

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
BUKOPA DISTRICT REGISTRY
AT BUKOPA**

(PC) CIVIL APPEAL NO. 44 OF 2022

*(Arising from Misc. Civil Application No. 28 of 2021 of Bukoba District court, originating from
Probate & Administration Cause No.4 of 2021 of the Primary Court of Bukoba District at
Kishanje)*

GRATIAN MAGANA.....APPLICANT

VERSUS

**JUSTUS KWEYAMBA KAMUHABWA (*Administrator of the Estate of the late
Joseph Peter*).....RESPONDENT**

JUDGMENT

*22/11/2022 & 16/12/2022
E. L. NGIGWANA, J.*

The appellant herein above was aggrieved by the ruling of the District Court of Bukoba (F.A. Kaijage-RM) in Misc. Civil Application No.28 of 2021 transferring Probate & Administration Cause No. 04 of 2021 from the Primary Court of Bukoba District at Kishanje to Bukoba District Court on two grounds; **one**, that the matter is complex to be handled by the primary Court. **Two**, an intention of the respondent to engage and advocate.

Briefly, the facts giving rise to this matter as per available records are the effect; the respondent is the Administrator of the estate of the late Joseph Peter through Probate and Administration Cause No. 5 of 2012 of the Primary Court of Bukoba District at Korokero. That, after being appointed, the appellant filed the objection alleging that the Respondent had not distributed the properties in accordance with the "Will" but the said "Will" was declared Null and void by the Primary Court.

Discontented by the ruling of the primary court declaring the "Will" null and void, the Appellant preferred the Probate & Administration Appeal No.08 of 2012 at the District Court of Bukoba at Bukoba, but the same ended up being dismissed with costs for want of merit.

Still dissatisfied, the appellant appealed to the High Court in order to challenge the concurrent decisions vide Probate and Administration Appeal No.16 of 2016. The High Court (Kairo, J as she then was) found that the "Will" as stated by both subordinates courts was not valid hence could not be relied upon.

As regards the appellant's complaint that subordinates courts erred in law to associate the property; Plot No.88 Rufiji Street, Mwanza City, the sole property of the Appellant to the estates of the deceased person without any justification, this Court found that it was not the proper court to determine ownership of the said property, given the scanty facts availed to it. The court ruled further that the Administrator is a liberty to institute a separate suit in a proper court to determine the actual owner of the property at issue.

There was no appeal preferred by the Appellant to the Court of Appeal, instead, he petitioned for the administration of the estates of the late **Joseph Kamuhabwa** through Probate & Administration Cause No.04 of 2021 at the Primary Court of Bukoba District at Kishanje.

Having noted so, the respondent filed a caveat against the said petition alleging that JOSEPH KAMUHABWA and JOSEPH PETER are the names of the same deceased. On 24/08/2021, the matter was fixed to come for hearing on 05/10/2021. However, on 17th day of September, 2021 the respondent

herein lodged Misc. Civil Application No.28 of 2021 made under section 33 (1) and 47(1) (b) of the Magistrates' Courts Act [Cap. 11 R.E 2019], moving the District Court of Bukoba to order for the transfer of Probate & Administration Cause No.04 of 2021 on the ground that the matter involves complex issues and the need for legal representation.

After hearing the parties, the District court granted the application stating two (2) major reasons; One; Circumstances and gravity of the matter; arising from the allegation that Joseph Kamuhabwa whom the appellant petitioned on Probate No. 4 of 2021 and Joseph Peter whom the Respondent petitioned on Probate Cause No.5 of 2012 are the names referring to the same deceased person whose probate had been determined already by the Primary Court of Bukoba at Korekero and the High Court. Two, that the matter is complex therefore, the applicant need to be legally represented by an advocate taking into account that this matter had been instituted at the trial court before the amendment allowing advocates to appear before primary court came into force.

Aggrieved by the decision of the District Court, the Appellant has knocked the doors of the court armed with three (3) grounds of appeal which were framed as follows;

- 1. That, the Resident Magistrate erred in law and fact by refusing to remit the case to Kishanje Primary Court on the ground that the case is complex.*
- 2. That, the Resident Magistrate erred in law and fact by failing to see the difference between the names Joseph Peter and Joseph Kamuhabwa.*

3. That, the case involves matters of customary law therefore; the court with jurisdiction to entertain the matter is the primary court.

