

**THE UNITED REPUBLIC OF TANZANIA**

**(JUDICIARY)**

**THE HIGH COURT**

**(MUSOMA SUB REGISTRY)**

**AT MUSOMA**

**(PC) CIVIL APPEAL No. 1 OF 2023**

*(Arising from the District Court of Musoma at Musoma in Civil Revision No. 16 of 2022; originating from Musoma Urban Primary Court at Musoma in Probate Cause No. 102 OF 2007)*

**1. ATANAS MKAIMA**

**2. ALPHONCE TUNDE &**

**3. FELECIAN MHERE**



..... **APPELLANTS**

*Versus*

**DEOGRATIUS MSELELE JANUARY** ..... **RESPONDENT**

[As Administrator of the estates of late

Benadeta Atanas Changwe]

**JUDGMENT**

24.05.2023 & 24.05.2023

**Mtulya, J.:**

Bibi **Benadeta Atanas Changwe** (the deceased) had expired in 1966. Following the demise of the deceased and the need to administer her properties, **Kikao cha Familia ya Benadeata Atanas Changwe** (the first meeting) was convened on 1<sup>st</sup> September 2007 to appoint an administrator of the deceased's estates. The meeting was attended by **Alphonse Tunde** (chairperson), **Felician Mhere** (secretary), **Kadogo Mkaima** (member), **Pascal Mkaima** (member) and **Atanas Mkaima**

(member). The first meeting finally recommended **Paschal Mkaima** to be an administrator of the deceased's estates. **Paschal Mkaima** then took all necessary steps, including filing of a **Probate Cause No. 102 of 2007** (The cause) before **Musoma Urban Primary Court at Musoma** (the primary court). The primary court heard **Paschal Mkaima** and appointed him as the administrator of the deceased's estates. It was unfortunate that the record of appeal shows that **Paschal Mkaima** was recorded dead on 6<sup>th</sup> July 2021, as per exhibit P.2.

Subsequent to the death of **Paschal Mkaima**, another meeting with different set of members was convened on 21<sup>st</sup> August 2022. The meeting was named: **Kikao cha Ukoo wa Marehemu Benadeta Nyansige Changwe** (second meeting) and had resolved that **Deogratias Mselele January** (the respondent) to be appointed as the new administrator of the deceased's estates. It is unfortunate that the first five (5) members who attended the first meeting were not summoned to appear in the second meeting, which appointed the respondent.

The primary court in the cause, after hearing the respondent, had appointed him to be administrator of the deceased estates. However, before the proceedings of the cause

could take its course for the appointment of the respondent on 7<sup>th</sup> September 2022, the primary court had already received two (2) complaint letters which were drafted and registered in the cause by the chairman and secretary of the first meeting. The first letter titled: **PINGAMIZI LA MAOMBI YA KUTEULIWA MSIMAMIZI WA MIRATHI YA MAREHEMU BENADETA ATANAS CHANGWE: KUTOANA NA MAOMBI Na. 50 YA 2022** was drafted by the secretary of the first meeting on 27<sup>th</sup> June 2022 and the second letter titled: **MIRATHI Na 102 YA 2007: MAREHEMU BENADETA ATANAS CHANGWE**, was written by the chairman of the first meeting on 17<sup>th</sup> August, 2022.

The record of appeal shows that the primary court in the cause was then called on 9<sup>th</sup> August 2022 to issue necessary orders. However, the primary court had decline to consider the letters of protests and necessary orders. The proceedings of the day had remained mute, despite presence of the learned magistrate and his court clerk.

The primary court in the cause had then decided to summon the respondent on 7<sup>th</sup> September 2022 to register relevant materials in favour of the appointment. After registration of all necessary materials in the cause, the primary

court had determined the cause in favor of the respondent. The determination of the primary court had aggrieved some of the members of the first meeting, namely; **Atanas Mkaima, Alphonse Tunde** and **Felician Mhere** (the appellants) hence preferred **Civil Revision No. 16 of 2022** (the revision) before the **District Court of Musoma at Musoma** (the district court). After the registration of all relevant materials the district court had decided the revision in favor of the respondent and at page 5 of the judgment stated that:

*In my considered view, I do not see any error in law in the proceedings and decision of the trial court.*

The reasoning of the district court in the revision is displayed at page 5 & 6 of the judgment and was based on the authorities in Rule 9 (1) of the **Primary Court (Administration of Estate) Rules**, GN No. 49 of 1971 (the Rules) and Rules 2 (c) & 5 of the **Fifth Schedule to the Magistrates' Courts Act** [Cap. 11 R. E. 2019] (the schedule). Both the decision and reasoning of the district court aggrieved the appellants hence preferred **(PC) Civil Appeal No. 1 of 2023** (the appeal) in this court complaining on the right to be heard and participate in the administration of the deceased's estates and failure of the primary court to resolve the

two complaints letters registered by the chairman and secretary of the first meeting. Today, when the appeal was scheduled for hearing, the parties appeared themselves without any legal representation and had very brief submissions.

