IN THE HIGH COURT OF TANZANIA

MBEYA DISTRICT REGISTRY

AT MBEYA

PROBATE APPEAL NO. 10 OF 2022

(Arising from the District Court of Mbeya District at Mbeya in Probate Appeal No. 9 of 2021 Originating from the Primary Court of Mbeya District at Urban in Probate and Administration Cause No. 114 of 2019.)

1. **ZAINABU MWAMBUSI**
2. **IKRIMA YAHAYA FUNDIKIRA**

.....APPELLANTS

VERSUS

1. **ABDULKARIM FUNDIKIRA**
2. **HASHIMU FUNDIKIRA**
3. **HAIDARI KHALIFA ZUBERI**
4. **MUSSA KHALIFA ZUBERI**

.....RESPONDENTS

JUDGMENT

Date of Last Order: 14/02/2023
Date of Judgement: 27/04/2023

NDUNGURU, J.

The 1st appellant, Zainabu Rajabu Mwambusi is the biological mother of Ikrima Yahaya Fundikira (the 2nd appellant) and a step mother of Abdulkarim Fundikira and Hashimu Fundikira (the 1st and 2nd respondents respectively). On 13/11/2019 the Primary Court of Mbeya District, at Urban appointed the appellants as co-administrator of the estates of the late FUNDIKIRA YAHAYA MFAUME. However, upon the application made by the 1st and 2nd respondents before the same court,

their letters of administration were revoked on 19/11/2021 on the reason that they did not perform their duties. Consequently, the Primary Court appointed Haidari Khalifa Zuberi and Mussa Khalifa Zuberi (the 3rd and 4th respondents respectively) to take over the office of the administrator.

Dissatisfied by the revocation and appointment of the 3rd and 4th respondents the appellants appealed to the District Court. In its decision the District Court dismissed the appeal and confirmed the decision of the Primary Court. Further discontented, the appellants preferred this second appeal raising a total of five (5) grounds of appeal as follow:

1. The appellate District Court erred both in law and facts when it heard(sic) that the 2nd respondent was properly served with summons and that he was not denied an opportunity to be heard on the objection proceedings filed by the 1st and 2nd respondents.
2. The appellate District Court erred both in points of law and facts when it heard(sic) that the appointed Administrators namely HAIDARI KHALIFA (3rd respondent) and MUSSA KHALIFA ZUBERI (4th respondent) apart of being witnesses for the 1st and 2nd respondent were not biased against the appellants.
3. The appellate District Court erred both in points of law and facts when it treated the 1st and 2nd respondents as children born out of

wedlock and were not entitled to inherit the property of the late FUNDIKIRA YAHYA MFAUME.

4. The appellate District Court erred both in points of law and facts when it treated the matrimonial house in the name of the late FUNDIKIRA YAHYA MFAUME to be his property to the exclusion of the appellant the widow.
5. The appellate District Court erred both in points of law and facts when it decided that the decision of the primary court was in accordance to Islamic law in forgetting that Islamic law does not recognize children born out of wedlock.

At the hearing of the appeal the appellants were represented by advocate Simon Mwakolo whereas the respondents appeared unrepresented. The Appeal was argued by way of written submissions.

For the reasons to be apparent in due course of this judgment it is my preference to start determining the 1st ground of appeal which is the complaint by the 2nd appellant that he was denied his right to be heard as there was no proof of service of summons for him to appear for hearing.

Arguing for the appeal, regarding the 1st ground counsel for the appellants submitted that the 2nd appellant was denied his right to be heard since the application for revocation was heard in his absence.

According to the counsel, though the District Court held that there was a proof that he was served with summons to appear the record does not show how he was served and no affidavit of a person who served him. Counsel for the appellants relying on the case of **Mohmed Kitwana vs Mohamed Mang'uro,** PC. Civil Appeal No. 193 of 2004 High Court of Tanzania at Dar es Salaam (unreported) where it was held that denial of a right to fair hearing renders the decision void.

In reply, through their joint written submissions, the respondents contended regarding the 1st ground of appeal that the complaint by the 2nd appellant is unmeritorious since the record shows that he was duly served more than once but opted not to enter appearance. They further contended that the fact that the 1st appellant knew the existence of the application the same knowledge automatically applied to the 2nd appellant.

In rejoinder, counsel for the appellants reiterated the submission in chief. He added that the record of the trial court does not confirm the mere words of the trial Magistrate that the 2nd appellant was duly served on that he prayed for nullification of the whole proceedings since it goes contrary to the natural justice of the right to be heard.

I have thoroughly considered the parties' submissions, the record and the law. The issue regarding the 1st ground of appeal is whether the 2nd appellant was denied his right to be heard.

As I have introduced hereinabove, the 1st and 2nd appellants were appointed as co-administrators of the estates of the deceased, the late Fundikira Yahaya Mfaume. They were however revoked from the office and other administrators appointed following the application for revocation filed by the 1st and 2nd respondents. There is no dispute that 2nd appellant was revoked together with the 1st appellant in his absence. This means that the decision of revoking the 2nd appellant was arrived at without him showing course or giving evidence why his office which he held with the 1st appellant should not be revoked.

