

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM**

CIVIL APPEAL NO. 196 OF 2022

(Arising from the judgment of the District Court of Kinondoni at Kinondoni in Revision Case No. 45 of 2021 delivered on 09th November 2022 by Hon. J.A KALUYENDA -PRM)

ADAMU BAKARI SHABANI..... APPELLANT

VERSUS

BUTHANIA ADAM BAKARI1stRESPONDENT

ABDALLAH SAID SHAH.....2nd RESPONDENT

JUDGMENT

MKWIZU, J:

Aggrieved by the judgment of the District Court of Kinondoni at Kinondoni, the appellant lodged a Memorandum of Appeal with six grounds of appeal as follows:

- 1. That the learned Magistrate erred in law and fact by relying on the WILL which is totally defective in the eyes of the law since it lacks the qualities to be the legal declaration*
- 2. That the learned Magistrate erred in law and fact by relying on the Defective Will since the late BAKARI SHABANI HASSAN bequeathed the property namely the House located at BUBUBU which does not belong to him.*

- 3. That the learned Magistrate erred in law and fact by entertaining the Application which was totally out of time to be filed before the District Court of Kinondoni.*
- 4. That the learned Magistrate erred in law and fact by directing the administrator of the estate to distribute the deceased estate as per the WILL which is invalid and defective, contrary to the law regarding the probate and administration of estate directs.*
- 5. That the trial Magistrate erred in law and fact by ignoring the submission of the Respondents and their legal arguments provided to dispute the said Application before the Court*
- 6. That the trial Court erred in Law and facts by relying on the defective application which is incapable of any legal support and hence led him to reach the unfair decision*

The appellant was at the hearing represented by Mr. Hassan Salum learned advocate and the Respondent enjoyed the legal service of Mr George Sang'udi also learned advocate and the appeal was argued through written submission. The 2nd respondent did not file any submissions so the judgment will be considered in line with the filed submissions only.

In his written submissions, the appellant opted to deduce all his grounds to two main complaints censuring the district court for relying on a defective WILL that was made in contravention of the law and entertaining a time-barred revision application.

Arguing the 1st point, the appellant's counsel censured the learned Magistrate for relying on an invalid WILL for two reasons ***one***, that the WILL lacks a witness from the clan member contrary to Rule 19 of the

Local Customary law (Declaration) (No. 4) Order, Government Notice (GN) 436 /1963, the Third schedule, laws of wills (sheria za wosia) in judicature and Application of Laws Act, TANZ, LAWS SUBSIDIARY LEGIS (CAP 358. R.E 2002 (Hereinafter WILLS LAW) Rule 7, in the third schedule on the part of (LAWS OF WILL)

Secondly, through the said WILL the deceased person disinherited his own son, (the Applicant in this case) and bequeathed his property to the grandchild who is the second respondent in this matter and the daughter of the Appellant herein, without reasons contrary to rules 30 and 31 of the **Local Customary law (Declaration) (No. 4) Order, Government Notice (GN) 436 /1963**, the Third schedule, laws of wills (sheria za wosia) in judicature and Application of Laws Act, subsidiary legislation (CAP 358. R.E 2002 (Hereinafter WILLS LAW.))He invited the court to be persuaded by the decision of The **Late Albert Patrick Ndakidemi Between Straton Patrice Ndakidemi and Margareth Albert Ndakidemi, Angela Albert Ndakidemi, Zena Abdallah Athuman, Josephine Christopher Ruta And Fatuma Ramadhani Mnyawi**, Probate And Administration Cause No. 4 Of 2019 pressing the court to declare the said will as invalid.

On the issue of time limitation, the appellant's counsel faulted the resident Magistrate for entertaining a time-barred Application. He contended that Application No. 46 /2021 was filed in the District Court of Kinondoni in October contrary to section 22 (4) of the Magistrate Court Act CAP 11 R.E 2019, prohibiting the filing of revision proceedings from the decision of the primary court after the expiry of the twelve months. And that issue of fraud and mistake considered was not proved and could not, at any rate,

qualify the 1st respondent to apply for revision after the expiration of the prescribed time. He was of the view that 1st respondent (original applicant) ought to have applied for an extension of time which grounds for the delay would have been enumerated for the court's consideration. He lastly implored the court to quash the judgment of the Kinondoni district Court and allow the appeal with cost.

