IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MOROGORO SUB - REGISTRY)

AT MOROGORO

(PC) PROBATE APPEAL NO. 9 OF 2022

(Arising from Probate Appeal No. 10 of 2021; In the District Court of Morogoro, at Morogoro; Originating from Probate Cause No. 210 of 2021 in the Urban Primary Court of Morogoro, at Morogoro)

KIBIBI WAZIRI SALUMU.....APPELLANT

VERSUS

JUMA SALUM KONDO..... RESPONDENT

JUDGMENT

06th Oct, 2023 & 25th March, 2024

CHABA, J.

This is an appeal from the decision of the District Court of Morogoro, at Morogoro in (PC) Probate Appeal No. 10 of 2021. It stems from the Urban Primary Court of Morogoro, at Morogoro in Shauri la Mirathi / Probate Cause No. 210 of 2021.

A brief background leading to the instant appeal may be recapitulated as follows: Initially, the respondent, Juma Salum Kondo petitioned for a letters of administration of the estate of the late Waziri Salumu Kondo who died intestate on 3rd day of October, 2020 while at home. He was survived by six children including the appellant/objector herein. Following the demise of the deceased

person, members from the family of the deceased person and his widow wife, Maua Selemani Saidi including the petitioner, Juma Salum Kondo and the appellant/objector, Kibibi Waziri Salumu conducted a clan meeting aiming to suggest a name/names and appoint a person/persons who could stand as an administrator(s) or administratrix of the estate of the deceased, Waziri Salum Kondo and afterwards officially undertake to initiate the processes of petitioning for letters of administration before a competent Court vested with the requisite jurisdiction. The clan meeting also did identify all the surviving children, widow wife and landed properties left by the deceased including the house built on Plot No. 31, Block "L 2"; K/Ndege, Morogoro Municipality. Consequently, the respondent, Juma Salum Kondo was nominated by the clan meeting to assume for the post. He therefore, petitioned and filed the same on 12th day of July, 2021. However, before his appointment, he was encountered with an objection by the appellant, Kibibi Waziri Salumu, a daughter of the deceased, Waziri Salumu Kondo. Her main objection relates to the house on Plot No. 31, Block L "2" situated at Kiwanja cha Ndege (K/Ndege), Unguu Street within Morogoro Municipality which the respondent herein included in the lists of the estate of the deceased, Waziri Salumu Kondo. Explaining why she raised such an objection, the appellant told the trial Court that, this house (Plot No. 31, Block L "2") was the property of her late brother, Hamisi Waziri. She asserted that, her late brother, Hamisi Waziri once told his father (their paternal father), Waziri Salumu

Kondo (now the deceased) that, upon his demise (Hamisi Waziri), his father (Waziri Salumu Kondo) will inherit his house built on Plot No. 31, Block "L.2"; K/Ndege, Morogoro Municipality until his death. Afterwards, the appellant herein could step into the shoes of her late father and inherit the house. She insisted that, the house in dispute did belong to her late brother, Hamisi Waziri and the same was included in the lists of the deceased's estate (Hamisi Waziri) and finally landed into her ownership through a WILL written and issued by the deceased (Hamisi Waziri). So, she claimed that, the said house is her property and cannot be included in the lists of the estates of the late Waziri Salumu Kondo, her father.

According to the record, both parties were afforded with the rights to be heard. Being the one who petitioned for letters of administration, the respondent therefore kicked the ball rolling focusing on his petition for letters of administration. However, the appellant emerged before the trial Court and raised an objection protesting the house to be included as one among the estate of the deceased, Waziri Salumu Kondo, her father. As the record speaks for itself, the trial Court/Magistrate continued to hear the petition by calling other witnesses who joined their hands with the petitioner. Afterwards, the appellant/objector was invited by the trial Court/Magistrate to state her position and their key witnesses. At the end of the day, the trial Court/Magistrate was unsatisfied with the grounds put forward by the appellant in a bid to reinforce her objection

proceedings. It means that, her objection proceedings hit the rock and overruled. Afterward, the trial Court/Magistrate proceeded to grant the letters of administration to the respondent and accordingly appointed him to stand as an administrator of the estate of the deceased, Waziri Salumu Kondo.

However, with all the above fracas, controversy and misunderstanding on the said landed property, still the appellant's heart is clean and she has no grudges at all with the respondent for being appointed as an administrator of the estate of the late Waziri Salumu Kondo (his brother) and biological father to the appellant herein. In other words, she has no objection on this facet.

