been established by then, the respondent decided to make application for setting aside the *ex-parte* judgment in Probate Appeal No. 4 of 2014. This was done through Misc. Application No. 2 of 2015 at the District Court of Kishapu. Following that application, the *ex-parte* Judgment was set aside. That was on 19th November, 2015.

On that account, the probate Appeal No. 4 of 2014 was restored for hearing inter-parties. As the court venue had changed then, the Probate Appeal No. 4 of 2014 at Shinyanga District Court wrongly became filed as Probate and Administration No. 1 of 2015 at Kishapu District Court. I termed it wrongly simply because it had to bear the word "Appeal".

All in all, hearing of it inter-parties took place and its judgment was delivered on 5th January, 2016. This judgment, firstly nullified the appointment of the respondent that was done at Isungang'holo primary court, secondly, it appointed the appellant to be the administrator of his estate and lastly, it divided the deceased's estates.

Following that decision, the applicant herein has now approached this court in this application, seeking for declaration that the decision in Probate and Administration No. 1 of 2015 of Kishapu District Court be declared *res judicata* and to restore decision in the Probate Appeal No. 4 of 2014 of Shinyanga District Court.

On 17th May, 2022 this application was called on for hearing. Both parties appeared unrepresented.

Submitting in support of the application, the applicant adopted his affidavit and stated further that, the Probate and Administration No. 1 of 2015 of Kishapu District Court be declared *res judicata* over the Probate Appeal No. 4 of 2014 of Shinyanga District Court.

In reply the respondent stated that, through Application No. 2 of 2015, he successfully applied to set aside the probate appeal No. 4 of 2014 that was heard ex-parte at Shinyanga District Court. He added that, as a result the applicant herein on 23rd December, 2015 filed the Probate Appeal No. 1 of 2015 at Kishapu District Court. Further, the respondent stated that, on that appeal, he was not removed from the post of being administrator of the deceased's estates.

In rejoinder the applicant stated that, he had never gone to Kishapu District Court to institute any case. To insist the same he stated

that, he was not involved in any case filed at Kishapu District Court, be it Application No. 2 of 2015 or Probate Appeal No. 1 of 2015. He prayed for this application to be granted. This is the end of both parties' submissions.

I have gone through earnestly the available records, pleadings and the both parties' submissions as well. The issue is whether this application is meritorious.

As alluded earlier, this application is supported with the affidavit that was sworn by the applicant on 11th June, 2021. Paragraph 3 of the said affidavit shows that, it is the applicant who first filed the Probate Appeal No. 4 of 2014 at the Shinyanga District Court. The same paragraph shows that, the same applicant then filed the Probate and Administration No. 1 of 2015 at Kishapu District Court. That testimony goes contrary to what the applicant has submitted before this court. In his submissions he stated that, he never filed any case at the District Court of Kishapu.

With this submission, it means that, the applicant is lying somewhere. Either way, if the applicant has lied in his affidavit, then this application is incompetent for being supported with the defective

affidavit which contains lies. And if the applicant tells lies in his submissions, then the application is likewise incompetent.

Accordingly, the applicant in his second prayer in his chamber summons, asks this court to restore the Probate Appeal No. 4 of 2014 of the Shinyanga District Court. This poses a doubt in the applicant's application. Why should the applicant pray that Probate Appeal No. 4 of 2014 be restored? That prayer presupposes that the same appeal was set aside that is why he wants the same to be restored.

If the said appeal was not set aside, the applicant would not have sought for such an order to restore it. This shows that the applicant knows the existence of Application No. 2 of 2015 Kishapu District Court which had set aside the said Probate Appeal No. 4 of 2014.

As long as the *ex-parte* decision in Probate Appeal No. 4 of 2014 was set aside, then it follows therefore that, the same cannot be restored. It cannot be restored as long as Probate No. 1 of 2015 of Kishapu District Court has taken its place.

All what the applicant could do when aggrieved with the Probate No. 1 of 2015 Kishapu District Court, was to challenge it through appeal. On that account too, the Probate and Administration No. 1 of 2015

cannot be declared *res judicata* for the same reasons that the said Probate Appeal No. 4 of 2014 Shinyanga District Court had already been set aside.

This point too makes the applicant's application for the reason of *res judicata* to have no merits. As thus, I find the applicant's application unmeritorious and I proceed to dismiss the same with costs.



S. M. KULITA
JUDGE
17/08/2022

DATED at **SHINYANGA** this 17th day of August, 2022.



S. M. KULITA
JUDGE
17/08/2022

