

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

CIVIL APPEAL NO. 299 OF 2021

**(Originating from Civil Revision No. 32 of 2020, Ilala District Court delivered
on 30th July 2021 before Hon. Laizer PRM)**

HAPPY MICHAEL MTAJI APPELLANT

VERSUS

ANASTASIA ABEL NKINI RESPONDENT

JUDGMENT

Last Order : 22nd October 2022

Date of Judgment: 13th October 2022

BADE, J.

This appeal results from Civil Revision no 32 of 2020 from Ilala District Court where the appellant lost in her attempt to invoke that Court's supervisory powers to revise lower court decision on issuing letters of administration to the respondents herein, which he claimed was done without the court's having jurisdiction so to do.

The appellant has filed seven grounds of appeal viz

1. That the trial Magistrate misdirect herself that Administratrix was legally appointed and she has already discharge her duties while the relied documents for an appointment were equipped with fraud and illegalities for its own (sic) hence void ab initio.

2. That, the trial Resident Magistrate Court misdirect (sic) herself that. Administratrix has been already discharge her (sic) duties while there was no such an appointment as per the law.
3. That learned trial magistrate (sic) erred in law and fact by failure to call for the records of Ilala Primary Court in the Probate and Administration of Estates Cause no 102 of 2019 for the purposes of examining the records and satisfying itself as regards to the correctness, legality, propriety of the decision thereon.
4. That failure to hear and determine Mirathi No 102 of 2019 by relying on the preliminary objections which was matters of fact had occasioned into miscarriage of justice to the Appellant thereon left the deceased properly administered (sic)
5. The Trial Resident Magistrate misdirect (sic) herself that Application for Revision No 32 of 2020 has been already taken (sic) by event and thereby failed to revise and quash the entire proceedings against Mirathi 102 of 2019 tainted with fraud and illegalities.
6. The trial Resident Magistrate erred in law by affirming the appointment of the respondent without any legal and justifiable bases and hence the whole purposes for revision was (sic) forthwith defeated.
7. The Trial Resident Magistrate erroneously relied on forged documents hence the appointment of the Respondent was illegal on face of the of law (sic)

When the appeal was called for hearing, there was a mix up of dates and thus the court had to accommodate parties and agree to a scheduling

order to dispose off the appeal. These submissions are the result of compliance to such.

Briefly, the appellants case can be adduced from the counsel's submission that there was a miscarriage of justice occasioned by the position that maintains an administratrix had already discharged her duties while they do not recognize the appointment of this administratrix to start with. They insist on the lower court's magistrate (Revision No. 32 of 2020 of Ilala District Court) to ought to have found in their favor and revised the proceedings of the Primary Court that issued letters of administration of the estate of the late Dr. Albert Nkini to Anastasia Nkini due to illegality, or impropriety or correctness of the decision of the Ilala Primary Court (Probate and Administration Cause 102 of 2019). They thus argued their first and second grounds of appeal together.

This they contend was illegal because Ilala Primary Court had no jurisdiction as per item **1(1) of the Fifth Schedule to the Magistrates' Courts Act 1984 Cap 11 RE 2019** whereby the jurisdiction of primary court is limited to the estates governed by Islamic or Customary law only. This they contend further that is in equal footing with **Section 18(10)(a)(i) of the Magistrates' Courts Act** (supra), hence since the estate of the deceased did not fall under the auspice of Islamic or customary law following the fact that most of the deceased estate are registered under Registrar of Titles. They maintain that the jurisdiction of Primary Court was ousted by the provision of **Section 3 of the Probate and Administration of Estate Act Cap 352** which provides that:

"The high Court shall have jurisdiction in all matters relating to probate and administration of deceased estates, with power to grant probates of wills and letters of administration to estates of deceased person and to alter or revoke such grants"

In response, the respondent's case has been deduced to state that since the Administratrix of the estate had discharge her duties by filing inventory and accounts and the proceedings were marked closed, then there is nothing to appeal on here as the court below had nothing to revise; and there was no office that would be revoked in favor of the appellant here.

