IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOBA DISTRICT REGISTRY

AT BUKOBA

(PC) CIVIL APPEAL NO. 20 OF 2021

(Arising from Civil Revision No. 04 of 2021 at the District Court of Muleba at Muleba and Originating from Probate Cause No. 19 of 2020 of the Nshamba Primary Court)

ADVENTINA LEOPORD----------1ST APPELLANT

GRACE LEOPORD----------2ND APPELLANT

JENESTA LEOPORD----------3RD APPELLANT

VERSUS

ALLY BUSHAIJA (1ST Administrator of the Estate of the Late Bwemero Karulema)----------1ST RESPONDENT

THEODORA BWEMERO (2nd Administrator of the Estate of the Late Bwemero Karulema)----------2ND RESPONDENT

JUDGMENT

Date of Last Order: 23/03/2022

Date of Judgment: 08/04/2022

A. E. Mwipopo, J.

Adventina Leopord, Grace Leopord and Jenesta Leopord, the appellants herein, filed Civil Revision No. 01 of 2021 in the District Court of Muleba District at Muleba against the decision of Nshamba Primary Court in Probate Cause No. 19 of 2020. The said Probate Cause was filed in the Primary Court by respondents herein namely Ally Bushaija and Theodora Bwemero. The respondents applied to the Nshamba Primary Court to be appointed administrator of the late Bwemero Karulema. The Primary Court heard the parties and delivered its judgment on 20th October, 2020, where it appointed the respondents to be administrator of the deceased estates. The appellants filed revision in the District Court challenging the appointment of the respondents to be administrator of the deceased estates. The District Court dismissed the revision for a reason that the procedure for appointment of the respondent as administrator of the deceased estates by the Primary Court was proper. The appellants were not satisfied with the decision of the District Court and they filed the present appeal in this Court.

The Petition of Appeal filed by the appellants in this Court contains six grounds of appeal as follows hereunder:-

1. *That, the Magistrate erred in law and facts without holding that the respondents delayed 32 years in opening the probate cause of the late Bwemero Karulema.*
2. *That, the Magistrate erred in law and facts to hold that the Court was not a proper forum to challenge the administration while the appellants*

were not parties to the probate matter and other appellants are living far, it was proper for Court to make revision of the proceeding in the trial Court bellow.

3. *That, the Magistrate erred in law and fact to hold that the appellants could have objected in the trial Court but when they appeared in the trial Court they were restricted to make their objection and the Court denied them their right to be heard in respective probate matter, the only remedy was to file the revision.*
4. *That, the Magistrate erred in law and facts without considering that the property in dispute belongs to the appellants, they redeemed the property and they have been living peaceful without interference from any person.*
5. *That, the Magistrate erred in law and facts to concur with the respondents that they adduced the reasons before opening the probate cause in Nshamba Primary Court while it is not true.*
6. *That, the Magistrate erred in law and facts for not considering that trial Court has no jurisdiction to try the matter because no reason was adduced by respondents in petitioning for the probate cause.*

On the hearing date, the appellants had a service of Mr. Derick Zephrine Advocate, whereas, both respondents appeared in person, unrepresented.

Mr. Derick Zephrine submitted on 1st, 5th and 6th grounds of appeal jointly and the same to 2nd and 3rd grounds of appeal were submitted together. The counsel abandoned the 4th ground of appeal. On the 1st, 5th and 6th grounds of the appeal, the counsel said that the District court was not supposed to dismiss the revision as there is irregularity for allowing respondents to open a probate case

after 32 years. The said position was stated by the court in the case of **Methodius Maliseli v. Rachislaus Leonsi**, Probate and Administration Cause Appeal No. 10 of 2017, High Court at Bukoba, (unreported) and in **Ramadhan Said Abasi Kambuga and 2 Others v. Mbaraka Abasi Kambuga**, Probate and Administration Appeal No. 1 of 2015, High Court at Sumbawanga, (unreported). The respondent reason for opening probate case is that they were living in peace until disputes over the ownership of the land started to emerge. The said reason was stated during hearing of the revision in the District Court and was not stated in the trial Primary Court. If the trial and appellate court considered this it would have found that there was irregularity. The said irregularity is failure to give reason for filing probate case after 32 years.

