IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF BUKOBA)

AT BUKOBA

PC PROBATE APPEAL NO. 15 OF 2023

(Arising from the Probate Appeal No. 02/2023 at Bukoba District Court and Original Probate Couse No. 54/2022 of Bukoba Urban Primary Court)

RAHEL LUANGISA..1ST APPELLANT
YUDES LUANGISA..2ND APPELLANT

VERSUS

MURUNG1 BADRU KICHWABUTA....................................RESPONDENT

RULING

29th April & 10th May, 2024

A.Y. MWENDA, J

This is the second appeal brought by the Appellants to challenge the decision of the first appellate court, the District Court of Bukoba, which upheld the decision of the Bukoba Urban Primary Court.

Originally, before Bukoba Urban Primary Court, the appellants filed the probate Cause No. 54/2022 craving to be appointed as administratrixes of the estate of their late father, one Thomas Luangisa Rwaijumba. The present respondent, one MURUNGI BADRU KICHWABUTA opposed it by filing an objection. In her objection she raised three points to wit, one, that the applicants, now the appellants did not convene a clan meeting to appoint them as those involved were the applicants

themselves and their biological children. Two, that the application by the applicant was preceded by ill motive because there was nothing to administer as the applicants targeted to administer a plot belonging her father, the late Samwel Luangisa and three that the application in question was filed out of time since the late Thomas Luangisa Rwaijumba died 49 years way back. After both sides have tendered their respective evidence, the lower court sustained the objections. The appellants were aggrieved by such findings and appealed before the District Court which upheld the trial Court's findings.

Again, dissatisfied by the appellate Court's findings, the appellants filed the present appeal with six grounds. For reasons apparent hereunder, the court found no reasons to reproduce the said grounds.

When this appeal was called on for hearing both sides were in attendance. The appellants were represented by Mr. PONTIAN MUJUNI, learned counsel whilst the respondent was represented by one Mr. DANSTAN MUJAKI, learned Counsel.

By agreement of the parties, the court ordered this appeal to be disposed by way of written submission. Both parties complied to the scheduling order save for failure by Mr. MUJUNI to file a rejoinder which until the morning of 30th April was not yet filed contrary to the court's order requiring him to do so by 29th of April 2024.

In the appellants' written submissions, the learned counsel raised a point of law worthy to be determined first before embarking onto the grounds of appeal.

According to him, what seem to be the evidence during cross examination is phrases which correspond to nothing as they are not fully connected with respective questions imposed to the witness. The learned counsel stressed that, with the wrong recording of the evidence the trial magistrate was unable to read and understand the evidence adduced during cross examination thereby occasioning injustice to the extent. He said that the decision and findings in question merely came from the magistrate's own source and not from proceedings. He referred to pages 12,13,16,17,18,19,20,23,24,25,25,28,

29,33,34,36,38,39,43 and 44 of the trial Court's typed proceedings as bearing the said anomalies. He also demonstrated a portion of the evidence at page 12 of the typed proceedings which reads as follows:

"-**ndio**

-**Mimi sijui**

-**Ni mgao**

-**Na ukoo ulifanya**

-**simaanishi hilo**

-Siwezi kusema chochote

-**No.18**

-Nimekuja kuchukua eneo la

Babayangu mapori

-**bado**

Further to that, the learned counsel for the appellants submitted that at page 37 of the proceedings, while they were adducing evidence, the court recorded the list of exhibits but failed to record the same as exhibits (admitted and marked as such).He stressed that at page 8 of the judgement, the said exhibits are referred to as **A** while the same is not reflected in the proceedings.

