IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF DAR ES SALAAM

AT DAR ES SALAAM

CIVIL APPEAL NO. 10 OF 2022

AMINA WARIOBA KIKANGA ..... APPLICANT

VERSUS

ZAINA MUSTAPHA KAKUMBI ..... RESPONDENT

(Appeal from the decision of the District Court of Kinondoni at Kinondoni in Misc. Civil Application No. 224 of 2020)

JUDGMENT

8th & 17th March, 2023

KISANYA, J.:

This appeal arises from the ruling of the District Court of Kinondoni in Misc. Civil Application No. 224 of 2020 in which the appellant's revision against the proceedings and decision of the Primary Court of Kawe in Probate and Administration Cause No. 134 of 2020 was struck out.

Briefly stated, on 22nd June, 2020, the Primary Court of Kawe appointed the respondent, Zaina Mustapha Kikumbi as the administratrix of the estate of her late husband, Mustapha Sanula Kikumbi. On 2nd July, 2020, the appellant, Amina Warioba Kikanga and Asha Salim Ninga lodged a letter of complaint before the Primary Court of Kawe. The duo introduced themselves as wives of the late Mustapha Sanula Kikumbi. They objected appointment of the respondent as administratrix of the estate of the late

Mustapha Sanula Kikumbi on the ground that they were not consulted in proposing the respondent.

When the appellant and the said Asha Salim Ninga appeared before the Primary Court on 7th July, 2020, they contended that they were no involved in a family meeting which appointed the respondent as the administratrix of the deceased's estate. They also prayed that the matter be transferred to the District Court. While Asha Salim Ninga indicated that she wanted to engage an advocate, the appellant did not state the reasons for transfer of the case file to the District Court. Having heard them, the Primary Court advised them on the procedure to be complied with. It proceeded with other stages of probate cause.

Being dissatisfied with the proceedings and decision of the Primary Court, the appellant filed an application before the District Court of Kinondoni in Misc. Civil Application No. 224 of 2020. She moved the District Court to be pleased to call for and examine the records of Primary Court in Probate and Administration Cause No. 134 of 2020 for purposes of satisfying itself of the correctness, legality, regularity and propriety of the proceedings, decision and order thereon dated 22nd June, 2020 and revise the same.

After hearing both parties, the District Court held, among other, that the only remedy available to the appellant was to move the Primary Court to revoke and annul appointment of the respondent as administratrix. It went

on to dismiss the application and advise the parties to seek the appropriate remedy in the Primary Court.

Still aggrieved, the appellant has filed an appeal before this Court. Her counsel raised four grounds of appeal which are produced as hereunder:

1. *That the Court erred in law and fact in failing to exercise jurisdiction vested on it hence occasioning injustice to the Appellant.*
2. *That the Court erred in law and fact in acting contrary to the law, failing to correctly apply the law, unreasonably or without any justifiable reason dishonouring the doctrine of binding precedent hence prejudicing the Appellant.*
3. *That the Court erred in law and fact in completely misconceiving the gist of the application, the facts supporting it, the applicable law, misdirected itself on the remedies sought and the submissions made hence unjustly dismissing the application.*
4. *That the Court erred in law and fact in dismissing the application based on its own facts which are alien to the Appellant and counsel or reading from quite a different page.*

When this matter was called on for hearing, the appellant appeared in person and was represented by Mr. Amin Mshana, learned advocate assisted by Mr. Rochus Kasenga, also learned advocate. The hearing proceeded in the absence of the respondent who defaulted to appear without notice.

In the course of composing the judgment, the Court noticed that the ruling which gave rise to the revision filed in the District Court and the present appeal was not signed by the assessors who sat with the learned magistrate of the trial court. On that account, the Court found it necessary recall the parties to address it if the ruling or judgment of the primary court was issued in accordance with the law. This time, the respondent was represented by Mr. Peter Madaha, learned advocate. He was granted leave to submit on the issue raised by the Court.

Responding to that issue, Mr. Mshana conceded that the ruling of the primary court was not signed by the assessors. It was his view that the said omission suggest that the assessors did not participate in making the decision thereby contravening section 7 of the Magistrates' Courts Act, Cap. 11, R.E., 2019 and rule 3(1) of the Magistrate Courts (Primary Courts) (Judgment of Court) Rules, GN No. 2 of 1988. It was his further submission the said anomaly suggests that there is no ruling passed by the primary court and that the assessors were not involved. He was of the further view that the said anomaly cannot be cured by section 37 of the MCA on the account that the applicant was prejudiced as indicated in her application for revision filed in the District Court. That said, he prayed that the proceedings and decision of the primary court and district court be quashed for want of judgment or ruling of the primary court.

