

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF BUKOBA

AT BUKOBA

(PC) CIVIL APPEAL NO. 41 OF 2022

(Arising from Bukoba District Court Misc. Civil Application No. 3 of 2022 and Probate Application No. 15/2019 of Bukoba Urban Primary Court Originating from Bukoba Urban Primary Court in Probate Cause No. 80 of 1995)

JASSON MUTAGAHYWA KAGISA..... APPELLANT

VERSUS

HELMELINDA BENEDICTO KAHATANO 1ST RESPONDENT

CYRUS SIMON KAGISA..... 2ND RESPONDENT

JUDGMENT

22nd May and 16th June, 2023

BANZI, J.:

The genesis of this appeal emanates from Probate Cause No. 80 of 1995 before Bukoba Urban Primary Court where the appellant petitioned and was appointed to administer the estate of the late Simon Mwombeki Kagisa who died on 10th June, 1994 at Kibeta within Bukoba Municipality. However, until 2019, the appellant was alleged to have not performed the duty he was entrusted to do, that is, to distribute the estate of the deceased to the rightful heir; the 2nd respondent who is alleged to be the sole heir. As a result, the 1st and 2nd respondents, who are mother and son, respectively, filed Probate Cause No. 15 of 2019 at the same Court seeking revocation of the of the appellant for failure to file inventory for over 26 years after being appointed. On 10th September, 2021, the trial court delivered its decision revoking the

appointment of the appellant and ordered the clan meeting to be convened so as to appoint another administrator.

That decision aggrieved the appellant, however, instead of appealing against the revocation order, he filed Application No. 20 of 2019 before Bukoba Resident Magistrate's Court seeking transfer of Probate Cause No. 80 of 1995 from the Urban Primary Court to that Court. His application was refused because the case before it was no longer pending before the trial court. That decision again aggrieved the appellant who applied for Revision before this Court vide Civil Revision No. 8 of 2020 but the respondents unsuccessfully raised a number objections in which this court dismissed them and allowed the matter to be heard on merit. However, before the hearing could continue, Mr. Mathias Rweyemamu prayed to withdraw the application. The same was granted.

Having withdrawn the application, the appellant applied before the District Court Vide Misc. Civil Application No. 3 of 2022 seeking for extension of time to appeal against the decision of the trial court in Probate Cause No. 15 of 2019 which revoked his appointment. However, before the application was heard, the respondents raised Preliminary Objection containing five Points which may be paraphrased thus; **one**, the application was filed out of time; **two**, that the application was misconceived and bad in law for having confusion and being multiplicity of action and grounded on omnibus appeals;

three, the applicant failed to cite proper provisions of law; **four**, the matters intended to be appealed against are already executed; and **five**, the appeal is accompanied with the intended petition of appeal contrary to the law. Thereafter, the parties were granted leave to argue the PO by way of written submissions. In his ruling, learned magistrate decided to determine the application for extension of time instead of the preliminary point of objection raised by the respondents. Finally, he dismissed the application on the reason that there were no sufficient reasons to extend time.

Aggrieved with that decision, the appellant knocked the doors of this Court armed with three grounds thus:

- 1. That the learned Senior Resident Magistrate grossly erred in law and facts to dismiss an application for extension of time without availing the appellant an (sic) fundamental right of being heard.*
- 2. That the learned Senior Resident Magistrate after had found the Respondent(sic) failed to argue their filed preliminary objection points of law as it was fixed by Court order grossly erred in law and fact for not allowed (sic) the application for extension of time which was not opposed by any of the Respondent(sic).*
- 3. That the learned senior Resident Magistrate after had found that the process of Appeal had been commenced by parties grossly erred in law and fact to involve the Revisionary jurisdiction proceeded by dismissing the*

*Application without jurisdiction to do so and in breach
the Principals (sic) of natural justice.*

At the hearing, the appellant had legal services of Mr. Mathias Rweyemamu, learned counsel whereas the respondents appeared in person, unrepresented. The parties prayed and were granted leave to argue the appeal by way of written submissions. However, after passing through the grounds of appeal and the submissions of both parties, I am of the view that, the first ground is capable of disposing of the appeal, therefore I will not dwell on the other raised grounds.

Arguing in support of the first ground, Mr. Rweyemamu submitted that, learned Magistrate determined and dismissed the application without affording the appellant with right to be heard which is a breach of natural justice as enshrined under Article 13 (6) (a) of the Constitution of the United Republic of Tanzania. He supported his stance with a number of cases just to mention a few, **Yazidi Kassim Mbakileki v. CRDB (1996) Ltd and Two Others** [2019] TZCA 117 TanzLII and **Pili Ernest v. Moshi Musani** [2021] TZCA 297 TanzLII.

