

**IN THE UNITED REPUBLIC OF TANZANIA
THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM**

CIVIL APPEAL NO. 188 OF 2020

*(Arising from Civil Revision No. 17 of 2019 of District Court of Temeke at
Temeke)*

SADA MIRAJI.....APPELLANT

VERSUS

HAWA SALUM.....RESPONDENT

JUDGMENT

Date of last order: - 23/03/2022
Date of judgment: - 27/04/2022

OPIYO, J.

The above-named appellant being aggrieved by the decision of the District Court of Temeke at Temeke vide Civil Revision No. 17 of 2019 delivered on 31st August, 2020 before Hon. Ndossy, RM appeal against the said decision on the following grounds:-

1. That, the District Court erred in law for not giving reasons for striking out the applicant's preliminary objection.

2. That, the District Court erred in law for entertaining revision which was preferred against beneficiaries instead of administrators.
3. That, the District Court erred in law for deciding revision outside the issues raised by the respondent.
4. That, the District Court erred in law and fact by deciding that there was no consent of heirs to the bequeath of the petitioner made by the deceased.
5. That the District Court erred in law for entertaining revision which was a disguise of appeal

Wherefore, the appellant prays for the appeal to be allowed, the decision of Temeke District Court in Revision No.17 of 2020 to be quashed and set aside, the decision of Mbagala Primary Court to be upheld, the cost of the Appeal and any relief deemed fit to be granted by the court.

In the course of hearing this appeal, the court ordered for the appeal to be disposed of by written submission.

Arguing for the appeal, on her submission the appellant prayed to drop grounds No. 4 and 5 and argue the rest of the grounds in sequence. Starting with the first ground that the District Court erred in law for not



giving reasons for striking out the preliminary objection that was raised by the appellant, the application was incompetent and bad in law and constituted gross abuse of court process for being preferred as a revision instead of appeal. Two, that application was incompetent and bad in law for misjoinder of parties. She submitted that the said preliminary objections were argued by way of written submission as ordered by the court, but the same was struck out without any reason stated which amounted to a breach of the principle of fair hearing that ought to be exercised by the court.

On the second ground that the District Court erred in law on entertaining the revision against the beneficiary instead of the administrator. Presenting the gist of this ground, he submitted that in this case the administrator was already appointed by the Primary Court and thus the matter that was preferred at the District Court ought to have been preferred against the administrator not the beneficiary as was done by the respondent herein. She referred to Fifth Schedule of the Magistrate's Court Act, Cap 11, RE 2019 under rule 6, Part II on powers and duties of an administrator appointed by the primary court. She also referred to Rule 2 Order XXX of the Civil Procedure code in which the

administrator may have to represent the third-party claims or made a party to the suit.

The third ground is that the District Court erred in law and fact in deciding the revision outside the issue which was raised by the respondent. It is a settled principle that parties are bound by their pleadings, the application brought by the respondent was only for revising the probate matter before the Primary court on the ground that, the will was invalid, there was no ground which was based on the consent of heirs hence the District Court was misguided as the issue was not brought before it, she argued.

Resisting the appeal, the respondent stated as regard to the first ground that the preliminary objection which was raised before the court was heard through written submission and the court struck out with reasons that are well articulated in the court records. The ground is therefore baseless. She therefore urged the court to dismiss it with costs.

On the second ground, the respondent stated that she is the administrator of the deceased estate, and she was a very person to be affected by the application for revision because the property in dispute

was given to the person sued, therefore it was necessary for her to be joined so that she can be heard.

Lastly on the third ground the respondent submitted that the magistrate decided in accordance to the issue which was raised by the parties during the hearing of the application for revision and the issue of consent as submitted by the advocate for the applicant was raised when the Magistrate was questioning legalities of the applicant to have the house located at Mabagala Kizuiani Temeke Dar es Salaam if it is correct to have more than 1/3 of the properties of the deceased according to Islamic law, while there is no consent from other rightful heirs

After a thorough perusal of the lower courts' records, I will dispose of the grounds of appeal as raised and drop the fourth and fifth grounds as prayed by the appellant. Starting with the first ground that the District Court erred in law by not giving reasons for striking out the applicant's preliminary objection. From the District Court proceedings, it is reflected that on 26th November 2019 vide exchequer receipt No. 24781813 the respondent, the applicant filed a notice of preliminary objection. The proceedings of 20th December, 2019 reflect the same where the court ordered for the preliminary objection to be disposed of by the way of a

written submission, and the proceedings of 17th February, 2020 indicates that ruling was delivered and read before the parties, but perusing the lower court file there is no copy of the ruling attached which makes it hard for this appellate court to answer the first ground as whether the reasons were stated or not. However, what matters in this circumstance is not the reason for overruling the preliminary objection rather the fact that the objection was determined after both parties were perfectly heard. The matter revision was after that heard and decision reached. This ground is therefore, dismissed.