On his part, Mr. Madaha was of the view that the assessors participated during the hearing of the matter. He named them as Paulina and Mgomba. However, the learned counsel conceded that the assessors did not sign the typed judgment/ruling. He went on to submit that the omission to sign judgment is an incurable irregularity. To cement his argument, he cited the cases of **Valentina Shabrina vs Lepord Daudi**, PC Civil Appeal No. 11 of 2022, HCT at DSM, **Benezeth Nashon vs Paschal Mbakile**, PC Criminal Appeal NO. 4 of 2021 and **Bikara Erasto vs Penina Erasto** and Others, PC Probate Appeal No. 7 of 2021 (all unreported). He was of the view that the proper recourse is to quash the decisions of the primary court and district court and remit the case file to the primary court with direction of signing the ruling in accordance with law. The learned counsel contented that nothing to suggest that the appellant was prejudiced.

Considering that the issue raised by the Court goes to the root of the matter, it will be addressed first before considering the grounds of appeal.

Mr. Mshana had nothing to submit in rejoinder.

Having considered the contending submissions, I am of the view that the issue raised by the Court is determined by addressing the question whether the trial court issued a ruling. This issue is governed by rule 53 (2) and (3) of the Magistrate's Courts (Civil Procedure in Primary Courts) Rules, 1964 which

provides for the form and pronouncement of decision of the primary court. It stipulates:

> *"53. (1) At the conclusion of the hearing or on a later day fixed by the court, the court shall give its decision.*
>
> *(2) Every decision shall–*
>
> *(a) be in writing;*
>
> *(b)* ***be signed by the magistrate who heard the proceeding****;*
>
> *(c) be pronounced in open court; and*
>
> *(d) be dated as of the day on which it is pronounced.*
>
> *Provided that clerical or arithmetical mistakes or errors arising from any accidental slip or omission, may be corrected before the close of the proceedings and in the presence of the parties.* (Emphasize supplied).

From the above quoted provision, it is the legal requirement that the judgment of the primary court must be signed by the magistrate who heard the proceedings and pronounced in the open court.

However, the record bears it out that the matter giving rise to this appeal was heard by a magistrate and two assessors as mandatorily required by section 7 of the MCA. In that regard, the decision of the primary court was arrived at and made in accordance with rule 3(1) and (2) of the Rules which provides as follows:

> *"3. (1) Where in any proceedings the court has heard all the evidence or matters pertaining to the issue to be*

determined by the court, ***the magistrate shall proceed to consult with the assessors present, with the view of reaching a decision of the court****.*

(2) If all the members of the court agree on one decision, the magistrate ***shall proceed to record the decision or judgment of the court which shall be signed by all the members.***

(3) For the avoidance of doubt a magistrate shall not, in lieu of or in addition to, the consultations referred to in sub-rule (1) of this Rule, be entitled to sum up to the other members of the court." (Emphasize supplied).

As it can be glanced from the above cited provision, the assessors were required to participate in making decision of the primary court. Thus, the trial magistrate was expected to consult them and proceed to compose a judgment or ruling. At the end of the day, the judgment or ruling was required to be signed by the trial magistrate and assessors who heard the evidence or matters subject to the decision. See also the case of **Neli Manase Foya vs Damian Mlinga**, Civil Appeal No. 25 of 2002 (unreported) where it was held that:-

"*It is evident from sub rule (2) above that all members of the court are required to participate in the decision making process of the court. Assessors are members of the court, co – equal with the magistrate. After they have completed hearing the evidence from the parties, the stage is then set for the magistrate to consult with them in order to reach a decision of the court. This*

presupposes that before the court reaches a decision, there will be a conference of the members of the court to deliberate on the issues before them and reach a decision. In such a case, the magistrate will write down the decision, which will then be signed by all members of the court." (Emphasize supplied)

Pursuant to the record at hand, the probate cause was heard on 22nd June, 2022. As rightly observed by Mr. Madaha, the learned trial magistrate sat with two assessors namely, Pauline and Mgomba. Thus, section 7 of the MCA was complied with.

As for the ruling, the case file has no handwritten ruling. It turned out that the learned trial magistrate typed a ruling which was pronounced on 22nd June, 2022. However, both assessors did not sign the ruling which appointed the respondent as administratrix of the estate of the deceased. The said omission implies that the assessors did not participate in making the decision. On that account the ruling leading to the revision filed in the District Court and the present appeal is a nullity for contravening rule 3 (2) of the Rules. This position was stated in the cases of **Valentina Shabrina** (supra), **Benezeth Nashon**, (supra) and **Bikara Erasto** (supra) cited by Mr. Madaha.

The present appeal is incompetent for want of decision made by the Primary Court. I therefore find no need of addressing the appeal on merit.

In view thereof, I exercise the revisionary powers bestowed upon this Court by nullifying and quashing the ruling of the Kawe Primary Court dated 22nd June, 2020. In the result, the proceedings and orders made after 22nd June, 2022, including the proceedings and ruling of the District Court in Misc. Civil Application No. 224 of 2020 are also a nullity. I proceed to quash and set them aside. On the way forward, I remit the case file the trial court to compose the ruling afresh in accordance with the law. This being a probate matter, I make no order as to costs.

DATED at DAR ES SALAAM this 17th day of March, 2023.

S.E. KISANYA
JUDGE