The question that is pertinent to me as it was previously in the court below is whether a closed office which no longer exist can still be liable to be sued or challenged or ordered whichever way? This notwithstanding the justification that arose from the interpretation of the legal provisions which either confers or oust jurisdiction of the court to be able to determine a matter before it. I find this to be important because it still is the contention here that the primary court had no jurisdiction to issue probate.

For ease of reference I will reproduce here the particular provision which the appellant is contending with - Item 1(1) of the Fifth Schedule to the Magistrates' Court Act:

The jurisdiction of a primary court in the administration of deceased's estates, where the law applicable to the administration or distribution or the succession to, the estate is customary law or Islamic law, may be exercised in cases where the deceased at the time of his death,

had a fixed place of abode within the local limits of the court's jurisdiction;

In my view the provision of this law is couched in permissible terms, and works to include; not to exclude the jurisdiction of the Primary Court. That deceased estates which can be administered include customary and Islamic law, where deceased had their places of abode within local limits of jurisdiction of the primary courts.

I do not think it proper to venture into an historical and or academic discourse of how or why the inclusion of customary and Islamic law, but its logical to think that people were previously inclined to either be administered by clan leaders under their customary affinities, or Kadhis / Sheikhs under them, instead of approaching the courts. The wording of this provision is not exclusive but rather permissive. And we have countless matters all over our country where primary courts have administered estates of persons other than those affiliated with customary or Islamic law. It defies reason to think this is an exclusion because if you look at geographical distribution of our courts, many places will be left without any district courts or people would have to travel very long journeys to find a district court to administer their estates. I can not help but to think of how inconvenient and absurd such a situation will be.

The other provision that the appellant think oust the jurisdiction of primary courts is Section 3 of the Probate and Administration of Estate Act Cap 352. This section too in my understanding, does not exclude all other courts' jurisdiction to deal with probate matters. This is why the high courts

have always been open to entertain probate matters in its original jurisdiction including customary and Islamic matters, which is vested by this provision.

This court had an opportunity to consider a matter in similar nature where the issue was whether a primary court had exercised jurisdiction illegally or with material irregularities in **Yohana Mgema Escobar@Yohana John Mgema vs Richard Francis Mgema, Misc Civil Revision No 4 of 2020 (Tanga)** (unreported). My brother the learned Judge Mruma reasoned that it's a long standing perversion in interpretation of law to think that paragraph 1(1) of part 1 of the 5th schedule of the Magistrate Courts Act excludes jurisdiction of Primary Courts from entertaining applications for probate and letters of administration where the law applicable is neither Islamic or customary..... the law under the heading powers of primary courts in Administration does not exclude Christian or any other denomination from administration of their estates by primary courts.

But more importantly, while I would agree with the counsel for the appellant and all the plethora of cases that he cited to show that if a court acted without jurisdiction, then whatever they did would be nullified. I firmly think that this is only true if the same is done against an existing cause or state of affairs.

The appellant alleges that the magistrate court in invoking the revisional powers, would have affirmed the appointment and or look at the documents. While what was filed before the magistrate court would have such effect if considered on merits, but the truth of the matter is that the

magistrate court rightly dealt with preliminary objections which disposed of the entire application. As such there is nowhere it was said that the appointment of the respondent was confirmed or otherwise. And even at this hour, it has been a while since the matter of administration of Dr Albert Nkini in Ilala Primary Court (Probate and Administration Cause 102 of 2019) is concluded. It is now in so far as the administration of the estate, functus officio. There was nothing in legal terms, then in the course of revision proceedings preferred; or now in this appeal for the court to revoke or annul. That there was no such an office which the court would stand to revoke or annul. In the words of **Justices of Appeal in Ahmed Mohamed Al Laamar vs Fatuma Bakari and Another Civil Appeal No. 71 of 2021. The Court of Appeal of Tanzania** (unreported) where they say, ".....in law the probate proceedings were effectively closed from that day. Given the fact that the appellant had already discharged his duties of executing the will, whether honestly or otherwise, and had already exhibited the inventory and accounts in the High Court, there was no granted probate which could have been revoked or annulled in terms of section 49 of the Act"

Obviously the District Court Magistrate was correct in determining the preliminary points of law first and was correct in his finding which led him to uphold the preliminary objection. On the premises I find the first grounds to be unmeritorious.

