THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

IRINGA DISTRICT REGISTRY

AT IRINGA

PROBATE APPEAL NO. 1 OF 2022

(From the District Court of Njombe District, at Njombe in Misc. Application No. 16 of 2021, Originating in Probate Cause No. 12 of 2019, in the Primary Court of Njombe District, at Urban).

BETWEEN

THOMAS GODFREY MFYUJI..... APPELLANT

AND

CHRISTOPHER T. MFYUJI.....RESPONDENT

JUDGMENT

13th September & 12th December, 2022.

UTAMWA, J:

This probate appeal originates from the Primary Court of Njombe District, at Njombe Urban (The trial court). The respondent, CHRISTOPHER T. MFYUJI was discontented by the decision of the trial court in Probate

Cause No. 12 of 2019. That decision *inter alia*, appointed the appellant THOMAS GODFREY MFYUJI, as administrator of the estate of the late Godfrey Mfuji (Henceforth the deceased). Since the respondent was not party to the proceedings before the trial court, he approached the District Court of Njombe District, at Njombe (The District Court) in Misc. Application No. 16 of 2021 by way of revision.

Upon hearing the parties, the District Court made a decision dated 22nd April, 2022 (The impugned ruling) in favour of the respondent. It actually, held that the trial court had no jurisdiction to entertain the probate matter. It further nullified the proceedings of the trial court and its orders. It also ordered that, the case be filed in a proper court by any party who finds it fit. The District Court further directed the appellant to surrender all the documents given to him upon being appointed as administrator by the trial court.

The appellant was aggrieved by the impugned ruling of the District Court. He thus, appealed to this court. The petition of appeal was couched in Kiswahili. Its grounds of appeal can however, be literally translated as follows:

1. That, the District Court erred in law and fact in contravening the rules on additional evidence and deciding the case without considering the additional evidence.

2. That, the District Court erred in law to revoke probate cause which had been closed and for failure to take additional

evidence, instead it considered submissions by an advocate to make the decision.

3. That, the District Court erred in law and fact in making a ruling that there was a legal issue which had not been considered by the trial court.

4. That, the District Court erred in law and fact in holding that the trial court had no jurisdiction to entertain the probate and administration cause upon considering oral submissions on the ground that the deceased was a Christian instead of taking evidence to prove the same.

5. That, the District Court erred in law and fact in entertaining the revision while the respondent had an opportunity to raise his complaints before the trial court before, after appointment and before the filing of inventory.

Based on the above grounds, the appellant urged this court to allow his appeal with costs and uphold the filing of inventory done by the trial court. The respondent vehemently resisted the appeal.

At the hearing of the appeal, both parties appeared in person and unrepresented. The appeal was argued by way of written submissions.

In supporting the first ground of appeal, the appellant submitted that, the law guides that, an issue of jurisdiction is very important and has to be considered before the hearing of any matter. In the present case, the

District Court ordered the taking of additional evidence under section 21(1)(a) of the Magistrates Courts Act, Cap. 11 RE. 2019 (The MCA). The additional evidence was related to the mode of life of the deceased so that the court could make a fair decision. The above provision guide that, additional evidence must be adduced under oath by the parties in court and not otherwise. A witness giving such evidence should be cross-examined by the opposite party. Any evidence recorded contrary to the above provisions should be nullified. The District Court did not call witnesses. This course contravened the law on taking evidence and should not be tolerated as it was held in the case of **Presidential Parastatal Sector Reform Commission v. Azania Bancorp Ltd (2006) TLR 1.**

On the second ground of appeal, the appellant submitted that, the District Court rejected the taking of evidence of the appellant and ordered that the advocates must submit orally. It also received documents contrary to the law. On page 6 and 8 of the proceedings before the District Court, the record shows that the District Court received several documents and were marked as exhibits A1, A2, and A3 contrary to the law on evidence. To cement his position, he cited the **Presidential Parastatal Case** (supra).

The appellant further argued on the third and fourth grounds of appeal collectively. He submitted that, it is trite law that submissions are not evidence and cannot be used to present new evidence as it was held in **TUICO v. Mbeya Cement Co. Ltd & NIC (T) Ltd (2006) TLR 41.** In the present case, the District Court relied upon the submissions by the

parties as evidence when considering the issue of whether the trial court had jurisdiction to entertain the probate and administration cause. This is reflected on page 3 of the impugned ruling. There is no any evidence in the present case that proves that the deceased lived a Christian mode of life. Moreover, there is no any evidence which shows that the deceased's burial was conducted under Christian rites. Besides, the burial ceremony is not a proof that the deceased was Christian. There was no any will tendered in court which proved that the deceased wanted to be buried in the Christian way. The fact that the respondent's counsel submitted that the deceased was a Christian with one wife, was not sufficient proof that he was actually Christian. This was because, the submissions were not cross-examined.

