

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IRINGA SUB REGISTRY

AT IRINGA

CIVIL APPEAL NO. 12 OF 2023

*(Originating from the Civil Case No. 11 of 2021 in the District Court of
Njombe at Njombe)*

JOEL SANGA-----1ST APPELLANT

ANNA SANGA-----2ND APPELLANT

CLAUDI SANGA-----3RD APPELLANT

CLINTON SANGA-----4TH APPELLANT

CLIFU SANGA-----5TH APPELLANT

VERSUS

MARY P. MWIGUNE----- RESPONDENT

JUDGMENT

Date of the Last Order: 18/04/2024

Date of the Judgment: 31/05/2024

A. E. Mwipopo, J.

This appeal originates from the decision of the Njombe District Court in Civil Case No. 11 of 2021. The Respondent namely Mary P. Mwigune sued the appellants namely Joel Sanga as the administrator of the estate of

Christopher H. Sanga, Anna Sanga, Claudi Sanga, Clinton Sanga and Clifu Sanga for recovery of Tshs. 70,000,000/= which she lends to the late Christopher H. Sanga. Anna Sanga, Claudi Sanga, Clinton Sanga and Clifu Sanga were beneficiaries of the deceased estates. The trial Court delivered its judgment in favour of the respondent and ordered the 2nd, 3rd, 4th and 5th appellants to pay the respondent from the deceased estates the claimed amount. The appellants were not satisfied with the decision of the trial Court and filed the present appeal in this Court.

The petition of appeal filed by the appellants contains 12 grounds of appeal, as follows hereunder:-

- 1. That, the trial court erred in law and facts for admitting and giving weight during the preparation of its judgment to exhibit P3 tendered by an incompetent person and without adhering to proper procedures.*
- 2. That, the trial court erred in law for admitting exhibit P1 titled "Mkataba wa Kukopeshana Fedha" without adhering to the principles of making and admitting it in court.*
- 3. That, the trial court erred in law for admitting and giving weight to exhibit P2 as binding to the claimed amount of money given as a loan without having the spouse consent as required by law.*
- 4. That, the trial court erred in law for reaching its conclusion without considering defence evidence, hence causing injustice in its decision.*

5. (a) *That, the trial court erred in law for failing to draw an adverse inference against the respondent for failure to call Sylvia Hasani Mbilinyi and Neema Sanga as witnesses.*

(b) *That, the trial court erred in law for failure to hold that Silvia Hasan Mbilinyi, who is one of the wives of the deceased person, witnessed the contract between the plaintiff and the deceased person without the respondent calling her to testify in court as a witness.*
6. *That, the trial court erred in fact for holding that the appellants were knowledgeable about the claimed loan by the deceased person and neglected to pay it without considering the defence evidence to that effect.*
7. *That, the trial court erred in fact holding that the respondent was not aware of the appointment of the administrator of the deceased estates while she participated in the whole process of burial of the deceased person and she was informed about the process of appointing the administrator of his estates.*
8. *That, the trial court erred in law by holding that the 1st appellant failed to honour his obligation for failure to affix the citation at creditors' houses which were not known to the administrator of the deceased estates.*
9. *That, the trial court erred in law for failing to hold that by the time the plaint was filed at the trial court, there was no existing administrator of the deceased estates to be sued in court.*
10. *That, the trial court erred in law and fact for holding that the respondent proved her allegations against the appellants.*

11. That, the trial court erred in law and fact for entering judgment against the 5th appellant on his capacity knowingly he is a minor and there was an application filed in the trial court by Msafiri Ebron Sanga as a next friend to the 5th appellant which was successfully.

12. That, the trial court erred in law and fact for failing to consider that the respondent filed the suit after the matter was overtaken by events.

The appellants during the hearing were jointly represented by Mr. Octavian Mbungani and Mr. Abdulheri Abel Mtimwa, advocates, whereas the respondent was represented by Mr. Batista Mhelela and Mr. Alex Mgani, advocates. The court invited counsels from both sides to make their submissions.