As to the second ground that, the District Court erred in law for entertaining revision which was preferred against beneficiaries instead of administrators, this ground was supported by the respondent during her submission whereby she argued that she is the administratrix of the deceased estate and she is affected by the application for revision because the property in dispute was given to her, therefore it was necessary for her to be joined so that she can be heard

In the trial court, that is Mbagala Primary court vide "*Shauri la Mirathi 158/2019* " on 09th July, 2019 the court gave its ruling and Tafawa Muhsin Joka and Hawa Salum were appointed by the said court to be



the administrator and administratrix of the estate of the late Muhsin Kambi Joka (*see page 2 of the Primary Court ruling*) and copy of the will was admitted as exhibit K-1 (*see page 2 and 3 of the Primary court ruling*). It was ordered that any person aggrieved should file his or her grievances to the Land Courts.

Perusing **exhibit K-1** (*a copy of a will*) one **Saada Miraji Mungi** was named as the only beneficiary and she was given a house located at Mbagala Kizuiani Dar es Salaam, Plot No. 320, and a 10-acre farm at Goma Pembe Mwanzenga, Mbezi Mkuranga.

Without wasting time, it is settled that, when a person dies, a legal representative is appointed to represent the estate of the deceased. The question to ask ourselves is who is a legal representative? Section 3 of the Civil Procedure Code, Cap 33, R.E 2019 defined the term as:-

"a person who in law represents the estate of a deceased person and includes any person who intermeddles with the estate of the deceased and where a party sue or is sued in a representative character on whom the estate devolves on death of the party so suing or sued."

This definition is not far from the definition of **Osborn's Concise Law Dictionary, Eighth Edition, 2003, Leslie Rutherford & Sheila**



Bone, Universal Law Publishing Co. Pvt. Ltd, pg 248 defined personal representative to mean:-

"an executor or administrator. The personal representative for the time being of a deceased person is deemed in law his heir and assign with the meaning of all trust and powers"

From the above definition, a legal representative is an executor or administrator in accordance with provisions of Probate and Administration of Estate Act Cap 352, R.E 2002. Where section 100 of the Probate and Administration of Estate Act (supra) states that:-

"An executor or administrator has the same power to sue in respect of all causes of action that survive the deceased, and may exercise the same powers for the recovery of debts due to him at the time of his death, as the deceased had when lived."

Thus, it is obvious that the one that was to be sued in the revision was the administrator or administratrix of the estate and not the beneficiary, as they are the ones appointed by the court as legal representative of the deceased to act on behalf of the deceased estate, hence, suing the beneficiary was wrong as argued by the appellant. Upon this finding, I find no need to dispose of the third ground as it has been observed that,

the same revision was made against a party not having *locus standi* and resulted in the court orders not being enforceable. The decision of the first appellate court is therefore quashed and set aside.

Conventionally, after quashing the decision of the first appellate court, the trial court's decision would be upheld. However, for what is noted in relation to the validity of alleged last will of the deceased that was admitted as exhibit K-1, this court is prepared to invoke its revisionary powers to enable it look into that issue for a wider and embracive justice. The invalidity of exhibit K-1 cannot go unnoticed. This document was alleged to be the last will of the deceased. From the face of it, several defects are noticed to make it a valid will it is alleged to be. First, the alleged will discriminates against other heirs and reasons are not stated, it only contains the name of Saada Miraji, the appellant herein as the only heir for the one of house at Mbagala Kizuiani and ten acre farm at Goma Pembe Mwanzega Mbezi within Mkuranga District, that constituted only part of property of the deceased (*see the case of **Benson Benjamini Mengi and 3 Others v Abdiel Reginald Mengi and Another Probate and Administration Cause No. 39 of 2019, High Court of Tanzania, DSM at page 63***) where the court



enumerated the situations in which a parent may disinherit his sons, daughters or wives, and necessity of the reasons if that is done. . It is also indicated in the alleged will that the bestowal started to operate at the date of the will (4/3/2009) which was before the death of the testator (*see last paragraph of exhibit K-1*), the will was witnessed before the Magistrate but no name of the magistrate or rank who witnessd it that has been stated. The above factors make the alleged will admitted as exhibit K-1 invalid, as it is so declared by this court. Estate to be determined as intestate.

Thus, to pave room for just administration of the deceased estate and collection of all properties as the inventory and accounts have not been filled, the file is remitted back to the trial court for intestate administration of the estate of the deceased by the already appointed joint administrators. For avoidance of possible biasness, the matter be presided over by a different Magistrate.

It is so ordered.



A handwritten signature in blue ink, appearing to be "M. P. Opiyo", written over a horizontal line.

**M. P. OPIYO,
JUDGE
27/04/2022**