IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

THE SUB - REGISTRY OF MWANZA

AT MWANZA

PC CIVIL APPEAL NO. 38 OF 2023

[*Arising from Kwimba District Court Misc. Civil Revision No. 03 of 2023*
Original Probate Cause No. 3 of 2011 of the Buyogo Primary Court]

ABEL KARANI (*administrator of the estates of*
DAUDI DALANGI) **----------APPELLANT**

VERSUS

DANIEL DAUD ----------RESPONDENT

JUDGEMENT

July 25th & August 21st, 2023

Morris, J

The Appellant above stands aggrieved by the ruling of Kwimba District Court in Misc. Civil Revision No. 03 of 2023. He has appealed to this Court with four grounds. He claims that, the District Court granted revision without legal basis; it failed to determine raised issues; it erred in law for failure to consider that the administrator is not legally required to consult heirs; and that revision was pursued against him while his administration had been closed. The first two grounds were filed via a

petition of appeal and the other two were added by his counsel with court's leave on 25/07/2023.

This matter has its genesis from the protracted Buyogo Primary Court's Probate Cause No. 3 of 2011. Through this cause, the appellant was appointed to administer the estate of late Daudi Dalungi. Incidentally, the respondent was unsuccessful in objecting the appointment. Upon lodging the inventory in the court, the appellant appeared before hon. Kattonga, PPCM praying to the court to distribute the deceased's estates to heirs. The respondent was included in the list of heirs.

On 28/04/2011, the court (magistrate and assessors), the appellant, heirs and other members mentioned in the proceedings paid a physical visit to all listed deceased's properties. On 26/5/2011 the subject court, in consultation with and upon request of the appellant, distributed the properties among the heirs. Among other properties, the respondent was given a piece of land located at Hungumalwa along Mwanza-Shinyanga Road (the suit property).

Six years passed uneventfully. However, in 2017, the appellant filed Probate No. 6 of 2017 at Buyogo Primary Court. On appearance, before

Hon. Opudo, RM; he claimed to had not finalized to administer the estate of the deceased. So, he prayed to accomplish the task. His prayer was granted on 22/8/2017. Nevertheless, the probate record is silent as to what transpired regarding administration from 22/8/2017 to 7/11/2022.

The appellant under his capacity as administrator of the estates, however, sued the respondent vide Land Application No. 673 of 2017 before the District Land and Housing Tribunal (DLHT). He claimed against the latter for the houses including the guest house built by respondent on Plot No. 111 Block 'A' Hungumalwa, Kwimba District, Mwanza. To straighten up these proceedings, the subject matter in DLHT dispute was the estate purportedly distributed to the respondent in 2011. DLHT ordered the respondent to demolish his guest house which he had built on the land still claimed as belonging to the deceased's estate. The respondent appealed to this court (Land Appeal No. 27 of 2021). Hon. Massam J, found that the DLHT lacked jurisdiction. Consequently, she quashed the said Tribunal's judgement and decree; set aside the orders therefrom; and ordered that the matter be finalized in the probate court.

Therefrom, on 7/11/2022, the appellant entered appearance again before the Buyogo Primary Court purporting to finalize administration exercise in that court. Accordingly, he prayed for time within which to distribute the deceased's estates. On 21/11/2022 he filed probate form Nos. V and VI indicating distribution of the suit property at 55% to the respondent; and 15% to Elikana Daud, Rhoda Daudi and Diana Daudi each.

The respondent opposed such distribution pattern before the Primary Court. His main argument was that the appellant had, in 2011, moved the court to distribute the estate which exercise culminated in the suit property being given to him. He tendered the court order to such effect (exhibit P1). He also claimed to have had built a guest house thereon ever since. Though the primary court (Hon. Makiya, RM) delivered a ruling on 11/01/2023 acknowledging its order of 26/05/2011 and subsequent accounts filed by the appellant; it still ordered the appellant to file only one form of accounts.

On 16/01/2023, the appellant complied and the Primary Court closed the probate file on 25/01/2023. Disgruntled by the whole procedure, the

respondent applied for revision before the District Court of Kwimba. The latter court (Hon. Jagadi SRM), determined the same on 28/4/2023 thereby ordering the Primary Court to summon heirs and re-distribute the deceased's estate according to law. Further, the District Court directed that applicable inventory and final accounts should be filed accordingly. This time, it was the appellant who became discontented. The present appeal is the manifestation of his aggrievances.