The first appellant submitted that the procedure of appointing the respondent had declined summons to the appellants to enjoy the right to be heard. In his opinion, *mchakato wa mirathi ulienda kinyemela*, whereas the second appellant complained that the process took local procedures instead of court legal procedures. According to him, the respondent *alichaguliwa kienyeji enyeji*. The third appellant on his part had complained that the second meeting avoided necessary heirs of the deceased's estates and was convened by a small group of persons with their secret agenda, which was supported by the learned primary court magistrate.

In authenticating his submission, the third appellant contended that the primary court in the cause had received two important letters of complaint from the chairman and secretary of the first meeting, but had failed to consider and resolve them before hearing of the cause. According to him even the hearing proceedings itself was conducted by two persons only the

respondent and learned primary court magistrate. In his opinion:  
*mchakato wa mirathi haukufuatwa.*

Replying submissions of the appellants, the respondent contended that the appellants were invited in the second meeting, but had declined to register their attendance hence they had forgone their right to be heard. In his opinion, all legal requirements were followed by the primary court in the cause hence there is no need to disturb the decision of the primary court.

Rejoining the submission of the respondent, the first and second appellant insisted their previous submissions whereas the third appellant submitted that there is no evidence on record showing that the appellants had declined appearance in the second meeting. According to him the respondent and learned primary court magistrate had a secret agenda with a purpose.

I have perused the record and found the two (2) letters of protest in the appointment of the respondent filed in the primary court before hearing proceedings of the cause on 7<sup>th</sup> September 2022. It is unfortunate that the primary court was called on 9<sup>th</sup> August 2022 for necessary orders, but the learned primary court magistrate had declined determination of the complaints

displayed in the letters, including the complaint on the cited **Application No. 50 of 2022**. However, on 7<sup>th</sup> September 2022, the learned magistrate had proceeded with the respondent's hearing before he was sworn in accordance to the laws regulating oaths. Finally, on 18<sup>th</sup> October 2022, the primary court had resolved the cause in favor of the appointment of the respondent.

From the record, it is obvious that the primary court had declined to resolve important issues in the letters as registered by the secretary and chairman of the first meeting. It is also unfortunate that the respondent registered relevant materials in the cause without oath. Similarly, the record is mute on citation of the cause to let all interested parties aware of the cause as per requirement of the law (see: **Waheeda Yakub Selemani v. Mary Atupele Mungai & Another** (PC) Civil Revision No. 34 of 2020 and **Lucas Samike @ Mponeja v. Ndalaha Amani @ Mange**, (PC) Probate Appeal No. 16 of 2021; and **Hadija Said Matika v. Awesa Said Matika**, (PC) Civil Appeal No. 2 of 2016).

Two months ago, specifically on 1<sup>st</sup> March 2022, when interpreting the provisions in Rule 9 (1) of the Rules, the indicated precedent of **Lucas Samike @ Mponeja v. Ndalaha**

**Amani @ Mange** (supra), at page 9 of the judgment, had resolved that:

*...the law was crafted in a way that all probate matters in respect of the same deceased should be centralized and **all interested parties must be informed**. That is why, if there is any person who is not satisfied with the appointment of the administrator, the first remedy thereof is to apply for revocation or annulment before the court which granted the administration.*

(Emphasis supplied).

The practice of this court shows further that, when a protest or caveat has been registered in the probate cause, it has to be resolved before the hearing of the application for appointment can take its course (see: **Edward Stephen Ntwale v. Christina Stephen Ntwale**, (PC) Probate Appeal No. 8 of 2020). In the present appeal, the primary court did not order for citation for all interested parties to be informed of the cause and ignored the caveat registered by the second and third appellants. This is precisely declined of the right to be heard on part of the primary court, which is not only a breach constitutional right enacted



under article 13 (6) (a) of the **Constitution of the United Republic of Tanzania** [Cap. 2 R. E. 2002] (the Constitution), but also a violation of human rights which are protected and promoted by this court (see: **Judge In Charge, High Court at Arusha & The Attorney General v. Nin Munuo Ng'uni** [2004] TLR 44; **Mbeya Rukwa Auto Parts and Transport Limited v. Jestina George Mwakyoma** [2003] TLR 251).

Having said so and noting the indicated irregularities committed by the primary court move into the merit of the cause, and being aware of the interest of justice involving the same relatives, I set aside all proceedings and quash judgment of the district court in the revision for want of proper record. Similarly, I quash decision of the primary court and set aside proceedings in the cause from 7<sup>th</sup> September 2022 up to 9<sup>th</sup> September 2022, when the primary court delivered its decision.

I further remit the case file to the primary court to proceed from 27<sup>th</sup> June 2022 when first letter of protest was registered in the cause. The proceedings be in must accordance to the law regulating the right to be heard and probate causes. The matter should be heard and resolved to its finality at reasonable time, by another learned magistrate of the primary court with

competent jurisdiction. I do so without costs as this is a probate cause and the parties are relatives from the same family and in any case the faults were caused by the respondent, but blessed by the primary and district courts.

It is so ordered.





F. H. Mtulya

**Judge**

24.05.2022

This Judgment was delivered in Chambers under Seal of this court in the presence of the first appellant, **Mr. Atanas Mkaima**, second appellant, **Mr. Alphonse Tunde** and in the presence of the respondent, **Mr. Deogratias Mselele January**.



F. H. Mtulya

**Judge**

24.05.2022