IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CIVIL REVISION NO. 23 OF 2023

(Originating from Probate Appeal No. 2/2022, Bagamoyo District Court)

AMINA HASSAN KASOMO .....APPLICANT

VERSUS

NASSIR ALLY NASSIR .....1ST RESPONDENT

FATUMA ALLY NASSIR.....2ND RESPONDENT

HAPSA ALLY NASSIR.....3RD RESPONDENT

RASHID ALLY NASSIR.....4TH RESPONDENT

SALUM ALLY NASSIR.....5TH RESPONDENT

SILLA ALLY NASSIR.....6TH RESPONDENT

SAID ALLY NASSIR.....7TH RESPONDENT

FATUMA ALLY NASSIR.....8TH RESPONDENT

SAUDA ALLY NASSIR.....9TH RESPONDENT

MAATUM ALLY NASSIR.....10TH RESPONDENT

MASHUM ALLY NASSIR.....11TH RESPONDENT

ASHURA ALLY NASSIR.....12TH RESPONDENT

MWINYI ALLY NASSIR.....13TH RESPONDENT

RULING

15/12/2022 & 24/03/2023

E. B. LUVANDA, J.

The Applicant above mentioned lodged this revision under the enabling provision of section 44 (1) (a) and (b) of the Magistrate's Court Act, Cap

11 R.E. 2019, moving the Court to call for record and inspect the proceeding orders arising from Probate Appeal No. 02/2022 Bagamoyo District court and set it aside. In the affidavit in support, the Applicant deposed that this application is based of the following grounds: that the first appellate court had no jurisdiction to entertain a probate appeal emanating from complaints which would have been dealt by the primary court; the district court acted in the exercise of the court's jurisdiction illegally and with material irregularity causing injustice to the Applicant; there is an error material to the proceedings involving and result in injustice to the Applicant; the decision of the district court is illegal, irregular and improper.

The Respondents above named, countered that the decision subject for revision arisen from probate appeal. That the district court exercised its appellate jurisdiction to make and deliver the judgment in issue. The decision is appealable to this Court.

Mr. Bwire Benson Kuboja learned Counsel for Applicant paraphrased the four grounds of revision in the affidavit and streamlined into one ground that the district court acted in the exercise of the court's jurisdiction illegally and with material irregularity causing injustice to the Applicant. The learned Counsel submitted that the Respondents had no *locus stand*

(sic, *standi*) to file an appeal in the primary court (sic, district court) since they were not a party to the original suit (sic, probate) in the primary court. He submitted that the Respondents did not institute objection proceedings before the Applicant was granted letters of administration and therefore had no right whatsoever to appeal to the district court to challenge the decision of the primary court. He cited the case of **William Memuruti & Another vs Longishu Memuruti** (Misc. Civil Application No. 74/2017 HCTZ 2195. He submitted that an application for revocation should be made to the same court which made the grants, citing paragraph 5 of page 237 of **Succession and Trust in Tanzania, Theory and Practice,** N.N.N. Nditi (Junior); Rule 9 91) of the primary courts (Administration of Estate) Rules G.N. No. 49/1971.

He submitted that a clan meeting ordered by the district court to be convened, has never been a requirement when one applies for the grant of letters of administration, he cited the case of **Eckson Mtafya vs Michael Mtafya,** Probate Appeal No. 6/2020 TZHC 3604.

In response, **Mr. Juma Nassoro** learned Counsel for Respondents, challenged the legality of the revision, that the Applicant made no prayer moving the Court to exercise its revisional powers, rather moved the Court to exercise powers to inspect the record of the Probate Appeal No. 2/2022.

