IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB- REGISTRY OF DAR ES SALAAM

AT DAR ES SALAAM

CIVIL APPEAL 12 OF 2022

(Arising from the decision of the District Court of Bagamoyo at Bagamoyo, in Civil Appeal No. 2 of 2022, by Hon. Mmanya-RM dated 14th day of April, 2022)

HILAL AHMAD MBARAKA ..... APPELLANT

VERSUS

MOHAMED AHMED MBARAK .....RESPONDENT

JUDGMENT

16th August, & 4th October, 2022

ISMAIL, J.

This matter began as a probate matter (Probate Cause No. 39 of 2020) in the Primary Court of Bagamoyo District sitting at Mwambao. The appellant herein applied for grant of probate of the estate of the late Ahmad Mbarak Omary, his father. The late Ahmad Mbarak Omary (deceased) died on 10th May, 2020, and was by a widow and six children.

The petition for grant of probate was met with resistance, through an objection raised by the respondent. His points of contention touched on the appellant's moral standards which he contended would not allow him to be entrusted with the responsibility of administering the deceased's estate. The

respondent also decried what he contended to be efforts to squander and waste the estate of the deceased to the detriment of some of the beneficiaries of the estate. There was also an outcry on the validity of the will, said to have been left behind by the deceased. In the respondent's view, the will was anomalous in form.

In the end, and besides other pronouncements, the trial court appointed the appellant, along with the respondent, as joint administrators of the deceased's estate, a decision that caused an uproar and rage from the appellant and a few of the beneficiaries. Feeling hard done by the decision, the appellant chose to take a ladder up, to the District Court. His nine-ground appeal fell through as the 1st appellate court upheld the trial court's decision in all respects.

The appellant did not shirk, he still felt that justice had not been dispensed to his liking. He has preferred the instant appeal, raising five grounds of appeal which are reproduced as follows:

1. *That the appellate District Court erred in law and in fact for entertaining the appeal which was improper before it by comprising a party (the respondent) who was not a party to the trial proceedings in primary court;*

2. *That the appellate District Court erred in law and in fact for applying Islamic laws in which the trial primary court did*

determine which law is applicable to the probate case before it;

3. *That the appellate District Court erred in law and in fact for failure for determining (sic) the appeal through Islamic rites and failure to determine the status of the three children who were born out of wedlock and whom (sic) were included as heirs by the trial primary court;*

4. *That the appellate District Court erred in law and in fact for confirming that the deceased will (sic) was a forged document without any proof of the allegation of forgery advanced by the trial primary court;*

5. *That the appellate District Court erred in law and in fact for failure to determine each ground of appeal as raised by the appellant and improperly proceeded to frame three issues to determine the appeal as if it is a civil case.*

The appeal was disposed by way of written submissions whose filing was ordered on 16th August, 2022. Both parties complied with the filing schedule to the letter. The appellant's submission was preferred by a quadruple of the legal counsel in Messrs Mathew Kabunga, Andrew Kannonyele, Heri Zuku and Florence Aloyce Tesha; whereas the respondent enlisted the services of Mr. Juvenalis Motete, learned advocate.

The appellant's contention in ground one is that the appeal in the 1st appellate court involved a party that was not a party to the original proceedings. Learned counsel contended that the recourse that such party had was to prefer revisional proceedings and not an appeal. To buttress his contention, the respondent referred the Court to decisions of the Court of Appeal of Tanzania in ***Ahmed Ally Salum v. Ritha Baswali & Another***, CAT-Civil Application No. 21 of 1999; and ***Felix Lendita v. Michael Long'idu***, CAT-Civil Application No. 312/17 of 2017 (both unreported).

Learned counsel invited the Court to nullify the proceedings bred out of the alleged irregularity.

