IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA

PC. CIVIL APPEAL NO. 55 OF 2023

(Original Probate Appeal No. 10/2022 before Bariadi District Court from Probate Cause No. 53/2022 Somanda Primary Court)

LUCIA LUDELENGEJA..... .....APPELLANT

VERSUS

JEREMIAH NSULWA.....RESPONDENT

(Administrator of Estate of Late Mayala Ngweso Bulugu)

JUDGMENT

30th October, & 6th November, 2023

KAWISHE, J.:

This appeal is intended to challenge the decision of the District Court of Bariadi in Probate Appeal No. 10 of 2022. Initially, the respondent filed probate cause before the trial court for letters of administration of the estates of the late Mayala Ngweso Bulugu and he was therefore successfully granted. In the meantime, the appellant applied for revocation of the letters of administration conferred to the respondent. The application was not successful she then approached the first appellate court asking for revocation of the respondent's letters of administration. Similarly, her application was not successful.

The appellant has now approached this Court with four grounds of appeal. The reasons are written in Kiswahili, they are: ***first,*** *kwamba,*

mahakama iliyosikiliza rufaa kwa mara ya kwanza ilikosea kisheria kuachana na uwakilisho wa mrufani hasa kwenye hoja ya kisheria iliyoibuliwa mbele yake na kuacha kabisa bila kuisemea wakati hoja hiyo ilikuwa hoja inayohusu mamlaka ya mahakama (jurisdiction) ambayo inaweza kuibuliwa muda wowote; ***second,*** *kwamba mahakama iliyosikiliza rufaa ya kwanza ilikosea kisheria na kimantiki kutozingatia sababu ya 3 ya rufaa wala kuifanyia maamuzi ilihali ipo katika uwakilisho wa mawakili wa pande zote mbili;* ***third,*** *kwamba mahakama iliyosikiliza rufaa kwa mara ya kwanza ilikosea kisheria na kimantiki kwa kushindwa kumtengua msimamizi wa mirathi mrufaniwa baada ya kukubali sababu zote za kumtengua mrufaniwa katika mahakama ya mwanzo kwamba zilikuwa na mantiki badala yake amefanya maamuzi bila kuzingatia sheria na kutoa amri ambayo haijaombwa na mtu yeyote and* ***fourth****, kwamba mahakama iliyosikiliza rufaa kwa mara ya kwanza ilikosea kisheria na kimantiki kutojumuisha uwakilisho wa maandishi kama sehemu ya mwenendo wa shauri, kutoita ushahidi wa bank statement kama ilivyoombwa na mrufani katika uwakilisho wake na wala hajaisemea kwenye hukumu yake wakati kama mahakama ya kwanza ya rufaa alikuwa na mamlaka hayo kisheria.*

When the appeal was called for hearing, the appellant enjoyed the service of Mr. Paul Obwana, learned advocate and the respondent enjoyed the service of Mr. Audax Constantine learned advocate. At the beginning of the hearing, Mr. Obwana learned advocate for the appellant addressed the 1st ground stating that the first appellate court erred in law, in leaving out

the submission by the appellant, specifically on the matter of law presented before it, the first appellate court did not make any decision while it was a ground concerning the jurisdiction of the court. To biff up his argument Mr. Obwana referred to the case of **Beatrice Brighton Kamanga and Amanda Brighton Kamanga vs. Ziada William Kamanga,** Civil Revision No. 13 of 2020. Mr. Obwana further submitted that, the deceased had two places of abode where he lived that is, Geita, Katoro and Bariadi, hence the primary court lacked jurisdiction to entertain the matter. Mr. Obwana was of the view that the issue of residence was covered extensively by the Court in the case of **Beatrice Brighton Kamanga and Amanda Brighton Kamanga vs. Ziada William Kamanga** (supra). The Court stated:

> *"That there is no pecuniary limit though in practice it is advised that where the matter is complicated or where it involves assets outside the jurisdiction of the Primary Court (i.e outside the district) the matter should be filed in the High Court."*

Mr. Obwana further argued that, this is a decision of the High Court, which the lower courts have to comply with. He referred to **Fabian Robison Bisaya** *(as administrator of the estate of late Robson Bisaya)* **vs. *Azori Fanuel Bisaya*** *(as administrator of the estate of the late Fanuel Bisaya)* Probate Appeal No. 2 of 2019, and paragraph 1 (1) of the 5th

schedule of Magistrates Courts Act. Mr. Obwana further submitted that, since the deceased had properties outside Bariadi, it was prudent that the case could have been filed in the High Court. He also relied on the position of the case of **Alphonce Buhatwa vs. Julieth Rhoda Alphonce,** Civil Reference No. 9/2016 (CAT) Dar es Salaam and **SCI (Tanzania Ltd) vs. Gulam Huhamidal Punjan and another** Commercial Case No.130 of 2020, (unreported).

