

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(ARUSHA DISTRICT REGISTRY)**

**AT ARUSHA**

**PC CIVIL APPEAL NO.34 OF 2021**

*(C/f from Civil Appeal no. 3 of 2021, at the District Court of Monduli at Monduli,  
Originating from Probate and Administration Cause No. 9 of 2020 at Mto wa Mbu  
Primary Court)*

**LASHASHE NAMORWA KIVUYO .....APPELLANT**

**VERSUS**

**SANARE SAILEPU MOLLEL.....RESPONDENT**

**JUDGMENT**

*Date of last order: 2-12-2021*

*Date of judgement: 3-2-2022*

**B.K. PHILLIP, J**

Lal Ashe Namorwa Kivuyo , the Appellant herein appeals against decision of the District Court of Monduli which upheld the decision of Mto wa Mbu Primary Court (the trial Court). For understanding of the coming discussion let me give a brief background to this appeal.

The Appellant was a petitioner before the trial Court for the letters of administration of the estate of the late Nyangusi Sailepu who died interstate. Before trial Court could hear his petition, he met with caveat from one Namelock Nyangusi Sailepu who contested the appellant to be

appointed as a sole administrator of the estate of the late Nyangusi Sailepu on the ground that the appellant will not do justice to her because he does not recognize her as a legal wife of deceased. Namelock Nyangusi Sailepu beseeched the trial Court to appoint one Sanare Sailepu Mollel to be Co-administrator of the deceased estate. The trial Court ruled in her favour and appointed Sanare Sailepu Mollel as co-administrator of the deceased estate and declared that Namelock Nyangusi Sailepu was a legal wife of the deceased.

The Appellant was aggrieved by the aforementioned decision. He appeal to the District Court of Monduli on the following grounds;

- i) That the trial Court proceedings were tainted with gross and incurable procedural irregularities which rendered the judgment of the trial Court null and void.
- ii) That trial Court erred in law and facts for failure to observe the law in determining the suit between parties.
- iii) That trial Court erred in law and fact for failing to properly evaluate evidence adduced during the trial.
- iv) That trial Court erred in fact and law in believing fabricated and false evidence of respondent to the extent of appointing respondent as the co-administrator of the deceased estate.

The appeal did not sail through. The District Court ruled on favour of respondent. The appellant did not despair. He lodged the appeal in hand challenging the decisions of both lower Courts on the following grounds:

- i) That, the 1<sup>st</sup> appellate Court misdirected itself and failed to hold that the proceedings of the trial Court are tainted with gross incurable procedural irregularities which render the whole decision thereof null and void.
- ii) That, the 1<sup>st</sup> appellate Court misdirected itself and failed to hold that the trial Court failed to observe the law in determining the suit between the parties before it.
- iii) That, the 1<sup>st</sup> appellate Court erred both in law and in fact for failure to hold that the appointment of respondent as a Co-administratrix of deceased estate was done contrary to the laid down procedure and therefore illegal, that is, there was no proper use of the form as provided by law.

In this appeal the appellant was represented by John M. Shirima, learned counsel whereas the respondent had the services of Mr. Daudi Lairumbe, learned counsel. The appeal was heard by way of written submissions.

Mr. Shirima, started his submission by notifying this Court that he decided to drop the third ground of appeal. Submitting for the first ground of appeal, the learned counsel argued that the first appellate Court misdirected itself and failed to hold that the proceedings of the trial Court are tainted with gross and incurable procedural irregularities which rendered the whole decision thereof null and void. He added that the proceedings before trial Court shows that hearing was attended by two assessors, but the Court's records do not show that the assessors gave their opinions in respect of whole proceedings before reaching the final decision contrary to section 7 (3) of Magistrates' Courts Act. (Cap 11 R.E. 2019). To cement his argument, he cited the case of **Neli Manase Foya vs Damian Mlinga (2005) TLR 167.**

With regard to the second ground of appeal, he submitted that the first appellate Court misdirected itself and failed to hold that the trial Court failed to observe the law in determining the suit between parties. He maintained that the evidence before trial Court shows that during his life time the deceased resided at Arusha and Moita Bwawani, hence the petition was wrongly lodged at Mto wa Mbu Primary Court instead of Monduli Primary Court or Arusha Urban Primary Court. He cited Rule 1 (1)

of the fifth schedule of the Magistrates' Court Act, Cap 11 R.E 2019 and the case of **Sharma vs. R. 20 EACA 310**, to cement his arguments.

