IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF DAR ES SALAAM

AT DAR ES SALAAM

(PC) CIVIL APPEAL NO. 122 OF 2021

ANDREW MICHAEL MCHOME ..... APPELLANT

VERSUS

MARIAM HAMIS ABRAHAMANI ..... RESPONDENT

(Appeal from the judgment of the District Court of Kibaha at Kibaha in Probate Appeal No. 3 of 2021)

JUDGMENT

25th February and 15th March, 2022

KISANYA, J.:

This is an appeal against the decision of the District Court of Kibaha at Kibaha (first appellate court) that sat on appeal against the decision of Mkuza Primary Court (trial court) in Probate Cause No. 2 of 2021. The said probate cause was instituted by the appellant, Andrew Michael Mchome who petitioned for letters of administration of the estate of the late Twazi Michael Mchome who happened to be his brother. The probate proceedings were terminated in the appellant's favour. Thus, the trial court appointed him as administrator of the estate of the late Twazi Michael Mchome.

Subsequent to that ruling, the respondent, Mariam Hamis Abrahamani moved the trial court claiming for the following: *One*, that she was not involved in the filing of the probate cause. *Two*, that she is the wife of the late Twazi Michael Mchome and thus, entitled to the estate of the deceased. The trial court decided both issues against the respondent. That decision did not amuse the respondent who chose to appeal to the first appellate court. She fronted four grounds of appeal to the effect that, the trial court had no jurisdiction to entertain the matter; the trial court failed to evaluate evidence tendered by the respondent; the respondent was denied right to call witnesses and adduce evidence; and the trial court failed to consider that the appellant was not a faithful administrator.

The first appellate court agreed with the respondent that the trial court had no jurisdiction to hear and determine the probate cause and that she was denied the right to be heard. In that regard, the proceedings and decision of the trial court were declared a nullity. It was ordered the case be tried de-novo at Mlandizi Primary Court. Eventually, the said decision bred the present appeal which has six grounds of appeal. The same can be consolidated in five grounds as follows: -

1. *That the first appellate court erred in law and fact in holding that the trial court had no jurisdiction to entertain Probate Cause No. 2 of 2021.*
2. *That the first appellate court erred in law and fact in holding that the respondent was not accorded the right to be heard.*
3. *That the first appellate court erred in law and fact by nullifying the proceedings and decision of Probate Cause No. 2 of 2021 of Mkuza Primary Court and ordering the case to be tried de novo by the Mlandizi Primary Court.*
4. *That the first appellate court erred in law and fact by failing to consider the citation was fixed in the premises of the Mlandizi Primary Court.*
5. *That, the first appellate court erred in law and fact by disregarding that the deceased was a Christian.*

When this appeal came for hearing, Mr. Tumaini Mgonja, learned advocate appeared for the appellant, while Mr. Vedastus Majura, learned counsel represented the respondent.

Mr. Mgonja commenced his submission by praying to abandon the then six ground (which is ground five hereinabove). His submission in

support of the remaining grounds of appeal was tailored on two issues. The first issue was in relation to the geographical or territorial jurisdiction of the trial court. He faulted the first appellate court in holding that the trial court had no jurisdiction. Referring the Court to paragraph 1(1) of the Fifth Schedule to the Magistrates' Courts Act, Cap. 11, R.E. 2019 (the MCA), the learned counsel argued that the primary court has jurisdiction to hear and determine probate cases if the deceased had a fixed place abode within its territorial jurisdiction. Referring further to section 3(1) of the MCA, Mr. Mgonja submitted that the territorial jurisdiction of the primary court is within the district in which it is established.

In view of that position, the learned counsel was of the view that the Mkuza Primary Court had jurisdiction within Kibaha District Court and thus, seized with jurisdiction to determine the probate cause because the deceased had a fixed place of abode at Mlandizi within Kibaha District. He implored the court to consider that the issues of accessibility and closeness to the primary court are not relevant when determining whether it has jurisdiction.

The second issue was on the right to be heard. Mr. Mgonja grieved that the first appellate court erred in holding that the respondent was

denied calling witnesses and proving her case. He contended that, the first appellate court did not consider that it is the respondent who was duty bound to call her witnesses.

In the light of the above submission, Mr. Mgonja prayed that the appeal be allowed.

Submitting in rebuttal, Mr. Majura conceded that Mkuza Primary Court is within Kibaha District. However, he argued that the probate cause was required to be instituted at Mlandizi Primary Court where the deceased had a fixed place of abode. His argument was also based on paragraph 1(1) of the Fifth Schedule to the MCA.

With regard to the issue of right to be heard, Mr. Majura argued that the respondent was denied the right to call witnesses and give evidence to prove that he was married to the deceased. He cited the case of **Rapha Bigabo vs Frabilaces Wambura** [1985] TLR on the requirement of proof of presumption of marriage.

That said, the learned counsel for the respondent submitted that the first appellate court did not error in its decision. Therefore, he asked

the Court to dismiss the appeal and confirm the decision of the first appellate court.