In ground two of the appeal, the appellant is decrying the application of Islamic laws while the trial court did not determine the law applicable in the proceedings before it. While acknowledging that the primary court enjoys exclusive jurisdiction in matters of Customary and Islamic laws. In learned counsel's view, the court ought to have first determined the law applicable in the matter before it determined the matter. This, learned counsel contended, infracted section 18 (1) (a) (i) and (2) of the Magistrates' Court's Act, Cap. 11 R.E. 2019. The appellant's contention is that the 1st appellate court stripped into error to determine the appeal in the context of Islamic

law while the trial court made no finding on the law to be relied upon. In the appellant's view, this was an erroneous indulgence.

Ground three queries the 1st appellate court's failure to determine the appeal through Islamic rites, and inability to pronounce the status of three of the deceased's children who were born out of wedlock but were included in the list of heirs. The contention by the appellant is that, whereas the 1st appellate court spent some considerable time explaining the applicability of Islamic law, it did little or nothing to determine the status of illegitimate children who, in Islamic law, are not supposed to be included in the estate of the deceased.

The appellant argued that only children born out of the marriage contracted between the deceased and Bi Nuru Mohamed Salum were legitimate beneficiaries, casting away three others who were born out of mothers who were not marries to the deceased. The contention by learned counsel is that it was improper for the 1st appellate court to cast a blind eye on this matter. They attributed the anomaly to the decision to reject and nullify the will merely on the basis of typographical errors. They argued that the will, alleged to have been forged, did not fall into the description of what forgery is, under sections 333, 334 and 335 of the Penal Code, Cap. 16 R.E. 2022. They fortified their argument by citing the case of ***Raymond Adolf***

Louis & 2 Others v. Republic, CAT-Criminal Appeal No. 120 of 2019 (unreported), in which the offence of forgery was defined and described.

The appellant argued that forgery, a criminal offence, requires proof beyond reasonable doubt, but, in this case, nothing of the sort was proved. The appellant contended, as well, that no evidence was called with a view to finding out if the contents of the will were forged. This would involve the witnesses that included Mohamed A. Bajber and Bakari Said.

The appellant further contended that the respondent's clamour for nullification of the will was actuated by ill motive of getting the appellant stripped off the role of administration of the estate as doing that would provide a leeway which would allow the respondent to squander the assets constituting the estate.

Regarding ground five of appeal, the contention is that both of the lower courts failed to guide the parties on the applicable law in probate and application for grant of letters of administration. The appellant argued that these matters are governed by sections 24 and 33 of the Probate and Administration of Estates Act, Cap. 352 R.E. 2019. The view held by the appellant is that parties were not guided on the applicable provision of the law, and that this constituted a failure that bred an irregularity.

With regards to ground six of appeal, the contention is that the 1st appellate court framed issues in appeal proceedings which is quite unconventional in appeal cases. Learned counsel argued that, even then, one of the three issues framed was misplaced and, as result, the same caused inconvenience and misrepresentation by the parties as nobody contested the religious beliefs of the deceased. They said that framing and resolution of the issues was done at the expense of resolution of six grounds of appeal which were left unattended. They argued that failure to determine other grounds of appeal caused a denial of the appellant's right to be heard, which is also a violation of Article 13 (6) of the Constitution of the United Republic of Tanzania, 1977 (as amended).

The appellant contended that he was entitled to be heard on all the grounds of appeal and not on the framed issues.

In consequence, the appellant urged the Court to allow the appeal with costs.

The respondent counsel began his submission by giving a genesis of what preceded the instant proceedings. The blow by blow account highlighted the journey that the parties took in ensuring that the estate of the deceased gets as a fitting stewardship and eventual delivery to the beneficiaries thereof.

Reverting to grounds of appeal, learned counsel submitted in respect of ground one, that it is true that the respondent was not a party to the original proceedings. He surfaced in the course of the proceedings, featuring as an objection to the grant of the probate. The learned advocate argued that the respondent was made a party when the appellant preferred revisional proceedings against the decision to appoint him as a joint administrator of the estate. He argued that the complaint by the appellant are a complaint against his own doings.