In rebuttal, Mr. Daudi, the counsel for the respondent submitted that the allegation that trial Magistrate did not consult assessors before writing the judgment is unfounded since the assessors have appended their signature in the judgement of the trial Court to signify their participations. Not only that the assessors signed the judgment also, the proceedings of trial Court reveals that both assessors have gave their opinion on page 78 and 79 of the proceedings. To back up his argument he cited the case of **Faraji Ndilivako Ndelwa vs. Eliza Mlyapeke Sanga, PC Matrimonial Appeal no. 11 of 2020, at the High court of Tanzania at Iringa** (unreported) and the case of **Neli Manase Foya vs. Damian Mlinga (2005) TLR 167**.

With regard to the second ground of appeal, the counsel for the respondent submitted that it is a well known principle that an appellate Court cannot entertain new matters which were not raised before the trial Court. To bolster his argument he cited the case of **Hassan Bundala @ Swaga vs. Republic, criminal appeal no.386 of 2015** (unreported). He contended that the issue of jurisdiction was never

raised by appellant in both the trial Court and first Appellate Court, therefore it cannot be raised at this stage.

In rejoinder the counsel for appellant reiterated his submissions in chief.

I have carefully gone through the petition of Appeal, the lower Courts' records and submissions made by both learned counsel. I have noted that the issues for determination in this appeal are; one, whether the opinions of the assessors were considered by trial magistrate in her judgement and two whether the trial Court had jurisdiction to hear Probate and administration Cause no. 9 of 2020.

The Records of the trial Court show that the assessors namely Rehema Juma and Ainase William were fully involved in the hearing of the case and they signed the judgement. In my opinion since the assessors signed the judgement it means that, the magistrate consulted them. With due respect to Mr. Shirima, section 7 (3) of the Magistrates' Court Act Cap 11 R.E 2019 does not require the opinions of assessors to be reduced into writing. Even the case he cited, that is the case of **Neli Manase Foya** (supra) does not support his contention. In that case the Court was held as follows;

*"Since assessors are the members of the Court and signed the judgement as such and not for the purpose of authenticating it or*

*confirming it, they are neither required to give their opinions nor to have their opinions recorded by the magistrate.....as for the assessors opinions it is now days not necessary to write assessors opinions provided they sign the judgement of the Court to certify that they agree with it."*

In addition in the case of **Faraji Ndilivako Ndelwa** (supra) the Court held as follows;

*" it is not necessary as it was contended by Mr. Jally Mongo that, the trial magistrate after having consulted the assessors and gave their opinions he was required to reduce the opinion into writing as well, as they signed the judgement which signify that the assessors were consulted, there is no such requirement in the rule above cited, hence failure to put assessors opinions into writing cannot render the judgement and proceedings to be defective and nullity."*

In the upshot, the learned Counsel's stance that decision of trial Court is null and void is unfounded as the Court's records show that assessors participated fully in the hearing of the case and they signed the judgement.

