

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(TEMEKE HIGH COURT SUB-REGISTRY)
(ONE STOP JUDICIAL CENTRE)**

AT TEMEKE

PC. CIVIL APPEAL NO. 3 OF 2022

*(Arising from Probate Appeal No. 6 of 2021 of Kinondoni District Court before
Hon. E. A. Mwakalinga – SRM, Original Mirathi No. 109 of 2020 of the Primary Court of
Kinondoni District at Manseze/Sinza before Hon. M. Banza – RM)*

JAMES PETER MIDELO.....APPELLANT

VERSUS

ASIA NGOTO.....1st RESPONDENT

MARTHA MACHEMBA.....2nd RESPONDENT

JUDGMENT

28/3/2022 & 16/5/2022.

I.C. MUGETA, J

The appellant petitioned for a grant of the letters of administration of the estate of the late Bertha Joseph Mayunga comprised of a land at Tandale Uzuri, Kinondoni District – Dar es Salaam. The petition was filed before the Primary Court of Kinondoni District at Manseze/Sinza in Mirathi No. 109/2020. His petition was dismissed and in lieu thereof, Martha Phabian Mchemba was appointed as administratrix of the deceased's estate. The appellant was aggrieved. He filed an appeal to the District Court in which he included the first respondent who was not a party to the proceedings in the Primary Court for a reason that he is a buyer of the property subject of the

administration. The 1st respondent raised an objection which was upheld. The District Court held that the appeal was incompetent for involving a party who was not part of the original proceedings. Consequently, the appeal was dismissed. Dissatisfied, the appellant has preferred this appeal on three grounds as hereunder: -

- i. The District Court erred to dismiss the appeal on account of being improperly before it while the appeal was not heard on merits.*
- ii. The District Court erred to dismiss the appeal as adding another person could not have defeated the whole appeal.*
- iii. The District Court misdirected itself on the application of the principle in the case it cited.*

The appeal was heard by way of filing written submissions and both parties complied with the schedule. The appellant is represented by Frank Kilian, learned advocate while the respondents are represented by Senen E. Maponda, learned counsel.

According to the counsel for the appellant, the complaint in the first ground of appeal is that after the District Court upheld the preliminary objection the remedy was to strike out the appeal and not to dismiss it. This is because, he argued, dismissing the appeal implies that the appeal was heard on merits

which is not the case. He cited the cases of **Matengo Cooperative marketing Union Ltd V. Ali Mohamed Osman** [1959] E.A 577 and **Yahya Khamis V Hamida Haji Idd and 2 others**, Civil Appeal No 255/2018, Court of Appeal – Bukoba (unreported) to buttress his argument.

The learned counsel for the appellant submitted further that the complaint in the second ground of appeal is about dismissing the appeal for including a wrong party while the remedy was only to strike out the name of the wrongly joined party and proceed with the appeal. On that account he invited this court to invoke the principle of overriding objective to reverse the decision of the district court.

Regarding the third ground of appeal, the learned counsel submitted that in the case of **Magu District Council & Another V. Mhande Nkwabi** [1997] TZH 19 (16 October, 1997) (sic) which the District Court cited and relied upon, the High Court found that the application was incompetent and struck it out. The High Court did not dismiss it while the district court in the instant case dismissed the appeal.

In response, counsel for the respondents have made a general submission to cover all grounds of appeal for a reason that they are interrelated. I agree with his observation. It is the counsel's view that the District Court was right

because, indeed, the 1st respondent was wrongly joined and the principle in Magu District Counsel case (supra) was rightly applied.

In the alternative, the counsel submitted that in case this court find that the District Court erred, he prayed that it should not quash the decision of the District Court and order re-hearing of the case as that is unnecessary due to the fact that this court has supervisory powers and can examine the record of the lower court and determine the appeal on merits. He cited the case of ***Kulwa Julius V Mwita Chacha & others***, PC Probate Appeal No. 1/2020, High Court – Musoma (unreported) to support his argument. In rejoinder, the counsel for the appellant reiterated his submission in chief.

I shall discuss the first and second grounds of appeal jointly as they are interwoven.

