

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF BUKOBA

AT BUKOBA

PROBATE AND ADMINISTRATION CAUSE APPEAL NO. 11 OF 2023

(Arising from Civil Appeal No. 68 of 2020 of Muleba District Court; Originating from Kamachumu Primary Court in Probate and Administration Cause No. 12 of 2018)

VEDASTO JOHN..... APPELLANT

VERSUS

GEORGE RUGANGIRA..... 1ST RESPONDENT

JOSEPH LUENA..... 2ND RESPONDENT

JUDGMENT

13th September & 13th October, 2023

BANZI, J.:

Leoratha Mkabeyendezi (the deceased) died on 9th July, 1995 without being survived by any child. On 9th April, 2018, Modest R. Mushobozi, who is not party to this appeal, petitioned before Kamachumu Primary Court (the trial court) to be appointed as administrator of the estate of the deceased. No sooner than he filed the petition, the appellant together with ten clan members filed the objection before the trial court contending that, the deceased bequeathed all her properties to the appellant through Will whose copy was attached to their objection.

After hearing the objection, the trial court found that, neither Mushobozi nor the appellant was eligible to administer the estate of the

deceased. Therefore, it appointed the respondents as neutral persons to administer that estate. At first, the appellant appealed to Muleba District Court (the first appellate court) where his appeal was struck out for being incompetent. He appealed to this Court which set aside the decision of the first appellate court and granted him 21 days to file proper appeal. After hearing both parties, the first appellate court dismissed the appeal and hence, the appellant approached this Court by lodging the petition of appeal comprising four grounds which can be paraphrased thus; **one**, the special power of attorney was invalid for not being registered; **two**, the testimony of the representative was hearsay evidence; **three**, no sufficient reasons were advanced for the delay of filing a probate cause 23 years after the death of the deceased and **four**, the two courts below ignored the Will of the deceased bequeathing her properties to the appellant.

At the hearing of this appeal, Mr. Derick Zephurine, learned counsel represented the appellant whereas, the respondents enjoyed the legal services of Mr. Fumbuka NgotoIwa, learned counsel. The appeal was argued orally.

Mr. Zephurine began his submission by praying to abandon the fourth ground. Arguing in support of the first and second grounds, he submitted that, after filing the case before the trial court, Mr. Modest Mushobozi gave

special power of attorney to Temistocles to prosecute the case on his behalf. However, the said special power of attorney was not registered as required under section 8 of the Registration of Documents Act [Cap. 117 R.E. 2019] ("the Registration of Documents Act") and thus, it was invalid. He cited the case of **Rashid Salimu (On behalf of Dr. Pilli) v. Sabina Sumari**, Misc. Land Case Appeal No. 51 of 2019 HC Land Division (unreported) to support his point that, unregistered power of attorney has no legal effect.

He added that, section 33 (2) of the Magistrates' Courts Act [Cap. 11 R.E. 2019] ("the MCA") mentioned by the first appellate court in its judgment is not applicable because, the representative mentioned therein must be relative or any member of the household. However, in this case, Temistocles was not a member of household or relative or clan member of the said Modest Mushobozi. Therefore, apart from having unregistered power of attorney, he had no right to represent Modest Mushobozi before the trial court. Consequently, the evidence of Temistocles was hearsay and should not be considered. He cited the case of **Gozibert Rwamulelwa v. Prisca Rwamulelwa** [2005] TLR 417 to support his submission.

Regarding the third ground, he submitted that, although there is no time limit for instituting probate cause, no sufficient reason was advanced by the petitioner on the delay to file probate cause for 23 years after the

death of the deceased. He referred to the cases of **Magnus Simon Mulisa v. Wilson Simon Mulisa and Three Others**, Probate Appeal No. 11 of 2022 HC at Bukoba and **Masanja Luponya v. Elias Lubinza Mashili**, PC Probate Appeal No. 1 of 2020 HC at Shinyanga to back up his point. According to him, failure to advance reasons for the delay, makes the application to be incompetent and its remedy was to strike out. He urged for the appeal to be allowed and the findings of the two courts below be quashed and set aside. Since the proceedings were incompetent, the respondents should be revoked.

Responding to the first and second grounds jointly, Mr. Ngotolwa submitted that, section 33 (2) of the MCA and rule 20 of the Magistrates' Courts (Civil Procedure In Primary Courts) Rules, allow representation in primary courts by any relative or member of the household. According to him, Mushobozi introduced a person he knows although there is no evidence to establish if the two were relatives or if Temistocles was a member of household. He further stated that, although the special power of attorney was not registered, it was enough to express the representation because section 33 does not give the procedure on how to inform the court about such representation. Therefore, the lower courts were right to proceed with this matter. To him, the case of **Rashid Salimu** is distinguishable because

in that case, the dispute was about *locus standi* which is different in this case where the representative represented a party. Therefore, the evidence of the representative was not hearsay because it is taken as the evidence of the party who is represented. It was also his contention that, since Cap. 117 is not applicable in primary courts, Kamachumu Primary Court had jurisdiction to proceed with the matter. According to him, even if the power of attorney would not be there, Modest had informed the court about such representation.