However, the appellant was annoyed by the decision of the trial Court for overruling her objection and unsuccessfully appealed before the District Court of Morogoro, at Morogoro. Still aggrieved, the appellant preferred the instant appeal on four grounds of appeal as hereunder: -

1. That, the District Court erred in law and fact for upholding the decision of Morogoro Urban Primary Court which ruled that, house situated on Plot No. 31, Block "L.2"; K/Ndege, Morogoro Municipality belongs to the estate of the late Waziri Salumu Kondo, while the said property is not and has never been part of the estate of the late Waziri Salumu Kondo. The late Waziri Salum Kondo enjoyed usufructuary right only over the house.
2. That, the District Court erred in law and fact for upholding the decision of the Morogoro Urban Primary Court which erred in law for overruling the

objection raised by the Appellant herein that, house situated on Plot No. 31, Block "L.2"; K/Ndege, Morogoro Municipality belongs to the Appellant herein.

3. That, the District Court erred in law and fact for upholding the decision of the Morogoro Urban Primary Court which erred in law for failure to consider and invoke the principle of Res Judicata in respect of the house situated on Plot No. 31, Block "L.2"; K/Ndege, Morogoro Municipality. In Probate Cause No. 11/2000, the District Court of Morogoro endorsed the WILL of the owner of the house, the late Hamis Waziri to the effect that ownership of the house will go to the Appellant herein upon death of Waziri Salum Kondo.
4. That, the District Court erred in law and fact for failure to re-evaluate properly the evidence tendered at the trial Primary Court.

By consensus, the appeal was argued by way of written submissions. Mr. Ignas Seth Punge, learned advocate drew and filed written submission on behalf of his client, the appellant and Mr. Asifiwe Alinanuswe, also learned advocate drew and filed written submission for the respondent.

Onset, Mr. Punge first prayed to abandon ground 4 and proceeded to argue grounds 1, 2 and 3 in seriatim. On the first ground, Mr. Punge contended that, the respondent petitioned for a letters of administration of the estate of the late Waziri Salumu Kondo before the Primary Court of Morogoro, at Morogoro and

enlisted a house located on Plot No. 31, Block "L.2" K/Ndege, Morogoro Municipality as one of the properties of the late Waziri Salumu Kondo. He contended that, the deceased never owned this house and thus it cannot form part of his estate. He argues that, to-date the title to the house is still in the names of the late Hamis Waziri Salumu who is the appellant's brother. He said, the issue of owner of the land is defined under Section 2 (1) of the Land Registration Act [CAP. 334 R.E. 2019] to mean, as the person for the time being in whose name that estate or interest is registered, citing the case of **Salum Mateyo v. Mohamed Mateyo [1987] TLR 111,** to fortify his contention.

On the second ground, Mr. Punge submitted that, the appellant is a lawful owner of the house in dispute because her late brother, Hamisi Waziri executed a WILL bequeathing his house to his sister, Kibibi Waziri Salumu. He insisted that, this house do not and can never form part of the estate of the late Waziri Salumu Kondo. He said, the same is her personal property and she should not be deprived of it and it must be protected under Article 24 (1) of the Constitution of the United Republic of Tanzania.

As for ground 3, Mr. Punde accentuated that, in Probate Cause No. 11 of 2000, the District Court of Morogoro, at Morogoro endorsed the WILL of the owner of the house by the late Hamisi Waziri to the effect that, ownership of the house will go to the appellant upon the death of the late Waziri Salumu Kondo.

He said, the decision of the District Court in Probate Cause No. 11 of 2000 has never been reversed to-date. He vehemently disputed the respondent's allegation that, there is an existence of a Civil Appeal No. 108 of 2001 before the High Court of Tanzania, at Dar Es Salaam - District Registry which nullified the WILL. He said, this proposition was wrongly upheld by the District Court. In his opinion, they believe that the purported judgment never or does not exist. He contended that, if at all it exists, the respondent was required to avail its copy to the Court and the appellant, respectively. He stated that, the respondent was duty bound to comply with the provisions of sections 110 to 112 of the Evidence Act, [CAP. 6 R.E. 2019] as the burden of proof lies upon him. He stressed that, as the respondent failed to assist the lower Courts in the administration of justice by supplying the copy of the purported judgment, the logical and reasonable inference for such failure is that the purported judgment does not exist.

Mr. Punge went on arguing that, it is trite law that when a Court finally disposes of a case, it is ousted to have jurisdiction over it. This principle was enunciated by the Court in the cases of **Laemthongrice Company Limited v. Principal Secretary Ministry of Finance [2002] TLR 392 and Bibi Kisoko Medard v. Minister for Lands Housing and Urban Development and Another [1983] TLR 250.** For instance, in the case of **Laemthongrice Company Limited** (supra), the Court held *inter-alia* that:

"A Judge become a functus officio once he has given his original order and cannot depart from it in the absence of an application for review".

