IN THE HIGH COURT THE UNITED REPUBLIC OF TANZANIA

(DAR-ES-SALAAM DISTRICT REGISTRY)

AT DAR-ES-SALAAM

CIVIL APPEAL NO. 130 OF 2022

JACQUELINE NTUYABALIWE MENGI ..... APPELLANT

VERSUS

ABDIEL REGINALD MENGI (Administrator of the estate of the late Reginald Abraham Mengi) ..... 1st RESPONDENT

BENJAMIN ABRAHAM MENGI (Administrator of the estate of the late Reginald Abraham Mengi) ..... 2nd RESPONDENT

(Appeal from the decision of the Juvenile Court of Dar-es-Salaam at Kisutu)

(V. Mwaikambo, SRM)

Dated 22nd day of August 2022

In

(Civil Application No. 50 of 2022)

JUDGMENT

Date: 10 & 24/10/2022

NKWABI, J.:

The parties to this appeal are remorseless in admitting that the waters in the probate and administration cause in respect of the estate of the late Reginald Abraham Mengi are yet to settle because the Probate and Administration Cause is still pending somewhere in this Country's Courts hierarchy. They are also unapologetic that currently they are locking horns on issues in respect of the maintenance of the two juvenile sons of the late Reginald namely Jaydan and Ryan. The appellant too on her side is relentless in suing

the respondents in their capacity as administrators of the estate of her late husband for the maintenance of her sons.

I find it apt to indicate the claims that the appellant claimed in the trial Court but which she was unsuccessful, whereas the failure necessitated this appeal. They are as follows:

i. T.shs 200,978,240/= in arrears for each child, hence T.shs 401,956,480/= for both of them.
ii. T.shs 94,392,000/= for the school fees for the year August, 2021 to July, 2022.
iii. School fees at T.shs 94,392,000/= (or at such other rate, if any, to be stated by the school (s) at which the students shall be studying for the year starting from August 2022 to July 2023, and so on every year until when the children complete form six (6) studies.
iv. T.shs 24,000,000/= for transport of the children to and from school from January, 2022 to December, 2022 and all succeeding years until the children finish form six.

v. T.shs 30,000,000/= for medical insurance of the children for the period of 12 months from May, 2022 to April 2023 and for all subsequent years until when the children attain the age of 18 years.

vi. T.shs 15,000,000/= for general maintenance every month in advance from February, 2022 to when the children will attain the age of 18 years.

vii. T.shs 36,150,480 for house insurance per year from January, 2023 to when the children attain the age of 18 years.

In what appears to be a claim that the suit is not maintainable because the Juvenile Court (the trial court) lacks jurisdiction to entertain the matter, the trial court ruled that:

> *"More so, since there are ongoing probate cases which all aim at making sure that the estate of the deceased is distributed fairly to the lawful heirs it is better for the applicant to lodge her prayers before the Probate court and not juvenile court."*

The above finding of the trial court piqued the appellant. No wonder, because she had earlier got a ruling in her favour to the extent that the trial

court had the requisite jurisdiction to entertain the application. This is what D. J. Msoffe, RM stated in her ruling which I quote as hereunder:

> *"I start with the question of jurisdiction that was raised. The Application at hand is the Application for Maintenance of the children. The jurisdiction to hear and determine these kind of applications is vested with the Juvenile Court; ..."*

She thus decided that:

> *"... this court has jurisdiction to hear and determine applications for maintenance as per section 98 (1) (b) of the Law of the Child Act, No. 1 of 2009."*

Four grounds of appeal were preferred by the appellant in this appeal. The 3rd one was dropped by the counsel for the appellant during submissions. Thus, I assign a new number to the 4th ground of appeal, then the grounds of appeal will read are as follows:

1. That the trial court having dismissed the respondent's objection that the administrators of the estate had no legal duty to maintain Jaydan and Ryan and had no jurisdiction to entertain the matter, erred in law and fact by not upholding the claims having not been contradicted and actually having been admitted by the Respondents.

2. The trial court erred in law and in fact by not making a clear order stating the sum of money with figures, which is executable which the respondents were to pay the Appellant for the children to realize their right of maintenance against the Respondents, and who were disputing it.
3. That the Trial Court erred in law and in fact by looking somewhere in its final decision to raise, argue and decided against the Appellant the issues as to whether the Respondents have a duty to maintain the children and where they should submit such claims to, such issues having, first, not been before the court for decision, and secondly, been long concluded by the same Court against the Respondents.