While joining hands in finding fault in the decision to institute an appeal to appoint the respondent as a co-administrator, the respondent's advocate took the view that the regularity of the things would entail applying for revocation of the appointment, instead of preferring an appeal to the 1st appellate court. This, he said, would conform to the requirements of the Primary Courts (Administration of Estates) Rules, G.N. No. 49 of 1971.

The respondent was valiantly opposed to the contention that the proceedings ought to have taken the revisional path. He contended that the respondent was, all along, a party to the proceedings, including the proceedings in Mirathi No. 39 of 2020. On this and other grounds, learned counsel argued, the decisions in ***Ahmed Ally Salum v. Ritha Baswali & Another*** (supra) and ***Felix Lendita v. Michael Long'idu*** (supra) are

distinguishable as the conditions that obtained in the said cases are substantially at variance with what obtains in the instant matter. The respondent's advocate took the view that the decision in Mirathi No. 39 of 2020 remains unscathed notwithstanding the fact that the 1st appellate court dismissed Civil Appeal No. 1 of 2022. He took the view that the appellant's efforts are intended to circumvent the decision of the Court in Civil Appeal No. 272 of 2020, that quashed and set aside Civil Revision No. 6 of 2020.

Mr. Motete took the view that the appellant's efforts are akin to an objection against his own appeal and a concession that all his previous efforts were born out of a wrong process that has done a lot of harm to the respondent.

Regarding ground two of the appeal, the view held by respondent's counsel is that this ground is baseless, unfounded and misleading. He argued that it was the appellant's himself who prayed that the deceased's estate be administered in accordance with Islamic law. He cited page 6 of the typed judgment as a testimony to his contention. He argued that issues relating to the choice of the applicable law were dealt when the court discussed and deliberated on the deceased's last will. Mr. Motete contended that the question of choice of law applicable was settled when the court decided to

invalidate the will, on realisation that the same had not conformed to the tenets of Islamic law.

A further testimony to that, according to Mr. Motete, is the framing of grounds 3 and 4 of the appeal to the 1st appellate court which were challenging the trial court's conclusion on the law applicable i.e. Islamic law. He held the view that the trial court's finding on the applicable law was unequivocal and that this was the basis for the appellant's displeasure, hence the instant appeal. He urged the Court to dismiss this ground of appeal.

With regards to ground three Mr. Motete was of the contention that this grounds contradicts the appellant's own contention in ground 2 of the appeal in which it was decried the court's decision to apply Islamic law. While accusing the appellant of double speak, he argued that this ground is baseless and of no legal justification. The respondent argued that in the absence of clear demonstration of facts of legal provisions wrongly applied, the appellant's contention is a mere assertion which is neither backed up with facts nor is it backed up by any law.

Regarding determination of the status of the three children, the argument by the respondent's advocate is that this is a new ground which was not brought up or addressed by the lower courts. Learned counsel argued that, whereas the status of Saida Ahmad Mbarak feature prominently

in both of the lower courts, that of her siblings was never in question. He contended that it would be inappropriate to invite the Court to make a finding in respect of a matter whose evidence was not adduced in lower courts. Mr. Motete argued that the matter regarding Saida Ahmad Mbarak was settled albeit amidst some grumblings from the appellant. He took the view that the question of legitimacy of the children was being used as a ploy to disinherit them from the estate. He urged the Court to reject this point out of hand.

Submitting on ground four of the appeal, the view held by his counsel is that no issue was framed to require the courts to investigate into the allegation of forgery which was never raised and deliberated upon by either of the lower courts. Regarding validity of the will, the contention by respondent's counsel is that the irregularities found were apparent on the face of the will, rendering it invalid. Some of the anomalies included use of plurality in the drafting, insinuating that the will was drafted by one person; lack of the signature of the testator; the witness of the will was unlicensed; and failure to conform to Islamic law. The respondent took the view that this ground of appeal is based and it ought to be dismissed for being baseless, irrelevant and superfluous.

