THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA DISTRICT REGISTRY

AT MBEYA

PROBATE APPEAL NO. 11 OF 2022

(Arising from the District Court of Rungwe District at Tukuyu in Revision No. 1 of 2022 Originating from the Primary Court of Rungwe District at Katumba in Probate and Administration Cause No. 1 of 2021.)

1. LAZARO S/O MWAKASEGE
2. ANTONY S/O MWAKASEGE } **.....APPELLANTS**
3. GEORGE S/O MWAKASEGE

VERSUS

GABRIEL S/O MWAKASEGE .....RESPONDENT

JUDGMENT

Date of Last Order: 23/06/2023

Date of Judgement: 23/08/2023

Ndunguru, J.

The appellants; Lazaro Mwakasege, Anthony Mwakasege and George Mwakasege and the respondent, Gabriel Mwakasege are siblings to one father, the late Peter Mkwakasege Mwakatalika (the deceased). They are quarrelling over the estate of the deceased. The appellants are

in this court challenging the decision of the District Court which dismissed their application for revision in Civil Revision No. 1 of 2022.

Facts leading to this appeal are not complicated as they can be grained from the record. They are as follows; before the Primary Court of Rungwe District at Katumba through probate and administration cause No. 1 of 2021, (henceforth the administration), the respondent was appointed as an administrator of the deceased's estates. He thereafter collected and distributed the same to the heirs, including the appellants and filed inventory on 26/08/2021. Consequently, on 07/09/2021 the administration was marked closed and the respondent was discharged from his duties as the administrator. Seemingly, the appellants were dissatisfied with the distribution, on 5th May 2022 they filed an application for revision before the District Court seeking to revise the proceedings and decision of the Primary Court on the administration.

The application in the District Court was resisted by the respondent. Apart from being protested, the respondent's counsel also raised a preliminary objection on points of law among others that the application was unmaintainable for being overtaken by event. Counsel submitted that upon the respondent filed inventory and the

administration being marked closed, nothing was left for the District Court to revise. The appellants through their counsel maintained that the District Court is vested with powers to intervene the process in course of administration since the heirs were not called before the Primary Court to state if they were satisfied with the distribution of the estates hence, they were condemned unheard.

Having heard the parties' submissions about the preliminary objection the District Court sustained the same, as the result it dismissed the application and advised the parties that whoever aggrieved by the decision of the Primary Court might have resorted to other remedies such as suing the respondent or subjecting him to criminal proceedings.

Discontented by the District Court findings the appellants approached this court with the instant appeal advancing seven (7) grounds of appeal as follows:

1. The learned District Court's Magistrate erred for ignoring to exercise its revisional powers without any justifiable reasons.
2. That the learned District Court's Magistrate erred in law and facts to upheld(sic) preliminary objection of the respondent without considering the cardinal principle of overriding objective.

3. That the learned District Court's Magistrate erred in law and facts to ignore the right of to be heard for the appellants, which is the constitution rights.
4. That the learned District Court's Magistrate fails to exercise its revisional power hence it fails to discover that the Primary Court of Rungwe at Katumba had no jurisdiction to hear the probate of Christian deceased.
5. That the learned District Court's Magistrate erred in law and facts to order the costs in probate case without giving any exceptional reason to do so.
6. That the the learned District Court's Magistrate erred in law and facts to upheld preliminary objection which is mixed with the facts and not pure point of law.
7. Ruling of the District Court is not clear on how it decides the point of preliminary objection of probate case number 1/2022 while the inventory of that probate filed in 2021.

By the consent of the parties and the leave of the Court, the appeal was heard by written submissions. The appellants appeared unrepresented whereas the respondent was represented by Mr. Luka Ngogo, learned advocate.

Submitting in support of the appeal, the appellants appear to have abandoned other grounds and opted to argue the 1st ground only. They amplified that since the District Court has revisional jurisdiction under section 22(1) and (2) of the MCA would have exercised it and if found the decision of the PRIMARY COURT irregular or illegal would have ordered the PRIMARY COURT to re-open the file and follow legal procedures. To that effect they cited the case of **Edina Mfuruki vs Grace Mfuruki** PC Civil Appeal No. 16 of 2021 High Court at Bukoba (unreported).

According to them the circumstances of their case were different from others since there were irregularities in the Primary Court proceedings like; not calling the beneficiary to explain if they agreed with the distribution of the estates and that the administration was filed secretly by the respondent upon forging their signatures. It was their view therefore, that the District Court would have followed this court decision in **Said Matika vs Awesa Said Matika** PC Civil Appeal No. 2 of 2016 at Mtwara where the Court found serious irregularities in the Primary Court proceedings as the result it ordered retrial before another magistrate.

Relying to their submissions, they prayed this court to allow the appeal and order the Probate be re-opened.

