

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IN THE DISTRICT REGISTRY OF SHINYANGA)
AT SHINYANGA

PC CIVIL APPEAL NO.49 OF 2022

(Originating from Probate Revision No 2/2022 before Bariadi District Court dated 26th June 2022 and Probate and Administration cause no 51 of 2014 of Somanda Primary Court dated 19th November 2014)

ESTHER LUGWISAAPPELLANT

VERSUS

MARTHER MABULA @LUGWISHA RESPONDENT

(The Administratrix of the estate of the late Emmanuel Lugwisha)

Last order on 9/11/2022

Judgment date on 21/11/2022

JUDGMENT

MASSAM, J.

This appeal under discussion is against the decision of the Bariadi District court at Bariadi. Brief of facts of this matter was that respondent at Somanda Primary Court prayed to be appointed as administrator of the estate of Emanuel Lugwisha and the court appointed her as prayed and




proceed with administration and lastly form no V1 of financial account was filed and the only property mentioned was a house which respondent was given to own it for 100 percent, later on respondent filed an application praying this court to order appellant to vacate to her house and the court grant the same, later on appellant brought the application praying the court to cancel the appointment of the respondent as the administratrix of the estate of the late Emanuel Lugwisha, the appellant lost her case as the court found out that the court erred to entertain probate case no 51/2014 while the administratrix was already seized to administer the deceased estate.

Aggrieved with the said decision appellant appealed to this court with four grounds of appeal as follows that;

[1] That the Senior Resident Magistrate erred in law and fact by disregarding that the probate and administration no 51/2014 had no form no V therefore the said case was not closed to date as form no V is missing.

[2] That the Senior Resident Magistrate erred in law and fact by disregarding that the respondent monopolized the deceased estate and that form no 1 does not match with form no v1

[3] That the Senior Magistrate erred in law and in fact by ordering probate revision to the probate and administration cause no 51/2014 before Somanda Primary Court while there was an objection before the trial court before F.J Mathias



RM pending judgment therefore the Senior Magistrate Bariadi was to wait first for delivery of judgment of the said objection.

[4] That the Senior Resident magistrate erred in law and in fact by disregarding that the appellant's objection before the trial court was due to other estates of the deceased person which were not included and left when the respondent was appointed to administer only some of the estates.

So, appellant pray the appeal to be allowed, the decision of Resident Magistrate Court to be declared null and void, and the probate case no 51/2014 to be remitted back for the trial court to deliver the ruling of objection. Respondent in her reply of the ground of appeal she attached notice of preliminary hearing in point of law that;

[I] The appeal is not proper and incompetent as it offends order xxxix rule 1 of CPCCap 33 R.E 2019 as amended

[ii] The appellant appeal is bad in law for containing narrative and argumentative grounds contrary to order xxxix r.1 [2] of the CPCCap 33 R.E 2019 as amended.

[iii] The appeal of the appellant is untenable and incompetent for containing grounds of appeal not originating from the copy of the decree appealed from and its judgment contrary to the law. The respondent prayed this court to struct out the appeal, and any other reliefs this court deem



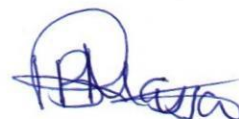
fit to grant to the respondent. When the matter comes for hearing both parties were unrepresented.

Respondent in her submission submitted that the appellants appeal did not attach with the decision and order which is appealed for the act which is against order xxxix rule 1 of the Civil Procedure CodeCap 33, to support her submission she cited the case of **T. G World International ltd Vs. carrier options Africa [Tanzania] Ltd** in civil appeal no 23 of 2021in page 7-8.

She added that the appeal was filed against order xxxix of CPC rule 2 of CPC Cap 33, because the appellant insert some issues which was not arises from appealed decision which is against order xxxix rule 2 of CPC, so she pray this appeal to be dismissed with costs, and to give orders to restrain appellant, her relatives, agents to enter to herhouse.

Appellant in her reply to the respondent's submission she submitted that the said objection has no merit as the mentioned law does not operate in Primary courtsas the same has its own law especially to the appeal, which originated from Primary Courts, to support her argument she cited the case of **Silvia Komba Vs Sagunda Manyanda** PC civil appeal no 8 of 2021 High court Songea in page 3-5 gives the directives which laws are required to be used in Primary Courts. So, he prays the Preliminary objection to be struck out for want of merit and the appeal to be heard on merit.

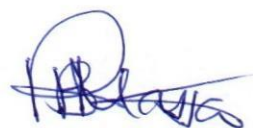
In her rejoinder the respondent said that she has nothing to add than what she stated to her submission.



From what was stated above for and against the parties the duty of this court is to **determine whether the raised preliminary objection has merit**. In first and second point of objections the respondent claims that the appeal filed was not complied with order xxxix rule 1[I] of CPC, in replying the same the appellant insisted that Civil Procedure Act does not used in the appeal which arises from Primary court as the Primary courts has its own laws. So respondent was supposed to use the laws which operated in Primary Courts.

This court is in support with the submission from the appellant that it is true that Primary court has its own set of laws, rules, regulation and Civil Procedure Act is not applicable, Primary Courts use the Civil Procedure [Appeals in Proceedings originating in Primary Court] Rules 1963 GN 312 /1964 and Magistrates Courts Act Cap 11 R.E2019, and this court has no doubt that is dealing with the appeal from Primary Court so it is supposed to take into account that the Primary Courts has its laws and rules relating to Primary Procedure, so the act of respondent of using the Civil Procedure code was against the law, as elaborated in the case of **Haruna Chakupewa Vs Patrick Christopher Ntalukundo** Pc Civil No 10 Of 2021, High Court of Kigoma. So according to that this court finds the first preliminary objection has merit.

This court replying the point of objection that the appellant did not attach the decision and order which are appealed for, this court found out that Magistrate Court Act in section 25[3] directs where and how to file the appeal from Primary Court, it's says; every appeal to the high court shall be by way of petition and shall be filed in the District Court from the decision

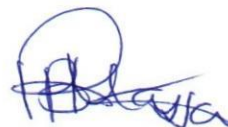


or order in respect of which the appeal is brought and subsection [4] says that upon receipt of petition under this section the District Court shall for with dispatch the petition together with the record of proceedings in the Primary Court and the District Court to the High court.

So, this court is in view that it was not the duty of appellant to dispatch the petition and record to this court but the duty of the District Court, so any failure if any the court was to be blamed. This court in perusal of the court record the said decision was attached, so there is no law which appellant did not complied with. So, this court finds the second preliminary objection unmerited.

In the last point of objection respondent submitted that the appellant in her grounds of appeal put the issues which was not discussed in the trial court and in the decision and order of the court, in replying the same the appellant said nothing concerning that issue but insisted that the law which respondent used in her preliminary objection was not operating in the Primary Court. This court in answering the same finds out that the respondent failed to inform this court which issues appellant put in her ground of appeal which was not discussed in trial court decisions, so failure of doing so make this this court finds the said objection with no merit.

In the upshot since the all-preliminary objection are of no merit, the respondent preliminary objection is hereby overruled, so let the appeal be heard on merit. No order for costs regarding the nature of the case and relationship between the parties.



It is so ordered.

DATED at **SHINYANGA** this 21st day of November, 2022.


R.B. Massam

JUDGE

21/11/2022