The appellant also argued that, there are Christians who are legally married to one wife, but live under customary mode of life as it was evidenced in the case of **Benson Benjamini Mengi & Others v. Abdiel Regnard Mengi & Another, Probate and Administration Cause No. 39 of 2019, High Court of Tanzania (HCT) at Dar es Salaam** (unreported). In the absence of any evidence to the contrary, the District Court was wrong in holding that the deceased was a Christian based on the submissions by the parties that the deceased had one wife and was buried under Christian rites. That conclusion was therefore, invalid as it was in the case of **Iluminatus Mkoka v. R (2003) TLR 245**.

The appellant in the last ground of appeal contended that the respondent had no any justifiable reason for the revision before the District

Court. He only wanted to delay the division of the estate of the deceased and deny the widow and the beneficiaries of the estate of their respective rights. This can be evidenced from page 5 of the proceedings of the District Court. The respondent was also assisted by the District Court in depriving the appellant of his rights by wrongly admitting in evidence the documents tendered before the District Court. The inventory on the estate of the deceased had already been filed in court and duly advertised in the newspaper. The respondent did not take any step because he knew he did not have any right over the property. The respondent has no any legal right over the said house in dispute.

By way of replying submissions, the respondent argued that, the appellant's first ground of appeal is misconceived. This is because, the District Court decided the matter as the court of first instance and not as an appellate court as argued by the appellant. The present appeal arises from the Application for Revision No. 12 of 2021 before the District Court in which the respondent (third party) was challenging the legality in the Probate Cause No. 16 of 2021. The procedure in an application for revision of a matter determined by a primary court, the rules of procedure and practice require an applicant to submit his case and tender his supporting documents (if any). The respondent on the other hand does the same before the applicant re-joins. This was what transpired in the application subject to this appeal. He differentiated the **Presidential Parastatal case** (supra) cited by the appellant. This was because, unlike the present

case, that precedent involved a fresh suit while the present matter involves an application for revision.

The respondent thus, argued that, the District Court was properly convinced in quashing the appointment of the appellant as the administrator of the estate of the deceased. This was so because, the deceased was prophesying Christian rites and was buried in Christian rituals. The District Court thus, had jurisdiction to decide as it did.

On the second ground of appeal, the respondent contended that, there was no appeal before the District Court on the alleged probate cause. The District Court heard an application for revision of probate cause No. 16 of 2021 between the respondent and the appellant. It did so in accordance with the procedure and practice of hearing applications filed in a court of law. The procedures adopted by the District Court in the hearing and determining the application before it was thus, proper and the decision was therefore properly reached.

As regards the third and fourth grounds, the respondent submitted that the **TUICO case** (supra) cited by the appellant is not reported in the cited Law Report. The appellant has misconceived the procedure for hearing normal suits and applications. The issue raised by the appellant that the deceased was a Christian and buried according to the Christian rites was not raised at the hearing before the trial court. Raising it at this stage is an afterthought which cannot be entertained at this stage. The appellant's contention that there was no cross-examination is therefore, also misconceived. The **Benson Benjamin case** (supra) is also irrelevant

in the present case because, the District Court determined the application basing on the submissions by both parties. The respondent also distinguished the **Illuminatus Mkoka case** (cited by the appellant above).

On the last ground of appeal, the respondent argued that, the appellant's submissions were also misconceived. This was because, the application determined among other things, the manner in which the appellant manoeuvred on the general citation regarding the probate cause before the trial court so as to conceal knowledge to the respondent. This course was meant to avoid caveat by the respondent. The allegations submitted by the appellant are thus, baseless and the District Court properly granted the application. This ground therefore lacks merits. The respondent thus, urged this court to dismiss the appeal with costs.

By way of rejoinder submissions, the appellant contended that, the respondent is misleading the court on that, the procedures in taking evidence in an application is different from taking evidence in a main suits. The court should consider the appellant's submissions in-chief since there are issues not disputed by the respondent. In fact, the appellant basically reiterated his submissions in-chief and prayed for the nullification of the proceeding and order of the District Court.