Building his argument, Mr. Punge urged the Court to note that, since it is the same Magistrate (Hon. Maua Hamduni, SRM) who presided over both cases, she ought to have taken Judicial Notice of the previous Judgment failure of which the matter at hand finds itself being caught by the web of *res judicata* as the same was determined in Probate Cause No. 11 of 2000. He cited Section 9 of the Civil Procedure Code [CAP. 33 R.E. 2019] (the CPC) and the case of **Lotta v. Tanaki and Others (2003) 2 EA 556 at page 557,** where the Apex Court of our Land elucidated the application of the principle of *res judicata.*

In view of the above submission, Mr. Punge prayed the appeal be allowed and the Judgment of the District Court of Morogoro which upheld the decision of the Primary Court of Morogoro be set aside. He further prayed the Court to declare that the house on Plot No. 31, Block "L.2" situated at K/Ndege, Morogoro Municipality does not belong to the estate of the late Waziri Salumu Kondo, and that it belongs to the appellant, Kibibi Waziri Salumu.

Responding to the appellant's submission, the Counsel for the respondent, Mr. Asifiwe Alinanuswe firstly, prayed his reply to the petition of appeal be adopted by the Court and form part of the respondent's submission. He

proceeded to argue that, the respondent was right to include the house in dispute as a property of the late Waziri Salumu Kondo contrary to what is being thought. He averred that, if we go by argument that the house is still in the names of the deceased, Hamisi Waziri, then the house cannot form part of the estate of the deceased, Waziri Salum Kondo, and similarly the same cannot be the property of the appellant as it doesn't bear her names. The right position would be that, the house is neither the appellant's property nor forms part of the estate of the late Waziri Salumu Kondo and the effect thereof would be, no one has a *locus standi* to claim for the said house.

He said, the argument by the appellant that, the late Waziri Salumu Kondo enjoyed only usufructuary rights had no legal back up. He underlined that, in Islamic Jurisprudence, inheritance is governed by proximity. This means that, the nearer pushes the distant. Applying the principle, the answer is obvious that the late Waziri Salumu Kondo is proxime to the estate of his son, Hamisi Waziri compared to the appellant, Kibibi Waziri Salumu. He stressed that, in Islamic Jurisprudence, a son who leaves no issues after him, his estates fall to his parents and the parents alone inherit him, citing the Holy Quran, Surah An-Nisaa 4 verse 12, to fortify his argument.

On the second ground, it was Mr. Alinanuswe's contention that, the fact that the late Waziri Salumu Kondo bequeathed the house to the appellant, was not

proved by the appellant before the trial Court. At trial, the appellant did not prove the existence of the said WILL as she failed to tender the same and she did not call any one to prove on the letters of the said WILL. He highlighted that, it is an elementary rule that whoever desires the Court to believe him, must prove. He referred this Court to Regulation 1 (2) of the Magistrates' Courts (Rules of Evidence in Primary Courts) Regulations, GN. No. 22 of 1964 and 66 of 1972 which states that: -

> "Where a person makes a claim against another in a civil case, the claimant must prove all the facts necessary to establish the claim unless the other party (that is the defendant) admits the claim".

Moreover, Mr. Alinanuswe submitted that, the witnesses called by the appellant testified that the said WILL was neither witnessed, signed nor dated. With those shortfalls, there is no Court of law that will endorse the same to be a WILL. To reinforce his argument, he cited the case of **Hemedi Saidi v. Mohamedi Mbilu [1984] TLR 112** wherein the Court held *inter-alia* that, in measuring the weight of evidence (as the present one) the number of witnesses is immaterial. It is the quality of the evidence which counts. He added that, Islamic Religion does not permit a person to bequeath more than what he is entitled to, citing the **case of Waziri Maneno Choka v. Abasi Choka,** Civil

Appeal No. 51 of 1999 (unreported). With this authority, Mr. Alinanuswe emphasized that, it is safe to arrive to a conclusion that, there was no valid WILL as the appellant wants the Court to believe.

In respect of the third ground, Mr. Alinanuswe contended that, the appellant is complaining that, the District Court erred in law to determine the matter which was conclusively done. But it is unfortunate that, the said case was not availed both at the trial Court and the first appellate Court. In his view, that was a statement from the bar because at that point in time, the appellant had a legal obligation to make the said Probate Cause No. 11 of 2000 available before the Court so that it finds out what was in it.

He accentuated that, as correctly submitted by the Counsel for the appellant, *res judicata* is a bar to subsequent suit. However, for the same to apply, the standards set by the law which are five, all of them must be established and/or proved by the one who wants to rely on the same. If one principle misses, the doctrine cannot be invoked. He said, the crucial question to be determined here is, whether or not this principle is applicable in the matter under consideration. In his opinion, the principle does not fit and the same will help the appellant. He said, the cases cited by the Counsel for the appellant are all irrelevant and cannot be applicable in the circumstance of this case.

He was of the opinion that, if the appellant wanted to use a defective WILL to justify his claim, the appropriate forum would have been Land Tribunal pursuant to the provision of section 167 of the Land Act [CAP. 113 R.E. 2019]. Short of that, no decision has been made as to who is the rightful owner of the disputed plot. He emphasized that, invocation of Article 24 of the Constitution of the United Republic of Tanzania is misplaced.