Ground five has taken an exception to lower's court's failure to guide the parties on the procedure for conducting probate cases. The view taken

by the respondent's advocate is that this is a new ground of appeal which was not part of the grounds which were filed in Court. Learned counsel for the respondent urged the Court to resist the appellant's attempt to superimpose additional grounds of appeal at this late stage of the proceedings. He urged the Court to strike off this ground or accord no weight to it.

Mr. Motete argued, in the alternative, that the appellant enjoyed legal representation at the appellate stage and that his counsel were responsible for making sure that the procedure adopted is right. He took the view that the court did not owe the parties the duty of guiding them on as counsel are expected to know the procedure that governs probate cases.

Regarding ground six of the appeal, the contention by the respondent's advocate is that, owing to similarities that struck most of the grounds, the same were argued in a combined fashion. While admitting that the 1st appellate court framed three issues for determination, such issues revolved around the grounds of appeal all of which determined through disposal of the issues.

He was adamant that the appellant's contention that grounds 1, 2, 4, 5, 6 and 9 were left unattended is false and misleading.

The respondent argued that this appeal is, as was the appeal in the 1st appellate court, lacking in merit and deserving nothing but a dismissal with costs.

The appellant's rejoinder, though fairly long, did not raise any new issues. It was, by and large, a reiteration of what was stated in the submission in chief. I find nothing useful to extract from it. I, therefore, choose to give it a consideration.

The broad question to be resolved is whether the instant appeal has what it takes to succeed.

My starting point will be the sixth ground of appeal in which the contention that is contested by the respondent is that only three grounds of appeal were determined, leaving out six other grounds of appeal. The respondent's contention is that these grounds of appeal were disposed of in combination with other similar grounds of appeal.

It should be noted that courts are under imperative obligation to ensure that every ground of appeal raised on appeal are considered and determined to their finality. This has been emphasized in many a decision, mostly by the Court of Appeal of Tanzania. In the case of ***Malmo Montagekonsult AB Tanzania Branch v. Margareth Gama***, CAT-Civil

Appeal No. 86 of 2001 (unreported), in which it was held at p.p. 5 & 6, as follows:

> *"In the first place, an appellate court is not expected to answer the issues as framed at the trial. That is the role of the trial court. It is, however, expected to address the grounds of appeal before it. Even then, it does not have to deal seriatim with the grounds as listed in the memorandum of appeal. It may, if convenient, address the grounds generally or address the decisive ground of appeal only or discuss each ground separately."*

This position was amplified in the Court's subsequent decision in ***Hatari Masharubu @ Babu Ayubu v. Republic***, CAT-Criminal Appeal No. 590 of 2017. It was guided as hereunder:

> *"…. However, we wish to remind first appellate courts to always ensure that unless the grounds of appeal are compressed thereof and the reason given, each ground must be considered and determined to finality."*

While the cited decisions are provide the general position and the duty bestowed on a court, there is an exception to this fundamental requirement. The obvious exception is where a few of the grounds of appeal are sufficient to dispose of the appeal. Thus, in ***Mwajuma Bakari (Adminstratrix of the Estate of the lat Bakari Mohamed) v. Julita Simgeni & Another***,

CAT-Civil Appeal No. 71 of 2022 (unreported), the upper Bench gave the most exquisite pronouncement on the subject, when it held:

> *"The appellate court is bound to consider the grounds of appeal presented before it and in so doing, need not discuss all of them where only a few will be sufficient to dispose of the appeal but it is bound to address and resolve the complaints of the appellant either separately or jointly depending on the circumstance of each appeal. Contrary to that principle, in the instant case, the High Court did not at all decide the grounds of appeal presented before it, and instead it decided the appeal on the basis of the point of law was not sufficiently canvassed by the parties."*

See also: ***Cheyonga Samson @ Nyambare v. Republic***, CAT-Criminal Appeal No. 510 of 2019 (unreported).