In reply, the respondent's counsel stated that the appellants did neither refer to any ground of appeal nor adopt them to make part of their submissions hence it is as good as failure to make submission. Thus, that the appeal be dismissed.

Alternatively, he preferred to argued the 2nd and 6th grounds of appeal that the District Court cannot be faulted for not hearing the application for revision on merit as the matter was unmaintainable. That the District Court lacked jurisdiction as the available remedy after closing the probate was not to apply for revision. He held the view that the DISTRICT COURT was proper to start disposing the PO since it was a point of law. To reinforce his view, he referred this court to the case of **Khaji Abubakar Athumani vs Daud Lyakugile t/a Aluminium and Another** Civil Appeal No. 86 of 2018.

The counsel went on stating that the District Court could not have applied section 22 (1) (2) after it upheld the PO. That it rightly upheld the PO as per the Court of Appeal decision in the case of **Ahmed Mohamed Al Laamar vs Fatuma Bakari & Asha Bakari** Civil Appeal

No. 71 of 2012 where the remedy available after closing probate is to sue or institute criminal proceedings.

He distinguished the case of **Hadija Said Matika** cited by the appellants that it is different from the instant matter since in that case the probate was not yet closed but was pending. On the strength of his submissions, he urged this court to dismiss the appeal with costs.

In their rejoinder submissions, the appellants insisted that the District Court has revisional jurisdiction disregarding if the probate had been already closed. They said that the case of **Saada Rashid** cited by the respondent's counsel is distinguishable since *functus officio* principle enunciated therein is applicable to the same trial court in this matter the Primary Court and not the higher court in this matter the District Court in exercise of its revisional powers. They insisted the appeal to be allow with costs.

I have dispassionately followed the rival submissions by the parties. Looking at their arguments, no doubt that they have singled out the issue of whether the District Court was proper to uphold the PO raised by the respondent. As I have stated earlier, the District Court dismissed the application for revision filed by the appellants on the reason that after the administrator having filed inventory and the

administration cause being closed nothing was left worthy to be revised. This court will thus deliberate on whether the District Court was legally proper in its findings.

The action taken by the appellants of challenging the administration cause which has been already marked closed by the trial court is not novel in our jurisdiction. The Court of Appeal of Tanzania had once confronted with the situation of the same nature in **Ahmed Mohamed Al Laamar vs Fatuma Bakari & Asha Bakari** (supra). In that case, the Court had this to say; I quote a relevant part:

> *"....the appellant had already discharged his duties of executing the will, whether honestly or otherwise, and had already exhibited the inventory and accounts in the High Court, there was no granted probate which could have been revoked or annulled....."*

In the instant matter, the record is to the effect that, on 26/08/2021 the respondent presented the inventory before the Primary Court and on 07/09/2021 the administration cause was marked closed. Legally, the respondent as an administrator of the estates had already discharged his duties of distributing estates, whether honestly or otherwise. Relatively, the action of marking the probate or administration

cause closed is as good as execution of a decree which its effect once the decree is executed one cannot successfully apply for setting it aside. The same was observed by way of comparison in the **Ahmed Mohamed Al Laamar case** (supra) where it was said that:

> *"...In our respectful opinion, both common sense and logic dictate that one can only annul, repeal, vacate, put to an end, etc, what was previously granted or passed and is still operative or existing.* ***Nothing which has already come to an end can be put to an end or vacated, etc. That's why, for instance, no stay order can be passed to stay execution of a decree which has already been executed****..."* (Emphasis is mine)

In the matter at hand, the appellants at the District Court were urging it to revise the decision of the Primary Court and order re-open of the administration cause which had been closed. Under the circumstances, there was no administration which the District Court could have nullified and re-opened. It was thus correct to uphold the PO and dismiss the matter.

Equally, the District Court had in its findings advised the appellants the available remedies where there are grievances on the closed probate or administration cause as the case may be. Going back to the case of **Ahmed Mohamed Al Laamar,** the District Court was proper in its advice. Needless to restate, in that case the CAT illustrated the remedies as follows:

> *"...**One**, if the respondents genuinely believe that the appellant acted in excess of his mandate or wasted the estate and / or subjected it to damage or occasioned any loss to it through negligence, **they are free to sue him**. **Two**, if they are also convinced that he either fraudulently converted some properties forming part of the estate, and / or that he deliberately exhibited a false inventory or account, **they are equally free to institute criminal proceedings against him in accordance with the provisions of the governing laws**"*(Emphasis added).

In the premises, had the appellants adhered to the advice they would have not preferred the instant appeal but heeded to it.

That being said and done, I hereby dismiss the appeal for want of merits. Being the probate matter involving relatives. I make no order as to costs.

It is so ordered.

D.B. NDUNGURU

JUDGE

23/08/2023