He submitted that inspection is supervisory powers, the Court has no jurisdiction to set aside the judgment of the district court. He cited section 44 (1) (a) Cap 11 (supra). He submitted that the Court has no jurisdiction to hear and determined an application for revision filed as an alternative to appeal against the decision of the district court. He cited the case of **Moses J. Mwakibete vs Editor Uhuru Shirika la Magazeti ya Chama and National Printing Co. Ltd** (1995) TLR 134, for a proposition that a party who has a right to appeal cannot move the Court for revision. He submitted that this Court lack jurisdiction to try this application for revision on a decision of the district court exercising appellate jurisdiction. That the Applicant ought to invoke section 25 (1) (b) Cap 11 to come to this Court by way of appeal. He submitted in the merit of this application that the substantive law is section 20 (1) (b) of Cap. 11 (supra) which gives right to a person aggrieved with any decision of the primary court save for the decision mentioned in subsection (2) (a) (b) (c) of section 20. He submitted that the appeal was therefore properly before the district court and the district court properly exercised its appellate jurisdiction to quash and set aside the trial court judgment. He submitted that the primary court is decision null and void, because did not consult assessors. He cited rule 3(1) (2) of the Magistrate's Courts (Primary Courts) (Judgment of Court) Rules G.N. No. 2 of 1988; **Agnes**

Severini vs Mussa Mdoe (1989) TLR 164. The learned Counsel submitted that though convening clan meeting is not a requirement of law governing propate proceedings in courts, however such a practice has taken a best practice which reduce conflicts and unnecessary objections and endless litigations on the deceased's estate. He cited **Flora Augustine Mmbando vs Abdul Daud Chang'a** Civil Appeal No. 243/2021 HC DSM;.

On rejoinder, the learned Counsel for Applicant submitted that the issue of jurisdiction of this Court was dismissed by this Court on 26/10/2022. He submitted that the application is made under the provision of section 44(1) (a) Cap 11 and any other enabling provisions of the law. That the cited provision of the law, is suitable in relation to the application made, and the Applicant properly moved the Court to exercise its revision powers. He submitted that the Respondents herein were not party to the original suit in Probate Case (sic, cause) No. 18/2022 and therefore could not file appeal. He submitted that the Respondent's Counsel raised a new matter of assessors, which was not raised at the district court, which is improper. He cited the case of **Haji Seif vs Republic**, Criminal Appeal No. 66/2007.

It is true that the question of jurisdiction raised by the learned Counsel for Respondents in his reply submission, was struck out on 26/10/2022. Equally the issue of assessors, is a new ground, was not adjudicated at the district court. Therefore, they are disregarded.

May be for the sake of clarity, the enabling provision of section 44(1)(a) and (b) Cap 11 (supra), to this application, fall under subpart (b) which is all about Appellate and Revisional Jurisdiction, etc, of the High Court in Relation to Proceedings Originating in District courts and Courts of Resident Magistrates, which is under Part IV with a heading Original Jurisdiction and Powers of, And Appeals, Etc. From District Courts And Courts of Resident Magistrate. Therefore the provision of section 44(1)(a) and (b) confer jurisdiction to the High Court to exercise its additional powers of supervision and revision in relation to matters originating from District courts and Courts of Resident Magistrate, in exercise of its original jurisdiction.

Herein, the impugned decision of the district court was in relation to an appeal originating from the primary court. In other words the district court was sitting as an appellate court and not on exercise of its original jurisdiction. In the circumstances, the proper provision ought to be section 30(1)(a) and (b) with its margin supervision, but under subparagraph (i)

of paragraph (b) to subsection (i), the High Court may revise the proceedings of the district court; or under section section 31 with margin revision. Both sections 30(1) and 31, fall under sub part (c) tilted Appellate and Revisional Jurisdiction of the High Court in Relation to Matters Originating in Primary Courts, which fall under Part III with its heading Jurisdiction And Powers of, And Appeals, Etc. From Primary Courts. However, the omission is curable, because the Applicant had moved the Court with that wrong provision, but along with any other enabling provisions of the law. And therefore this revision is accommodated under that phrase and dealt accordingly under the proper provisions of the law cited above.

The learned Counsel for Applicant submitted that the district court acted in the exercise of the court's jurisdiction illegularity, because the Respondent's herein had no *locus stand (sic, standi)* to file an appeal while were not party to the original suit (sic, probate). The learned Counsel for Respondents in rebuttal submitted that section 20(1)(b) of Cap 11, gives right of appeal to a person aggrieved with any decision of the primary court.

