

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**TANGA SUB-REGISTRY**

**AT TANGA**

**PROBATE APPEAL NO. 11 OF 2022**

*(Arising from Appeal No. 1 of 2022 of Kilindi District Court at Kilindi, Originated from Probate Cause No. 12 of 2021 of Songe Primary Court)*

**ABRAHAMAN HASSAN LUSEWA ..... APPELLANT**

**VERSUS**

**MWENJUMA HASSAN KILO LUSEWA ..... RESPONDENT**

**JUDGEMENT**

*08/04/2024 & 30/04/2024*

**NDESAMBURO, J.:**

Abrahaman Hassan Lusewa, the appellant, is contesting the judgment of the District Court of Kilindi at Kilindi in Probate Appeal No. 01 of 2021. This decision dismissed his appeal stemming from the decision of the Songwe Primary Court in Probate Cause No. 12 of 2021. In that earlier case, his objections to the appointment of an administrator were dismissed, and Mwenjuma Hassan Kilo Lusewa was subsequently appointed as administrator of the estate of their late father, Hassan Killo Mohamed. Abrahaman Hassan Lusewa is

now seeking redress before this court, appealing against the aforementioned decision.

Before embarking on the merit of the appeal, I find it appropriate to narrate a brief background of this matter as it can be gleaned from the records.

Mwenjuma Hassan Kilo Mohamed initiated Probate Cause No. 12 of 2021 before the Songe Primary Court, seeking appointment as the administrator of his late father, Hassan Killo Lusewa's estate. However, the petition faced opposition from the appellant, who is the respondent's brother. The appellant raised five objections, including the legality of the family meeting where the respondent was appointed to petition for letters of administration. The appellant argued that some heirs were unaware of the meeting, resulting in their absence and the potential for the forgery of signatures to obtain consent from some heirs. Additionally, the appellant questioned the trustworthiness of the respondent. After considering the arguments presented by both parties, the Primary Court dismissed objection. However, the court directed the family of the deceased to convene a family meeting and file minutes that have

been signed by family members. The applicant appeared once again before the same Primary Court with the same minutes but in addition to family members. He petitioned and he was appointed as the administrator of the estate of his late father, Hassan Killo Lusewa, on the 25<sup>th</sup> of April 2022.

The respondent, aggrieved by the findings, appealed to the District Court of Kilindi, advancing four grounds to challenge the decision of the Primary Court. However, the appeal was dismissed, leading to the initiation of this second appeal based on the following:

- i. That, the learned magistrate misdirected himself in dismissing the appeal while there is enough evidence showing that the minutes appointing the respondent as the administrator were forged by the respondent.*
- ii. That, the learned magistrate misdirected himself as he ignored to allow appeal while there was enough evidence to the satisfaction of the court that the trial case at the trial court was not properly handed.*
- iii. That, the learned magistrate misdirected himself as he failed to appreciate and construe properly the grounds of appeal.*

During the hearing of this appeal, the appellant was represented by the learned counsel Mr. Kajembe, while the

respondent appeared in person. The appeal was conducted orally. However, the appellant chose to abandon the third ground of appeal, proceeding with only two grounds.

When given the floor to argue his appeal, on the first ground, the counsel vehemently contended that the complaint was based on the decision of the District Court to dismiss the appeal while there was enough evidence showing that the minutes appointing the respondent to apply for the letters of administration of the deceased's estate was forged by the respondent. The counsel referred this court to the judgment on page 2 where names of family members purportedly present, one Halima Kilo Msewa and Aziza Hassan Lusewe, were noted to be present while in real fact they were outside the meeting area, and some family members' signatures appeared to be duplicated/repeated. Despite this, the District Court failed to investigate these discrepancies thoroughly. The Appellant cited the decision of this court in **Magreth Anthony Mushi v Rogath Edward Ndos**i (PC) Civil Appeal No. 90/2020 Tanzil TZH 5451 to underscore the importance of addressing such irregularities.

In elaborating on the second ground, counsel argued that the District Court failed to recognize that the trial court mishandled the matter despite acknowledging anomalies evident on pages 5-8 of its judgment. Counsel contended that although the Primary Court ordered the family to reconvene and hold a meeting, the respondent submitted the same minutes with only a few additional names. Moreover, the District Court erred in holding that the Primary Court erred in ordering new family minutes to be filed. While acknowledging that family minutes are not crucial in probate matters, counsel asserted that they held significant importance in this case. Alternatively, counsel submitted that the District Court could have considered appointing a second administrator to foster peace and harmony within the family.

The learned counsel thereafter, urged this court to allow the appeal and order each party to bear its costs.

Responding to the first ground of appeal, the respondent argued that the District Court's decision was accurate and that the appellant had not provided sufficient evidence to support his forgery claim. The respondent failed to identify individuals whose signatures

were allegedly forged, nor did he present any witnesses to corroborate this assertion.

Regarding the second ground, the respondent affirmed the District Court's findings, emphasizing that the decision was in accordance with the law and carefully assessed the evidence presented by both parties. Contrary to the appellant's assertions, the respondent argued that the appellant did not adequately explain to the court how the trial court's handling of the matter deviated from legal procedures or constituted mishandling.

In conclusion, the respondent urged the court to dismiss the appeal and award costs against the appellant.

In rejoinder, the learned Advocate Kajembe stated that the names of persons whose names were forged were mentioned on page 2 of the judgment and insisted that the case was not properly handled by the Primary Court.

I have considered and weighed the rival arguments by both parties. The court will address each ground of appeal as argued by the parties.

Beginning with the first ground, the appellant disputes the authenticity of the family meeting minutes submitted by the respondent, alleging that it was forged by the respondent. The learned counsel argues that the District Court neglected its duty to thoroughly investigate the alleged forgery.