Because of the above grounds of appeal, the appellant is praying for the following reliefs:

a. An order granting the reliefs prayed by the Appellant in the Trial Court in full.
b. In the event the Court, for any reason, is minded not to grant the whole claim of the Appellant as lodged, an order specifying the relief granted on each limb which can be enforced;

c. In the event the Court sees reason to take a long time on the matter, or having determined the matter, to remit the file back to the Trial Court for it to make any order or determination of any matter, an interim order requiring the Respondent to pay the money needed for school fees for the academic years of 2021/2022 and 2022/2023 within 5 days from the date of the order or directing the Trial Court to make such order.
d. An order quashing the orders of the Trial Court that touched on matters which were not brought to it for decision or order.
e. An order granting costs of this appeal and costs of the case in the Trial Court, and
f. An order granting any relief which the Court sees fair and just to grant

The hearing of this appeal was carried out through oral submissions. The appellant was represented by Mr. Audax Vedasto, learned counsel. The respondents too were represented by Mr. Roman Masumbuko and Ms. Helena Clemence, also learned counsel.

It was a strong contention, in submission of Mr. Vedasto in respect of the 1st ground of appeal that, the trial court misdirected itself by determining a

question which had already been determined, it refused to order for maintenance at the standard/station of their deceased father. The decision is confusing for deciding the respondents had duty and had not duty to maintain. He contended that the question of jurisdiction had already been determined.

Turning to the question on res-subjudice for there is a probate cause still pending in this Court and Revision in the Court of Appeal, Mr. Vedasto stated that that point had already been decided by the trial court in a ruling, but it was redecided in the subsequent ruling.

He urged that it was wrong for the trial court to reject the application while it was not challenged. In fact, Mr. Vedasto asserted, it was admitted in paragraph 2, of the reply to the application, annexture 2 coupled with the submission. He added, paragraph 4(1)(a) of the affidavit proved, there is no judgment on this limb of the claim and maintained that there is no any executable sum ordered by the trial court though the trial court ruled that the children had rights. He cited Juvenile Court Rules in Rule 2016 GN. 182/2016 of Rule 86 (1).

Mr. Vedasto asked this Court faults the decision of the trial court and grants the reliefs that were prayed in the trial Court. He then prayed the Court to quash the decision of the trial court, sets it aside and make orders in respect of reliefs as per their application and the memorandum of appeal citing the decision of the CAT in **Scholastica Benedict v. Martin Benedict.**

In reply submission, Mr. Masumbuko contended that there is no any admission of any claims in the lower court. The respondents denied all the claims as such they support the ruling of the trial court. He further maintained that the respondents were sued as administrators not in personal capacity. The mistake was to invoke the probate matter in a Juvenile Court, explained Mr. Masumbuko and added that probate matters are determined by probate courts only. A Juvenile Court does not act as a Probate Court, contended Mr. Masumbuko. There is no guardian or father in the circumstances. The assumption is that all parents are alive. It is only living parents could be sued in a Juvenile Court, he stressed.

It was also the view of Mr. Masumbuko that the applicant ought to maintain her children under Section 8 of the Child Act. The respondents are not even guardians. He referred this Court to the case of **Joseph Shumbusho v.**

Mary Tigerwa & 2 Others, Civil Appeal No. 183/2016 at page 21 to the effect that *"powers of administrators cannot be questioned."*

He also stated that the principle of functus officio is irrelevant here because no claim was maintainable in a Juvenile Court while explaining that the deceased has no station of life. The only person who remains with duty to maintain is the surviving parent. He backed his view with the case of **Josephat Lugogera v. Clemence,** PC Matrimonial Appeal No. 8/2019 (H.C.) (unreported). He added, the appellant did not show her financial position.

He was of a further opinion that the trial Court was right to consider what were necessaries. Annexture E. of the application shows the inventory has been filed and the inventory does not support the claim. No specific amount could be made as inventory does not support and that is not a probate court, explained Mr. Masumbuko.

It was also the contention of Mr. Masumbuko that in respect of necessaries which were not here going to live in Dubai are luxuries. Even when the deceased was alive necessaries were provided for while the children were in Tanzania. He pointed out that the rejoinder did not respond to the

maintenance or provision of the necessaries. He further contended that the resolution is not that of the administrators. That is a company matter and explained that the administrators are not part to the resolution page, 14 – 15 of the decision. Else, pointed Mr. Masumbuko, there ought to be social inquiry report as per section 45 (1) of the Law of Child Act. Lastly, he prayed the appeal be dismissed for having no merits with no orders as to costs.

In his short rejoinder submission, Mr. Vedasto insisted that there was admission and added that the claims are in the knowledge of the respondents. He maintained that what the appellant is claiming for is what used to be discharged by the father of her sons. He referred this Court to paragraph 2 of the applicant's rejoinder who replied about her employment.

It was a further contention of Mr. Vedasto that there was no appeal, revision or anything against the prior ruling of the trial Court. He prayed this Court to quash any ruling on matters which touched the merits of prior ruling and added that it was wrong for the trail Court to have made a decision on matters which had already been decided upon.

Mr. Vedasto also explained that what is claimed, there is no extra cost on account of the appellant being in Dubai, no claim for rent. Two Million for

Month were paid in Dar es Salaam which is also being claimed. He thus prayed that the children get something from the estate of their father while invoking the provisions of section 10 of the Law of the Child Act. He asked the Court to allow the appeal and grant all their prayers.