Mr. Obwana, argued the 2nd ground of appeal by stating that, the 1st appellate court erred in law and fact by not considering the 3rd ground of the appeal and determine it; while it is in the submissions of the learned advocates for both parties. He referred to page 11 of the typed judgment of the first appellate court, 3rd paragraph where the first appellate court stated:

> *"That the mere argument of the respondent that he has been offering some money for maintenance to the appellant and to the appellant's blood sons who are representatives in interest and who are staying together with appellant and share everything as far as basic needs are concerned is not sufficient as far as there is no proof in the court".*

Mr. Obwana continued to maintain that, such findings of the court sufficed to revoke the letters of administration of the respondent. He made reference to rule IX (1) (e) of the Primary Court (Administration of Estates)

Rules GN No. 49 of 1971. The learned counsel prayed to this Court to intervene and find out that the trial court defaulted in abiding to the rules, it had to revoke the letters of administration as it found out that the administrator defaulted as it was observed in the case of **Hadija Said Matika vs. Awesa Saidi Matika,** PC. Civil. Appeal No. 2 of 2016, High Court of Tanzania, at Mtwara.

Building on the 4th ground of appeal, Mr. Obwana stated that, the first appellate court erred in law and fact to exclude the written submission from the proceedings. And not call for bank statement as requested by the appellant. He banked on section 21 (1) (a) of the Magistrates' Courts Act, Cap 11 R.E. 2019. Mr. Obwana prayed to this Court to exercise its powers to revoke the administrator and appoint another administrator without prayers being presented as it was decided in the case of **Joseph Shumbusho vs. Marygrace Tigerwa and 2 others,** Civil App. No. 103 of 2016, CAT Dar es Salaam, which gave the High Court powers to revoke and appoint another administrator.

In response Mr. Audax learned advocate for the respondent agreed with the counsel for the appellant in part on grounds 1, 2 and 3, in part, he maintained that, basically they are complaints concerning the

failure of the first appellate court in deciding the appeal by way of written submission. Mr. Audax further stated that, going through the 5 grounds raised at the first appellate court it is clear that the magistrate did not decide the grounds. In other words, he did not deal with the grounds in each of them either specifically or generally. That he failed to comply with rule XVI (a) (b) (c) (d) of the Civil Procedure Code (Appeals in Proceedings Originating from Primary Courts) Rules GN No. 312 of 1964. Mr. Audax while drawing inference from what he submitted here, he was of the view that, non-compliance of the rules resulted in the learned magistrate not stating whether the appeal was allowed or dismissed.

Mr. Audax argued that, in the course of dealing with the appeal the learned magistrate came up with extraneous matters which were not addressed by the parties; for instance, the issue of calling a clan meeting to involve all the heirs and the beneficiaries. That, the learned magistrate at the first appellate court, directed involvement of the appellant in every stage of administration of the deceased estate, failure of the appellant to be involved in clan meeting and other issues.

Mr. Audax insisted that the first appellate court came out with extraneous matters and did not avail the parties an opportunity to be

heard. He referred to the case of **Milikiori Mtei Malandu vs. Bertha Patrick** (Pc. Civil Appeal No.40 of 2023) [2023] TZHC, from which he stated that the judgment of the first appellate court is nullity because of its failure to determine the grounds of appeal and for coming up with matters without giving the parties and their advocates right of hearing.

Mr. Audax replying on the 1st of this appeal which concerns the issue of place of abode of the deceased, Katoro Geita and Bariadi, contended that this court cannot deal with it as it is not purely based on point of law. It is a mixed point of law and fact.

On the 2nd ground Mr. Audax argued that since the first appellate court did not consider the 3rd ground of appeal and decide it, that ground concerns matter of fact and law, this is a 2nd appellate court thus, cannot step in the shoes of the 1st appellate court.

Responding to the 3rd ground, Mr. Audax submitted that, this ground was not raised as a ground of appeal specifically before the 1st appellate court to consider and determine. He argued that, at the grounds of appeal specifically ground 4 and 5 tabled before the 1st appellate court were not clear.

The learned counsel proposed that, since the 1st appeal was ordered to be heard by way of written submissions while such submissions are in the record of first appellate court, this court be pleased to order another magistrate to compose a new judgment based on the written submissions and grounds of appeal.

In his rejoinder, Mr. Obwana the counsel for the appellant appreciated that, the learned counsel for the respondent agreed with their 1st, 2nd and 3rd grounds of appeal. He added that the 1st appellate court summarized what it gathered from the records of the trial court. The 1st appellate court agreed that the administrator did not prove that he took care of the respondent. The learned counsel prayed to this Court to intervene on the matters of law. He reiterated his submission in-chief.