When Mr. Mgonja rose to rejoin, he reiterated that the Mkuza Primary Court had jurisdiction to try the matter and that the respondent was accorded the right to be heard.

Those are the competing views for my consideration. I have to begin with the issue whether the trial court had jurisdiction to hear and determine the probate matter that led to this appeal. As rightly argued by Mr. Mgonja, the law is settled that jurisdiction is a creature of a statute. The primary court's jurisdiction in the administration of estate of the deceased is provided for under rule 1(1) of the Fifth Schedule to the MCA which reads: -

> "*The jurisdiction of a primary court in the administration of deceased's estates, where the law applicable to the administration or distribution of the succession to, the estate is customary law 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 limits of the court's jurisdiction****:"*

It is common ground that the deceased had a fixed place of abode at Mlandizi within Kibaha District and that the petition for letters of administration was instituted in the Mkuza Primary Court which is within the same District. Was the Mkuza Primary Court seized with jurisdiction? In terms of section 3(1) of the MCA, the primary court has jurisdiction within the area in which it is established. The said section provides: -

> *"3. (1). 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."*

Reading from section 3(1) of the MCA and paragraph 1(1) of the Fifth Schedule to MCA, I am certain that, any primary court within the district court has territorial jurisdiction in the administration of deceased's estates. This stance was also taken in the case of **Hyasinta Kokwijuka Felix Kamugisa vs Deusdedith Kamugisha**, Probate Appeal No. 4 of 2018, HCT at Bukoba (unreported) relied upon by the first appellate court in which this Court (Kilekamanjega, J) held that:-

> *"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 (sic) a fixed abode at the time of his death."

Despite the above position, the Court held the view that a person should be advised to institute the probate cause to the primary court closer to the deceased's fixed place of abode and other interested parties. However, such advice is given at the stage of admitting the case. Upon admission and hearing of the probate cause, the primary court which is not closer to the deceased fixed place of abode cannot be held to lack jurisdiction if the deceased's place of abode was within its territorial jurisdiction.

In the instant appeal, parties do not dispute that the deceased had a fixed place of abode at Mlandizi within Kibaha District. Therefore, the Mkuza Primary Court which is established within Kibaha District had territorial or geographical jurisdiction to determine the probate and administration cause lodged by the appellant. Thus, the first ground is found meritorious.

The second issue is whether the respondent was accorded the right to be heard. This right is enshrined in Article 13(6) (a) of the

Constitution. It is also one the principles of natural justice. [See the case of **Mbeya - Rukwa Auto Parts and Transport Ltd v. Jestina George Mwakyoma** (2003) TLR 251]. The law is also settled that, any decision based on the proceedings in which the right was contravened is a nullity for infringement of the principle of natural justice. This position was stated in **M/S Darsh Industries Limited vs M/S Mount Meru Milleers Limited,** Civil Appeal No. 144 of 2015 [2016] TZCA 144; in which the Court of Appeal cited with approval its decision in **Abbas Sherally and Another v. Abdul S. H. M. Faza Iboy**, Civil Application No. 33 of 2002 (unreported) where it held that:-

> *The right of a party to be heard before adverse action is taken against such party has been stated and emphasized by courts in numerous decisions.* ***That right is so basic that a decision which is arrived at in violation of it will be nullified****, even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice. "[Emphasis added].*

In our case, the respondent's grievance before the first appellate court was to the effect that she was denied the right to call witnesses and give evidence. In his submission before this Court, Mr. Mgonja was of the view that it is the respondent who was required to call witnesses.

However, he did not address the Court on whether the appellant was accorded the right to give evidence. As rightly argued by Mr. Majura, one of the respondent's prayers at the trial court was for a declaration that she was the deceased's wife, and hence, entitled to the estates left by the deceased. Since the respondent's claim before the trial court was in a form of objection, she was entitled to give evidence to prove her claim. Also, the trial court was expected to record whether the respondent opted to close her case without calling witnesses.

Having gone through the proceedings of the trial court, I find no evidence that was given by the respondent let alone the appellant. What the trial court did is to allow the respondent to make submission and instead of adducing her evidence. Guided by the position of the Court of Appeal in the case of **The Registered Trustees of Achi Diocese of Dar es Salaam vs the Chairman Bunju Village Government and 11 Others**, Civil Appeal No. 147 of 2016 (unreported), the submissions made by the respondent was not part of her evidence.

In view of the above, I agree with Mr. Majura that the respondent was denied the right to be heard. However, that is in relation to the respondent's claim that was lodged before the trial court after the

appellant had been appointed as an administrator of the deceased's estates. The proceedings that led to appointment of the appellant as administrator of the estate of the deceased were not affected.

In the final event, the appeal is partly allowed to the extent demonstrated herein. Consequently, the proceedings of the primary court in relation to the respondent's claim are hereby nullified and the ruling passed thereof quashed and set aside. It is ordered further that the respondent's claim be heard afresh before the Mkuza Primary Court. Each party shall bear its own costs.

It is so ordered.

DATED at DAR ES SALAAM this 15th day of March, 2022.

S.E. Kisanya
JUDGE