I have considered the petition of appeal, the submissions by both parties, the record and the law. In deciding this appeal, I will firstly consider and determine the fourth ground of appeal. If need will arise, I will also consider the rest of the grounds. This adjudication plan is based

on the grounds that, according to the anatomy of the appeal at hand, in case that ground will be upheld, it will have the legal effect of disposing of the entire appeal. This will be so even without considering the rest of the grounds of appeal.

Now, regarding the fourth ground of appeal the issue to be determined is *whether the District Court was justified to hold that the trial court lacked jurisdiction to entertain the probate matter basing on mere submissions by the parties before it.* It is clear from the record that, the revision before the District Court was mainly based on the ground that, the trial court had no jurisdiction to entertain the probate cause. This was so claimed because the deceased was professing Christianity. Though the respondent was not so clear in his revisional application before the District Court, and though the District Court itself was not so clear in its impugned ruling, the revisional application and the impugned ruling were based on paragraph 1 of the Fifth Schedule to the MCA. Such provisions essentially give jurisdiction to a primary court to entertain a probate matter only where the law applicable is either customary or Islamic. The respondent thus, maintained in the revisional application that, since the deceased professed Christianity, then the trial court lacked jurisdiction.

It must also be noted that, in the matter at hand, and according to the record, the District Court heard the oral submissions of applicant's counsel and fixed a date for a ruling. The learned Resident Magistrate who presided over the matter later noted before pronouncing the ruling, that, the lower court's record was silent on the mode of life of the deceased

before his death. The Magistrate also considered that fact as crucial in assisting the court to determine its jurisdiction. As a way forward therefore, the learned Magistrate directed the parties to address the court on that aspect first. The respondent's counsel made his oral submissions arguing generally that the deceased professed Christian religion. The respondent also replied thereto claiming essentially that the deceased did not live any Christian life. Basing on those submissions, the District Court made the impugned ruling with the orders I listed earlier.

In my settled opinion, the circumstances of the matter at hand call for a negative answer to the issue posed above regarding the fourth ground of appeal. This view is based on the following reasons: in the first place, jurisdiction of a court is a statutory creation. In the matter at hand, it is not disputed by the parties that paragraph 1 of the Fifth Schedule to the MCA in fact, limits the jurisdiction of a primary court to probate matters where the law applicable is Islamic or customary. I also agree with them on such position of the law. Nonetheless, the major dispute between the parties before the District Court was based on the issue of whether the deceased professed Christianity during his life.

In my further view, the issue just posed above was a factual issue as opposed to a legal issue. Such issue of fact therefore, needed evidence to be proved. It could not need mere submissions by the parties from the bar. Again, since the District Court had detected that the record of the trial court was silent on the aspect of the way the deceased lived before his death, it was its duty to ensure that evidence was obtained in proof of the

major issue between the parties posed above. Nonetheless, the District Court did not require the parties to produce evidence on the issue. It only called for submissions by parties. Through such submissions, the District Court also received some documentary exhibits as rightly contended by the appellant.

In law, submissions by the parties or their counsel are not evidence at all as correctly submitted by the appellant. Apart from the precedent cited by the appellant in support of this legal position, there are also other authorities to that effect; see for example the holding by the Court of Appeal (The CAT) in the case of **The Assistant Imports Controller (B.O.T) Mwanza v. Magnum Agencies Co. L.T.D, CAT Civ. Appeal No; 20 of 1990, at Mwanza** (unreported). Submissions therefore, however impressive, cannot take place of evidence. This is because, they are essentially mere opinion by the parties or their counsel on the case and they are not made on oath. Furthermore, a party or counsel making submissions cannot be cross-examined on what he/she submits for purposes of verifying the veracity of his/her contentions. The District Court could not therefore, base its impugned ruling on the submissions by the parties on the mode of life of the deceased during his life. For the same reasons, the District Court could not also consider the documents presented through submissions in making its impugned ruling as it did. It thus, committed a serious irregularity in making the impugned ruling.

The above discussed irregularity committed by the District Court caused injustice to the appellant since it led to a decision against him

basing on mere submissions instead of evidence. The abnormality cannot thus, be saved under section 37 of the MCA and the principle of overriding objective. The provisions of section 37 of the MCA essentially saves proceedings or decisions of primary courts and District Courts with irregularities which do not cause injustice. As to the principle of overriding objective, it has been underscored in our various written laws. It essentially requires courts to deal with cases justly, speedily and have regard to substantive justice as opposed to procedural technicalities. The principle was also underscored by the CAT in the case of **Yakobo Magoiga Kichere v. Peninah Yusuph, Civil Appeal No. 55 of 2017, CAT at Mwanza** (unreported) which construed section 45 of the LADCA.

