

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

**(ARUSHA DISTRICT REGISTRY)
AT ARUSHA**

CIVIL REVISION NO. 5 OF 2022

(Originating from District Court of Arusha in Probate and Administration Cause No. 08 of 2022)

EMMANUEL COSMAS KESSY APPLICANT

Versus

FRIDA AGAPITI KESSY..... 1ST RESPONDENT

DAMIAN ANTHONY KESSY 2ND RESPONDENT

R U L I N G

Date of last Order: 29th September, 2022

Date of Ruling: 3rd October, 2022

MALATA, J.

The Applicant, Emmanuel Cosmas Kessy, filed this application moving the Court to call for record of the District Court of Arusha and revise the proceedings and order dated 31/05/2022, in Probate and Administration Cause No. 08 of 2022, subsequently make an appropriate orders and directions. The Applicant was a party in Probate and Administration Cause No. 08 of 2022 and was aggrieved by the order dated 31/05/2022, subject of this Revision.

The District Court of Arusha in Probate and Administration Cause No 08 of 2022 struck out the Application for want of jurisdiction and directed the parties to petition for letters of administration in this Court for two



reasons: **One**, the Deceased was a Christian and his mode of life was that of Christianity and **two**, the value of the deceased 's estate is far beyond the jurisdiction of the District Court. Finally, the trial court explained to the parties on the right to appeal in case of any dissatisfaction of the trial Court's Order. Aggrieved by the said order the Applicant who was the Caveator in the said proceedings preferred this application for revision as opposed to the directives of the trial Court.

On 29/09/2022, when the matter came for hearing, the Applicant was represented by Messrs. David Makatha and Anord Wilson learned advocates, while the Respondents appeared through Messrs. Imran Juma and Dismas Lume, learned advocates.

Before proceeding with hearing of the Application, this Court directed the parties to address on whether this Court had power to determine the Application of this nature where right to appeal lies. Mr. Wilson submitted in principle that, the impugned order by District Court is appealable. However, the law mandates this Court to entertain the Application for revision of the impugned order despite the fact that the order is appealable. He referred this Court to sections 79(1)(a) and 95 of Civil Procedure Code, Cap 33 [R.E 2019] (hereinafter "the CPC"), as the provision empowering the Court to do so. He maintained that



section 79(1) (a) of the Civil Procedure Code, empowers this Court to entertain such application even where there is right to appeal. Further, he submitted that section 95 of the CPC gives inherent powers to this court to do anything for the interest of justice.

Finally, he referred this Court to the decision in the case of **Crepina Joseph Ngumbi vs Julius Nganya**, Civil Application No. 22 of 2019, (unreported), specifically at page 5 which is to the effect that where the estate exceed the pecuniary limit then the District Court has no jurisdiction to try it.

On his part, Mr. Lume submitted that this Court has no jurisdiction to entertain this Application where there is a right to appeal against the impugned order dated 31/05/2022. As such, the Application is untenable in law. He added that under section 79(I) of the CPC is to the effect where there is right to appeal one should not invoke revisional powers of the Court. To cement his argument, he referred this Court to the case of **Arusha International Conference Centre [AICC] vs Ayoub Bendera and 11 Others**, Civil Appeal No. 17 of 2010 (unreported). At page 5 of that decision, the Court of Appeal settled that revision can only be exercised where there is no right to appeal.



Regarding application of section 95 of the CPC, the learned counsel submitted that it is inapplicable as the same cannot be used where there is specific provision dealing with specific issue. Finally, Mr. Lume maintained that this Court has no jurisdiction to entertain the Application in the circumstances, thus prayed for dismissal of the same.

In his rejoinder submission, Mr. Anord reiterated what he submitted in the submission in chief. In the response to referred case of **Arusha international Conference Center** (supra), which deliberated applicability of section 79 (1) of the CPC, he submitted that the same is distinguishable as the circumstances are different, though no reasons were given.

To begin with, it is trite law that revision is not an alternative to appeal. This principle owes its foundation from the Court of Appeal decision in the case of **Augustino Lyatonga Mrema vs Republic and Masumbuko Lamwai** [1999] TLR 273 where it was held that:

"To invoke the Court of Appeal's power of revision there should be no right of appeal in the matter; the purpose of this condition is to prevent the power of revision being used as an alternative to appeal."



The Court of Appeal has further maintained the same position even on the application of section 79(1) of the CPC which deals with revisional powers of the Court. Basically, the provision curtails the court from invoking revisional powers where there is right to appeal. In the cited case of **Arusha International Conference Centre [AICC] vs Ayoub Bendera and 11 others** (supra), the Court of Appeal reaffirmed that:

"It is clear from the above section 79(1) that revision is exercised only where there is no right to appeal."

The question here is whether the order by the District Court of Arusha in Probate and Administration Cause No. 08 of 2022 dated 31/05/2022 is appealable.

First, it is undisputed from both parties stand that, they admitted in their submissions that the order subject of this application is appealable.

Second, the trial court, in its impugned order stated in clear terms that:

"Right of Appeal amply elucidated so that the dissatisfied party can resort onto, but within the prescriptions of the law of the land."

B. Y. Mwakisu – RM

31/05/2022"

Three, the proceedings of the District Court issued under the Magistrates Courts' Act Cap 11 R. E. 2019 are appealable under section



43 (3) of the said Act. **Four**, the impugned order is appealable under section 72 and 83 of the Probate and Administration of Estate Act, Cap. 352 R. E. 2002. **Five**, the impugned order is appealable under section 74(1) of Civil Procedure Code Cap.33 R.E.2019

Based on the afore cited principles, it is therefore with no iota of doubt that, the order by the District Court dated 31/05/2022 is appealable as submitted by both Counsel for Applicant and Respondents. Therefore, since it is appealable, and in compliance with the guidance of the law and Court of Appeal directives in the afore cited decision that, no revision if decision or order is appealable, then this Court hold that, this Application for revision is legally untenable. As such, I do not subscribe to the position taken by the Applicant's counsel but I share view with the Respondents' counsel.

In the upshot this Court rules that, since the order by District Court dated 31/05/2022 arising from Probate and Administration Cause No. 08 of 2022 was appealable, it is goes without saying that, this Court has no power to adjudicate on the same as this Court's power is ousted by section 79(1) of the CPC and other principles established by the Court of Appeal as referred in herein above.



Consequently, I rule that, the Application for revision is therefore incompetent and it is accordingly struck out. As the irregularity was raised by the Court *suo mottu*, there shall be no order as to costs.

Order accordingly.

DATED at ARUSHA this 3rd October, 2022.




G. P. Malata
JUDGE
03/10/2022