

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CIVIL APPEAL NO. 9 OF 2023

(C/F Civil Case No. 29 of 2021 of the District Court of Arusha at Arusha)

MATILDA T. PHILIP.....1ST APPELLANT

ELVAISON E. MARO.....2ND APPELLANT

REJENDRA O. SARAIYA.....3RD APPELLANT

VERSUS

MAGRETH THOMAS OLOTU.....RESPONDENT

JUDGMENT

31/08/2023 & 26/10/2023

GWAE, J

Dissatisfied by the decision of the District Court of Arusha at Arusha (the trial court) in Civil Case No. 29 of 2021, the appellants have filed this appeal with the following grounds;

1. That, the honourable trial court erred in law and facts by failure to consider, discuss and resolve all issues raised during trial of the suit hence causing miscarriage of justice to the appellants.
2. That, the honourable court erred in law and in facts by failure to apply the laws governing probate matters and how that

law governs the transfer of ownership of 429,600 shares owned by the late Thomas Philip Olotu to his heirs.

3. That, the honourable trial court erred in law and in fact by relying its decision to the testimonies of first defendant witness, Miss Lulu Abdul Kassim, which contravenes the laws on how the properties of the deceased including shares moves its ownership from the deceased to the heirs.
4. That, the honourable trial court erred in law and in fact by holding that the plaintiff is the legal owner of 429,600 shares while the procedure under the law for those shares to move from previous owner, late Thomas Philip Olotu to his heirs was not complied with.
5. That, the honourable trial court erred in law and in fact in holding that the 429,600 shares is inseparable and inextricability with 179 shares, and that 429,600 shares has incubated from 179 shares, the holding which is not supported by evidence on records and the law.
6. That, the honourable trial court erred in la and in fact in holding that the appellants herein, jointly and severally have curtailed the respondent herein, the plaintiff in lower court, to access and enjoy her rights dully stipulated in exhibit P2 and P6, the fact which is not true and is not supported by evidence on records.
7. That, the honourable trial court failed to evaluate the available evidence on records and the law hence arriving at erroneous and illegal decision.

8. That, the honourable trial court erred in law and in fact basing its decision to the contradictory evidence given by the respondent herein during trial and ignored the strong evidence adduced by the appellants herein.

Primarily, the respondent herein filed a suit in the trial court against the appellants together with CRDB Bank PLC, which is not part in this appeal claiming to be recognised as a sole beneficiary of 179 shares acquired by her father plus the surplus generated from the original shares making 429,600 shares. The respondent further claimed trespass against the appellants herein to be her shares in their attempt to re-distribute 429, 421 shares which were already transmitted to her.

The respondent thus prayed for a declaration that she is the legal owner of all shares allotted to her vide Probate cause No. 11 of 2016 plus the surplus shares and bonus that have generated from the same. A declaration that the act of the appellants herein of re-distributing surplus shares in an already closed Probate and Administrative Cause is illegal. An order sanctioning the CRDB Bank Plc to recognise the respondent as the sole owner of all shares owned by the late Thomas Philip Olotu at her bank plus all surplus shares and bonuses that generated from the original shares. An order sanctioning the CRDB Bank to allow the respondent to

take over the shares and to utilize the same, general damages and cost of the suit.

After hearing of the evidence from both parties, the trial court was satisfied that the respondent proved her case. The trial court its decision relied on the evidence adduced by Miss Lulu Kassim, the bank senior share registration officer whose testimony is to the effect that the one who is entitled to 179 shares is the one who is eligible to own the 429,600 shares. Her reason being that, the share in dispute are the products of the 179 principal shares. Thus, they are inseparable to the principal shares distributed to the respondent. Therefore, the trial court ordered the CRDB Bank to effectively transfer 429,600 shares from the deceased's name to that of the respondent.

Before this court as first appellate court, the appellants enjoyed legal services from the learned advocate one Mr. Gwakisa Sambo, on the other hand, advocate Asubuhi Yoyo, represented the respondent. The hearing of the appellant's appeal was ordered to be conducted by way of written submission.