Finally, the Counsel urged the Court to dismiss the entire appeal with costs.

By way of rejoinder, Mr. Punge mostly echoed his submission in chief. He however added that, they do appreciate that the Counsel for respondent did not dispute the fact that, the house in question is still in the names of the deceased, Hamisi Waziri who is the appellant's brother, meaning that the names have never been changed. He maintained that, the deceased executed a WILL bequeathing the house to the appellant upon his death and the same was tendered and admitted during trial in Probate Cause No. 11 of 2000 at the District Court of Morogoro, at Morogoro which endorsed the WILL to the effect that, the house will go to the appellant, Kibibi Waziri Salumu but upon the demise of her father, one Waziri Salumu Kondo. He maintained that, the WILL met all characteristics of a valid WILL. Though the respondent and his Counsel asserted that, the said WILL was challenged by way of appeal to the High Court of Tanzania, Dar Es

Salaam District Registry via Civil Appeal No. 108 of 2001, but he failed to produce the purported copy of judgment to support his argument.

As to the question whether the trial Court was a proper forum to deal with the dispute of a house or not, Mr. Punge was of the opinion that, the Court dealing with probate case is vested with full jurisdiction to resolve the dispute relating to the ownership. He said, the powers of the trial Court are several and not limited only to appointing the administrator. He said, this position of the law was underscored by the decision of the CAT in the case of **Mgeni Seif v. Mohamed Yahaya Khalfani (Civil Application No. 1 of 2009) [2017] TZCA 258 (29 June 2017)** on pages 8, 14 and 15 of the Judgment.

In the end, the Mr. Punge reiterated his prayers in chief by urging the Court to allow the appeal with costs.

Having summarized the rival submissions advanced by the Counsels for the parties for and against the instant appeal, before embarking on the merits of this appeal, I find it appropriate to highlight first the principles governing second appeal. It is well-established principle of law that, the second Appellate Court is bound not to interfere with the concurrent findings of facts by two Courts below unless there has been a misapprehension of evidence or where there has been a misdirection to the extent that such misdirection occasioned miscarriage of justice to the appellant. There is plethora of authorities on this position. **[See -**

Neli Manase Foya v. Damian Mlinga [2005] TLR 167; Herode Lucas and Another v. Republic, Criminal Appeal No. 407 of 2016, CAT-Mbeya (unreported); **Machemba Paulo v. Republic,** Criminal Appeal No. 538 of 2015, CAT-Tabora (unreported); and **Joel Ngailo v. Republic**, Criminal Appeal No. 344 of 2017, CAT-Iringa (unreported) (just to mention a few).

It is worth noting here that, the trial Court and the District Court concurred on findings of fact that the appellant did not establish and prove that, the house in question was bequeathed to her through a WILL by her late brother, Hamisi Waziri. Even the grounds of appeal raised before the first Appellate Court by the appellant are almost the same as lodged in this second appeal. Again, it is apparent on record that the respondent, Juma Salum Kondo petitioned for a letter of administration in respect of the estate of the late Waziri Salumu Kondo and had all blessings from the clan meeting attended by both family members from the deceased's family and the family of his widow wife one Maua Selemani Saidi including the appellant herself. The deceased is survived by six children including the appellant, Kibibi Waziri Salumu.

In this appeal, the decisive and most important point at issue is ownership of Plot No. 31, Block "L.2" situated at K/Ndege within Morogoro Municipality and therefore, whether the same should be included in the lists of the estate of the deceased or not. The contending argument is that, while the appellant is

claiming that the house was bequeathed to her by her late brother, Hamisi Waziri vide a WILL, on the other, the respondent is vehemently disputing the claim by stating that such a house has never been bequeathed to the appellant.

I have dispassionately read and considered the competing arguments for and against this second appeal and I had ample time to examine the records of lower Courts. It is undisputed fact that, the Appellate Courts are enjoined to apply and interpret the law of the land and ensuring proper applications of the laws by the Court(s) below as it was expounded by the Apex Court of the Land in the case of **Marwa Mahende v. Republic [1998] TLR 249** at page 253, to wit: -

> "As stated before, the issue of the trial magistrate not exercising his discretion under the sub-section was not a ground of appeal but was only raised by the Court in the course of the hearing. Doubt was expressed as to the propriety of this move by the Court. We think, however, that there is nothing improper about this. **The duty of the courts is to apply and interpret the laws of the country. The superior courts have the additional duty of ensuring proper application of the laws by the Courts below**".
>
> [Emphasis added].

To determine the present appeal, I propose to start with ground three. In this ground, the appellant is faulting the decision of the District Court of Morogoro, at Morogoro that it erred in law and fact for upholding the decision of the Morogoro Urban Primary Court which erred in law for failure to consider and invoke the principle of *res judicata* in respect of the house situated on Plot No. 31, Block "L.2"; K/Ndege, Morogoro Municipality. That, in Probate Cause No. 11 of 2000, the District Court endorsed the WILL of the owner of the house, the late Hamis Waziri to the effect that ownership of the house will go to the appellant herein upon death of Waziri Salumu Kondo.