In rebuttal, the respondent's counsel said, the issue of the validity of the WILL was never raised in the trial primary court. It came to feature for the first time in the revision's proceedings at the District Court of Kinondoni. He relied on **Elisa Moses Msaki vs. Yesaya Ngateu Matee** (1990) TLR 90 and **Kenedy Makuza Versus Monalia Microfinance Ltd**, Pc Civil Appeal No. 01 of 2021(Unreported)

The further that, the Primary in Probate Cause No.182 of 2014 had jurisdiction to hear all objections relating to the validity of a WILL as guided by Rule 2 of the Primary Court (administration of Estate) Rules, GN No.49 of 1971 and **Mark Alexander Gaetje & 2others Versus Brigitte Gaetje Defloor**, Civil Revision No. 3 Of 2011(Unreported) contending that the district court being an appellate court has no jurisdiction to determine matters that were neither raised nor determined by the lower court for doing so will be positioning itself in the shoes of the trial court. In support of this argument, he cited the case of **Paschal Juma Ng'wendesha Versus Amos Ndaki**, Land Appeal No. 09 Of 2019 (Unreported)

While admitting that WILL needs to be made in accordance with the Local Customary Law (Declaration No.4) Order, Government Notice (GN) 496/1963 Schedule 1 Laws of Wills. The respondent counsel said the

WILL made by BARAKA SHABANI HASSAN the deceased in this matter complied with the law. The "WILL" was witnessed by two neutral witnesses BRIGADIA JENERALI HABIB NASSORO MBARUKU (RTD) and LT.COL.EZEKIEL JOEL MAYUNGA (RTD); ABDALLAH SAID SHAHA, relative to the deceased; and one STEPHEN S. TONYA, Advocate. He insisted that on page 1 of the said WILL the relative to the deceased one ABDALLAH SAID SHAHA who is also the administrator of the estates of the deceased was present and signed the WILL on 20th June 2013. Citing the decision of this court in **David Samson Shunda & 2 Others Versus Mashimo Kibungi Ndulu**, Pc. Probate Appeal No. 06 Of 2021 (Unreported), the respondent counsel said, in law, the administrator can play both roles, as an administrator and witness of the Will. He implored the court to find the will as valid.

On the issue of the dis-inheriting the deceased son without reason, the learned counsel said, this issue is being brought here for the first time for it was never raised in **Probate Cause No.182 of 2014** (the Primary Court) or **Revision No.45 of 2021**(the District Court). He sought reliance in the decision of this court in **Paschal Juma Ng'wendesha (Supra)**

Distinguishing the cited decision in Probate And Administration Cause No.4/2019, in **The Matter Of Estate of The Late Albert Patrick Ndakidemi Between Straton Patrice Ndakidemi And Margareth Albert Ndakidemi & Others**, (Unreported) **he said**, the court, in this case, dealt with a decision in which the issue of the validity of WILL was at issue in the lower court with a caveat lodged by caveators regarding

the validity of WILL at the court of first instance (Probate Court) which is not the case here.

He said, in this case, the appellant was not mentioned in the WILL as a beneficiary of the deceased estates but was unlawfully replaced instead of the 1st respondent and included as the beneficiary of the deceased estate as exhibited by an inventory lodged on 16/07/2018 titled “*Utekelezaji Ugawajii wa Marathi Mali za Marehemu Bakari Shabani Hassani Nyumba – Segerea*” Watakaokabidhiwa (warithi) Abdulbari Bakari Shabani, Diana Bakari Shabani na Adam Bakari Shabani (Buthaina Adam). He was of the view that the appellant was supposed to file objections about the validity of WILL at the probate Court (the Primary Court) and not at this appellate Court.

On whether Revision No.45 of 2021 filed in the District Court of Kinondoni at Kinondoni was time-barred, the respondent counsel conceded that probate cause No.182 of 2014 was determined by the primary court on 27th May 2014 and the application for Revision No.45/2021 was filed in the district court on 26th October 2021 almost 7 years after the decision in probate cause. He also joined hands with the appellant’s counsel on the proper interpretation of section 22(4) of the MCA, he was quick to add that the respondent had in paragraphs 1, 9, and 11 respectively of the amended affidavit filed in the District Court on 26th October 2021 advanced Disability, Fraud and Continuing wrong as grounds for the excluding the time between the primary court decision to the time of filing the revision application. He said the 1st respondent became aware that she was excluded from the estates of her deceased grandfather when she approached the administrator (2nd Respondent) for the payment of her

school fees in October 2021. He insisted that since there was a concealment of the distribution of the deceased estate to the 1st respondent, such period is under sections 2(2) and 26(a) and (b) of the law of limitation(supra), excludable in reckoning the time. He cited the case of **Stanbic Bank Tanzania Limited Versus M/Stradexim Company Limited**, Civil Appeal No. 75 of 2019 (**Unreported**) **At Dar Es Salaam**. He in conclusion said that Revision Application No.45 of 2021 filed in the District Court of Kinondoni at Kinondoni was not time-barred. He prayed for the dismissal of the appeal with costs.

