IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOBA DISTRICT REGISTRY

AT BUKOBA

(PC) CIVIL APPEAL NO. 30 OF 2022

(Arising from Civil Appeal No. 38 of 2021 of the Muleba District Court that originated from Nshamba Primary Court in Probate and Administration Cause No. 5 of 2016)

CONSTANTINE RWABULOBE.....APPELLANT

VERSUS

ADVENTINA RWABULOBE.....RESPONDENT

JUDGMENT

09/08/2022 & 02/09/2022
E. L. NGIGWANA, J.

This is a second appeal by the appellant, Constantine Rwabulobe following his dissatisfaction with the decision of the District Court of Muleba at Muleba in Civil Appeal No. 38 of 2021, originating from Probate and Administration Cause No. 5 of 2016 of Nshamba Primary Court.

Brief facts of this case as per available records are to the effect that; the appellant's father one Rwabulobe Biligikubisi died in 1973. Following the said death, the respondent, Adventina Rwabulobe, the only widow of the deceased successfully petitioned for letters of administration of the estate of her deceased husband in Probate and Administration Cause No. 10 of 2013 of Nshamba Primary Court. The respondent as the adminitratix of the estate of her late husband distributed the properties to the lawful heirs and filed inventory before the trial court.

The appellant who is the son of the respondent vide Probate and Administration Cause No. 5 of 2016 challenged the inventory and the distribution made. The trial court considered the objection raised and

eventually, the previous distribution done was quashed and set aside. A fresh distribution was ordered by the trial court.

The respondent was aggrieved by the trial court decision, therefore, appealed to the District Court of Muleba at Muleba vide Probate Appeal No. 6 of 2016 whereby on 07/06/2017, the decision of the trial court was quashed and set aside.

Aggrieved by the decision of the District Court, the appellant knocked the doors of the High Court vide Probate Appeal No. 07 of 2018, whereby on 15/05/2020, the proceedings and the decision of the District Court were quashed and set aside because this court (Mtulya J.) found that Probate Appeal No. 6 of 2016 was filed out of time and without leave of the court. The decision of the trial court dated 11/10/2021 was restored with slight directives that the respondent should proceed as administering the estate of their deceased husband.

From there, the respondent went on discharging her duties as an administratix of the estate for the late Rwabulobe Biligikubisi. On 23/03/2021, the appellant knocked the doors of the trial court for the second time, objecting redistribution made by the respondent on 01/03/2021.

In compliance of paragraph 15 (3) of the Magistrates' Courts (Civil Procedure in Primary Court Rules, G.N No.119 of 1983, the hearing date was fixed by the trial court whereas, the parties entered appearance but the appellant was not ready to prosecute his case/objection. Consequently, the objection was dismissed for want of prosecution.

Aggrieved by the dismissal order of the trial court, the appellant appealed to the District Court of Muleba on two grounds;

(1) *That, the trial magistrate erred in law and fact by not entertaining the matter on merit.*

(2) *That, the trial court erred in law and fact by not observing principle of natural justice.*

After hearing the appeal, the District Court arrived at its decision that the appeal was devoid of merit owing to the reason that the appellant was afforded the right to be heard but he was not ready to exercise it. Consequently, the appeal was dismissed without costs.

Aggrieved by the decision of the District Court, the appellant has knocked the door of this court by way of appeal clothed with three grounds of appeal:-

(1) That the first appellate court misdirected by dismissing the petition of appeal on the basis that the appellant never appeared to prosecute his case intentionally.

(2) That the trial court erred in law and fact for not affording equal rights in hearing the appellant's objections by being served with the reply to objections by the Respondent so that he can know the version of the respondent at the hearing stage to avoid being surprised.

(3) *That the first appellant court erred in law as formulated issues that escaped the real question raised by the appellant of his right to be heard and a fair trial.*

Wherefore, the appellant is praying to this court to allow the appeal, quash the decision of the lowers courts and order the objection to be heard on merit.