The question whether the matter before the trial Court was barred by the doctrine of *res judicata* or not, can be sorted out by the facts of the case, the evidence adduced at trial and the applicable law. The principle of *res-judicata* is the creature of law. I have read the written submissions from both sides and carefully considered the records in line with the requirements of the principle itself. At the outset, I must say as forcefully submitted by the learned Counsel for the respondent that, for the principle to apply, the standards set by the law which are five, must all of them be established and/or proved by the one who wants to rely on. These five standards do not apply in isolation. Truly, if one misses, the doctrine cannot be invoked. Section 9 of the Civil Procedure Code [CAP. 33 R.E. 2019] (the CPC) and rule 11 of the Magistrates' Courts (Civil Procedure in Primary Courts) Rules, GNs. Nos. 310 of 1964 and 119 of 1983 are

governing provisions. For instance, according to the CPC, for the *doctrine* to apply the following ingredients must be proved and co-exists: -

i. The former suit must have been between the same litigating parties or between parties under whom they or any of them claim;
ii. The subject matter directly and substantially in issue in the subsequent suit must be the same matter which was directly and substantially in issue in the former suit either actually or constructively;
iii. The parties in subsequent suit must have litigated under the same title in the former suit;
iv. The matter must have been heard and finally decided; and
v. That, the former suit must have been decided by a Court of competent jurisdiction.

This principle has been celebrated in number of cases including but not limited to the cases of **Esterignas Luambano v. Adriano Gedam Kipalile**, Civil Appeal No. 91 of 2014, CAT-Zanzibar (unreported); **Nyabichune Village Council v. Maswa Mang'era Kasongo**, Land Appeal No. 90 of 2020, HCT-Musoma (unreported); **Peniel Lotta v. Gabriel Tanaki and Others [2003] TLR 312**; and the case of **Umoja Garage v. NBC Holding Company [2003] TLR 339**.

Now, coming to the matter under consideration in line with the records in which this appeal stems, my scrutiny revealed that in Probate Cause No. 11 of

2000, Waziri Salumu Kondo (now the deceased) stood as the applicant and the one petitioned for a letters of administration in respect of the estate of the late, Hamisi Waziri (his son and the appellant's brother). Waziri Salumu Kondo and one Habiba Selemani on the 18th day of December, 2000 were appointed as co-administrator and administratrix of the estate of the late Hamisi Waziri. Now gauging whether the former suit (Probate Cause No. 11 of 2000) was between the same litigating parties or between parties under whom they or any of them claim (Kibibi Waziri Salumu and Juma Salum Kondo), in my view, the answer is negative. The second test is, whether the subject matter directly and substantially in issue in the subsequent suit (The house built on Plot No. 31, Block "L.2" situated at K/Ndege, Morogoro Municipality) is the same matter which was directly and substantially in issue in the former suit either actually or constructively. Again, in my view, the answer is negative. The third test is, whether the parties in subsequent suit (Kibibi Waziri Salumu and Juma Salum Kondo) have litigated under the same title in the former suit (Probate Cause No. 11 of 2000). Here the answer is obvious, that is negative. The fourth test is, whether the matter under consideration have been heard and finally decided, yet again the answer is negative. The fifth and last test is, whether the former suit (Probate Cause No. 11 of 2000) have been decided by a Court of competent jurisdiction, obvious the answer is in affirmative.

From the above finding, my observation is that the matter in issue, herein the house on Plot No. 31, Block "L.2" situated at K/Ndege, Morogoro Municipality has never been litigated between the parties herein and conclusively determined by a competent Court. On this point, I concur with the decision made by the first Appellate Court and the argument put forward by the learned Counsel for the respondent that, the principle of *res judicata* does not fit in the matter under consideration and the same at this point in time cannot help the appellant.

Next for consideration are grounds one and two which I find it suitable to discuss them altogether. The appellant's main grievance is that, the District Court erred in law and fact by confirming the decision of the trial Court which overruled her objection over the house in question which she believes that is her own property and ruled that the house in question belongs to the estate of the late Waziri Salumu Kondo while the same is not and has never been part of the estate of the late Waziri Salumu Kondo. Only that, the late Waziri Salumu Kondo enjoyed usufructuary right over the house.