On the issue of jurisdiction, first I wish to point out that, as correctly argued by respondent's advocate, the issue on jurisdiction was not raised at the lower Court and as matter of principle, the appealte Court is not supposed to entertain issues which were not raised at the lower court/trial court. However, I agree with Mr Shirima that issues of law pertaining to

the Court's jurisdiction can be raised at any stage. [ See the case of **Tanzania Revenue Authority Vs Tango Transport Compnay Ltd, Civil Appeal No. 84 of 2009**, and **Mwananchi Communications Limited Vs Joshua K. Kajula and two others , Civil Appeal No. 126/01 of 2016** ( both unreported)]. Therefore, when it comes to issues of law on the Court's jurisdiction, there is an exception to the general rule. It is for the aforesaid reasons I will deal with the 2<sup>nd</sup> ground of appeal which is questioning the jurisdiction of the trial Court in this matter.

In this matter both counsel agreed that deceased during his life time resided at Arusha and Moita Bwawani. Counsel for the appellant argued that the petitioner erred in law to lodge the petition at the Primary Court of Mto wa Mbu. He contravened the provision of Rule 1 (1) of the fifth schedule of Magistrates' Courts Act Cap 11 R.E 2019. The same was supposed to be lodged at Monduli Primary Court or Arusha Urban Primary Court. It has to be noted that the geographical jurisdiction of the Primary Court is stipulated under section 3 (1) and (2) of the Magistrates' Court Act, Cap 11 R.E 2019 ( Henceforth " Cap 11). Which provides as follows;

Section 3(1) (2) of Cap 11



*"There are hereby established in every District Primary Courts which shall, subject to the provisions of any law for the time being in force, exercise jurisdiction within the respective Districts in which they are established.*

*(2) The designation of a Primary Court shall be the Primary Court of the District in which it is established".*

The provisions of the law quoted herein above establishe Primary court in every District. Other Primary Courts within Districts are just Primary Courts centres. Rule 1 (1) of the fifth schedule to Cap 11 states that *"the jurisdiction of a primary court in the administration of a deceased estates, where the law applicable to the administration or distribution or the succession to the estate is Customary or Islamic Law, may be exercised in cases where the deceased at the time of his death had **a fixed place of abode within the local limit of the court's jurisdiction"**.*

Petition for the letters of administration was lodged at Mto wa Mbu Primary Court which is within Monduli District. Evidence from both sides shows that deceased had fixed place of abode in Arusha and Moita Bwawani. Moita Bwawani is located in Monduli District. It is my considered legal opinion that since Moita Bwawani is located in Monduli District there is nothing wrong in lodging the petition at any Primary

Court within Monduli District including Mto wa Mbu Primary Court which is located in Monduli District. In the case of **Beatrice Brighton Kamanga and Amanda Brighton Kamanga vs. Ziada William Kamanga, Civil Revision No. 13 of 2020 HC**, ( unreported) my brother Hon. L.M. MLACHA, J while deliberating on an issue concerning the jurisdiction of Primary Courts within one District said the following;

*".....The appointment is done by Primary Court which exercise jurisdiction in the area where the deceased had a **fixed place of abode** before he died. This is basically the area of the whole District because the jurisdiction of the Primary Court covers the whole of the District where it is established. So, the deceased must have a fixed place of abode within the particular District. If the deceased had two or three fixed places of abode, let's say, Dar es salaam, Lindi and Kyela Mbeya any of the Primary Courts in the respective Districts can hear the matter. It will be upon the choice of the parties."*

Also, in the case of **Hyasintha Kokwijuka Felix Kamugisha vs. Deusdedith Kamugisha, Probate Appeal No. 4 of 2018 HC at Bukoba**, the Court said the following;

*".....therefore, the Primary Court established within the District has geographical jurisdiction within the whole District where it is established. It follows therefore that a person may institute a case*

*in any Primary Court within the District where the deceased at a fixed abode at time of his death.”*

From the foregoing, the petition for the letters of administration was rightly filed at Mto wa Mbu Primary Court and no any provision of the law was violated. In fine, I find no merit in this appeal and the same is dismissed with costs.

Dated this 3<sup>rd</sup> day of January 2022



A handwritten signature in blue ink, appearing to read "B.K. Phillip", with a long horizontal stroke extending to the right.

**B.K.PHILLIP**

**JUDGE.**