

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB - REGISTRY OF MWANZA
AT MWANZA

PC CIVIL APPEAL NO.84 of 2022

*(Originating from District Court Magu in Probate Appeal no.01/2022,
Original in Probate Cause No.29/2021 from Magu Urban Primary Court)*

BENJAMIN MERICK NJIGA.....APPELLANT

VERSUS

FRANCIS MAHUSHI MASALU.....RESPONDENT

JUDGMENT

Oct.27th, & Nov. 4th, 2022

Morris, J

Probate proceedings are oftentimes as grief-stricken as the demise of the relative whose estate is sought to be administered. The glued brotherhood and sisterhood that existed amongst the heirs and beneficiaries before the death of the relative suddenly melts. Sometimes misunderstandings between them are escalated to unimaginable scales. Properties left behind by the deceased become major focal end for each one. The present appeal forms no exception to this unfortunate pattern.

Parties to this appeal are brothers sharing a common matriline but different fathers. They were both born to one late Sabina Mahushi Masalu. The appellant's father was Merick Njiga and Lugunya Mayala Busalubune

a father to the respondent. Late Sabina Mahushi Masalu was first married to the former under which marriage nine children were born including the appellant. She deserted him and got married to the respondent's father. All parents are now deceased.

The administration of estate of late Merick Njiga, per the records, seems to be uneventful. Administration of estate late Sabina Mahushi Masalu is yet to be processed. That is, no administrator/trix has been appointed. However, the estate of Lugunya Mayala Busalubune have been placed under the respondent's administration. The present appeal relates to the latter probate. It is the appellant's contention that, upon being appointed, the respondent allegedly included the house of their mutual mother (Sabina Mahushi Masalu) in the estate of late Lugunya Mayala Busalubune (appellant's father). Thus, the appellant initiated proceedings to challenge the alleged inclusion of their mother's property, on behalf of his other siblings. The house in dispute is at Kisamba Village, Lubugu Ward-Magu District.

To achieve his rivalry objective, the appellant challenges appointment of the respondent and/or administration which includes the subject house. His attempts in both Magu Primary Court and District Court ended unyieldingly. The present appeal manifests the appellant's insistent determination to keep up the disputation.

This appeal has been preferred with three grounds. All aim at challenging the Magu District Court's decision (E.J. Kimaro) in Probate Appeal No.01/2022 whose original records is from Magu Urban Primary Court Probate 29/2021. During the hearing, however, Advocate Baraka Kessy who appeared for the appellant prayed to consolidate the 1st and 3rd grounds and argue them jointly. The respondent's Advocate, Arsein Molland, held no objection to such prayer.

Regarding the consolidated grounds, the appellant's counsel submitted that the present proceedings were mounted because of the Magu District Court's decision of 8th November, 2021 which directed the appellant to challenge administration of estate under Probate No. 29/2021 instead of filing a fresh petition.

Further, he argued that despite the objection lodged by the appellant, the Primary Court and District Court confirmed the appointment of the respondent as administrator of estate of Lugunya Mayala Busalubune. To him, the District Court erred in law and fact by confirming the decision of the trial court which stepped into the shoes of the administrator and involved itself with distribution of estate; especially on the basis of a discriminatory law. Citing an example, the learned counsel for the appellant submitted that the Primary Court, while appointing the respondent as administrator it also adjudicated on the legality of the

appellant and 8 other children of late Sabina Mahushi to inherit (page 2-para 2 from bottom of the trial court's judgment, especially the framed issues). He argued that the trial court was aware of the existence of other interested parties well before the actual objection was filed. That is why the court held that the nine (9) siblings of the respondent had no right to inherit from late Luhaya Mayala Busalubune's estates.