According to the counsel for the appellants, the 2nd appellant was not heard due to the reason that he was not served with summons to appear. On their part, the respondents maintained that he was served many times but opted not to enter appearance. The respondents also argued that since the 1st appellant appeared it was an automatic proof that the 2nd appellant had knowledge of the existence of the application for revocation. Their line of argument also formed the base of District Court's decision.

Looking at the nature of the ground of appeal and the arguments by the parties the complaint was made as collective grounds of appeal for both appellants whereas it involves the 2nd appellant only. This means that in the same petition of appeal one appellant is complaining of being denied his right to be heard while the other is challenging the merits of the decision in both lower courts. The minor question is whether a party who is complaining that he was not duly served to appear as the 2nd appellant is doing has an automatic right to appeal.

The answer is provided under Rule 30 (1) of the Magistrates' Courts (Civil Procedure in Primary Courts) Rules, GN. Nos. 310 of 1964-119 of 1983, which provides that:

> *"Where a claim has been proved and a decision given against a defendant in his absence, the defendant may subject to the provisions of any law for the time being in force relating to the limitation of proceedings,* ***apply to the court for an order to set aside the decision and if the court is satisfied that the summons was not duly served, or that the defendant was prevented by any sufficient cause from appearing when the proceeding was called on for hearing the court shall make an order setting aside the***

decision as against such defendant upon such terms as it shall think fit."

Deriving from the above provision in relation with the matter at hand, as much as the 2nd appellant is complaining that he was not duly served, the available remedy was not to go to the District Court by way of appeal but he ought to go back to the Primary Court to apply for setting aside of the *ex parte* decision upon satisfying it that either the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the proceeding was called on for hearing. The same position has been discussed in a relative number of decisions in this court and by the Court of Appeal of Tanzania (the CAT) in **Jaffari Sanya & Another v Salehe Sadiq Osman**, Civil Appeal No. 119 of 2014 and **Pangea Minerals Ltd v. Petrofuel (T) Limited and 2 Others**, Civil Appeal No. 96 of 2015 (both unreported). The two decisions were also referred by the CAT in the recent case of **Dangote Industries Ltd Tanzania v. Warnercom (T) Limited**, Civil Appeal No. 13 Of 2021, CAT at Dar es Salaam, (unreported). In that case the CAT underscored that:

".....where the defendant intends to challenge both the order to proceed ex parte and the merit of the findings in the ex parte judgment, he cannot challenge the merit of the findings

before dealing with an application to set aside the ex parte judgment first. This principle is based on the long standing rule of procedure that, one cannot go for appeal or other actions to a higher court if there are remedies at the lower. He has to exhaust all available remedies to the lower court first....."

That being the position of the law, the appellants in this matter having complained of the 2nd appellant's to be denied his right to be heard for the application which was determined in his absence ought to have first applied for setting aside of challenged *ex parte* decision against him. The petition of appeal in this court and the one that was filed before the District Court in the first appeal are conspicuous that the 1st appellant is not complaining about *ex parte* decision rather she is complaining of the merits of the decision. The mixture, in my view is a misconception of the law. I hold so because, grievances combined in a single appeal of which each grievance has its own remedy cannot be effectively delt simultaneously. Either the 2nd appellant could have firstly preferred an application for setting aside of the complained decision which was passed *ex parte* against him or would have neglected the complaint and decide to join hands with the 1st appellant to challenge the merits of the decision. This is due to the reason that the law does not bar a party to challenge

the merit of an *ex parte* decision if he does not challenge the order by the trial court to proceed *ex party*. See the illustration in the **Dangote Industries Ltd Tanzania v. Warnercom (T) Limited** (supra).

In the event, the appeal in the first instance i.e in the District Court was not legally competent to be determined thereat. When looking at the decision of the District Court especially on the 1st ground of appeal it is not clear as to whether it was determining the appeal which challenged the trial court's decision denying the appellant an application for setting aside of *ex parte* decision or was determining the merit of the trial court's decision.

Had the District Court considered the nature of the 1st ground of appeal, it would have rejected the entire appeal for being incompetent. Basing on the fact that the District Court proceeded with an incompetent appeal the result reached at was a nullity.

In the circumstances this appeal being emanated from a nullity decision, the same flows in the same truck that is a nullity. Since it is nullity appeal, I have no jurisdiction to decide its merit.

In the upshot, I hereby invoke the revisional powers of this court under section 31(2) of the Magistrates' Courts Act, Cap. 11 R.E 2019 to nullify, quash and set aside of the judgment of the District Court dated

22/06/2022. Considering the fact that parties in this matter are relatives and it is a probate case, I make no order as to costs.

It is so ordered.

D.B. NDUNGURU

JUDGE

27/04/2023