Reading from the eight (8) grounds of appeal submitted by the appellants herein above, this court is fundamentally called upon to determine two grounds to wit; **one.** Whether the trial court determined

all issues framed, **second**, whether it was proper for the trial court to hold that the respondent is entitled to 429,600 shares originating from the 179 original shares.

Submitting on the first issue Mr. Sambo argued that before the trial court there were four issues framed for determination. However, in its determination the trial court did not determine the fourth issue which was whether the respondent herein had a cause of action against the appellants and thus occasioned miscarriage of justice to the appellants. He supported his argument with the decisions of the Court of Appeal of Tanzania in the case of **Joseph Ndyamukama (Administrator of the Estate of the late Gratian Ndyamukama) vs N.I.C Bank Tanzania Ltd & 2 Others**, Civil Appeal No. 239 of 2017 (Unreported) and **Stanbic Bank Tanzania Ltd vs Trust Engineering Works Ltd**, Civil Appeal No. 374 of 2019 (Unreported). The counsel thus prayed this court to set aside the judgment and decree of the trial court and remit the record back for composition of the judgment by another magistrate.

Responding to the above, Mr. Yoyo counsel for the respondent replied that all issues were determined by the trial court and nothing was left unattended. Arguing on the supported cases cited by the appellants'

counsel, Mr. Yoyo was of the view that they are distinguishable from the circumstances of the matter at hand and cannot be relied upon.

This issue does not need to detain me much and my answer to it is in affirmative on the following reason; it is apparent from the record that on 27/06/2022 the court in consultation with the parties' advocates framed three issues. However, on 28/11/2022 Mr. Gwakisa representing the appellants requested to add another issue, which is whether the plaintiff has any cause of action against the 1st 2nd 3rd and 4th defendants, the same was added to make four issues for determination by the trial court.

Nevertheless, in composition of the judgment at page 10 the trial magistrate was guided by only three issues in exclusion of the fourth issue that was proposed by Mr. Sambo and framed by the court and therefore the decision based only on three issues. It has been held severally that a decision of the court should be based on the issues framed by the court in consultation with the parties and failure to do so results in a miscarriage of justice. See the decision of the Court of Appeal in of **Said Mohamed Said vs. Muhusin Amiri & another**, Civil Appeal No. 110 of 2020, (Reported Tanzlii). That being said, the legal consequence to that effect has always been for the file to be remitted back for composition of a new

judgment with consideration of all issues framed by the parties. Nonetheless, for reasons that shall be explained in the second issue this court shall not give such order as it will be impracticable.

In the 2nd ground, it is the argument of the appellants' counsel that the trial court was wrong to order that, the respondent was entitled to 429,600 shares while the evidence on record is straight forward that the original 179 shares 179 were bequeathed to the respondent and that in the year 2017 the shares were found to be 429,600. Therefore, according to Mr. Sambo the remaining 429,421 shares are undistributed and therefore they are subject to administration.

Amplifying on the above Mr. Sambo stated that it was improper for the trial court to assume the work of the administrator to order the distribution of the said shares to the respondent. In fact, it is the contention of the counsel that the alleged distribution was done prematurely as the said shares were still in the ownership of the deceased and the process of administration was not completed.

As far as the existence of the 429,600 shares is concerned, Mr. Sambo submitted that the said shares existed even prior to the death of the owner (the deceased) therefore it cannot be said that the same

generated after the 179 share distributed to the respondent. Mr. Sambo thus prayed for the dismissal of the suit with costs.

Responding to the above, Mr. Yoyo contended that the trial court was not a probate court, according to him what was before the trial court was a pure civil case and therefore it is a misconception to state that the trial court distributed the shares to the beneficiary. According to him the findings of the trial court were very fair and verifiable given the circumstance of the already closed probate cause therefore it suited the substantive justice needed in the real circumstance of the case.