The appellants argued their 3rd, 4th, and 5th grounds together, they contend that there was a miscarriage of justice for the trial court's failure

to revise and set aside primary court's records to ascertain illegalities raised in Civil Revision No. 32 of 2020 instead the court dwelt on preliminary objections and failed to discharge its obligation to dispense justice for the appellant; since they necessarily also think that the respondent forged documents in Mirathi No. 102/2019 at Ilala primary court.

The appellants seemed to have abandoned their other grounds of appeal without the courtesy of ever seeking leave of the court to do so. Be that as it may, I now must address these grounds as raised.

In countering these next set of grounds of appeal, the respondent's counsel explained why it was necessary that the court to address the preliminary points of law. It is a wonder why does the court need to consider these back and forth exchanges with legal counsel on issues that civil practice at common law demands that they be conceded at. Surely it is disappointing to think that the counsel for the appellant would not understand why the court had to address the preliminary points of objections first no matter what sort of claim or how important one thinks their claims are, and that if these points of law are found to be valid, then yes, the matter will be disposed of at an early stage. It is trite law and the position in our jurisdiction. The case of **Mukisa Biscuit Manufacturing Co. Ltd v. Westend Distribution Ltd (1969) EA 696** is always on point regarding this issue and is a law school reference. Defining a preliminary objection the court stated *.....it consists of a point of law which has been pleaded, or which arises by clear implication, and which if argued as a preliminary point, may dispose of the suit.*

"A preliminary objection is in the nature of the what used to be demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion"

Further on the cojoined grounds of appeal, the appellants have put forth serious allegations of fraud, which have criminal connotation. Notably as observed by the counsel for the respondent, the appellant is not bothered to elaborate whether the alleged fraud is in the course of appointment or in the course of administration of the estate.

Either way, I am inclined to not entertain these allegations in this appeal and I agree with the counsel for the respondent that a proper way for the appellant would be to proceed criminally and meet the standard of proof that is fit for these kinds of allegations. I am convinced of this position as it is the correct position as provided for in the case of **Ahmed Mohamed Al Laamar's case supra** where the court has firmly pronounced itself on the legal position and remedy after a probate matter is effectively marked closed; despite the appellant's counsel thinking that this case is irrelevant and distinguishable.

At this point I think it is pertinent to state the principle and the law governing proof of cases. The general principle rule is that he who alleges must prove. The rule finds backing in the Law of Evidence Act, Cap 6 R.E. 2019 which among other things state:

110. Whoever desires any court to give judgment as to any legal right or liability dependent on existence of facts which he asserts must prove that those facts exist.

111. The burden of proof in a suit lies on that person who would fail if no evidence at all were given on either side.

I think the appellant can find remedy in other legally available avenues to pursue her rights if she thinks she has legal standing and her rights were infringed.

On final analysis and reasoning, I firmly believe that this appeal is without any merit, and thus it must fail. The same is dismissed on its entirety with costs to the Respondents.

It is so ordered.



A. Z. BADE
JUDGE
13/10/2022

COURT: Judgment delivered in chamber by Hon. Luambano, DR in the presence of Ms. Yasinta Sebastian, advocate holding brief for Mr. Akiza Rugemalira, advocate for the appellant and in the presence of Mr. Denice

Mugyabuso, advocate holding brief for Mr. Sixbert Ngemera, advocate for the respondent.

Right to appeal fully stated.

A handwritten signature in black ink, appearing to be 'DS' with a flourish.

Signed:

Date: 13/10/2022