

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

**(IN THE DISTRICT REGISTRY OF KIGOMA)**

**AT KIGOMA**

**PROBATE AND ADMINISTRATION OF ESTATE APPEAL NO. 2 OF 2022**

(Arising from Civil Revision No. 4/2021 District Court of Kigoma at Kigoma Before Hon. K.V. Mwakitalu - RM, Original Probate and Administration cause No. 56/2021 Primary Court of Kigoma at Ujiji before Hon. N. Tungaraza - RM)

**PILI MRISHO HUSSEIN ..... APPELLANT**

**VERSUS**

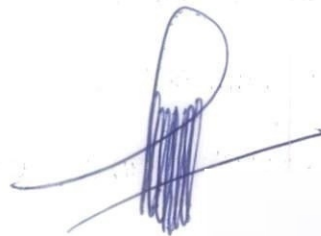
**JUMANNE RAMADHANI NDENGEREKO..... RESPONDENT**

**JUDGMENT**

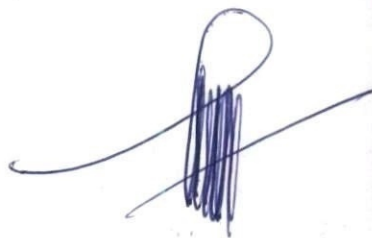
14/7/2022 & 9/9/2022

**L.M. Mlacha,J**

This is an appeal against the decision of the district court of Kigoma made in Revision No. 4 of 2021 (K.V. Mwakitalu R.M). In the said decision, the district court revised the decision of the primary court of Kigoma district at Ujiji made in Probate Cause No. 56 of 2021. Aggrieved by the decision, the applicant, Pili Mrisho Hussein, lodged this appeal armed with five grounds of appeal which read thus:



1. That, the revision court erred both in law and fact for allowing the application on ground that the respondent herein was a crucial party which has never objected any despites of the notice seen in a said house, streets and on public notice board.
2. That, revision court erred by misdirecting itself for allowing the application in bases of service of notice and summons was not physical and not considering that the service of notice was effective as usual practice and requirement.
3. That, the revision court erred both in law and facts by allowing the application without considering that the respondent herein had maliciously denied appearing in court several times. The appellant further states that the court had never even examined the extent of his negligent in court matters.
4. That, the revision court erred both in law and facts by granting application while the appellant applied and appointed by a different magistrate and assessor as directed by the High Court. The appellant further states that the respondent herein has such a non-court attendance.

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5. That, the revision court erred for granting an application while the respondent herein had no any proof of his objection in the said appointment. The appellant further states that the respondent herein had an option even to lodge caveat pursuant to the said interest in the said houses.

The respondent, Jumanne Ramadhani Ndengereko, is resisting the appeal. He entered an appearance personally. He also engaged Mr. Ignatus Kagashe to defend him. The appellant appeared in person fending for herself.

To understand the appeal properly, a bit of the background is essential. The records show that the appellant applied for letters of administration of the estate of the late Hussein Ally in Probate at the primary court of Kigoma district at Ujiji Primary Court in Cause No. 47 of 2016. The late Hussein Ally was her grandfather and died on 24/12/2012. The only property involved in the estate is a house on plot No.14 Simu street, Mwanga South, Kigoma-Ujiji Municipal. The respondent lodged an objection in the case saying that the house is his. That, the deceased gave it to him before his death. The primary court decided in favour of the respondent. It decided that the respondent was declared both the owner



and administrator of the estate. The appellant appealed to the district court of Kigoma vide Probate Appeal No. 6 of 2016. The district court reversed the decision of the primary court and appointed the appellant to be the administrator of the estate of the deceased. The respondent appealed to this court sitting at Tabora in (PC) Probate Appeal No. 12 of 2016. This court (utamwa J) nullified the proceedings and decisions of the lower courts. The judgments of the lower courts were vacated and set aside after a finding that the court had failed to make a finding on whether the house was an estate of the deceased or not. This court advised the respondent (now appellant) to return to the primary court and lodge her petition afresh (if she so wished) to be heard by a different magistrate and a different set of assessors. It was further said that if the appellant (now respondent) wished to object the matter, he can also do so at the primary court. It was something like a trial *denovo* before another magistrate and a new set of assessors which had specific instructions.