Based on the submissions of the counsel of both parties, I find that the 1st question I am called upon to decided is whether the trial Court had the requisite jurisdiction to entertain the matter.

Mr. Vedasto is answering that question in the affirmative basing on the reasons that the ruling of the trial Court, Msoffe, SRM was that the trial court had the jurisdiction to entertain the matter in a ground that before the trial court was claims for maintenance of the juvenile sons of the deceased.

On his side, Mr. Masumbuko is of a contrary view. He is claiming that since the father of the juvenile sons is no more, claims ought to have been submitted to the probate and administration Court which would entertain the claims and give reliefs. He is thus backing the final determination made by the trial court.

I have decided to start with the question on the jurisdiction of the trial Court because it is so fundamental since, if the trial court had no requisite jurisdiction to entertain the matter, then this Court too has no jurisdiction to grant the reliefs prayed by the appellant in the trial court. It is opportune to point out that parties cannot confer jurisdiction to a court of law be it by admission or otherwise because jurisdiction is not conferred to a court of law by parties rather, it is conferred by the law.

It is also important to note here that the respondents are not serously disputing responsibility in maintaining the juvenile sons of the deceased. They are advancing two main reasons, first, that there is no court order to that effect and second, according to the inventory filed in the probate Court, the bank accounts of the deceased has no any money.

At this point, I cannot indulge myself in the merits of the appeal, rather I have to determine the important question as to whether the trial court had the jurisdiction to entertain the matter in the first place.

Admittedly, the respondents are urging that the appellant has to submit her claim in the probate Court, for in their view, the trial court lacked the jurisdiction to entertain the matter. I am inclined to agree with the counsel

for the respondents that the trial court lacked the jurisdiction to entertain the matter. It is the probate Court which is vested with the jurisdiction. In the premises, I do not concur with the decision of the trial court which, Msoffe, SRM. ruled that the trial court had the jurisdiction to entertain the matter.

In the case of **Leticia Mtani Ihonde v. Adventina Valentina Masonyi (Administratrix of estate of the late Buhacha Bartazari Kichinda),** Civil Appeal No. 521 of 2021, CAT (unreported), the Court, though in a different scenario had these to say:

> *"In the present case, with claims to be provided with her share of matrimonial properties allegedly acquired during the subsistence of the appellant's marriage with the deceased, the appellant sought relief in a matrimonial cause against the administratrix of the estate of the deceased. We are of settled minds that since the spouse was dead, the proper avenue for the appellant's claims should have been a Probate and Administration cause and not a matrimonial cause."*

In my view, this appeal calls for the same stance like that **in Letisia Mtani Ihonde's** case (supra) for the following reasons. Firstly, the administrators have the duty to use the estate to ensure the welfare of the issues of the deceased particularly those who are under 18 years of age, secondly, failure to do so they may be challenged in the probate court and may be removed, see **Monica Nyamakare Jigamba v Mugeta Bwire Bhakome as administrator of the Estate of Musiba Reni Jigabha & Another,** Civil Application No. 199/01 of 2019 CAT (unreported).

Thirdly, administrators of the deceased's estate have the fiduciary duty to consult other heirs in the administration of the estate as per **Joseph Shumbusho v Mary Grace Tigerwa & 2 Others,** Civil Appeal No. 183 of 2016, CAT (unreported), while the deceased (when he was alive) had no fiduciary duty to consult his heirs on how he would use his assets. Fourthly, like the argument of the counsel for the respondents, the deceased has no station of life. In the circumstances a court that is best placed to decide on the matter is not the juvenile Court rather the Probate and Administration Court. Fifthly, in the administration of the estate, the Probate Court has no power to interfere in the acts taken by the administrator as opposed to the Juvenile Court which gives orders as to the maintenance, see **Mariam Juma**

v. Tabea Robert Makange, Civil Appeal No. 38 of 2009 (CAT) (unreported), is that not more so with the Juvenile Court?

The trial magistrate who decided on merit this matter in the juvenile Court, seems to have been confronted with two devils. As such, he opted to choose the least, thus, he came to the decision that she delivered. Even if I proceed to nullify the final decision of the trial court, I am not inclined to grant the prayers sought by the counsel for the appellant in this Court and in the trial court because in my view, the trial Court lacked the requisite jurisdiction to entertain the matter for the reasons I have elaborated above. A suit or application which is lodged in a court which has no jurisdiction to entertain ought to be dismissed, so does an appeal which originates from a court which had no jurisdiction.

In the premises the advice given to the appellant by the trial court that the appellant had to lodge her claims in the probate and administration Court is found to be proper by this Court because it is mere advice. I do not see the need to discuss the grounds of appeal because it will be a fruitless exercise. I proceed to dismiss this appeal. Each party shall bear their own costs as the counsel for the respondents did not press for costs.

It is so ordered.

DATED at **DAR-ES-SALAAM** this 24th day of October, 2022.

J. F. NKWABI

JUDGE