The appellant's rejoinder submissions are a reiteration of his submissions in chief and therefore I will refrain from reproducing the same in this decision.

I have considerably considered the appeal, the records, and the parties' submissions. The siphoned facts from the records are that the appellant in this appeal is the biological father to the 1st respondent in these proceedings while the 2nd respondent, is an administrator of the estate of the appellant's father (late Bakari Shabani Hassani) who is also the grandfather to the 1st respondent. It is said that the late Bakari Shabani died testate, leaving a will-bequeathing part of his estate to his grandchild, 1st respondent naming the 2nd respondent as the proposed administrator.

Based on that undisputed background, the 2nd respondent petitioned for the letters of administration of the estate of the late Bakari Shabani Hassani) before the Kinondoni Primary Court via Marathi No 182 of 2014. His petition went unopposed and was on 27/6/2014 granted in the presence of all the beneficiaries. During the distribution of the estate, the

1st respondent was not allocated any property. Her portion was handed to her father, the current appellant. The reason disclosed by the records is that the 1st respondent was a minor at that time, so the administrator handed the property to her father, the appellant as a caretaker.

It was not until the year 2021 that the 1st respondent learned that she was excluded from inheriting his grandfather's estate. This was after she had approached the 2nd respondent, the administrator for payment of her school fees where she was notified that her portion of the deceased estate was handled to his father prompting the filing of revision proceeding (No 45 of 2021) against the administrator of the estate(Original petitioner) and her father, appellant in this appeal challenging the appropriateness of the trial court proceedings that blessed the administrator's inventory that had excluded the listed beneficiaries from the deceased estate. Three grounds for revisions raised in Revision No. 45 of 2021 are:

- 1) That this honorable court be pleased to call the records of the proceedings relating to Probate Cause No. 182 of 2014 to satisfy itself as to the correctness and legality of the inventory that was lodged before the Primary court by the Administrator excluding the legal beneficiaries mentioned in the WILL of the late BAKARI SHABANI HASSANI
- 2) That, this Honourable court be pleased to order the 1st respondent to distribute the properties forming the estate of BAKARI SHABANI HASSAN as per his WILL that was left behind by the late BAKARI SHABANI HASSAN
- 3) Any other relief(s) that this honorable court may deem fit and equitable to grant.

After a careful review of the issues brought for determination, the revisions proceedings, and the party's submissions, I found two pertinent legal points to be resolved before further step is taken to resolve the appeal before the court:

(1) whether the district court had a requisite mandate to investigate the legality of the inventory lodged by the administrator in the primary court and order redistribution of the deceased estate in accordance with the will.

(2) whether the appellant, 2nd respondent the revisions proceedings not a party to the trial court proceedings were validly joined in the revisions proceedings.

However, having cropped up during the composition of the judgment, the court is, under the principles of natural justice, duty-bound to call parties to air out their views in respect of the raised points before any decision is made as acting contrary would be to condemning them unheard. This is the law as interpreted in the case of **I.P.T.L Vs. Standard Chartered Bank**, Civil Revision No.1 of 2009 (unreported) where it was held that:

"No decision must be made by any court of justice /body or authority entrusted with the power to determine rights and duties to adversely affect the interests of any person without first giving him a hearing according to the principles of natural justice."

Guided by the above decision, the parties were summoned, informed of the issues, and allowed to address the court on the points. Mr. Hassan Salum Advocate for the appellant maintained that the district court lacked the power to redistribute the deceased estate to the heirs. He contended

that the district court was to investigate and direct the probate court to do what it failed to do.

On whether it was right for the appellant to be joined as a respondent in the Revisions before Kinondoni D/Court. This advocate said it wasn't. He submitted that since the 2nd respondent was the only applicant in that probate application, who had a duty to distribute the deceased estate, then the revision emanating therefrom ought to have been preferred against the original parties and not otherwise. The appellant being not a party to the probate court proceedings, ought not to have formed party in the revision's proceedings.