The message extracted from these decisions is that, where a ground of appeal is sufficient to dispose of the entire appeal then discussion and determination of such ground can result in the disposal of the appeal without resorting to other grounds of appeal. That is perfectly in order. Review of the 1st appellate court's proceedings brings out a position that is in concurrence with what the respondent contends. This is to the effect that each of the nine grounds of appeal were discussed and findings made thereon. At no point did the issues framed constitute a substitute of the

grounds of appeal as contended by the appellant or at all. Drawing of the issues, an irregular conduct, in my view, would not be said to have intended to serve as an abandonment of the grounds of the appeal. I am convinced that determination of these grounds was done in combination with other grounds of appeal. I hold the view that, on the evidence of what obtains in the appeal proceedings, the appellant's contention on this ground is hollow and destitute of fruits. I dismiss it.

Ground one of the appeal faults the appellate court's decision to entertain an appeal while the respondent was not a party to the original proceedings. It is true and the law is settled, that a person who is not a party to the original proceedings cannot institute an appeal against the decision emanating from the said proceedings. The decisions cited by the appellant come in handy in this respect. The question that should engross my mind is whether the respondent in both of these appellate courts was a stranger who never featured in the trial proceedings. My unflustered answer to this question is in the negative.

This is essentially because the respondent, an objector or caveator, featured in the proceedings that bred the decision that appointed the parties to serve as joint administrators. It is the decision of the trial court in which the respondent featured as an objector. It cannot be said that the

respondent's involvement of the came subsequent to the decision of the primary court. He has been an ever present feature in the proceedings. He could not, in case he was aggrieved by the decision, have instituted a revision where all preconditions for the institution of the appeal were in existence. Similarly, no revisions proceedings would be instituted against him if the sole reason for preferring such proceedings was that the respondent was not a party to the proceedings.

What is stranger than fiction is the fact that the person who challenges the decision is the very same person who instituted this matter. He triggered the decision that he is now reneging on, on a flimsy reason that a revision ought to have been a fitting remedy and preferable to an appeal. As I consign this contention to the dustbin of oblivion, I hold the view that this ground of appeal is bred out of improper reading of the law and facts of the case. In consequence, this ground fails.

Ground two faults the 1st appellate court's application of Islamic law while the trial court had not determined the applicable law in the circumstances of the case. This ground is as hollow as it gets. A cursory glance at the trial proceedings reveals that the trial court pronounced itself on the law that it applied in making a decision that eventually invalidated the will. The act of gauging the will against what obtains under Islamic law is

the clearest of the court's intent and decision to apply Islamic law as the law governing the estate of the deceased. This is gathered from page 12 of the typed decision of the trial court in which it was stated as follows:

> *"Pili hata kwa minajiri ya dini ya kiislam wosia huo haukufuata taratibu ya sharia ya kiislam. Kwa kuwa mtoa wosia anaruhusiwa kuhusia 1/3 ya mali yake na 2/3 lazima ilisiwe na warithi. Mwombaji ameleta kiapo X4 wakieleza wanataka mirathi hii igawiwe kwa dini ya kiislam. Hivyo kutokana na kasoro hizo Mahakama hii inaona wosia huo batili."*

Nothing could be more telling than the just quoted excerpt. It quells any fears that the parties would have on the position of the trial court regarding the law that it settled on in determining the matter. This ground of appeal is lacking in merit and I dismiss it.

The contention on ground three is that the 1st appellate court failed to determine the appeal through Islamic rites. The court is also alleged to have failed to resolve the status of three children who were born out of wedlock and were included in the list of beneficiaries by the trial court.

