

**IN THE HIGH COURT OF TANZANIA
(MOROGORO SUB-REGISTRY)
AT MOROGORO**

PC. PROBATE APPEAL NO. 6 OF 2022

(Arising from Probate Appeal No. 14 of 2021 in the District Court of Morogoro, at Morogoro; Originating from the decision of the Morogoro Urban Primary Court in Probate Cause No. 281 of 2020)

BETWEEN

ESNATH CHARLES ITEBA APPELLANT

VERSUS

BERNADETHA CHARLES ITEBA 1ST RESPONDENT

CAROLYNE CHARLES ITEBA 2ND RESPONDENT

JUDGEMENT

14th & 30th June, 2023

CHABA, J.

This is an appeal against the decision of the District Court of Morogoro, at Morogoro in Probate Appeal No. 14 of 2021 which was adjudicated in favour of the respondents.

Briefly, the background of this appeal is to the effect that, before the Urban Primary Court of Morogoro, at Morogoro the appellant and the 1st respondent herein successfully petitioned to be appointed as administratrix of the estates of the deceased, Charles William Iteba who died intestate on 25th My, 2020.



On 21st January, 2021 the first respondent, Bernadetha Charles Iteba filed a caveat, objecting her exclusion from among the children of the late Charles William Iteba in the decision of the Urban Primary Court of Morogoro 2nd December, 2020. According to the trial Court record, the Court registered the objection/caveat and scheduled it for hearing whereby on 19th November, 2021 the trial Court found that, the objector failed to prove her objection and consequently dismissed the objection.

Dissatisfied with the trial Court's decision, the 1st respondent appealed to the District Court of Morogoro, at Morogoro intending to challenge that decision. Upon heard the matter, the first appellate Court in its decision dated 09th June, 2022 allowed the appeal, quashed and set aside the decision of Urban Primary Court of Morogoro and thereafter gave an order to the effect that, the appellant/1st respondent is a biological daughter of the late Charles William Iteba.

Aggrieved by the decision of the first appellate Court, the appellant, **ESNATH CHARLES ITEBA** has now appealed to this Court on the following two grounds of appeal as hereunder: -

1. That, the learned Magistrate erred in law and in facts for failure to evaluate and analyse evidence on record concerning the 2nd respondent's utterance that the 1st respondent is not a biological child of the deceased Charles William Iteba as a result reached to unjust decision.



2. That, the learned Magistrate erred in law and facts in failing to take recognizance of the fact that, paternity is not determined solely by birth certificate but can be clarified through DNA analysis.

By consensus of both parties, leave of the Court was sought and granted to the effect that, this appeal be disposed of by way of written submissions. Both parties adhered to the Court's scheduled orders.


At the hearing of the instant appeal, the appellant enjoyed the service of Mr. Barcoal Deogratus, the learned advocate who prepared and drew the appellant's submission, whilst the 1st respondent enlisted the services of Mr. Ignas Punge, also the learned advocate. For reason better known to herself, the second respondent didn't file her reply submission. At this juncture, I commend and appreciate as well, both sides for their comprehensive submissions which assisted this Court to reach to what I believe, to be a fair and just decision.

Before I begin to address the raised grounds of appeal, I must point out that this being the second appeal, I am inclined to be guided by a settled principle of law underscored by the Court of Appeal of Tanzania in the case of **The Director of Public Prosecutions Vs. Jaffari Mfaume Kawawa [1981] TLR 149** in which the Court stated that, in the second appeal the Court is only entitled to interfere with the concurrent findings of facts made by the courts below only if there is a misdirection or non-direction made. The rationale behind is that, the trial Court having seen the witnesses, is placed in better



position to assess their demeanour and credibility, whereas the second appellate Court assess the same from the record. **See: Mussa Mwaikunda Vs. The Republic**, [2006] TLR 387, **Amratlal D.M t/a Zanzibar Silk Stores Vs A.H. Jariwala t/a Zanzibar Hotel [1980] TLR 31** and **Issa Mgara @ Shuka Vs. Republic**, Criminal Appeal No.37

As hinted earlier on, there are only two grounds of appeal fronted before this Court by the appellant. However, for reasons that will shortly come to light, I need not to reflect and dwell on the details of these two grounds of appeal. I will explain in details. While in the course of perusing the lower Courts records for the purpose of determining the merits of this appeal, I noted an irregularity in the objection proceedings subject of this appeal. Basically, the trial Court proceeding was handled by two different resident magistrates who presided over the matter (Honourable Sara. S. Buya, RM and Honourable Kisaka Ng'humbi, RM). The objection proceedings commenced on 20th October, 2021 and it was reduced into writing by Hon. Buya, RM who heard the evidence of Benardetha Charles Iteba, the caveator. On 4th November, 2021, the case was then taken over by Hon. Ng'humbi, RM who proceeded to hear the evidence of the respondent, Esnath Charles Iteba (the appellant herein) without giving out reasons for the take-over. At the end of the matter, the learned magistrate composed the ruling wherein he dismissed the objection and declared that the caveator (the 1st respondent herein) is not a biological daughter of the late Charles Iteba.