In reply, the respondents argued that, no error was committed by the learned magistrate because the parties were given their right to be heard when they were ordered to argue the preliminary points of objection by way of written submissions but the appellant failed to file reply in his written

submission pursuant to the court's order. Consequently, the hearing of objection proceeded *ex-parte* against him. However, the cited cases have no any relevance to this matter.

Having considered the submissions of both parties, the issue for determination is whether the appeal has merit. After passing through the impugned ruling at page 2, the learned magistrate stated that:

"However, this application is not going to be decided on grounds of objection raised by the respondents for the reasons hereunder I will explain, that when I was perusing the trial court's record and other relative documents in the record associated with this matter, for purpose of preparing this ruling I found that the ground to support application and copy annexed by an applicant has no sufficient reasons to extend the time to file an appeal out of time, the grounds of application state among another thing as illegalities and irregularities, that Probate and Administration Cause No. 80 of 1995 had closed and also the trial magistrate set aside and nullified the proceeding of competent magistrate dated 2.11.1995 without jurisdiction to do so..."

From the above quoted extract, although at that particular moment the matter before him for determination was preliminary objection, but the learned magistrate did not determine the points raised and decided to determine main application for extension of time which he concluded by

dismissing it for lack of sufficient reasons to warrant extension of time. It is very unfortunate that, he did so without affording the parties with right to be heard on the main application. It is important at this juncture to underscore that, right to be heard is not only fundamental but also constitutional. There are a number of cases which laid down the position that, the party to a proceeding should not be condemned unheard even if hearing him would not change the position because by doing so is a breach of fundamental natural justice. For instance, in the case of **Abbas Sherali & Another v. Abdul Sultan Haji Mohamed Fazalboy**, Civil Application No. 33 of 2002 CAT (unreported) it was stated that:

"The right of a party to be heard before adverse action is taken against such party has been stated and emphasized by courts in numerous decisions. That right is so basic that 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 a breach of natural justice."

Therefore, failure to afford parties with their right to be heard, the decision becomes a nullity. In the case at hand, the learned magistrate ordered the parties to argue the objection raised but instead, in his ruling, he determined the application of extension of time which was not argued by the parties. As a result, the raised objection was not determined. It is trite law that, once a preliminary objection is raised, the court should determine

it first before going to the merit of the matter before it. In **Deonesia Onesmo Muyoga and 4 Others v. Emmanuel Luhahula**, Civil Appeal No. 219 of 2020 CAT (unreported), the trial District Court embarked on conducting the trial and handing down judgment without initially resolving the preliminary objection. On appeal to the Court of Appeal it was stated that:

"It is settled law that, once a preliminary objection is raised, it must be determined first before the substantive case is heard and determined. This is pertinent because the whole purpose of a preliminary objection is to make the court consider the first stage much earlier, save the time of the court and the parties by not going into the merits of the case because there is a point of law that would dispose of the matter summarily."


The same position was also stated in the case of **James Burchard Rugemalila v. Republic and Mr. Harbinder Singh Sethi**, Criminal Application No. 59/19 of 2017 CAT (unreported) where it was stated that:

"Once a preliminary point of law is raised, the Court is duty bound to entertain it first and make a decision thereon before proceeding to hear the substantive matter."

From the cited cases herein above, the learned magistrate was required to put everything aside and determine the preliminary objection. However, he decided to determine the application without determining the

preliminary objection first, which is a gross error. With regard to that error, the proceedings and the decision thereof become a nullity.

For that reason, I allow the appeal. The proceedings of Bukoba District Court in Misc. Civil Application No. 3 of 2022 starting from 3rd June, 2022 to the end are hereby nullified and as a result, the ruling dated 30th June, 2022 is quashed. I hereby remit the file to Bukoba District Court for fresh hearing of PO before determination of main application before another Magistrate with competent jurisdiction. As the flaw was caused by court itself and taking into consideration the nature of the dispute, I make no order as to costs. It is so ordered.



I. K. Banzi
JUDGE
16/06/2023

Delivered this 16th day of June, 2023 in the presence of Mr. Mathias Rweyemamu, learned counsel for the appellant who is also present and in the absence of the respondents.



I. K. Banzi
JUDGE
16/06/2023