In respect of the third ground, Mr. Ngotolwa stated that, the reasons for delay were stated at page 11 of the trial court proceedings and they were approved by the first appellate court at page 8 of the proceedings. Therefore, the case of **Magnus Simon Mulisa** is not applicable because in that case, the delay was not an issue unlike this case where delay was questioned and answered. He urged the court to consider that the properties of the deceased still exist and they were never distributed to beneficiaries. He prayed the appeal to be dismissed and allow the respondents who are neutral persons to continue with their duties to distribute properties of the deceased so as to end litigation, and the appellant will have right to object for distribution.

In rejoinder, Mr. Zephurine argued that the so-called power of attorney had no leg to stand because the representative was neither relative nor

member of household. Had he been the member of the household, the power of attorney would have stated so. However, the court acted improperly by receiving unregistered power of attorney. According to him, the respondents were appointed on the matter whose basis is flawed. Also, the reason for delay was not disclosed and the appointed administrators are alleged to be neutral but the proceedings show they are not neutral.

Having considered the grounds of appeal, the submissions of both sides, and the records of the two courts below, the issue for determination is whether the appeal has merit.

I will begin with the first and second grounds. Section 33 (2) of the MCA provides that:

*"Subject to the provisions of subsections (1) and (3) of this section and to any rules of court relating to the representation of parties, a **primary court may permit any relative or any member of the household of any party to any proceedings of a civil nature, upon the request of such party, to appear and act for that party.**"*

What I gather from the extract above is that, for another person to be permitted to appear and act for any party to the proceedings before the primary court, the following conditions must be fulfilled; one, the party to

the proceedings must apply to the court; two, such representative must be either a relative or member of the household of the said party to the proceedings. Short of that, the permission would be invalid.

In the matter at hand, the proceedings of 9th April, 2018 found at page 1 of the proceedings reveals that and I quote:

"TAREHE: 9/4/2018

MBELE YA: C.F. NGONYANI

WASHAURI: 1. YUPO

2. YUPO

MWOMBAJI: YUPO

MAOMBI-Kuteuliwa kuwa msimamizi wa mirathi ya marehemu leorata mkabayendezi wa Bukongo Kamachumu.

Mwombaji: Mhe mimi nafanya kazi Dar es Salaam hivyo naomba katika shauri hili.

COURT: Mahakama hii inakubaliana na ombi la mwombaji kwa mujibu wa kifungu No.33(2) MCA Cap RE 2002."

AMRI:

(1) Hearing Tarehe 23/4/2018

(2) Fomu No. II ibandikwe katika mbao za matangazo.

C.F. NGONYANI -RM

9/4/2018"

It is apparent from extract above that, the petitioner Modest R. Mushobozi informed the trial court that, he is working in Dar es Salaam.

However, his request is incomplete because, he did not disclose further if he is requesting to be represented by his relative or member of his household. I have carefully perused on the original record and the same is incomplete just as the typed proceedings. This in itself reveals that, his request was not complete enough to be considered and permitted by the trial court. Under these circumstances, even the permission by the trial court was invalid for want of disclosure of relationship between the petitioner and his representative.


Apart from that, in the special power of attorney which the said petitioner appointed Themistocles Kibeo to act on his behalf in Probate Cause No. 12 of 2018, nothing was disclosed to establish that, Themistocles Kibeo is either the relative or member of the household of the petitioner. Besides, the special power of attorney in itself is ineffectual for failure to be registered as required under section 8 of the Registration of Documents Act. In that regard, the said special power of attorney is invalid and cannot be used as the basis of Themistocles to appear and act on behalf of the petitioner Modest R. Mushobozi. Therefore, whatever was testified by Themistocles Kibeo on behalf of the petitioner has no legal legs to stand on, as the trial court's permission granted pursuant to section 33 (2) of the MCA. Consequent to that, even the appointment of the respondents also follows

suit. The first two grounds alone suffice to dispose of this appeal and I don't see the need to delve into the remaining ground.

Before I pen off, I find it prudent to comment on the properties of the deceased. At the trial court, the appellant claimed that, the deceased left the Will bequeathing all her properties to him. In their objection, the appellant and his co-objectors attached the copy of the alleged Will. The fact that the appellant was bequeathed all properties of the deceased does not in itself make him the lawful owner because such properties can only be legally transferred to him by executor of the Will through Probate Cause. That is to say, there must be the Probate Cause instituted before the court of competent jurisdiction which will appoint the executor of the Will who will eventually transfer the properties of the deceased to the rightful heir according to the said Will be it the appellant or any other person mentioned therein.

That being said, I find the appeal with merit and I hereby allow it. Consequently, I invoke revisional powers under section 31 of the MCA and nullify the proceedings, quash the judgments and set aside the orders in Probate and Administration Cause No.12 of 2018 before Kamachumu Primary Court and Civil Appeal No. 68 of 2020 before Muleba District Court. Any interested party in the estate of the deceased Leoratha Mkabeyendezi is

directed to file the Probate and Administration Cause before the competent court so that her properties should be formally distributed to rightful heir(s). Owing to the nature of this matter, each party shall bear its own costs. It is so ordered.



I. K. BANZI
JUDGE
13/10/2023

Delivered this 13th day of October, 2023 in the presence of the appellant and in the absence of the respondents.



I. K. BANZI
JUDGE
13/10/2023