At the hearing of this appeal, both parties appeared in person and unrepresented. The appeal was argued orally. In his submission, the appellant confirmed that he had refused to proceed with the hearing in the trial court because he lodged his objection in writing but no reply to the objection was made in writing by the respondent. He added that, even if they are ordered to go back to the trial court, he is still not ready to prosecute the objection in absence of the reply in the written form from the respondent.

On his side, the respondent submitted that, the applicant was afforded the right to be heard but he refused to exercise it, thus, this appeal is devoid of merit. She added that the appellant is troubling her for nothing. She ended her submission praying that this appeal be dismissed.

Having carefully heard submissions by the parties, and having considered the grounds of appeal, the issue for determination is whether the District was justified to confirm the decision of the trial court which dismissed the objection by the appellant for want of prosecution. In this appeal, I will mostly allow the record of the trial court to speak for itself so as to appreciate what transpired in there.

The record of the trial court shows that, in the trial court, the appellant wanted the respondent to make the reply to the objection in writing, but the respondent was not ready to do so. Let the record of 12/05/2021 speak for itself;

Mpingaji:

"Naomba mjibu maombi alete majibu yake kwa maandishi."

The respondent responded to the prayer of the appellant as follows;

Mjibu pingamizi:

"Mheshimiwa hakimu, naomba nieleze kwa mdomo, mimi sijui kuandika na wala sina fedha ya kwenda kwa wakili kuandikiwa majibu."

Having heard both parties in that issue, the trial issued the order as follows;

Amri: *Kutokana na hoja za mpingaji pamoja na mjibu pingamizi amekwisha pata maelezo ya pingamizi kwa maandishi, mahakama hii imeelekeza mjibu maombi (pingamizi) atasikilizwa majibu yake kwa mdomo tarehe 25/05/2021. Usikiliwaji utaanza upande wa mleta maombi."*

Washauri 1. Signed

2. Signed

Signed: B.B. Mbenje – RM

12/05/2021"

On 25/05/2021, the appellant told the trial court that he was not ready for the hearing, then, the matter was adjourned to come for hearing on 10/06/2021 whereas upon appearance, the appellant refused to prosecute his objection.

Let the record speak for itself."

Mleta Pingamizi

"Siwezi kuendelea kusikilizwa, ni lazima mjibu pingamizi alete majibu yangu ya pingamizi kwa maandishi kama ambavyo na mimi nilivyoleta maombi yangu ya pingamizi kwa maandishi."

Washauri: 1. Signed

2. Signed

Signed: B.B. Mbenje – RM

10/06/2021"

Mjibu Pingamizi

"Nimeeleza hapa mahakamani kuwa nilipokea pingamizi la mpingaji kwa maandishi, nikaeleza mimi sina gharama ya kwenda kuandika kwa maandishi na sijui kusoma lakini pia majibu yangu nitayaeleza wakati wa usikilizwaji wa pingamizi na mahakama ikaniruhusu kuwa nitaeleza kwa njia mdomo majibu yangu kwa njia ya mdomo wakati wa usikilizwaji na leo tulielezwa kuwa mpingaji ataanza kusikilizwa pingamizi lake hivyo siko tayari kuleta kwa njia ya maandishi, nitaeleza kwa njia ya mdomo."

Having heard the parties, the trial Magistrate was satisfied that the proper step to take in the circumstances of the case was to dismiss it for want of prosecution and he did so. Let the record speak for itself;

Mahakama:

"Kutokana na maelezo ya mleta Pingamizi kuwa hawezi kuendelea na usikilizwaji mpaka mjibu pingamizi alete majibu kwa njia ya maandishi kutokana na amri ya Mahakama hii kuruhusu mjibu pingamizi kujibu majibu yake kwa mdomo wakati wa usikilizwaji na kwa kuwa leo tatehe 10/06/2021

lilikuja kwa ajili ya kusikilizwa upande wa mleta pingamizi na kwa kuwa ameeleza kuwa hawezi kuendelea mpaka alete majibu kwa maandishi, ni uamuzi wa mahakama hii kuondoa maombi haya kutokana na mleta pingamizi kukataa kuendelea na usikilizwaji."