It is a cardinal principle that in civil cases whoever alleges must prove his allegation. The Court of Appeal of Tanzania underscored this precedent in the case of **Antony M. Masanga v Penina (Mama Mgesi) and Another** Civil Appeal No. 118 of 2014 where it held:

*“in civil cases, the burden of proof lies on the party who alleges anything in his favour”.*

In addition, Rule 2 of the 1<sup>st</sup> Schedule of the Magistrates' Courts (Rules of Evidence in Primary Courts) Regulations GN Nos. 22 of 1964 and 66 of 1972 stipulates that the burden of proof falls upon the party making the allegation. Furthermore, Rule 6 of the same Regulation provides that the court is not required to be satisfied beyond a reasonable doubt that a party is correct before it decides the case in its favour, rather, it suffices if the weight of evidence

presented by one party outweighs that of the other. Since the appellant had alleged forgery and repetition of signatures, the onus was on him to substantiate these allegations.

In its determination of this ground, the District Court distinguished the cited case of **Magreth Anthony Mushi** (supra) from the present matter. It highlighted several differences: **One**, unlike the cited case where the appellant complained of not attending the family meeting but a signature against his name indicated otherwise, in this case, there is no signature against the name of the appellant in the family meeting minutes. **Two**, in the cited case, the appellant himself complained about the forging of his signature, whereas in the current matter, the individuals named by the appellant are not contesting the authenticity of their signatures. **Three**, in the cited case, the High Court was able to compare the signature of the appellant in the minutes with other documents signed by the appellant. However, in the current case, the appellant did not sign the minutes, making it impossible for the court to make such a comparison. Based on these points, the District Court concluded that there was no evidence of forgery. If the appellant's



signature was indeed forged, he should have pursued a criminal case to establish the forgery.

Considering the evidence presented in the record, as well as the rationale and conclusion reached by the District Court, I concur entirely with the District Court's determination that the claim of forgery and repetition of signature were not substantiated. The evidence on the record as presented by the appellant primarily centred on the assertion that the signatures in question were forged, some were repeated. However, during the proceedings, the appellant failed to provide any substantial testimony regarding the alleged forgery. Also, his two witnesses (SM2, Mohamed Hassan Lusewa, and SM3, Fatuma Hassan Lusewa) who testified before the Primary Court failed to provide any testimony regarding the forgery. Additionally, SM3 testified that she did not attend the family meeting but granted permission for the family to proceed. Subsequently, she signed the minutes at a later time.

The learned counsel argued that the District Court, acting as the first appellate court, was obligated to conduct a thorough comparison of the signatures in question, however, in the present

case as rightly held by the District Court, it could not carry out a signature comparison due to the unavailability of pertinent documents for such an analysis. This limitation was duly acknowledged by the District Court, and it would be unjust to blame the District Court under these circumstances.

Moreover, the individuals named by the appellant as not having signed the minutes, namely Halima Kilo Msewa and Aziza Hassan Lusewe, did not appear before the court to dispute the alleged forgery or contest the appointment of the respondent. Besides, the appellant failed to establish that the signatures he claimed to be duplicated or repeated were indeed duplicated.

It is worth noting that the appellant's allegation of forgery constitutes a criminal offence, demanding heightened attention and a higher burden of proof in court compared to a civil case. The Court of Appeal underscored this principle in the case of **Omari Yusuph v Rahma Ahmed Abdulkadr** [1987] TLR 169, emphasizing the need for thorough scrutiny and substantial evidence when such allegations are raised. The Court held:

*"...it is now established that when the question whether someone has committed a crime is raised in civil proceedings that allegation need to be established on a higher degree of probability than that which is required in ordinary civil cases..."*

See also the Court of Appeal decision in the cases of **Yeriko Mgege v Joseph Amos Mhiche**, Civil Appeal No. 137 of 2017 and **City Coffee Limited v Registered Trustee of Iloilo Coffee Group**, Civil Appeal No. 94 of 2018.

Based on the above analysis, it is evident that the first ground of appeal lacks merit and is thus dismissed.

The second ground of appeal revolves around the failure of the District Magistrate to acknowledge the mishandling of the trial court in permitting the respondent to submit the same minutes of the family meeting despite a clear court order mandating reconvening and the submission of new minutes. Additionally, it is contended that the District Court erred in its determination that fresh family minutes were not required, contrary to the order of the Primary Court. The counsel emphasizes the importance of the family meeting, asserting

that it is pivotal for electing a mutually agreed-upon individual to serve as the administrator of the estate. Such a decision will foster peace and harmony among the 47 children of the deceased. The respondent had opposing views.

After reviewing the decisions of both the District Court and the Primary Court, I find myself in agreement with the findings of the District Court. Indeed, the Primary Court erred in ordering the family to reconvene and prepare new minutes after overruling all preliminary objections. Once these objections were overruled, there was no basis for the Primary Court to issue such an order.

The record shows that the Primary Court proceeded with the petition using the same family meeting, albeit with additional names, however, this did not result in any miscarriage of justice for the appellant or the family as they were aware of the petition and had the opportunity to file a caveat.

Furthermore, as noted by Mr. Kajembe, the family meeting minutes are typically essential for applications for the appointment of administrators at the Primary Court, however, there is no specific

rule mandating their existence. See Rule 3 of the Primary Courts (Administration of Estates) Rules, GN No. 49 of 1971. Based on the above, the second ground of appeal is dismissed.

Given these considerations, the appeal lacks merit and is consequently dismissed in its entirety, with no order as to costs.

It is so ordered

**DATED** at **TANGA** this 30<sup>th</sup> day of April 2024



A handwritten signature in blue ink, appearing to read "H.P. Ndesamburo", is written above the printed name.

H.P NDESAMBURO

JUDGE