I subscribe to Mr. Motete's contention on both of the issues raised in this ground of appeal. With respect to failure to determine the appeal according to Islamic rites, the evident fact is that this stance represents the

shifting of positions by the appellant. This is in view of the fact that the contention by the appellant in the preceding ground of appeal is that Islamic law ought not to have been applied while the law applicable in the matter had not been ascertained. The appellant singled out section 18 (1) and (2) of Cap. 11 as the basis for his contention. Blaming the court for taking action he was accused of not taking is a testimony of the appellant's abhorrent waver in his position on the matter. It represents what I would consider to be an uncertainty about the route he desired to pursue in the matter. I find this to be irregular and untenable.

With respect to inclusion of children born out of wedlock, the position by the respondent is the correct one. The court would only determine what was before it and, in this case, the question of inclusion of the said children in the list of beneficiaries did not feature in the nine-ground petition of appeal that bred the impugned decision. This position is in line with the current legal holdings which is to the effect that matters raised anew are not to be entertained in the second appeal. Thus, in ***Ng'waja Joseph Serengeta @ Matako Meupe v. Republic***, CAT-Criminal Appeal No. 417 of 2018 (unreported), the Court of Appeal of Tanzania quoted with approval, its earlier decision in ***Asael Mwanga v. Republic***, CAT-Criminal Appeal No. 216 of 2018 (unreported), and held:

"Now all those grounds, whatever may be their merits, should have been argued in the High Court had the appellant lodged an appeal to that Court. In the event the High Court failed to discuss and decide them satisfactorily, the appellant could resort to this Court. What the appellant is now trying to do is to turn this Court to the first appellate court after the judgment of the District Court.

We must, therefore decline to turn this Court into a first appellate court from decisions of the District Court. In the result, we express no opinion on the grounds of appeal which the appellant brought to this court."

The upper Bench's reasoning in the foregoing matters was given a fortified view in the subsequent decision of ***Ng'waja Joseph Serengeta @ Matako Meupe v. Republic***, CAT-Criminal Appeal No. 417 of 2018 (unreported), wherein it was held as follows:

"the appellant's attempt to challenge the conviction at this stage is therefore not only legally untenable but illogical too."

It is on the basis of the foregoing that I decline to delve into the merits of this part of the ground of appeal. Overall, this ground of appeal fails.

Ground four of the appeal has castigated the 1st appellate court's decision to hold that the will was forged while no evidence was led to prove

the allegation of forgery. This ground need not detain us and the reason is obvious. In none of the decisions of the lower courts did the question of forgery of the will feature. The finding of the trial court was that the will lacked essential prerequisites of a valid will, one of which, the fact that the entirety of the estate of a Muslim cannot be bequeathed by a will. This is found at page 12 of the trial court's decision. There was also a question of the number of people who witnessed the will and other drafting issues. None touched on the forgery.

Since the ground of appeal is predicated on a wrong assumption and non-existent position, my conclusion is that this ground faults no finding of law or fact. It follows that the same should be dismissed.

Ground five of the appeal constitutes a new area of consternation. This is in view of the fact that the same was not factored in as a ground of appeal in the petition of appeal. Subsequent to the filing of the petition of appeal, the appellant never filed any supplementary petition of appeal through which any new contentions would be raised.

Filing of appeals to the High Court is governed by the provisions of section 25 (3) of Cap. 11 that states that appeals to the Court shall be by way of petition. This means that grounds of contention must be included in the petition. The petition in this case includes a supplementary petition of

appeal which may be filed subsequent to the filing of the petition of appeal, and one which would carry additional grounds mooted subsequent to filing of the petition of appeal.

In the instant case, this ground has been clandestinely sneaked in the course of preferring the submissions. This is an irregular conduct that defies the law and practice governing appeals. I take the view that this beings a ground that has not conformed to the law deserves nothing but a shrug. Consequently, I choose to ignore and make no pronouncement on its merits.

In the upshot of all this, I find the appeal lacking in merit and I dismiss it in its entirety. Parties will bear their own costs.

It is so ordered.

Rights of the parties have been duly explained.

DATED at **DAR ES SALAAM** this 04th day of October, 2022.

M.K. ISMAIL

JUDGE

04.10.2022