At the hearing, the applicant appeared in person, unrepresented while the respondent was represented Mr. Lameck Erasto. By consensus, this appeal was argued by way of written submissions.

In his submission, the appellant submitted that pursuant to the Written Laws (Miscellaneous Amendment) (No.3) Act. 2021, advocates are now allowed to appear and represent parties in the primary courts, thus the issue that the case file is worth of being transferred so that the respondent can be represented by an advocate has been overtaken by events.

As regards the second ground, it is the appellant's submission that, the deceased whose probate is being filed is JOSEPH KAMUHABWA and not JOSEPH PETER, and since the two persons are different persons, and the late Joseph Kamuhabwa was buried at Kishanje and since the properties sought to be administered are at Kishanje, it is logical that the Probate be filed at Kishanje.

As regards the 3rd ground, the appellant submitted that this probate is governed by Customary Law, thus Kishanje Primary Court is the best court to entertain the matter.

In reply, Mr. Lameck for the respondent submitted that the learned Magistrate had directed herself to the provisions of laws which was clearly cited in the Chamber Summons to wit; Section 33 (1) and 47 (1) (b) of the Magistrates Courts Act, [Cap.11 R.E 2019] .He further submitted that Application for transfer was filed at the Registry of the Bukoba

District Court before coming into force of the Written Laws (Miscellaneous Amendment) (No.3) Act, 2021 which became effective on 11th day of October, 2021. That, notwithstanding the amendment, the imports of section 47 (1) of the MCA is still essential in the administration of justice.

The learned counsel further submitted, there is nowhere complexity of the matter had been disputed by the appellant.

As regards the 2nd ground, the learned counselsubmitted that it was crystal clear that when the Appellant filed Probate Cause No.04 of 2021 at the Primary Court of Bukoba at Kishanje, the registered name of the deceased was Joseph Kamuhabwa, thus the glaring complexity arisen from the material facts of the same deceased person to have the two consecutive Probate Causes where the prior one had never been revoked. He referred this court to the case of **Abubakar Mohamed versus Juma Mfaume** [1989] TLR 145 where the court held that;

"I am of the view that a party seeking for transfer of a case from primary to District Court or that proceedings commences in a court other than a Primary Court should show good or sufficient reasons which are qualified and which the court will consider whether or not to grant the application"

As regards the 3rd ground, Mr. Lameck submitted that the argument for the case to be remitted to the Kishanje Primary Court with reasons that the matter is governed by Customary law lacks merits because even the District Land is not barred from entertaining a petition for the administration of the estate.

Now, my major task is to determine whether this appeal is meritorious.

In this matter, the record revealed that Misc. No. 28 of 2021 was made under section 33 (1) and 47 (1) (b) of the Magistrates' Courts Act, [Cap.11 R.E 2019] which provide as follows;

33 (1): - *"No advocate or public prosecutor as such may appear or act for any party in a primary court."*

I am alive that currently the situation is different pursuant to the amendments brought in by the Written Laws (Miscellaneous Amendments) (No. 3) Act, 2021, which allows advocates to appear and represent parties in the primary courts.

47.-(1) *Where any proceeding has been instituted in a primary court, it shall be lawful, at any time before judgment, for-*

(a) Not relevant.

(b) The district court or a court of a resident magistrate within any part of the local jurisdiction of which the primary court is established, to order the transfer of the proceedings to itself or to another magistrates' court; or

(c) Not relevant.

in any case where

(i) It appears that the circumstances or gravity of the proceeding make it desirable that the same should be transferred;

- (ii) *there is reasonable cause to believe that there would be a failure of justice were the proceeding to be heard in the primary court;*
- (iii) *the subject matter of the proceeding arose outside the local limits of the primary court's jurisdiction or is not within its jurisdiction, or in any case in which the law applicable is a customary law which is not a customary law prevailing within such first-mentioned primary court's local jurisdiction; or*
- (iv) *the proceeding seeks to establish or enforce a right or remedy under customary law or Islamic law, or is an application for the appointment of an administrator of the estate of a deceased person, and the court is satisfied that the law applicable is neither customary law nor Islamic law or that the question whether or not customary law or Islamic law is applicable cannot be determined without hearing or determining the proceedings, and the court shall record its reasons for making or ordering such transfer:*

Provided that, nothing in this subsection shall authorize-

- (a) *The transfer by a magistrates' court of any proceeding which is required by law to be commenced in a primary court except to another primary court; or*
- (b) *The transfer of any proceeding to a court which, however constituted, has no jurisdiction in respect of the subject matter thereof.*

Although there was no objection which was raised by the learned counsel for the respondent on the competence of this appeal, I find myself indebted to address the issue of competence of this appeal before determining whether the respondent had established sufficient reasons in the District Court of Bukoba for the case to be transferred from the primary Court of Kishanje to the District Court of Bukoba.