Indeed, this is a crux of the matter at hand. I have thoroughly examined the lower Court records and submissions made by the parties enriched by the authorities. At the outset, I must confess and admit as well that, without being careful in reading the records properly and positively analysing the evidence presented before the trial Court and re-assessing the findings and decision of the

first Appellate Court, it is so easy to fall in a trap of believing someone's story and find it hard to achieve justice and reach to a fair and just decision in this case. On scrutiny of the record pertaining to the Probate Cause No. 11 of 2000, filed in the District Court of Morogoro, at Morogoro, I have noticed that there is a piece of paper appears to be part and parcel of proceedings of the District Court dated 15/1/2001 which carries the cries of the appellant. Although it is appropriate to note that parts of the proceedings are illegible and has faded away, but at least the document shades/gives a light of what exactly transpired before the Court on the material date. For ease of reference, I find it apt to replicate the contents of proceedings for clarity and better understanding. I quote:

"**IN THE DISTRICT COURT OF MOROGORO**

AT MOROGORO

PROBATE CAUSE NO. 11 OF 2000

WAZIRI SALUM .....APPLICANT

VERSUS

HAMISI WAZIRI .....DECEASED

15/1/2001

Corum: Mrs. Yussufu – D.M.

Administrators – Present.

Administrators: We are come to court about the house of K/Ndege and the properties of the deceased.

1ST ADMINISTRATOR – WAZIRI SALUMU: I did not agree the house of K/Ndege that if I died to be the property of Kibibi Waziri because the whole properties will be at one side. About furniture's and properties of the house I have no objection.

2ND ADMINISTRATOR: At the first time he agreed to follow the WILL of deceased told that if his father died the house of K/Ndege to be handed to Kibibi Waziri (applicant herein).

COURT: Since this estate followed the WILL of deceased and the deceased stated that the house of K/Ndege to be the property of his father and when dead to be handed to Kibibi so the court has no any reason to change what stated by the deceased. The House of K/Ndege to be changed and her names to appear the name of 1st administrator and Kibibi Waziri. All the thing including furniture's followed what the deceased stated.

Sgd: M. Yussufu – D.M.

15.1.2001

Right of Appeal explained.

Sgd: M. Yussufu – D.M.

15.1.2001

COURT: The Offer of Plot No. 56 "J" Kihonda to be handed to Habiba Selemani and be changed to her name because the deceased gave her according to ..... (the document is illegible and has faded away).

Sgd: M. Yussufu – D.M.

15.1.2001".

End of quoting.

With the above piece of evidence, I have no flicker of doubt that the same is part and parcel of the record of the Court taken and recorded by the District Court of Morogoro, at Morogoro. The argument that, the deceased never owned

this house and thus can never form part of the estate of the deceased, Waziri Salumu Kondo, in my view, it sounds positive for obvious reason that, perhaps the house in dispute is a lawful property of the appellant because the appellant's brother, the late Hamisi Waziri appears to have been executed a WILL bequeathing his house to Kibibi Waziri Salumu. It follows therefore, as submitted by the Counsel for the appellant, that her personal property should be protected under Article 24 (1) of the Constitution of the United Republic of Tanzania to evade deprivation. My observation on these two grounds is that, the respondent and members of the clan were wrong to include the house in dispute as property of the late Waziri Salumu Kondo as asserted by the Counsel for the respondent. In similar way, the trial Court and the District Court concurrently erred in law and fact to rule that, the house in dispute formed part and parcel of the estate of the late, Waziri Salumu Kondo.

Apart from the above findings, I understand that, according to the proceedings of the trial Court this fact was not proved to the satisfaction of the trial Court/Magistrate and the appellant did not fully demonstrate the existence of the said WILL as required by the law. My examination of the records which corresponds to the submission made by Mr. Alinanuswe, the witnesses called by the appellant testified among others that, the said WILL was neither witnessed, signed nor dated. Mr. Alinanuswe added that, with these shortfalls, there is no

Court of law that may endorse the same to be a WILL. However, on facet, I disagree with the learned Counsel, Mr. Alinanuswe. My point of departure is founded on the fact that, their testimonies cannot be heavily relied on, for a reason that, my thorough scrutiny unveiled that, there is a piece of paper which I believe that, the same forms part and parcel of proceedings of the District Court of Morogoro, at Morogoro dated 15/1/2001. It is settled that, a Court record being a serious document should not be lightly impeached as there is always a presumption that a Court records represents accurately what happened. See the case of **Halfani Sudi Vs. Abieza Chichi (1998) TLR 527 at page 529**. To be frank, I am not prepared to allow, in any way or in whatever forms, impeachment of Court record on flimsy grounds, in as much as my findings is concerned. By so doing, that would lead to anarchy and disorderly in the administration of justice and ultimately prevent dispensation of justice.

Understandably, both parties admit the fact that Probate Cause No. 11 of 2000 do exists. Their point of departure is, each of the party is pointing his/her fingers in the eyes of the other party to the effect that, the appellant failed to tender the alleged WILL authorizing her to rely on the same, so as to justify her claims. On the other hand, the respondent failed to tender in evidence the purported copy of judgment to support his argument that, the WILL executed by the late, Hamisi Waziri does not exists on the ground that it was challenged by

way of appeal to the High Court of Tanzania, Dar Es Salaam - District Registry via Civil Appeal No. 108 of 2001. Having considered the competing argument between the parties which revolves around the said WILL, my bold decision is that this contention has been absorbed by my findings hereinabove, to the extent that the piece of paper replicated above, which appears to be part and parcel of proceedings of the District Court dated 15/1/2001, gives and/or provides sufficient answer.