The records further show that the appellant returned to the primary court in compliance to the direction made by this court and filed Probate Cause No. 56 of 2021 seeking to administer the house. She enlisted herself and her brother, Shabani Mrisho Hussein as heirs of the estate of the late

Hussein Ally whom she called their grandfather. Apparently, his father, Mrisho Hussein had died long before the filing of the matter. The primary Court (N.W. Tungaraza) appointed her to be the administrator of the estate in the decision which was later vacated by the district court in the revision.

The appellant being a layman could not submit on the grounds of appeal as presented. She made a general submission. She told the court that the house in issue is house on plot No. 14, Simu street, south Mwanga. She submitted that the respondent forged documents to make it his but could not succeed in the cases which passed through 9 magistrates. She defeated him in all the cases. She went on to say that the respondent is son of a brother in law of their grandfather. They know each other very well. She added that they were 6 but they are now 2. Others are dead. Three of them have died in the course of the cases involving the house.

The appellant went on to submit that her father, the late Mrisho Hussein was the only son of Hussein Ally and thus the only heir. The respondent migrated to the house and lived as a relative. He stayed with their grandfather. He then claimed ownerships of the house using forged documents.

Like the appellant, Mr. Kagashe did not address the grounds of appeal, one by one. He combined them together. He started by saying that Mzee Hussein was living with the respondent up to the date of his death which was in November 2012. Following his death, Moshi Mrisho filed Probate Cause No. 80 of 2014 at Ujiji Primary Court seeking to administer the estate. There followed Probate Appeal No. 4 of 2015 which quashed the decision of Probate Cause No. 80 of 2014. Moshi who is a relative of the appellant died. The appellant arose and filed Probate Cause No. 47 of 2016 seeking to administer the estate. The respondent objected. His objection was sustained because of the evidence that the house had been given to him. The appellant appealed in Probate Appeal No. 6 of 2016. The decision of the primary court was vacated. The appellant was appointed the administratrix in the decision which was later vacated by this court sitting at Tabora. The appellant filed Probate Cause No. 77 of 2018 as directed by this court. The respondent was not involved in the case hence the revision which vacated the decision of the primary court. Counsel supported the decision of the district court. The appellant made a short rejoinder and argued the respondent whom he called "my brother" to understand her course so that the case could come to an end.



In revising the decision of the primary court, Hon. K.V. Mwakitalu RM had this to say at page 5 of the Judgment.

*"... that after the respondent lodged the application afresh, the trial court should have ensured that **the notice of the trial and a summons have been sent and served personally to the applicant to see if he still wishes to object** the respondent application" (Emphasis added)*

Guided by rule 5 of the Primary Court (Administration of Estates) Rules, GN 49 of 1971, the district court found that there was a requirement to send a notice or summons to the applicant (now respondent), to see if he had an objection, something which was not adhered to. He then proceeded to revise and vacate the proceedings and the decision of the primary court a decision which is now being challenged.

I have had a close at the grounds of appeal. Having done so, I have found the following. Grounds one challenge the finding of the district court based on the requirement to serve a notice or summons to the respondent. The issue is whether there was a requirement for physical service or simply the general citation as was done by the primary court. Ground three has a

complaint that the respondent defaulted appearance maliciously. That he was aware of the case but defaulted maliciously. Ground four say that the condition of a new magistrate and a new set of assessors was complied with. Ground five say that the application was granted because the respondent did not come to object the appointment. Looking at the grounds of appeal, I think the central issue is whether the district court was justified in revising and setting aside the decision of the primary court regard being made to the directions of this court.