The appellant's counsel also submitted that the duty to distribute property of estate is vested on the administrator/trix not the court. The case of **Nuru Salum v Husna Ally Masoud Juma**, PC. Probate No.10/2019(unreported) was cited to buttress his point. He referred the Court at page 3 (last sentence) of the subject judgement and argued that the court outlawed courts which determine probate cases to involve themselves in actual administration processes or take sides. Thus, he concluded that because circumstances in the present matter are similar to those under **Nuru Salum's** case (*supra*), the Primary Court should have summoned the said 9 children in order to hear them first. Failure to do so, according to his further submissions, the trial Court not only it denied them the right to be heard, but also adjudicated a land dispute which falls outside the court's jurisdiction. Consequently. To him, the District Court should have quashed the said decision. Because the 1st appellate court did not, he prayed to this Court to rectify the anomaly.

Regarding the second ground, the appellant's counsel submitted that the District Court was wrong to hold that there is no time limit in probate matters. He cited that the records reveal that late Lugunya died in July 1987 and his probate was pursued in 2021 which is a clear 34-year lapse. To the appellant, the delay must have necessitated the petitioner-respondent to give reasons for such delay prior to his being appointed. He cited the case of **Masanja Luponya v Elias Lubinza Mashilo** PC. Probate No. 01/2020 (unreported) in this connection.

In reply, Advocate Molland for the respondent objected this appeal. He started by stating that the appellant lacks the necessary *locus standi* to challenge the respondent because he is neither a legal representative of late Sabina Mahushi Masalu's estate nor is he having leave to represent the other 8 siblings of his. He maintained that this point was also raised before the 1st appellate court. The defence counsel reiterated that the appellant is contravening section 99 of the **Probate and Administration of Estates Act**, Cap 352 R.E. 2019.

Further, the respondent's Advocate submitted against 1st & 3rd grounds by stating that the Primary Court never distributed the estate. He cited Form No. 6 made pursuant to the **Primary Court Administration of Estates Rules** (GN.49/1971) which indicates that it is the respondent who lodged to court. That is, it was not initiated by the court. Hence, the

property of late Lugunya, according to the defence Counsel, was distributed by the respondent and not the court. The respondent's Advocate also argued that Primary Court's decision that the appellant and other siblings had no right to inherit late Lugunya's estate should be challenged by proving that the appellant and others have such right. Lest, the administration processes by the respondent should not be faulted howsoever. It was submitted further that using late Sabina's estate in these proceedings is wrong because the former is not before the court yet.

Further, the respondent submitted that the Primary Court had the role to appoint the administrator as exhibited by its decision on page 6 para 2. The court distanced itself from adjudicating on the land dispute for want of jurisdiction. He cited section 3(1) of the **Land Disputes Courts Act**, Cap 216 R.E. 2019 and **Fabian Robson Isaya v Azzori Fanuel Isaya**, PC. Probate Appeal No.2 of 2019- the High Court at Tabora (unreported) to the effect that when the landed property is claimed to fall on two or more estates, parties should go to proper forum dealing with land disputes.

Regarding ground no. 2, the respondent's counsel submitted that according to the case of **Hezron Mwakitingwe v Ely Mwakyoma**, Probate Appeal No. 3F/2020 where the HC (Mbeya), there is no time

limitation in probate matters, because relatives need to settle first from griefs of losing a relative; and setting the time-bar would result into unnecessary complications. It was further submitted that in the present matter, Form No.1 which initiated these proceedings at trial court indicates that the probate is Sukuma tradition-based. Hence, per the **Local Customary Law (Declaration Order)**, 1963-GN 279/1963 (Second Schedule; item 17) no time-limit in customary probates is set. Finally, he argued that the original records of the trial court reveal that reasons for late petitioning were disclosed. Consequently, he prayed that the appeal should be dismissed with costs.

Having summarized the rivalry submissions and arguments above, this Court is being invited to determine two issues; namely, the appropriateness of the appellant to challenge the respondent's appointment to administer the estate of his late father, Lugunya Mayala Busalubune; and the proper way to protect the interests in late Sabina Mahushi Masalu's estate. I will determine each issue at a time.

