

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

CIVIL APPEAL NO. 61 OF 2021

*(Arising from application for Revision No. 06 of 2021 in the District Court of Misungwi before
Hon. E.R Marley RM dated 28/10/2021)*

BETWEEN

MODESTA MWEN'HELA 1st APPELLANT
ROBERT JOSEPH.....2nd APPELLANT

And

JAPHET JOHN MAYILA1st RESPONDENT
WILFRED KUSHILING'WA.....2nd RESPONDENT

JUDGMENT

21st March and 08th April, 2022

ITEMBA, J.

This appeal is against the decision of the District Court of Misungwi at Misungwi in DC Revision No. 06 of 2021. Where the District Court dismissed the application for revision preferred by the appellants intending to challenge irregularities allegedly committed by Bukumbi Primary Court. The view taken by the District Court is that the Probate Cause was already finally determined by the trial court hence it can't interfere the same by re-opening it.

By way of a brief background, Japhet John Mayala and Wilfred Kushiling'we were both appointed as administrators of the estate of the late

Joseph Kamongo by Bukumbi Primary Court in probate cause No. 02 of 2020. The trial Court records shows that the matter was closed on 9/11/2021. The appellants who are both interested parties in the estate of the deceased were dissatisfied with the conducts of administrators, hence they filed application No. 01 of 2021 in the trial court intending to revoke their appointment. The application was dismissed for lack of jurisdiction. Being aggrieved, the appellants filed application for revision in the District Court of Misungwi which resulted to this appeal at hand.

The petition of appeal has one ground of appeal,

- 1. That, the Hon magistrate erred in law to dismiss the application for revision filed before him challenging the irregularities committed by Bukumbi Primary Court in Probate cause No. 01 and 02 on the ground that the district court had no jurisdiction to make revision on such decisions.*

At the hearing both parties agreed to dispose of the matter by way of oral submissions.

Mr. Majid Kangile, learned counsel appeared for the appellants while 1st respondent enjoyed professional service of Mr. Mathias Mashauri, and 2nd respondent was not represented, he appeared in person.

Arguing in support of appeal the learned counsel for the appellants submitted that, they believe the court misdirected itself by dismissing the application for revision because the Primary Court is lower to the District Court as provided under **Section 22(1) of Magistrate Court R.E 2019** herein the MCA.

He further submitted that, the matter at hand was tainted with a number of irregularities before Bukumbi Primary Court which in his view, were supposed to be cured by way of revision. That hands of the District Court were not tied from doing revision for the sake of justice.

He went on mentioning a number of irregularities alleging that were conducted in the trial Primary Court as follows: **(1)** the deceased was Christian and died practicing Christianity which primary Court has no jurisdiction to entertain such an application as provided under 5th schedule of MCA (Supra) part 1, **(2)** the records doesn't show whether the assessors were included in making decision, **(3)** there were two death's certificates with different names, the one which was tendered before the court and the one which the widow possesses. The names therein are Joseph Japhet Kamonyo and Joseph Kurwa Japhet respectively, he argues that there was fraud in acquiring them, **(4)** the Court did not mention the deceased

properties nor his beneficiaries, **(5)** properties in form number 586 are non-existing properties and those are the one awarded to the widow, and **(6)** a family meeting was conducted before the ward executive officer who is not a family member, which was not proper. He prays for this court to nullify the whole proceedings and findings by both primary court and first appellate court so that new administrator of the deceased estate will be appointed.

In reply the 1st respondent through his learned counsel contended that, before District Court was an application for revision against Primary Court's decision in misc. application No. 6/2021. The respondent raised a preliminary point of objection that the District Court has no jurisdiction.

He went further contending that, it is undisputed that the probate cause was closed on 8th, April, 2021. The inventory was filed on 23rd September, 2020 and once the probate is closed it is a legal position that there is no case before the court and the court cannot entertain any application thereafter. He supported his arguments with the Court of Appeal of Tanzania decision in the case of ***Ahmad Mohamed vs Fatma Bakari and other Civil Appeal No. 71 of 2021 Court of Appeal of Tanzania***. He also referred this court in the High court decisions in the case of ***Mohamed Simba Pendeza and Another vs Simba as Former adiministratix of***

***the estate of Saidi Simba and Saada Rashid vs Abdala Rashid Pc
Civil Appeal No. 12 of 2020.***

Regarding section 22 (1) of Magistrates Court Act (Supra) he was of the view that the application for revision could be proper if the probate cause was not closed.

In respect of illegalities, he states that, these are the matters of evidence, they cannot be entertained at this stage. He argues this court to find that, the appeal is misconceived and therefore it should be dismissed with costs.