From the submissions of the parties and the record of the district court, it is undisputed that the appeal was determined on a preliminary objection not on merits. In such cases, as per the case authorities cited by counsel for the appellant, the remedy has always been to strike out the appeal and not to dismiss it. The learned magistrate, therefore, erred to dismiss the appeal instead of striking it out. Further, I agree with counsel for the appellant that the District Court misapplied the principle in Magu District Council case

(supra). In that case the High Court determined an objection and found that the application before it was incompetent and struck it out. It did not dismiss it. On account of the foregoing, there is merits in the first and third grounds of appeal.

What about the second ground of appeal? It is settled that misjoinder of parties does not defeat the whole case. In a recent case of ***Hamis Bushiri Pazi & 4 others V Saul Henry Amon & 2 others and Attorney General as third party***, Civil Appeal No. 166/2019, Court of Appeal – Dar es Salaam (unreported) the Court of Appeal considered a situation where the trial court found that a case against a party was incompetent but still retained her name on record. The Court of Appeal (at page 20 of the judgment) held:

'The trial court having established that the claim against the third party was barred by law, it ought to have struck out the claim against the third party for being incompetent. In the circumstance, we strike off the third party in this appeal and declare that, the proceedings against the third party at the trial court were null and void'.

Likewise, in this case the District Court having found that the 1st respondent was wrongly joined at the appeal stage, the remedy was to strike out her name

and proceed with the appeal against the right parties. Therefore, the second ground of appeal has merits too.

What is the remedy for the errors of the district court? Counsel for the respondent has invited me to step into the shoes of the District Court and determine the appeal on merits. It is my view that the invitation by counsel for the respondent is untenable. His suggestion is possible when a court is sitting as first appellate court. This, however, is a second appeal where the court can determine matters that were decided by the first appellate court only. As the District Court did not determine the appeal on merits, this court has nothing to deal with on merits. In the same vein, counsel for the appellant invited me to consider the overriding objective principle in determining the merits of the second ground of appeal. The invitation is also untenable. I find no space where it fits in this case. The remedies, therefore, are as outlined at me last paragraph of this judgment.

Before I conclude, let me comment on the manner the learned magistrate at the District Court cited the cases she referred to in the judgment. At page 3, when referring to the counsel's submission she wrote: -

'He went further that, that the Civil Appeal 223 of the High court, it was ordered that ... he cemented his argument with the case of MUCISA BISCUITS case and other cases'.

At page 4 she cited a case as follows: -

'MAGU DISTRICT COUNCIL AND ANOTHER VERSUS MHANDE NKWABI [1997], 19 (16 October 1997)'

The way the learned Senior Resident Magistrate cited the cases is diametrically opposed to the traditional citation of cases. Reported cases ought to be cited by full names of the parties followed by the year of the report, name of the volume containing the case and the page of the report or the page where the relevant part is contained. The Magu District Council case (supra) is reported in [1997] T.L.R 286. This is how it ought to have been cited. It is not clear to me why the learned magistrate cited it as above. If she found the case on TanzLII, the manner such cases are cited is illustrated in the case of **Mosi s/o Chacha @Iranga & another Vs Republic**, Criminal Appeal No. 508 of 2019, Court of Appeal – Musoma (unreported) and **Hussein Ramadhani Beka V. Republic**, Criminal Appeal No. 349 of 2016, Court of Appeal – Mwanza (unreported).

Unreported cases are cited by full names of the parties, case number, name of the court and its place of sitting followed by the word unreported in brackets. When a case is cited as "Civil Appeal No. 223 of the High Court" or "MUCISA BISCUITS case and other cases" as the learned magistrate did, the reader of the judgment may be unable to trace it for his use as appropriate.

Proper citation of cases is important for easy of reference and clarity of information. Therefore, it is of utmost importance that cases are properly cited in court records.

In the fine, the appeal is allowed. The decision of the lower court is quashed. I, hereby, strike out from the appeal in this court and the district court the name of the first respondent for being improperly joined. The appeal at the District Court is restored. I direct the district court to determine the appeal on merits against the remaining parties. The appeal to be determined by another magistrate of competent jurisdiction.



Mugeta
I.C. MUGETA

JUDGE

16/05/2022

Court: - Judgment delivered in chambers in the presence of the appellant and in the absence of the respondents.

Sgd: I.C. MUGETA

JUDGE

16/05/2022