To begin with, it is pertinent and coherent to start by itemizing a number of matters which are not in dispute. One; that the appellant and the respondent do not share a common paternity. Two; that they are both children of late Sabina Mahushi Masalu (mother). Three; that estate of late Sabina does not have an administrator/trix yet. Four; the respondent

was appointed to administer estate of late Lugunya Mayala Busalubune (his father) unopposed. Five; the subject of dispute between parties herein hinges on inclusion of the house allegedly belonging to late Sabina's estate into the estate of late Lugunya.

Tenets on which the appeal is presented, as extractable from the appellant's submissions, include arguments that: the trial court became *functus officio* (for any future objection) when it prematurely held that the appellant and other 8 children of late Sabina could not inherit from late Lugunya's estate; it applied discriminatory law in holding so; it stepped into the shoes of the administrator and took side; it unlawfully clothed itself with jurisdiction to determine a land dispute; and the probate proceedings initiated by the respondent were hopelessly time-barred.

To address these aspects, I will begin by reproducing one of the relevant parts of the trial court's findings. For instance, at page 6 of its judgement dated December 18th, 2021, the trial court is definite that:

*'Kwa kuwa inaonekana kuna **mgogoro wa ardhi**, kwa maana ya nyumba inayodaiwa kuingizwa kwenye mirathi ya marehemu Lugunya Mayala, nitoe ushauri kwamba kwa yeyote anayeona ana **dai la ardhi au nyumba** anaweza kupeleka mgogoro wake kwenye **chombo chenye mamlaka** inayohusika na migogoro ya ardhi na nyumba. Hayo yameelezwa pia katika shauri la **Marietha Gabo v Asmau Mtengu**, Misc. Land Appeal No.21 of*

*2020 HC at Kigoma (unreported) kwamba mahakama ya Mwanzo inayosikiliza shauri la mirathi **haina mamlaka** kuamua mgogoro wa ardhi inayohusu mali ya marehemu. Na kwamba mamlaka ya mahakama ya Mwanzo **imefungwa** kwenye **kuteua** msimamizi wa mirathi, **kuthibitisha warithi** halali na **kumsimamia msimamizi** wa mirathi kukamilisha kazi yake.’ (Bolding for emphasis).*

From the excerpt above, it is clear that the Primary Court is not only appreciating that it lacks jurisdiction to adjudicate on land disputes but also it restates its statutory mandate, including; appointment of administrator, confirmation of beneficiaries and oversight of administration process. Hence, with due respect to the appellant’s Counsel, the Primary Court did not involve itself in distribution of estate of late Lugunya Mayala Busalubune. Records are silent as to exact which property was distributed to who.

However, I am also mindful than the trial court through its judgement of August 26th, 2021 touched on the issue of beneficiaries of the late Lugunya Mayala Busalubune’s estates. By so doing, in my view, the court was not distributing the estates, as argued by the appellant’s Advocate. I hold as such because, determination and/or confirmation of beneficiaries in probate is quite different from dictating who out of them should inherit what kind or proportion of the property in the estate. In the latter

undertaking, the court will be stepping into the shoes of the administrator. That becomes illegal [cases of **Nuru Salum** (*supra*); **Marietha Gabo** (*supra*); **Frank Lionel Marealle v Joseph Faustine Mawala** (*As legal representative of Jennifer P. Lyimo, deceased*), Civil Appeal No. 104 of 2020, Court of Appeal (Arusha-unreported); **Aziz Daudi Aziz v Amin Ahmed Ally & Selemani Wagheribu** Court of Appeal Civil Appeal No.36 of 1990 (unreported) followed]. Further, item 5 to the Fifth Schedule of the **Magistrates Courts Act**, Cap 11 R.E. 2019 powers and duties of administrators appointed by Primary Courts (as it is for the present matter).

The position in this case is clearly distinct. The appellant is not challenging being excluded in the estate of Lugunya Mayala Busalubune. For to succeed in doing that, as also observed by the respondent's Counsel, he should have led evidence which entitles his (and/or others) to benefit from the subject estate. In so doing, the argument of applying the alleged discriminatory law or not would be tabled and adjudicated thereof. Raising such principle in the present appeal, with respect, is to stretch it beyond its elasticity.