Nevertheless, it cannot be considered that the principle of overriding objective suppresses all other important principles that were also intended to promote justice. The holding by the same CAT in the case of **Mondorosi Village Council and 2 others v. Tanzania Breweries Limited and 4 others, Civil Appeal No. 66 of 2017, CAT at Arusha** (unreported) supports this particular view. Indeed, this precedent is a good authority that, the principle of overriding objective does not operate mechanically to save each and every blunder committed by parties to court proceedings or by courts of law themselves.

Owing to the above reasons, I am of the settled opinion that, upon being faced by the circumstances demonstrated above, the District Court ought to have resorted to section 21(1)(a) of the MCA by seeking additional evidence before it could make any order on the issue of

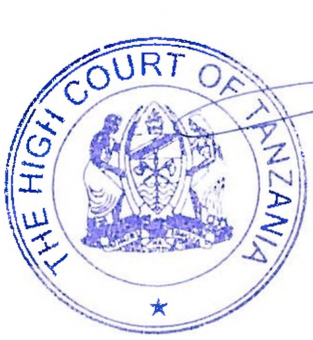
jurisdiction of the trial court. That legal issue on jurisdiction of the trial court, in fact, depended much on the determination of the factual issue of whether the deceased professed Christianity before his death. Indeed, powers for a District Court to look for additional evidence are exercisable by it when exercising its appellate jurisdiction. Nonetheless, they can also apply in its revisional jurisdiction by virtual of section 22(2) of the same statute. These provisions guide *inter alia*, that, in the exercise of its revisional jurisdiction, a district court shall have all the powers conferred upon it in the exercise of its appellate jurisdiction.

Having observed as above, I answer the issue posed above negatively that, the District Court was not justified to hold that the trial court lacked jurisdiction to entertain the probate matter basing on mere submissions by the parties before it. I therefore, uphold the fourth ground appeal.

At this juncture, it is also my concerted opinion that, the findings I have made in relation to the fourth ground of appeal are forceful enough to dispose the entire appeal. I will not thus, consider the rest of the grounds for the present appeal. Otherwise, I will be performing an academic or superfluous exercise which is not the core objective of the adjudication process.

Due to the above reasons, I nullify the proceedings of the District Court from the date the District Court ordered parties to submit on the life style of the deceased to the date of its impugned ruling. I also set aside the impugned ruling of the District Court and its all consequential orders.

The revisional application before it shall thus, be heard afresh by another Magistrate of competent jurisdiction. In case the successor Magistrate will have a similar opinion to the one held by the predecessor Magistrate as demonstrated above (i.e it was necessary to know the mode of life of the deceased before deciding the revisional application), then the law highlighted above shall be followed, unless the law provides for an alternative course according to the circumstances of the case. Each party shall bear its own costs since the presiding Magistrate in the District Court was instrumental in committing the irregularity discussed above. It is so ordered.



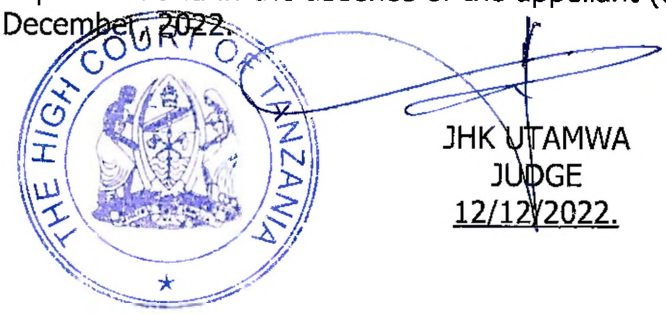
JHK UTAMWA

JUDGE

12/12/2022

12/12/2022 (AT NJOMBE RESIDENT MAGISTRATE COURT).
CORAM; JHK. Utamwa, J.
Appellant: Absent.
Respondent: present in person.
BC; G. Mpogole,

Court: Judgment delivered, at Njombe, Resident Magistrate Court in the presence of the respondent and in the absence of the appellant (though duly notified), in court, this 12th December, 2022.



JHK UTAMWA
JUDGE
12/12/2022.