With leave of the Court, parties argued the appeal by way of written submissions. The appellant herein was represented by Advocate Arsein Molland. Advocate Steven Mhoja acted for the respondent. Regarding the 1st ground of appeal, the appellant argued that the District Court decided the application for revision without legal basis. To him, revision should only be preferred to correct an illegality or impropriety. Instead, the impugned revision was preferred as an alternative to appeal. He faulted such approach by the respondent.

The 2nd ground challenges the District Court for having failed to determine the ground raised before it. Mr. Molland submitted that the application by the respondent lacked conformity to what the decision was

reached. In relation to the 3rd ground, it was argued that the administrator has no legal duty to consult heirs. I was referred to the case of ***Joseph Shumbusho v Mary Grace Tigerwa and 2 Others***, CoA Civil Appeal No. 183 of 2016 (unreported). In line with the cited case, the appellant submitted that the deceased's estate is vested in the administrator. And that such person has powers to distribute the properties without consulting the hears. The gist of the last ground was that the duty of the administrator ceased after distributing the deceased estate through filing accounts. Consequently, he should not be pursued in such capacity thereafter.

In reply, it was submitted by the respondent that he justifiably opted for revision as the ruling of the Primary Court was tainted with illegality. To him, there was an addition of heirs without legal basis. That is, there is no administration for life. He also argued that administration of estate is usually done in the interest of heirs. So, he considered that Probate Cause No. 03 of 2011 was illegitimately still pending. In rejoinder submission in chief was reiterated.

I have dispassionately considered the rival submissions of parties. In the interest of coherence of arguments and lucidity of analysis, I will start with the first and last grounds of appeal; jointly. This choice of preference is also due to the outcome of these proceedings, the reasons of which are rendered later in this judgement. Through the picked grounds of appeal, the Court considers whether or not the District Court had justification to invoke its revisionary powers and whether the probate file subject of revision was operationally active.

It is a cardinal law that revision cannot be used as alternative to appeal. When an aggrieved party has a right to appeal; he cannot invoke revisional powers of the superior court. See, for instance, ***Baghayo Gwadu v Michael Ginyau***, CoA Civil Application No. 568/17 of 2017; ***AG v Oysterbay Villas Limited and Kinondoni Municipal Council***, Civil Application No. 168/16 of 2017; and ***Simon Hamis Sanga v Stephen Mafimbo Madwary***, Civil Application No. 193/01 of 2021 (all unreported).

Notwithstanding the foregoing settled-principle, revision can be resorted to in lieu of appeal only in special circumstances [***Hallais Pro-***

Chemie v Wella AG [1996] TLR 269; and ***Felix Lendita v Michael Long'idu***, Civil Application No. 312 of 2017 (unreported)]. Amongst the bases justifying such limitation, is that revisionary powers should not abduct appellate remedies. Reference is made to ***Modest Joseph Temba v Bakari Selemani Simba and Others***, CoA Civil Revision No. 223/17 of 2019(unreported). Additionally, an appeal is a relief which a party enjoys as a matter of statutory set up. Hence, it should not be easily wasted. In this matter, the respondent argued that he applied for revision on the account of the Primary Court proceedings being tainted by illegality. With respect, illegality can and is normally challenged by way of appeal unless circumstances dictate otherwise.

Equally critical is the legal position that when the probate or administration cause is closed, matters therein cannot be undone in form of administration. See the case of ***Ahmed Mohamed Al Laamar v Fatuma Bakari and Another***, CoA Civil Appeal No. 71 of 2012 (unreported). Accordingly, thereafter heirs only have the recourse of suing the retired administrator (in his personal capacity) if they believe the

estate was misappropriated or his administration caused loss out of his negligence.

In the matter at hand, there are two parallel files for this probate at Bugoyo Primary Court. The first file is Probate No. 3 of 2011 whose proceedings ended on 26/5/2011 before Hon. Kattonga PPCM. The court record on that date bears the following court order;

> *"Baada ya mahakama kushauriana na msimamizi wa mirathi kama* ***alivyoomba msimamizi mwenyewe****, ufuatao ni mgawo kwa warithi…"* [literally put, emphasis supplied, the court involved itself in distribution of the estate in consultation with/under the request of the administrator].

Out of the above cause, the respondent was given the suit property. Incidentally, Hon. Makiya RM treated those proceedings as accounts. With all due respect to him, such proceedings were not accounts. Instead, they culminated into the court order. That is, I find no order closing that file rather the court ordered all heirs to be given the copy of the proceedings which contained the distribution of the deceased estate among them.

The second file is probate No. 6 of 2017. As pointed out above, this file was opened after 6 years of the previous distribution order of the court.