To the contrary, the axis of appellant's contest is the property, to which he and his siblings are beneficiaries, being made part of the estate that is administered by the respondent. Consequently, instead of the

appellant strenuously fighting to quash the respondent-administrator's mandate; in my thoughtful view, such efforts should have been directed towards protecting the property in question. Regarding the way he should have achieved such objective, this Court provides the answer while resolving the second issue later below.

Regarding the trial court being *functus officio* to determine objection by the appellant (and/or his siblings), this court finds that this argument is self-defeating. If the appellant was well aware that the said court had already out-ruled him and 8 others from inheriting; one will still wonder why he did not challenge such decision instead he filed an objection in the matter where his fate had already been determined, *albeit* prematurely or in total disregard of his right to be heard. Hence, to voluntarily subjecting himself to the mandate of the court which was already *functus officio*, on the part of the appellant, was equivalent to shooting oneself on his foot.

Another equally important limb raised and argued by the appellant was the aspect of time limitation. It is manifest that the respondent applied for administration of his late father's estate after lapse of over three decades. I am up and alive to existence, in our jurisprudence, of the two schools of thought in this connection. The first one holds that probate proceedings are not subject of time-limitation principles. The other school

of thought, yet, views otherwise. The latter stresses that every right to litigation should be fixed in particular sizes of time. That is, as it is the case for life, litigation must come to an end. Reference is made to, for example, cases of **Tanganyika Land Agency Limited and 7 Others v Manohar Lai Aggrwal**, CA, Civil Application No. 17 of 2008, (unreported); **Salim Mohamed Marwa @ Komba and Another v Republic**, Court of Appeal (Dar Es Salaam) Criminal Application No. 1 of 2020 (unreported); and **Lilian Jesus Fortes v Republic**, Court of Appeal (Dar Es Salaam) Criminal Application No. 77/01 of 2020 (unreported).

I was respectfully invited by the appellant's Counsel join the latter academy of thoughts. Though I am expected to enroll into either of these ideal schools of views, I am loath to blindly accept or decline the learned Counsel's offer. Not because of school fees, which I am sure is not applicable here, but because of the circumstances of this case. It is a settled position of law, that each case should be determined on its own merits (**Zatia Salehe v Said Salum Ramadhani**, High Court (Dar Es Salaam) Misc. Civ. Application No. 600 of 2019 (unreported); and **Giacomo Costa Fu Andrea v British Italian Trading Co. Ltd.** (1962) 2 All ER 53).

Going through the record of the trial court, one finds a respondent's letter dated July 9th, 2021 entitled: "*Ombi la Kufungua Kesi ya Mirathi nje*

ya Muda katika Mahakama ya Mwanzo Magu Mjini' (that is, an application to file a probate cause in the Magu Urban Primary Court out of time). Hence, I fault the District Court for having analyzed this point at length without keenly looking at the record before it. For if it did, it would have observed that the cited letter above conspicuously formed part of the trial Primary Court's record.

All above matters discussed and put into appropriate squares, the consolidated and argued grounds 1 and 3 of appeal are found to lack requisite merits. They are thus, as I hold, disallowed.

The second issue to determine is what is the appropriate way to protect the interests in late Sabina Mahushi Masalu's estate. This will not take a lot of the Court's time. Evidently, whoever has to protect her estate should first acquire the requisite legal mandate. That is s/he should secure necessary *locus standi* by initiating the probate and/or administration of estate proceedings.

Incidentally, records of this appeal hold it a fact that upon realizing that the respondent had been appointed in probate no. 29/2021, the appellant (in bid to secure requisite *locus standi* to challenge the named appointment) filed in the District Court of Magu, fresh probate proceedings (No. 31 of 2021) for Sabina Mahushi Masalu estate. The District Court, while making revision of three cases (Probate No. 29/2021;

Probate No. 31/2021; and Criminal Case No. 319 /2021) rejected the appellant's petition and directed that necessary objection should be preferred in the probate being administered by the respondent instead.