On his part, Mr. Mujaki for the respondent did not delve much into this point. He assigned reasons to the effect that the present appeal being the second (appeal), it cannot deal with matters which were not raised at all before the first appellate Court. I think Mr. Mujaki missed the point because what is raised by Mr. Mujuni is a point of law which in principle, can be raised at any time. This principle is not invented by me. It has been adumbrated in several decisions of the Court. For example, in the case of EX-POLICE NO. E.5812 PC RENATUS ITANISA VERSUS THE INSPECTOR GENERLA OF POLICE AND ATTORENY GENERAL, CIVIL APPEAL NO. 147 OF 2018, CAT(Unreported), the Court of held as follows that:

> "The appellant on his part conceded that no leave of the court was sought and granted before he lodged this appeal. He however attacked the delay on the part of the respondent for raising the issue now, while two years have lapsed since he served them with the record of appeal. It is a settled principle of law that a legal point

> may be raised at any time, even at the appellate stage. We have time and again restated the said stance of law in our various cases including Ms. FIDA HUSSEIN & COMPANY LIMITED VS TANZANIA HARBOURS AUTHORITY, CIVIL APPEAL NO. 60/1999(Unreported). On that account, the respondent is justified to raise the same at this stage regardless of the time lapse. The argument of the appellant on this aspect therefore holds no water".

That said, the argument by Mr. Mujaki holds no water and this court is of the view that the point so raised by Mr. Mujuni, being a matter of law, can and is determined by this court as I do hereunder.

At the outset it is apposite to point out that when an appeal is filed, the appellate court is obliged to scrutinize the lower/trial court's records and the party's submission regarding merits and or demerits of the appeal. At that stage, there is no room of collecting new evidence unless, under special circumstances, the court so directs in that fresh evidence be collected. That being the case, proper recording of the proceedings is key. During the process, the trial magistrate /judge is expected to record the witnesses' examination in chief, cross examination, and re-examination properly. In the course, the answers by the witness must portray the true picture of what the examiner intended the witness to tell the court in

admission or denial of every stated fact and the same must be reflected on the trial court's records. This is so because courts' records accurately represent what transpired in court and should not be easily impeached. In the present matter, as it was correctly submitted by Mr. Mujuni, since the witnesses' cross examination was recorded it is thus difficult to conclude that they represent what actually transpired during cross examination thereby making the same record miss important part which is cross examination. On that basis, since the first appeal and the present rely on the trial court's proceedings such anomaly occasioned injustice onto the parties. That said, I find merits in this point of law and as such, it is hereby sustained.

Regarding failure to record the appellants exhibits, this court went through the trial court's proceedings and noted two things involved. One, when CHARLES THOMAS MUCHUNGUZI was called on to testify for the appellants, he listed 7 documents which were intended to be admitted as exhibits. However, the records are silent on whether they were admitted as such (exhibits). Interestingly in the copy of trial court's judgment the said exhibits were referred to as exhibits **A.** One may wonder, at what point in time were they admitted as exhibits as marked as such while the proceedings are silent in that regard? Two, while attempting to tender the said exhibits, the respondent was not afforded any opportunity to challenge them. This was a denial of the rights to be heard on the part of the respondent. Regarding this principle, the court of appeal in VICTOR REAL ESTATE

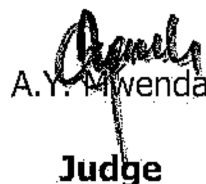
DEVELOPMENT LIMITED VERSU TANZANIA INVESTMENT BANK & 3 OTHERS, while citing the case of **Mbeya -Rukwa Autoparts and Transport Ltd v. Jestina George Mwakyoma** [2003] T.L.R 251 held that:

> "The right to be heard was not only a fundamental right, but constitutional one, and that where a party may not have been afforded such a right, the proceedings is a nullity."

Again, in the same proceedings there was another denial of the right to be heard on the part of the respondent. That is visible at page 44 of the trial court's proceedings where the then 1st respondent was called to testify, she briefly said that based on what the 2nd respondent testified, she had nothing to say. Having said so the respondent was not afforded opportunity to cross examine her.

From the foregoing reasoning, this court finds merits in the points of law raised by the learned counsel for the appellants. The anomalies affects the proceedings of the trial and the 1st appellate court and are hereby nullified. It is thus ordered that the hearing of the respondent's objection to start afresh before the same magistrate. Otherwise, there is no order as to costs.

It is so ordered.



A.Y. Mwenda

Judge

10.05.2024

Ruling delivered in chamber under the seal of this court in the presence of Mr. Pontian Mujuni, learned counsel for the appellants and Mr. Danstan Mujaki, learned counsel for the Respondent.

A.Y. Mwenda

Judge

10.05.2024