Mr. Yoyo went on submitting that at the trial court it was the appellant's evidence that there was a share certificate of the deceased bearing 179 principal shares, and that they used the said share certificate to apportion it to the respondent. He went further to state that it was the bank representative who appeared as DW1 who cleared the mis guided notion held by the appellants as to the impossibility of 429,600 shares to be transferred to the respondent using the inventory bearing 179 shares in the closed probate cause. It was Mr. Yoyo's argument that all shares are currently under the name of MATILDA PHILIP, the administratrix and that the CRDB Bank is waiting for the said administratrix to present the inventory form of the closed probate case, along with other attachment

to the bank for it to process and send to Dar es salaam stock exchange for registration.

Concluding his submission Mr. Yoyo told this court that the appellants herein were sued in their personal capacities and not as administrators. The factual and legal foundation of the case at the trial court was their act of resuming their administratorship duty after closure of probate cause and distribute share without mandate. The respondent's counsel being satisfied with the trial court findings he prayed the same to be left undisturbed.

I have read carefully the submissions by the parties, and as already stated above the question that is to be responded by this court is whether it was proper for the trial court to hold that the respondent is entitled to 429,600 shares which originate from the 179 original shares.

In the first place it should be made clear to the parties that this appeal has to be read in *pari materia* with Application No. 111 of 2020 on the reasons to follow;

On 27/11/2020 the appellants herein filed the above-mentioned application for an order that they may be re-instated into their active duties as administratrix/administrators of the estate of the late Thomas Philip Olotu. They further sought an order for extension of time to re file

the inventory and accounts of the properties and credits of the late Thomas Philip Olotu to include 429,421 shares held at CRDB Bank Plc which were not previously included. On the other hand, the respondent herein on 13/12/2021 filed a suit against the appellants here which is the subject of this appeal.

It should be remembered that, it was the appellants who had initiated these proceedings by seeking to be re-instated into their administration duties before the respondent filed her complaint to the trial court. In the said application, the court was satisfied that the respondent herein was apportioned only 179 shares and that the remaining 429,421 shares are unadministered therefore the court went on granting the relief sought and the appellants were reinstated into their administrative duties. With the finding in Application No. 111 of 2020 it is apparent that the trial court's finding is untenable in the eyes of law as the appellants have been resumed into their administration duties to administer the remaining shares of the deceased which have been apportioned by the trial court to the respondent.

More important this court is also of the view that the trial court had no jurisdiction to entertain the respondent's complaint leave alone the fact that the same was prematurely filed. As it is the impugned trial

court's decision is now in contradiction with the out come of the Application that was filed in this court by the appellants.

I am holding the above view due to the historical nature of the matter between the parties. The respondent's plaint was plainly instituted before the trial court on 13th day of December 2021 immediately after the order of the court (**Gwae, J**) dismissing the appellants' Misc. Civil Application No. 111 of 2020 for extension of time to file an application for restoration of Probate Cause No. 11 of 2016 dismissed 7th December 2021.

Subsequent to the order dismissing the appellant's application, on 25th January 2022, the appellants filed an application (Misc. Civil Application No. 7 of 2022) for extension of time to apply for setting aside the dismissal order vide Miscellaneous Civil Application No. 111 of 2020 as well as for re-admission. The latter application was granted on 24th May 2022 and hearing was scheduled on 26th July 2022. That means, the commencement of hearing of the respondent's suit on 28th November 2022 proceeded while the appellants' Misc. Civil Application No. 111 of 2022 was restored. Thus, requiring the stay of proceeding before the trial court over the same subject matter before this court.

The above being said, it is with no doubt that the appeal at hand is not devoid of merit. It is allowed. Proceedings and decision of the trial court are hereby quashed and set aside respectively. Taking into account that this is a probate matter involving blood relatives, common prudence demands that, each party to bear his/her own costs.

It is so ordered.

DATED at **ARUSHA** this 26th October 2023




MOHAMED R. GWAE
JUDGE