The 2nd respondent supported the appeal by the appellants.

In his quick rejoinder, the counsel for the applicants stated that, the 2nd respondent does not object the appeal because he is the family member and the 1st respondent is not a family member.

As regard to the cases cited by the respondent, he states that every case should be decided on its own merits. The law under ***section 22(1) of MCA*** (Supra) uses the word "any" which means the court is not limited.

On the option of opening new criminal case he is of the view that, it will prolong the matter at hand.

He submitted further that, there is another irregularity that citation was not made by the trial court. He insists that, the appeal be allowed and since this is the probate cause, costs should be waived.

After going through the counsel's rival submissions, there is only one issue for determination whether the appeal raises any meritorious position. Deducing from these submissions, the clear picture is that the contention revolves around legality of the District Court in dismissing appellant's application for lack of jurisdiction.

As rightly conceded by Mr. Mashauri, when probate cause has been finally determined there is no room to vacate such order. This principle of law was stated in the decision of ***Ahmad Mohamed vs Fatma bakari and another*** (Supra), the court of appeal had this to say: -

*"given the fact that the appellant had already discharged his duties of executing the will, whether honestly or otherwise, and had already exhibited the inventory and accounts in the High Court, **there was no granted probate which could have been revoked or annulled in terms of section 49(1) of the act.** As the appellant was already functus officio."*

It was further stated that:

"If the respondent genuinely believe that the appellant acted in excess of his mandate or wasted the estate and/or subjected it to damage or occasioned any loss to it through negligence, they are free to sue him. Section 138 and 139 are relevant. Two, if they are also convinced that either fraudulently converted some properties forming part of the estate, and/or that he deliberately exhibited a false inventory or account, they are equally free to institute criminal proceedings against him in accordance with the provisions of the governing laws." (Emphasis supplied)

This position was also stated earlier by the Court of Appeal in the case of ***Hadija Masudi as the Legal Representative of the Late Halima Masudi vs. Rashidi Makusudi***, Civil Appeal No.26 of 1992 where the court held that;

"This state of affairs does not however mean that the person who claims to be an heir of Salima Makusudi and who has not got his or her rightful share of the deceased's estate, has no remedy at law. Far from it. The remedy for such person, like the respondent, is to sue for the recovery of his or her share of the estate of the deceased, Salima Makusudi from any person who is in possession of it."

After going through the trial court's records, it shows that, inventory was filed on 23/09/2020 and on 09/11/2021 the probate cause was closed. Under those circumstances where the administrator had wound up his activities, any subsequent application will not be implementable as there will be nothing to revise.

In a number of occasions, the Court of Appeal has decided that whenever it is shown that the application will no longer serve the purpose it was intended to or that an application has been overtaken by events. The said application is dismissed. see for example **Felix Emmanuel Mkongwa v Andrew Kimwaga** Civil Application No. 249/2016, CAT Dar es salaam (unreported) and **Farida Adam (Administratrix of Estate of the Late Hamza Adam) vs Geoffrey Kabaka** Civil Application No. 33 of 2015 CAT Mwanza, (unreported).

I find support in the above cited authorities to state that the appellants misguided themselves by filing an application for revision before Misungwi District Court. However, the applicants still have an opportunity to either institute criminal charges or to open a fresh suit against them, if they believe that the said administrators have acted fraudulently.

Lastly, on the issue of illegality raised by Mr. Majid the learned counsel for the appellant, I agree with the findings of Mr. Mashauri that, those are the matters of evidence they can't be discussed at this stage.

Therefore, I hold that the application for revision before the District Court was misconceived for the reasons explained hereinabove.

Consequently, the appeal is hereby dismissed.

Order accordingly.

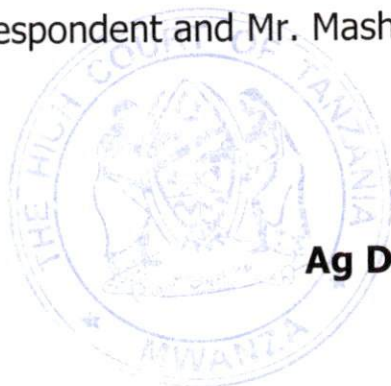
Right of appeal duly explained.

DATED at **MWANZA** this 8th day of April, 2022.



L. J. ITEMBA
JUDGE
08.4.2021

Judgment delivered at Mwanza this 8th day of April 2022, in the presence of the 2nd appellant, Mr. Majid Kangile, Advocate for the appellants, the 2nd respondent and Mr. Mashauri Advocate for the respondents.



S. KIAMA
Ag DEPUTY REGISTRAR
08.04.2022