

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA SUB REGISTRY

AT MUSOMA

CIVIL APPEAL NO 15 OF 2022

(Arising from the amended ruling in probate Appeal no 06 of 2020 of Musoma District Court)

WAMBURA SAWA 1ST APPELLANT
RUSOBYA SAID 2ND APPELLANT
MAKUKA RUSOBYA 3RD APPELLANT

VERSUS

KAGINA NOTI ZANGORI (Administrator

of the Estate of Zainabu Kagina 1ST RESPONDENT

IBRAHIM ABEID KAGINA (Administrator

of the Estate of Zainabu Kagina.....2ND RESPONDENT

JUDGMENT

16th & 16th March 2023

F. H. Mahimbali, J.:

This appeal dispute traces its origin from a Probate case in which the first appellant who is a wife of the deceased woman by a traditional ritual of *Nyumba ntobo*, claims isolated and distanced from the probate administration of her deceased husband.

The facts of this case may seem to be strange to non-Mara residents. The first appellant was taken by the deceased woman long time (in her childhood) and raised by her. The deceased woman is sibling to the 1st appellant's mother. As she was not blessed by any issue, she later, married her own niece (1st appellant) by a customary ritual popularly known as *nyumba ntobo*. The deceased woman became the husband and the 1st appellant (her niece) became her wife. They were then blessed with two issues. The first appellant then changed status from a niece to wife to her own aunt. The said woman then died, leaving her behind and the two issues. The said wife by "*nyumba ntobo*" now claims inheritance from the estate of her deceased husband.

Now, in what appears as being sidelined by other clan members of the deceased woman (husband by *nyumba ntobo*), the 1st appellant claims inheritance through court's proceedings. The probate case was then filed at the Primary Court and eventually at District Court by way of appeal. I am eager to know the legal status of the wife by *nyumba ntobo* over her deceased husband.

In essence, now she is aggrieved by the decision of Musoma District Court (T. Swai- RM) dated 10th June, 2022, which dismissed her appeal for want of jurisdiction.

The appellants' appeal before this court consists of three grounds namely:

- 1. That, the first appellate Court grossly erred in Law and Fact to hold that, the appellants' Appeal before the District Court was dismissed for want of jurisdiction and competency without giving reasons to that effect.*
- 2. That, the first Appellate Court was totally wrong in facts and Law to introduce and decide on a new point of law on time limitation which was not raised by the advocate for the respondents in Probate Appeal Number 06/2020 in the sense that the same was not among the Preliminary Objections on point of law raised by the respondents.*
- 3. That, the first Appellate Court grossly erred in Law and Facts to dismiss the Appeal before it instead of ordering the appellants to rectify any mistakes or errors (if any) appearing in their appeal to meet the ends of justice.*

When the appeal came for hearing today, only the 1st appellant was present and on the other hand, Mr. Mligo and Ms. Tweve learned advocate appeared for the respondents. This court then *suo-motto* observed that when determining the appeal, the first appellate court raised the issue of

time limitation *suo-motto* and through it, determined the appeal without hearing the parties submissions. I invited parties to address me whether that was right as per law making a decision to a new legal issue without affording parties the right of being heard.

Mr. Mligo learned counsel was of the firm view that what the appellate Magistrate did was not proper as he did so without affording the parties with the right to be heard.

On the side of the first appellant, she argued, if that is the case, then let there be retrial. However, considering that this case has been dealt by the same magistrate for several times and his decisions quashed several times on encountered legal errors, the best recourse was for the said appeal to be determined by another magistrate with jurisdiction argued the 1st appellant.

On the right to be heard, it is settled law that before adverse action or decision is taken against any party, he is to be afforded with the right to be heard. That right being basic, 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 breach

of natural justice (see **North Mara Gold Mine Limited vs Isaac Sultan**, Civil Appeal No 458 of 2020 CAT at Musoma, **Charles Christopher Humphrey Kombe vs Kinondoni Municipal Council**, Civil Appeal No 81 of 2017 and **Yazidi Kassim Mbakileki vs CRDB (1996) LTD and another**, Civil Reference no 14/04 of 2018- all unreported).

On that basis of the above settled position of the law, and having found that the learned appellate magistrate raised and determined the legal issues without hearing the parties, the decision thereof is a nullity. I thus nullify the proceedings of the first appellate court, quash the judgment and set aside the resultant order for dismissal of the appeal for having reached without giving the parties the right to be heard.

As the way forwarded, I hereby order and direct that let the appeal be heard denovo before another magistrate with jurisdiction. The same be expedited.

DATED at MUSOMA this 16th March 2023.



F. H. Mahimbali

Judge

Court: Judgment delivered today in the presence of Mr. Mligo and Ms. Tweve learned counsel the 1st appellant and Mr. Kelvin, RMA.



F. H. Mahimbali

Judge