

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

(PC) CIVIL APPEAL CASE No. 66 of 2022

*(Arising from the District Court of Tarime at Tarime in Probate Appeal
Case No. 2 of 2021; Originating from Probate Cause No. 2 of 2010
Nyaburongo Primary Court)*

1. **SIMION NEHEMIA** }
2. **JOHN NEHEMIA** } **APPELLANTS**
Versus
ERASTO NEHEMIA **RESPONDENT**

JUDGMENT

13.12.2022 & 13.12.2022

Mtulya, J.:

On 20th May 2021, the **Primary Court of Tarime at Nyaburongo** (the primary court) delivered two (2) decisions on the same cause of action cited as **Probate Cause No. 2 of 2010** (the cause) in a contest between **Mr. Erasto Nehemia** (the respondent) and his three (3) brothers from the same father, namely: **Mr. Simon Nehemia**, **Mr. John Nehemia** and **Mr. Noah Nehemia** (the appellants). The two (2) decisions of the primary court had two (2) different contents and unfortunately one is not reflected on the record. The one which is not reflected on the record, was appealed in the **District Court of Tarime at**

Tarime (the district court) in **Probate Appeal No. 2 of 2021** (the appeal) and it is not known how it found its way into the petition of appeal at the district court.

Basing on the materials brought by the decision which is not on the record, the district court on 28th July 2022 rendered down its decision in favour of the respondent as the administrator of the estates of the deceased, **Mr. Nehemia Ogaga** (the deceased). The decision of the district court in the appeal aggrieved the appellants hence approached this court and preferred **Probate Appeal Case No. 66 of 2022** (the probate appeal) complaining that both courts below erred in law and fact for failure to notice that the respondent was not faithful person to be an administrator of the deceased's estates.

Today afternoon when the probate appeal was scheduled for hearing, and after perusal of the record, it was vivid that the judgment of the primary court which is complained by the appellants is not on the record, and the one in the record has never been disputed and remains intact. In the record, there is no reasons displayed on such discrepancies of the decisions.

Following the citation of the fault, the parties' learned counsels, **Mr. Goodwilly Mweya** for the appellants and **Ms. Mary**

Samson for the respondent, were invited to state on the legal status of the present appeal in such discrepancies and confusions brought at the district court and this court.

According to Mr. Mweya, the judgment of the district court may be quashed and its proceedings be set aside as they originated from non-existing judgment of the primary court, whereas Ms. Samson thinks that the district court drafted judgment from wrong decision of the primary court.

This is one of the unfortunate cases to be brought in this court with dual decisions on the same subject matter and no record to show reasons on existence of the two decisions, one on record and another not known how it found its course into the district court. It is fortunate that the one on record has both proceedings and judgment in hand-written and typed form.

In my considered opinion and for interest of justice, I think the decision of the district court has to be quashed and proceedings set aside in favour of proper record of the court. This court is a court of law and justice and has additional powers in ensuring proper application of laws by the courts below. It cannot close its eyes when there is vivid error

material to the merit of the dispute which had caused injustice to the parties. Practice in this court and Court of Appeal has shown that issues which remain undetermined by the lower courts cannot be determined by this court (see: **Swabaha Mohamed Shoshi v. Saburia Mohamed Shoshi**, Civil Appeal No. 98 of 2018; **Alnoor Sharif Jamal v. Bahadur Ebrahim Shamji**, Civil Appeal No. 25 of 2006; **Nyamatemo Frugence v. Hekwe Kitang'ita**, Misc. Land Appeal Case No. 117 of 2021; and **Manyonyi Weswa v. Malibha Njoya**, Misc. Land Appeal Case No. 34 of 2022).

In stating the justification in favour of the practice, our superior court in the precedent of **Swabaha Mohamed Shoshi v. Saburia Mohamed Shoshi** (supra), at page 13 of the judgment, observed that:

It is clear that the jurisdiction of [courts] on appeal is to consider and examine matters that have been considered and decided upon by the [lower courts].

In the present appeal, the judgment which was intended to be protested in this court from the primary court was not considered and examined at the district court. In that case,

this court cannot entertain and resolve the dispute between the parties in the instant appeal. Having said so, and noting the error cannot be cured at this stage, I am moved to quash the judgment and set aside proceedings of the district court in the appeal for want of proper record of the court.

The undisputed judgment of the primary court in the cause, which is on record both in handwritten and typed form remains intact, and any of the parties who still interested in disputing the same may wish to do so in accordance to the laws regulating appeals from primary courts to district courts. I do so without any order as to costs. The reasons are obvious and straight forward that the fault was not caused by the parties and in any case the parties are relatives from the same father who may wish to sit and settle their differences amicably at the clan level.

Ordered accordingly.

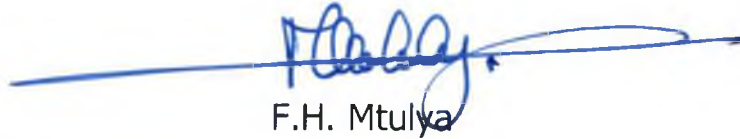



F.H. Mtulya

Judge

13.12.2022

This judgment was delivered in chambers under the seal of this court in the presence of the appellants, **Mr. Simon Nehemia** and **Mr. John Nehemia** and in the presence of the respondent, **Mr. Erasto Nehemia**, and in the presence of parties' learned counsels, **Mr. Goodwilly Mweya** and **Ms. Mary Samson**.



F.H. Mtulya

Judge

13.12.2022