The wording of the provision of section 20 (1) (b) Cap 11 (supra) is very clear, that only a party to the proceedings before the primary court can

and enjoy the right to appeal to the district court against any order or decision arising there from. For clarity I quote,

> *'(1) Save as hereinafter provided –*
> *(a) In proceedings of criminal nature ---*
> *(b) In any other proceedings* ***any party,***
> *If aggrieved by an order or decision of the primary court, may appeal there from to the district court of the district for which the primary court is established'*

The learned Counsel for Respondents did not dispel a fact that the Respondents were not party in Probate Cause No. 18/2022, Mwambao Primary Court. Therefore it was improper for the Respondents to prefer an appeal against the decision of Mwambao Primary Court in Probate Cause No. 18/2022 for which were not party, nor made any appearance by way of objection to a petition by Amina Hassani Kasomo to be appointed to administer the estate of the late Nasir Issa. Therefore the argument of the learned Counsel for Respondents that any person aggrieved with any decision rendered by the primary court can appeal against it, is not backed by any law.

A proper cause to them (Respondents herein) was to seek revocation of the appointment of the Applicant before the same court which made a grant of letters of administration to wit Mwambao Primary Court, then in

case of refusal or aggrievement to any order therein and after having made appearance to the proceedings of the probate before the Primary Court, could be entitled as a matter of law and right to appeal and challenge it to the district court.

In this respect, the district court acted with material illegality and irregularity to receive, entertain, adjudicate and allow the appeal.

By the way I have noted another glaring material error on the judgment of the district court, while the learned Counsels for both Applicant and Respondent, were contemplating that the district revoked the appointment of the Appellant, but in fact that is not the case. Actually the district court did not revoke the appointment of the Applicant herein in the express terms, rather it was somehow by implication, as the first appellate court ended advising litigants to convene an inclusive clan/family meeting for a proposal, although the verdict is vague, as to which proposal and what for. For brevity I quote in extensor the final verdict of the district court,

> *'Having so said, I allow the appeal and order the clan/family meeting to be convened to include appellants and the administrator (s) be proposed'*

This holding is problematic, open up to ambiguity and confusion to the proceeding and litigants.

But all in all, there is no formal revocation of the letters of administration granted to the Applicant.

Frankly speaking, the confusion also was by large attributed by the Respondents on the manner they framed and grounded their appeal. On the first ground they were challenging their non joinder to the suit (sic, probate); second ground challenged *locus stand (sic, standi)* of the Applicant to file suit (sic, probate); third ground challenged the suit (sic, probate) to be time barred; fourth ground faulted the Applicant herein for including the property not owned by the deceased and already distributed. No wonder upon allowing the first ground of appeal, the first appellate court got stuck on how to go about and land to a final verdict. But the answer is that all these complaints by the Respondents ought to be dealt by the court of first instance.

Rule 8 of the Primary Courts (Administration of Estates) Rules, G.N. No. 49 of 1971, provide, I quote,

> *'Subject to the provision of other law for the time being applicable the court may, in the exercise of the jurisdiction conferred on it by the provision of the Fifth Schedule to the Act, but no in derogation thereof, hear and decide any of the following maters, namely-*

(a) --- NA---

(b) --- N.A---

(c) ---N.A---

(d) Any question as to the property, assets or liabilities which vested in or lay on the deceased person at the time of his death'

According to G.N. No. 49/1971, specifically rule 2 define court to mean a primary court.

In this respect, majority of the complaints lodged by the Respondents by way of appeal before the district court ought to have been staged to the court of first instance with prerequisite jurisdiction aforesaid.

Therefore the proceedings of the district court are revised and its judgment quashed.

The Respondents are advised to channel their complaint to a proper forum.

The application is granted. Given the Stance of the matter being probate cause, I make no order as to costs.

E.B. LUVANDA

JUDGE

24/03/2023