I have gone through the grounds of appeal and heard the submissions of both learned counsels. Unfortunately, the learned counsels traversed beyond the borders of the grounds of appeal and drew in extra arguments which were not relevant. I tried to extract the necessary information from the warfare of long arguments. Also, I perused the grounds of appeal submitted to the first appellate court.

In perusing the records available, specifically the submissions of the parties at the first appellate court and the judgment delivered, I realized that:

First, ground No. 1 of this appeal concerns matters of law (jurisdiction). Second, the appellant and the respondent's submissions raised point of law. I agree with the appellant that the learned magistrate did not discuss neither decide the ground on point of law. The judgment did not dispose of the grounds presented before the first appellate court.

Unfortunately, the judgment which was prepared and read out by the learned magistrate did not address the grounds of appeal before the court and the written submissions made by the parties. The learned Magistrate came up with a new issue all together which was not raised by either of the parties or argued by them, hence denied the parties the right to be heard. Refer page 11 of the judgment where it reads:

> *"This court finds it prudent for the administrator to conduct meeting with all heirs, and discuss on how to distribute the assets of the deceased without forgetting the already distributed money which the appellant is claiming for misappropriation."*

In order to make up my mind in this appeal, I wish to borrow the reasoning of my brethren Hon. Matuma, J. in the case of **Isana Nila vs.**

Makingo Roketi, Land Appeal No. 31 of 2022, High Court, Shinyanga (Unreported). This Court stated that:

> *"The learned chairman had as well not invited the parties to address them on the issue before deciding it. That was wrong. It was condemning the parties unheard particularly the Appellant herein. The parties should have been given opportunity to be heard on the issue and produce documents if any in support of their relevant arguments."*

In the appeal at hand, the learned magistrate in the first appellate court did not abide to the principle of natural justice, the right to be heard which is provided for by the Constitution of the United Republic of Tanzania of 1977, article 13 (6) (a). The articles states:

> *"13 (6) Kwa madhumuni ya kuhakikisha usawa mbele ya sheria, mamlaka ya nchi itaweka taratibu zinazofaa au zinazozingatia misingi kwamba –*
>
> *(a) Wakati haki na wajibu wa mtu yeyote inapohitajika kufanyiwa maamuzi mahakama au chombo kingine chochote kinachohusika, basi mtu huyo atakuwa na haki ya kupewa fursa ya kusikilizwa kwa ukamilifu na pia haki ya kukata rufaani au kupata nafuu nyingine ya kisheria kutokana na maamuzi ya mahakama au chombo hicho kingine kinachohusika."*

See also the case of **Mbeya-Rukwa Autoparts & Transport Ltd. vs. Jestina George Mwakyoma** (Civil Appeal 45 of 2001) [2001] TZCA 14. In the case of **Sadiki Athumani vs Republic** [1988] TZHC 7, his Lordship Samatta, J. (as he then was) stated that:

"In the case now before me, clearly the learned magistrate strayed into a grave error in law in not giving the appellants the opportunity to be heard. There is no provision in section 20, 21 or 34 of the Magistrates' Courts Act, 1984" ... which empowers a District Court to dispense with the observance of natural justice."

The observation made in **Sadiki Athumani** (supra) applies to the appeal at hand. Since the first appellate court heard the parties fully for and against the appeal by way of written submission but did not compose the judgment on the grounds brought thereat, rather on extraneous issues not raised by the parties and did not avail the parties the right to be heard on the issues raised *suo moto*.

I am of the formed view that, the first appellate court was not correct. The Judgment and decree of the first appellate court are hereby quashed and set aside. I therefore, direct that, another magistrate in the first appellate court should compose the judgment on merits by considering the grounds of appeal and the written submissions of the parties. Any party who shall be dissatisfied with the judgment of the appeal in its merits shall have the right to appeal in accordance with the law.

I direct that, the records of the subordinate courts be remitted to the first appellate court without any unjustified delay. The orders and directives of this Court to be complied with. Once, the judgment on merit is

composed, the parties should be summoned and the same be delivered to them in accordance to the law. In case the first appellate court deem necessary to include matters not raised by the parties, then should invite the parties or their advocates to address the court to that effect. Therefore, I must conclude that, on the strength of ground one, this appeal is allowed to the extent explained herein above.

I make no orders as to costs.

Right to further appeal is explained.

It is so ordered.

DATED at **SHINYANGA** this 6th day of November, 2023.

E.L. KAWISHE
JUDGE
06/11/2023

Court: Judgment delivered this 6th day of November, 2023 in the presence of the parties in person and the presence of Mr. Audax for the respondent and Mr. Timotheus Sulusi holding brief for Mr. Obwana for the appellant.

THE HIGH COURT OF TANZANIA

E.L. KAWISHE
JUDGE
6/11/2023