On the other hand, Mr. Sang'udi advocate for the 1st respondent was of the view that the district court had powers to investigate the inventory and re-distribution of the deceased estates per the deceased's will under section 22 of the Magistrate Courts Act. He said, since the inventory was part of the proceedings of the primary court, the district court had the power to investigate. He contended further that the Court did not assume the power of the redistribution. It directed the Administrators to distribute the deceased estate according to the will. See **Adam Amin Ibrahim V Happy Ibrahim Ahmed**, Probate No 20 of 2020.

On the second point, Mr. Sang'udi submitted that the 2nd respondent in the revision proceedings was properly joined in the revision for he was named as a beneficiary and listed in the inventory and therefore interested party. Relying on the definition of the interested party in the case of **Geoffrey Moses Mapalala V Flora Neema Daudi**, Civil Appeal No. 51 of 2020 Mr. Sangudi said, the joining of the appellant was an appropriate measure taken to afford him a right to be heard. He cited the case of

Mudhihiri Hemedi Mewile V Furaha Chande Kigwalilo, PC Civil Appeal No 15/2020 page 6 to bolster his argument.

Seemingly in the alternative, the 1st respondent counsel argued that should the court find that the appellant was wrongly joined, it should find that there is no injustice caused, and proceed to quash and set aside the revisions proceedings, ruling, and orders emanating therefrom and order a retrial of the revision's proceedings with the original applicant in the revision's proceedings. He cited to the court the case of **Hassan Ng'anzi Halfani V Njama Juma Mbega (A legal representative of Mwanahamisi Njama & Another** Civil Application No 336 of 2020.

The 2nd respondent and the administrator of the deceased estate, had nothing substantial to tell the court, being a lay person, he left the matter for the court's decision.

I will begin with the 2nd issue. As indicated above, the appellant, Adam Bakari Shabani, and the 1st respondent Buthaina Adam Bakari were not parties to the original proceedings at the trial primary court. They only came in through the revision proceedings subject of this appeal. The question posed is, can revision proceedings introduce a new respondent, not a party to the original proceedings? The answer is simply No. It is well-settled in our jurisdiction that the right to challenge a decision on appeal is reserved for the parties to the suit. A nonparty, a total stranger to the decision but adversely affected by a decision can only approach the court through revision proceedings. This is the position **in Halima Hassan Marealle versus PSRC and Tanzania Gemstone Industries Ltd**, Civil Application No. 84 of 1999, Court of Appeal of Tanzania (unreported) where the Court said a third party and stranger to the

proceedings, could not have appealed, and therefore could only protect her interests by instituting the revision. See Also **Ahmed Ally Salum V Ritha Rashid and Another**, Civil Application No. 21 of 1999(CAT Unreported) and **Halais Pro Chemie Industries Ltd. versus A. G. Wella** (1996) TLR 269 to mention just a few.

Nevertheless, this rule does not extend to the respondent. The revision whether by a party to the original suit or a stranger to the original proceedings can only be preferred against the original parties. This is because revision by its nature is not a retrial, the court is called upon to investigate the record as it is and correct the errors identified. The submissions and issues to be argued must only be related to the matters that transpired in the original trial record. The respondent to the revision is a person called to respond or clarify the raised issues. In the end, the court endorses or disproves the applicant's grievances which would result in either changing the trial court's decision or affirming the same. So, it would be absurd, in my view, to join a new party as a respondent in the revision proceedings to respond to matters of which he does not know.

Mr. Sang'udi contended that the appellant was an interested party and therefore correctly joined. I have read the decision of Geoffrey **Moses Mapalala V Flora Neema Daudi** relied upon by Mr. Sang'udi, and that decision is distinguishable. In that decision, the appointment of the administration was challenged by the fact that she was a mere concubine. In resolving the issue, the court defined an interested party stressing that in granting letters of administration the court should, apart from considering the deceased wishes, paramount considerations should be on

whether the applicant has an interest in the estate of the deceased which is not the case here.

The court is thus convinced that the appellant was erroneously added to revision No. 45 of 2021. And since he actively participated in the proceedings, his presence vitiated the entire proceedings. I accordingly quashed the proceedings and set aside the judgment and decree resulting therefrom. The 1st respondent is at liberty to file a fresh revision application if she so wishes. This point alone suffices to dispose of the matter, I will therefore refrain from determining the 1st point.

Having considered the nature of the proceedings and the relationship of the parties, I order each party to bear its costs.

DATED at DAR ES SALAAM this 8th day of **SEPTEMBER** 2023.



E. Y Mkwizu
Judge
8 /9/2023