Washauri:- 1. Sgd

2. sgd

Sdg B.B Mbenje RM

10/06/2021"

I am alive that the right to be heard is so fundamental as stressed in the case of **Rukwa Auto Parts and Tran sport Ltd Versus Jestina George Mwakyoma,** [2003] TLR 251 where the Court of Appeal had this to say;

"In this country, natural justice is not merely a principal of common law; it has become a fundamental constitutional right Article 13 (b) (a) includes the right to be heard amongst the attributes of equality before the law, and declares in part;

(a) Wakati haki na wajibu wa mtu yeyote vinahitaji kufanyiwa uamizi na Mahakama au chombo kinginecho kinacho husika, ***basi mtu huyo atakuwa na haki ya kupewa fursa ya kusikilizwa kwa ukamilifu."***

In another case, Abbas **Sherally and Another Versus Abdul Fazalboy, Civil Application No. 33 of 2002,** the Court of Appeal emphasized the importance of the right to be heard as follows:

"The right of a party to be heard before adverse action or decision is taken against such party has been stated and emphasized by the courts in

numerous decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice. "

However, there is a well-settled principle that each case has to be looked and determined in its own circumstances. Considering what transpired in the trial court, it is apparent that the decision to dismiss the objection for want of prosecution was properly reached. It cannot be said that the appellant was condemned unheard or that there was an adverse action or decision taken against him without being afforded a right to be heard.

It was upon the appellant to exercise his right as per law and per court order. Court orders must always be respected. In the case of **TBL versus Edson Dhobe,** Misc. Application No. 96 of 2006 CAT (Unreported) that;

"Court orders should be respected and complied with. The court should not condone such failures. To do so is to set a bad precedent and invite chaos. This should not be allowed to occur. Always court should exercise firm control over proceedings. "

A party who, without justifiable reasons, refuses to exercise his or her right to be heard cannot turn around and accuse an adjudicator or the court that he was not afforded the right to be heard. In the matter at hand, it is true that the objection was not determined on merit owing to the reason that the appellant refused to prosecute it, the fact which is fully supported by the trial court proceedings, thus, the only option available to the trial court was to dismiss it for want of prosecution as it did.

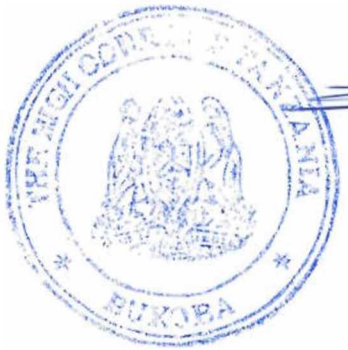
In my view, the act of the appellant appealing against the trial court order made under such circumstances amounts to an abuse of court process, the practice which must firmly be discouraged. I am also persuaded by the decision of the he High Court of Zimbabwe in the case **of Ignatius Masamha versus Secretary,** Judicial Service Commission HH-283/17 where the court held that;

"courts have a duty to guard the abuse of the court process and where there is unmitigated abuse.... it is only reasonable, expected and indeed proper for the court to shut its doors to the abuser and/or place such abuser on terms with regards how he may be allowed to exercise his rights of access to the courts."

It is also a well-established principle that concurrent findings of the lower courts should not be easily interfered. In **Fatuma Ally versus Ally Shabani,** CAT-Civil Appeal No. 103 of 2009 (unreported), it was held as follows;

"Where there are concurrent findings of fact by two Courts, the Court of Appeal, as a wise rule of practice, should not disturb them unless it is clearly shown that there has been a misapprehension of evidence, a miscarriage of justice or violation of some principle of law or procedure. In other words, concurrent findings of facts by lower Courts should not be interfered with except under certain circumstances."

Being guided by the herein above Court of Appeal decision, I find no justification to fault the concurrent decisions of lower courts in this matter. Consequently, this Appeal is dismissed in its entirety for want of merit. Given the nature of this matter, I enter no order as to costs.



E. L. NGIGWANA

JUDGE

02/09/2022

Judgment delivered this 2nd day of September, 2022 in the presence of both parties in person, Hon. E.M. Kamaleki, Judges Law Assistant and Ms. Tumaini Hamidu, B/C.

E. L. NGIGWANA

JUDGE

02/09/2022