It is trite that whenever a party to the case is aggrieved by the decision of the court, the first remedy available to the aggrieved party is to lodge an appeal to the higher court, and where the remedy of appeal is **blocked**, it is when an aggrieved party proceeds to move the higher court by way of revision. In the case of **Christostom H. Lugiko versus Ahmed Noor Mohamed Ally**, Civil Application No. 13 of 2013 CAT (Unreported) it was held that; the law is settled that revision is not an alternative to appeal process, the two remedies are different and should not be invoked in place or substitution of the other.

The law is very clear and unambiguous that Applications made section 47 of the Magistrates' Courts Act, Cap 11 R:E 2019 are not appealable. See ***Audax John versus Yasin Mohamed***, Misc. Criminal Revision No. 01 of 2020 HC-Bukoba, ***Sangito Kaaya versus Victor Kisimo***, Criminal Appeal No. 24 of 2020 HC-Arusha, ***Vodka Rojas versus Ntobagagira Balibusta***, (PC) Civil Appeal No. 3 of 2021 HC-Kigoma, ***Emma Mohamed Nampambe & 15 others versus Fatuma Machinga***, Misc. Civil Application No. 17 of 2020 HC-Mtwara and Edgar ***Ezekiel Sanga versus***

Ester Robert Mbuu, Misc. Civil Application No. 530 of 2021 HC-Dsm. (All unreported)

In other words, appeal has been **barred by statute**. This is as per section 49 (3) of MCA Cap. 11 R:E 2019 which provides that;

*"No appeal **shall** lie against the making of or any refusal to make, an order under the provisions of section 47 or 48."*

In the case of **JV Electronical & Electronics Co. Ltd and Shangai Electronic Power & D Engineering versus Rural Energy Agency & 2 Others**, Civil Application No. 162/01 of 2019 CAT (Unreported) it was held among other things that a matter may be challenged by **way of revision where the process of appeal is barred by statute or where there are exceptional circumstances or where the matter is *suo motu* called by the court for revision.**

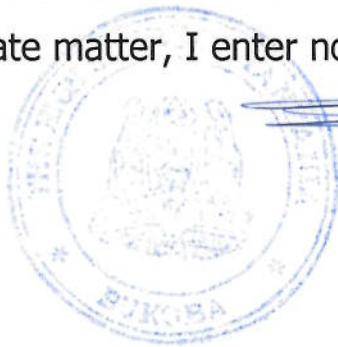
The foregoing section, by the use of the word "shall" has been coached in mandatory terms. It is elementary that whenever the word "shall" is used in the provision, it means that provision is imperative. This is by virtue of section 53 (2) of the Interpretation of Laws Act, Cap. 1 R.E 2019 which provides that;

"Where in any written law the word shall is used, in conferring a function, such word shall be interpreted to mean that the function so conferred must be performed."

In view of the above provisions, it goes without saying that the appellant ought not to have approached this court by way of revision. In other

words, the appellant ought to have approached this court by way of revision.

In the event, it is the finding of this court that this appeal is incompetent before this court for contravening section 49 (3) of the Magistrates' Courts Act, Cap.11R.E 2019. In the premise, I refrain myself from determining the merit of this appeal. Consequently, I proceed to strike out this appeal for being incompetent. If the appellant is still interested to challenge the decision of the District court of Bukoba in Misc. Application No.28 of 2021, he is at liberty do to so by way of revision after seeking and obtaining extension of time within which to file revision out of time. This being a Probate matter, I enter no order as to costs. It is so ordered.




E. L. NGIGWANA

JUDGE

16/12/2022

Court: Judgment delivered this 16th day of December, 2022 in the presence Mr. Lameck Erasto, Advocate for the respondent, Hon. E. M. Kamaleki, Judges Law Assistant and Ms. Sophia Fimbo, B/C but in the absence of the Applicant.




E. L. NGIGWANA

JUDGE

16/12/2022