At page 5 of its ruling, the District Court states:

'The first instituted probate case should remain and the Administrator of the estate is required to stop execution pending the determination of the objection proceedings by the applicant Benjamin Merck Njiga. The probate cause no. 31 of 2021 was wrongly filed as it is not possible to have two probate cases over the same property, the same shall be declared nullify (sic), the proceedings in probate case is a nullify (sic). The applicant in probate case no. 31 of 2021 shall be required to file objection on the probate case no. 29 of 2021 soon for immediate determination of the objection proceedings.'

Hence, the appellant complied. As indicated earlier in this judgment, that is the genesis of the proceedings from which this appeal germinates. This Court is of the further finding that, the appellant was lax or less vigilant in pursuing his right course. That is, if his motive was to secure legal mandate to protect his mother's interests (inherent in the respondent's administration and other property, if any) he should not have rested for less. He was supposed to challenge the decision of the District Court which refused to appoint him. Contrary to this obvious legal remedy,

he abandoned such route and jumped into a wrong bandwagon leading to the present absurd protraction.

The reason for the foregoing Court's holding in this regard is threefold: First, the appellant should have realized that for him to effectively protect the late Sabina's estate, he was enjoined to have the requisite *locus standi*. Second, Sabina's property, per the record, was not limited to the house subject of this appeal. Hence, by only challenging the house alone, would have left other properties without administrator. Three, rejecting to appoint the late Sabina's administrator of estate made the subject court *functus officio*. That is, it cannot subsequently appoint the appellant to administer his late mother's estate after having terminated the corresponding proceedings. Accordingly, the estate of late Sabina will end in waste. It is to be noted that the appellant testified before the Primary Court (page 2 of the judgment dated 28.12.2021) as:

*'Kwamba mali zilizo rodheshwa na watoto wa SABINA MAHUSHI ni mali **zake** halali alizopata baada ya kuachana na mme wake wa awali (Merick Njiga) na kwamba mali **nyingine** alirithi kutoka kwa wazazi wake kama vile **mashamba** na hazina uhusiano wowote na marehemu LUGUNYA MAYALA BUSALUBUNE'* (emphasis supplied).

The foregoing text translates that late Sabina had other property exclusively acquired after she 'divorced' her first husband (appellant's

father). These other properties need not only be protected but also, they should be distributed amongst heirs. And the envisaged protection and distribution cannot be legally done unless there is appointed a legal representative thereof. Henceforward, if the appellant were to be successful in challenging the respondent's mandate herein, an obvious two-limb impact is observable: the estate of late Lugunya will remain without the administrator and beneficiaries thereof will be unfairly prejudiced in respects of properties which are not allegedly late Sabina's.

In the upshot, the appellant should have challenged the District Court decision which denied him the subsequent right to administer the estates of his late mother (Sabina Mahushi Masalu). However, if he still wishes so, he can still do the needful subject to time enlargement. Subsequently, he will be able to initiate the land dispute involving the subject house in the appropriate forum.

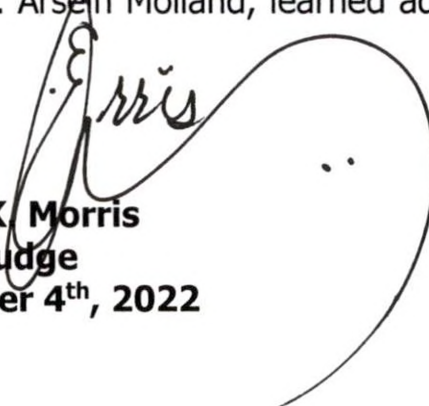
In view of the conclusions and reasons I have reached at and given above, this appeal does not justly stand the test of law. It is accordingly dismissed. Each party will bear own costs.

It is accordingly ordered.


C.K.K. Morris
Judge
November 4th, 2022

Judgement delivered in the presence of Mr. Bahati Kessy, learned advocate for the appellant and Mr. Arsein Molland, learned advocate for the respondent.




C.K.K. Morris
Judge
November 4th, 2022