Besides, I am at one with the Counsel for respondent that, if we go by argument that the house is still in the names of the deceased, Hamisi Waziri, truly, the house cannot form part of the estate of the deceased, Waziri Salumu Kondo. Equally, the same cannot be the property of the appellant as it doesn't bear her names. As rightly submitted by Mr. Alinanuswe, the correct position would be that, currently the house is neither the property of the appellant nor forms part of the estate of the late Waziri Salumu Kondo, and the effect thereof would be, no one has a *locus standi* to claim for the said house.

In the circumstance, I would also agree with Mr. Punge that may be, the late Waziri Salumu Kondo did only enjoy usufructuary rights, which is the right to enjoy the use of another's property short of the destruction or waste of its substance.

In addition, my scrutiny of the lower Courts records revealed further that, the District Court negligently failed to adhere to the well-established principle of law that, the first Appellate Court has a duty to re-appraise, re-assess and re-analyze the evidence on record before it arrives at its own conclusion. This principle was enunciated by the CAT in the case of **Siza Patrice v. Republic**, Criminal Appeal No. 19 of 2010 (unreported) where the Court observed that: -

> "We understand that it is settled law that a first appeal is in the form of rehearing. The first appellate court has a duty to re-evaluate the entire evidence in an objective manner and arrive at its own findings of fact, if necessary".

In view of the above discussions, I agree that, the District Court erred in law and fact by upholding the decision of the trial Court which overruled the appellant's objection over the house in question and ruled that, the same belongs to the late, Waziri Salumu Kondo while the same is not and has never been part of the estate of the late Waziri Salumu Kondo, apart from enjoying the alleged usufructuary right over the house. In the premises, I find it safe and justifiable to fault the findings of both lower Courts on the first and second grounds, as I hereby do. I therefore, find no merits on grounds one and two and dismiss it accordingly.

Before I pen off, I wish to say something on the trial Court proceedings. During perusal of the proceedings of the trial Magistrate, I discovered that when the respondent, Juma Salumu Kondo was invited by the Court to adduce his testimony, followed by his key witnesses, at the close of his case, the trial Magistrate also invited the appellant (caveator/objector), Kibibi Waziri Salumu who in similar way, testified and called the key witnesses to support her position. Thereafter, the trial Court proceeded to prepare its ruling where it overruled the raised objection and proceeded to grant the prayers sought by the petitioner and accordingly appointed the respondent to stand as an administrator of the estate of the deceased, Waziri Salumu Kondo.

In my view, the procedure adopted by the trial Magistrate and later on confirmed by the first Appellate Court was a mockery type of procedure in handling both the raised objection / objection proceedings and the main proceedings. In normal circumstances, the procedure adopted and applied by the trial Magistrate to handle the matter would vitiate the entire proceedings. However, I am mindful of the introduction of the overriding objective principle (oxygen principle) enshrined under Section 3A (1) and (2) of the CPC (supra) which encourages the Court to decide on substantive matters and do away with technicalities, unless the defect goes to the root of the matter. For the interest of justice, I see reasonable to invoke the overriding objective principle as the defect

does not go to the root of the trial Court proceedings. My holding on this point is invigorated by the decision of the CAT in the cases of **Yakobo Magoiga Gichere vs. Penina Yusuph (Civil Appeal 55 of 2017) [2018] TZCA 222 (9 October 2018);** and **Gaspar Peter v. Mtwara Urban Water Supply Authority (MTUWASA) (Civil Appeal No. 35 of 2017) (CAT at Mtwara)]** (Extracted from www.tanzlii.go.tz).

Another anomaly, is found on page 26, first paragraph of the ruling of the trial Court. The trial Court Magistrate apart from doing and performing her duty of granting the order sought by the respondent and appointing him as an administrator of the estate of the late Waziri Salumu Kondo, she proceeded to declare the heirs of the estate of the deceased and distributed the house on Plot No. 31, Block "L 2" to all six heirs including the widow wife, which is the function and domain of the administrator of the deceased's estate, hence against the law. For ease of reference, I find it pertinent to reproduce an excerpt of the ruling as hereunder:

> "Mahakama hii kwa pamoja inapitisha kwamba nyumba hiyo Plot No. 31 block "L 2" Manispaa Morogoro na nyumba Plot No. 45 Block "N 2" iliyopo Ukutu street sabasaba, nyumba hizo zote zitakuwa za watoto wa marehemu na mama yao. Watoto wanufaika na mirathi hii ni watoto wote sita".