At this juncture, I find it apt to put it clear that, when it comes to the change of hands of the adjudicators in a case, the law does not bar the case to change hands from one magistrate to another. Under Order XVIII, Rule 10 (1) of the Civil Procedure Code, [CAP. 33 R. E, 2019], the law provides: -

"Where a judge or magistrate is prevented by death, transfer or other cause from concluding the trial of a suit, his successor may deal with any evidence or memorandum taken down or made under the foregoing rules as if such evidence or memorandum has been taken down or made by him or under his direction under the said rules and may proceed with the suit from the stage at which his predecessor left it."

The above provision of the law was emphasized in various cases including the cases of **Abdi Masoud Iboma and 3 Others Vs. Republic**, Criminal Appeal No. 116 of 2015, (unreported), and **Kinondoni Municipal Council Vs. Q Consult Limited**, Civil Appeal No. 70 of 2016, which quoted with approval the case of **M/S Georges Centre Limited Vs. The Honourable Attorney General and Another**, Civil Appeal No. 29 of 2016 (unreported), in which the Court of Appeal of Tanzania gave a broader interpretation of the provision and elaborated further that:

"The general premise that can be gathered from the above provision is that, once the trial of a

case has begun before one judicial officer that judicial officer has to bring it to completion unless for some reason, he/she is unable to do that. **The provision cited above imposes upon a successor judge or magistrate an obligation to put on record why he/she has to take up a case that is party heard by another**". [Emphasis added].

In the matter under consideration, the records are clear that no reasons were assigned and / or given out for the change of magistrate who presided over the objection proceedings subject of this appeal from Hon. Sara Buya, RM to Hon. Kisaka Ngh'umbi, RM. It is now a settled law that, the irregularity is fatal and contravenes with the requirement of the law as it was held in the case of **Mariam Samburo (Legal Personal Representative of the Late Ramadhan Abas) Vs. Masoud Mohamed Joshi & 2 Others**, Civil Appeal No. 109 of 2016, CAT at DSM (unreported) at page 8 where the Court observed that: -

"the rationale behind existence of Order XVIII, Rule 10 (1) of the CPC in the effect that, recording of reasons for taking over the trial of the suit by a judge is a mandatory requirement as it promotes accountability on the part of successor judge. This means failure to do so amounts to procedural irregularity which in our

respective views and as rightly stated by Mr. Shayo and Mr. Mtenga, cannot be cured by overriding objective principal suggested by Dr. Lamwai".

The Court observed further at page 10 that: -

"Therefore, in the appeal at hand, we find and hold that, the takeover of the partly heard case by the successor judges mentioned above was highly irregular as there were no reason for succession advanced on record of appeal. We think that the circumstances of the suit which was before the High Court, reasons for successor judges were important especially the first who took over. In the circumstances, we are settled that, failure to by the said successor judge to assign reasons for the reassignment made them to lack jurisdiction to take over the trial of the suit and therefore, the entire proceedings as well as the judgment and decree are nullity."

Guided by the above authorities, there is no doubt that the irregularity goes to the root of the matter and it renders the proceedings of the successor magistrate and the entire ruling a nullity on the ground that the successor magistrate (Hon. Kisaka Ng'umbi, RM) failed to assign reasons for taking over

the trial of the suit or change of magistrate, hence lacked the requisite jurisdiction to try the case.

Having so found, I proceed to invoke the revisionary powers vested to this Court pursuant to the provision of section 30 (1) (b) (iii) of the Magistrates Courts Act [CAP. 11 R. E, 2019] (the MCA) and nullify the proceedings of the trial Court recorded from 4th day of November, 2021 where the successor magistrate took over the conduct of the case and quash the ruling and orders thereof. In similar way, the proceedings, judgment and decree of the District Court of Morogoro, at Morogoro in Probate Appeal No. 14 of 2021 and any other orders stemmed therefrom are also a nullity. Thus, the same are hereby quashed and set aside.

As a consequence, I order that the case file be remitted back to the trial Court before another Resident Magistrate to expeditiously proceed with the determination of the objection / caveat proceedings from where the predecessor resident magistrate ended. Since the nature of this case attracts no costs, I make no order as to costs as the error emanated from the trial Court itself. **Order accordingly.**

DATED at MOROGORO this 30th day of June, 2023.




M. J. CHABA

JUDGE

30/06/2023