This file was purportedly closed on 25/01/2023 by Hon. Makiya RM after the last accounts was filed by the appellant herein.

To me, the second Probate File (No. 6 of 2017) was erroneously opened and matters therein wrongly adjudicated by the same court. Apparently, the previous file on the same deceased estate was still being administered (not closed yet, pursuant to the law). Ironically, the Primary Court delivered its ruling on the respondent's objection while aware of the existence of Probate Cause No. 3 of 2011. However, all subsequent proceedings after 26/5/2011 were in Probate Case No. 6 of 2017. Hence, the ruling and order therefore concerned Probate Cause No.6 of 2017.

As correctly submitted for the appellant, the respondent herein had right to appeal against the decision of Hon. Makiya RM. However, he chose revision in the guise thereof after the probate file was closed. However, from facts on records; and the analysis I have given above, proceedings and resulting orders in Probate Cause No. 6 of 2017 were a total nullity. Had the District Court correctly directed its mind to the background details of the matter before it, it should have worn its revisionary legal garment.

Consequently, it ought to nullify the proceedings of the Buyogo Primary Court in Probate Cause No. 6 of 2017 on such basis.

The appellant herein, as administrator of the estate of the deceased, had invited the primary court to assist him to distribute the estates. Am alive to the law that the court cannot distribute the estates. Such powers are solely vested in the administrator. Following the appellant's failure in appreciation and exercise of his mandate, the deceased properties were distributed with the assistance of the court on 26/5/2011. Undisputed is the glaring fact that the order of the court was not challenged howsoever. That is, no appeal or revision was filed against that distribution mode. It still forms part of the court order to date.

Weirdly, the appellant misled the court after six years that no distribution had been effectuated. It was an inappropriate concoction of another history touching on the integrality of the deceased's estate. On other part of the discussion, is the record that the respondent who was given the suit property developed it by building a guest house thereon. With the new appellant-staged approach a portion of such property is at the verge of being distributed to other heirs over a decade later. That is,

if the subsequent claimed distribution is condoned, the respondent will retain 55% of the suit property and let the remaining percent to three heirs (at 15% each).

It is my well-considered opinion that it is not for a court of law, worth such noble name, to nurture injustice. The respondent, having legitimately acted on the basis of the court order; and having let other heirs retain their respective shares of the estate distributed to them back then, it will amount to blasting hell over him if this Court adjudges that he is not entitled to what the appellant-administrator fully participated in distributing to him. Besides, I take cognizance of the rule that courts should not distribute estates lest they risk being co-administrators. See the cases of ***Samson Kashosha Gabba v Charles Kingongo Gabba*** [1990] TLR 133 and ***Seif Marere v Mwadawa Salumu*** [1995] TLR 253. Still, in the instant matter, as the distribution was done **with full participation** and/or at **due request** of the administrator; in my view, such principle is accordingly not applicable *stricto sensu*.

The above findings notwithstanding, I also think that, if there was any error or illegality on the Primary Court order dated 26/5/2011, the

appellant and/or interested heirs were supposed challenge such order in accordance with the law. That way, the established mistake(s) would have been rectified at the earliest opportunity. Opening and pursuing parallel proceedings thereafter was, to me, consequentially tantamount to fraud.

That said and done, all proceedings and orders from in Probate Case No. 6 of 2017 were a nullity right from the word go. The subsequent revision by Kwimba District Court was equally no better. Hence, this appeal is also not spared. It is found to be incompetent for having arisen from the nullity. I see no need to determine other grounds. This appeal stands struck out accordingly.

However, because of the illegalities, incorrectness and improprieties stated above; this case stood fit for the District Court to use its revisionary powers. It failed to do so. Hence, this Court now exercises its revisionary mandate under section 29 (c) of ***the Magistrates Courts Act***, Cap 11 R.E 2019. All proceedings of Buyogo Primary Court from 21/7/2017 up to 25/1/2023 (under so-called Probate Cause No.6 of 2017) are hereby nullified and orders therefrom set aside. Likewise, the ruling of the District Court dated 28/05/2023 is quashed and set aside for being a nullity.

Consequently, parties are restored back to their *status quo* in line with the order of the Buyogo Primary Court (Hon. Kattonga PPCM) dated 26/5/2011. This being a probate matter, each party will shoulder own costs. It is so ordered. Right of appeal is fully explained to the parties.

C.K.K. Morris

Judge

August 21st, 2023

Judgement is delivered this 21st day of August 2023 in the presence of Daniel Daud, the respondent and in the absence of the appellant.

C.K.K. Morris

Judge

August 21st, 2023