My perusal of the decision of this court at page 6 could find the following:

*".....Since the respondent was claiming that the house was part of the deceased estate and was pressing the trial court to appoint her as administratrix of the estate, and since the appellant contended that the house was not part of the estate, then **the trial court had the duty to frame and answer two issues in a chronological order. In the first place it had to determine an issue of whether or not the house was part of the estate.** In so doing, it could get ample opportunity to hear the parties on the disputed ownership of the house before it could engage the issue related to the administration of the estate. The trial court had both the duty and jurisdiction to frame and determine that issue under rule 8 (d) of the Primary courts (Administration of Estates) Rules GN No. 49 of 1971....."*



*In case the trial court could find the first issue affirmatively (i.e. the house was part of the estate), **then it could proceed to determine the second issue of whether or not the respondent qualified to be appointed as administratrix.** If it could find the issue affirmatively, it could accordingly appoint her .....*

*However, in case the trial court could find the issue negatively i.e the house was not part of the estate (for being property of the appellant), then that could be the end of the matter and if could dismiss the respondent's application" (Emphasis added)*

It is thus obvious that Probate Cause no. 56 of 2021 was not supposed to be advertised in the usual way because this court had given a specific direction in the matter. The primary court was given a specific task to find out whether the house was an estate of the deceased or the property of a third party who was named to be the appellant. It was directed to receive the petition of the appellant and proceed to appoint her if she was the fit person to administer the estate, after resolving the issue of ownership. It was directed to summon or send a notice of filing of the petition to the respondent to see if he had any objection and if any, determine the objection before making the appointment.

Speaking of the effects of directions of a higher court this court had this to say in **Gideon Mwakalonge v. Niendiwe Safiel Mduma**, (HC Dsm Mgonya J), Civil Appeal No. 54 of 2020 at page 3:-

*"Moreover, it is trite law that **the decision of the High Court is binding to the Court Subordinate to it** ... Therefore it was wrong for the District Magistrate to dissent from the decision of the High Court by pronouncing judgment basing on his own opinion instead of adhering to the directives accorded by the High Court Judge.."(Emphasis added)*

The court went on to nullify and vacate the decision of the district court which was made contrary to express directions of this court. This is also the message behind section 44 (1) (a) of the Magistrates Courts Act cap 11 R.E. 2019 where it is written *"give such directions as it considers may be necessary in the interests of justice, and all such courts shall comply with such directions without undue delay."* The High Court has power to give directions to subordinate courts which must be complied with.

It was therefore correct, as properly observed by the district court that, there was a duty imposed on the primary court to cause the attendance of the respondent to see if he still had an objection, and if so to frame the two issues which should be resolved in a chronological order as explained

above. It was thus correct that there was a duty of summoning the respondent to see if he had an objection. It was not a matter to be dealt under the normal procedure of a general citation. Failure to call the respondent on a summons or notice was a fatal irregularity making the proceedings and decision illegal null and void. It also denied him a right to be heard which is guaranteed by article 13 (1) and (6) (a) of the Constitution. See also **Danny Shasha v. Samson Masoro & 11 Others**, (CAT), Civil Appeal No. 298 of 2020 pages 5 -6 where it was said thus:-

*"The Court has emphasized time and again that **a denial of the right to be heard in any proceedings would vitiate the proceedings**. Further, it is also an abrogation of the constitutional guarantee of the basic right to be heard as enshrined under Article 13(6)(a) of the Constitution of the United Republic of Tanzania, 1977."*(Emphasis added)

I agree with the district court that there was a non - compliance with the directions of this court leading to a failure of justice but I don't think that there was a need for filing a fresh matter. I think that the magistrate was just required to make an order of a trial denovo. This calls for the exercise of revision powers of this court for the court can exercise the powers in the course of hearing an appeal.



I the exercise of the revision powers of this court contained under section 44 (1) (a) of the Magistrates Courts Act cap11 R.E. 2019, on the reasons explained above, I make the following directions.

1. I direct Probate Cause Number 56 of 2021 to be heard denovo by another magistrate other than Tungaraza RM in the manner directed by this court save that taking into account the changes in the law there cannot be any assessors.
2. I stress that a notice should be served to the respondent to come and lodge an objection in respect of the house, if he so wishes, and if he does, the court should frame the two issues and decide them as directed by this court.
3. I direct the case to be heard and decided within three months from today.
4. Appeal allowed. No order for costs.

It is ordered so.



  
**L.M. Macha**

**Judge**

**9/9/2022**

**Court.** Judgment delivered. Right of Appeal explained.



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**L.M. Mlacha**

**Judge**

**9/9/2022**