It is settled law that, it is not a duty of the Court to declare who are the rightful beneficiaries or heirs of the estate of the deceased. The role of the Court is limited to declaring who survived the deceased. [See: Section 56 (1) (b) of the Probate and Administration of Estate Act [CAP. 352 R.E. 2019] and Paragraph 2 of Form No. 27, for the High Court and District Courts; and form No. I of the First Schedule of the Primary Courts [Administration of Estates Rules, GN. 49 of 1971] or upon determination of caveat. In **Monica Nyamakare Jigamba vs. Mugeta Bwire Bhakome & Another (Civil Application 199 of 2019) [2020] TZCA 1820 (16 October 2020) (Extracted from** www.tanzlii.go.tz) **the** CAT had the following to state: -

> ".....The probate or letters of administration court has no powers to determine the beneficiaries and heirs of the deceased. The law has vested that power to the grantee of probate or letters of administration".

Since, the irregularity is noticeable on the face of the trial Court record, the same cannot be left stand. As such, this excerpt is hereby expunged from the records.

For the above reasons, and in view of what I have endeavored to deliberate hereinabove, I find and hold that this appeal is meritorious. Accordingly, I allow the appeal and proceed to quash the proceedings of the District Court of

Morogoro, at Morogoro and set aside the Judgment, Decree and any other orders stems therein for misapprehension of evidence on records. Objection and/or objection proceedings are hereby sustained and the order appointing the respondent, Juma Salumu Kondo as an administrator of the estate of the late Waziri Salumu Kondo. For avoidance of doubt, the house located on Plot No. 31, Block "L.2" K/Ndege, Morogoro Municipality bearing the names of the deceased, Hamisi Waziri shall not be included (shall be excluded) in the lists of the estate of the deceased, Waziri Salumu Kondo as one among his properties for reasons stated hereinabove.

As to the way forward, I find it pertinent to borrow the wisdom of the Court in the case of **Ibrahimu Kusaga v. Emanuel Mweta [1986] TLR 26,** where the Court pointed out the situations where the administrator of the deceased's estate may sue or be sued. It stated: -

> ".....there may be cases where the property of a deceased person may be in dispute. In such cases, all those interested in the determination of the dispute or establishing ownership may institute proceedings against the Administrator or the Administrator may sue to establish the claim of deceased's property".

As the house built on Plot No. 31, Block "L.2" K/Ndege, Morogoro Municipality is still uncertain on the question of ownership, I also find it suitable

to be guided by the decision of the CAT in the case of **Mgeni Seif vs Mohamed Yahaya Khalfani (Civil Application No. 1 of 2009) [2017] TZCA 258 (29 June 2017)** (Extracted from www.tanzlii.go.tz), where the CAT speaking through His Lordship, the Acting Chief Justice (Juma, Ag. CJ., As he then was) on pages 1 and 8, 2nd paragraph, held:

> "It is only a probate and administration Court which can empower an administrator to transfer the deceased person's property. .....It seems clear to us that there are competing claims between the applicant and the respondent, over deceased person's estate. In the circumstance, only a probate and administration court can explain how the deceased person's estate passed on to a beneficiary or a bona fide purchaser of the estate for value. In other words, a person claiming any interest in the estate of the deceased must trace the root of title back to a letter of administration, where the deceased died intestate or probate, where the deceased passed away testate".

On the basis of the above authorities, I order and direct the parties herein to go to the Court that dealt with the Probate Cause No. 11 of 2000 at the District Court of Morogoro, at Morogoro and the purported Civil Appeal No. 108 of 2021, High Court of Tanzania, Dar Es Salaam Registry as I believe that, being

the Probate and Administration Court(s), they can be in a better place to explain how the estate (house in question) of the deceased, Hamisi Waziri passed on to a beneficiary, the appellant herein through a WILL. From there, the respondent herein, Juma Salum Kondo being the administrator of the estate of the late Waziri Salumu Kondo who is now vested with the powers to sue whenever he feels that the interest of the deceased's estate is at stake, may sue to establish the claim of deceased's property or the respondent may optimize the opportunity in similar way.

In the upshot, this appeal is allowed to the extent of my observations. Considering the relationship between the appellant and respondent, I order that, each party to this appeal shall bear its own costs.

It is so ordered.

DATED at **MOROGORO**, this 25th day of March, 2024.

M.J. Chaba

JUDGE

25/03/2024

Court:

Judgment delivered under my hand and the Seal of the Court this 25th day of March, 2024 in the presence of both parties, and Mr. Asifiwe Alinanuswe, Learned Advocate for the Respondent, also holding brief for Mr. Ignas Seth Punge, also Learned Advocate for the Appellant.

S. P. KIHAWA

DEPUTY REGISTRAR

25/03/2024

Court:

Right of the parties to appeal to the Court of Appeal of Tanzania fully explained.

S. P. KIHAWA

DEPUTY REGISTRAR

25/03/2024