The counsel said on the 2nd and 3rd grounds of appeal that the appellants were not part of the Probate Case and even when they objected the appointment of respondents and administrator of deceased estate they were denied right to be heard. Their only remedy in this case was to file application for revision before the District Court. The District Court held that appellant was supposed to object the probate case which was before the Primary Court, but they did object and their objecting was rejected.

In his reply, the 1st respondent said that the trial Primary Court and the District Court rightly held that the respondent have right to open probate and were

appointed administrator of the deceased estate according to the law. The appellants opened revision case in the District Court after the respondent has been appointed administrator of the deceased estate and has distributed the estates of the deceased. The appellants are not part to the case as their father died long time ago without any property. Thus, they have no interest whatsoever to the deceased estate. He said that they decided to open a probate case over the land which was distributed over 30 years ago after the appellants have raised the claims over the land.

The 2nd respondent said in his reply that their father died in 1988 and their brother who was the father of the appellants was not present. After 10 years he came back. The father of the appellants stayed at the house of their parents for some time before he passed away. The appellants also came to live in the land of the 2nd respondents' parents. As the children of their brother were growing, respondents decided to distribute the land left by their father to the children and the appellants. They appointed 1st Respondent. All 5 children of the deceased were given the land and he don't know the reason for the appellants to open the case as appeal.

In his rejoinder, the counsel for the appellants said that properties of appellants' father was distributed by the administrator of the estate. The 1st and 2nd respondents were appointed as administration of the deceased estate. The

counsel emphasized that there was irregularities in the Primary Court proceedings which the District Court and this court could interfered and rectify.

Having heard the submissions from the parties herein, the issue for determination is whether or not the appeal has merits.

In the 1st, 5th and 6th grounds of appeal the appellants alleges that the trial Primary Court erred to allow the respondents to open and be appointed as administrators of the deceased estates after 32 years has passed since the death of the deceased. I agree with the appellants that sufficient reason has to be adduced where a long time has passed before application for administration of the deceased estates is filed. The evidence in record shows that the respondents informed the trial Primary Court that the deceased estates have not been distributed since his demise in 1988. There is no other evidence whatsoever in the record which shows that the said estates of the deceased was distributed to heirs. In such situation where the said properties of the deceased was not distributed, it was prudent for the trial Court to appoint administrator of the deceased estates to distribute the estates to the heirs. The case of **Methodius Maliseli v. Radislaus Leonsi, (supra)**, and that of **Ramadhani Said Abasi Kambuka and 2 Others v. Mbaraka Abasi Kambuka, (supra)**, cited by the appellants are distinguished to the present case for the reason that in the cited cases the properties of the deceased had already been distributed to heirs soon after the deceased expired

and several years later somebody opened an application to be appointed the administrator of the said estates. In this case the evidence in record shows that the deceased estate was not distributed to anybody. Thus, I find the appellants' ground of appeal No. 1, 5 and 6 are devoid of merits.

Regarding the 2nd and 3rd grounds of appeal, I agree with the appellants that as they were not part of the Probate Case in the Primary Court their only remedy was to institute the revision in the District Court against the decision of the trial Primary Court. In the revision, the District Court is supposed to examine the records and registers of the trial Primary Court for the purposes of satisfying itself as to the correctness, legality or propriety of any decision or order of the primary court, and as to the regularity of any proceedings therein, and may revise any such proceedings. This is according to section 22 (1) of the Magistrates' Courts Act, Cap 11, R.E. 2019. The appellants attached the copy of the Application No. 206 of 2006 in the Bukoba District Land and Housing Tribunal where the 3rd appellant sued one Sarapion Samson for encroaching into clan land. This shows that the said land was a clan land and not owned by their father as they alleges. Also, the fact that the 3rd appellant redeemed the part of the land which was encroached by Sarapion Samson does not make her the owner of the clan land. The District Court found that the procedure for appointment of the respondent as administrator of deceased estate was proper. I'm also of the same position that

The Judgment was delivered today, this 08.04.02022 in chamber under the seal of this court in the presence of all appellants and all respondents. Right of appeal explained.

A. E. Mwipopo

Judge

08.04.2022