Mr. Octavian Mbungani submitted jointly on the 1st and 2nd grounds of appeal. He said exhibits P3 and P1 were not read over to the parties after admission and the same is contrary to the law as it was held in **Lista Chalo vs. Republic**, Criminal Appeal No. 220 of 2017, Court of Appeal of Tanzania at Dar Es Salaam, (unreported). He was of the view that reading the admitted exhibit helps parties to know the content of the documentary exhibit. He prayed for exhibits P3 and P1 to be discarded from the record.

It was the appellant's submission on the 3rd ground of appeal that the court held that exhibit P2 was binding matrimonial properties for the loan

taken without the consent of the spouse. The deceased wife Anna Sanga did not consent to the mortgage of the matrimonial land as the security for the loan. Exhibit P2 was made contrary to the Law, hence illegal. For that reason, the agreement in Exhibit P2 was void and the trial court was not supposed to rely on Exhibit P2.

The counsel said on the 4th ground of appeal that the trial court did not consider the appellants' evidence in its judgment. The same is the denial to hear the appellants' case contrary to the law.

In the 5th ground of appeal, the appellant's counsel said the trial court was supposed to draw adverse inference to the respondent for failure to bring Sylvia Hassan Mbilinyi and Neema Sanga as a witness. Sylvia Hassan Mbilinyi and Neema Sanga were material witnesses as PW1 testified to give a loan of 70 million Tanzania shillings to Christopher Sanga (the deceased) in their presence as witnesses of the loan. These witnesses to the transaction were not called to testify. The respondent was hiding something by not bringing these witnesses of the loan agreement between the deceased and the respondent. The trial court was supposed to draw adverse inferences as

it was done in the case of **Hemedi Said vs. Mohamed Mbilu [1984] TLR 113.**

The counsel said in the 6th ground of appeal that the trial court erred in holding the appellants were aware of the loan entered between the deceased and the respondent estates. The appellants made it clear in their evidence that they were not aware of the presence of the loan between the respondent and the deceased. Thus, they distributed and benefited from the deceased estates.

Regarding the 7th ground of appeal, the counsel submitted that the trial court erred in holding that the respondent did not know about the death of Christopher Sanga and was not aware when the administrator of the deceased estate was appointed. The evidence in the record shows the respondent was present at the burial of the deceased and he knew that Joel Sanga was appointed administrator of the deceased estates. The respondent stated the same in his evidence. The respondent had no sufficient reason to institute a suit two years after the deceased death.

The appellant's counsel submitted jointly on the 8th and 9th grounds of appeal. He said that the trial court erred to hold that Joel Sanga as

administrator of the deceased estate failed to inform all people who gave loans to the deceased about their claims. The 1st appellant was appointed by Makambako Primary Court to be administrator of deceased estates and he closed the probate case on 03/07/2019 after filing the inventory at the Primary Court. The 1st appellant said he put the notice on several areas and his evidence was not challenged through cross-examination. The 1st appellant had no other duty after the probate case was closed and he was discharged from the obligation of the deceased estates. After the 1st respondent discharged his duty as administrator of the deceased estates, it was wrong to sue him for the loan concerning the deceased estates.

The counsel said on the 11th ground of appeal that the trial court proceeded with the hearing, and gave judgment and decree to the 5th appellant who is a minor contrary to the law. The law is clear that the minor could be sued through his next friend. The record shows the Misc. Application No. 04 of 2021 was filed by Msafiri Sanga praying to represent the 5th appellant in the main suit. The same was granted by the trial court. But, in the judgment, the trial court entered judgment against the 5th appellant instead of the next friend of the 5th appellant. The defect is against the law.

Submitting on the last ground of appeal, the counsel said the trial court failed to consider that the case was filed after the matter had already been overtaken by event. The Probate Case was closed on 03/07/2019. This case was instituted at the trial court on 13/09/2021, two years after the probate case had already been closed. It was wrong to sue the administrator of deceased estates in this case.

In his reply, Mr. Alex Mgani disputed the claims of the appellant. He said on the 1st and 2nd grounds of appeal that the typed proceedings show on page 20 the exhibits P1 and P3 were read loudly to the court after its admission. The appellants were aware of the content of the documents. The trial court relied on all evidence available in the record including exhibits P1 and P3 in reaching its decision. It was wrong for the appellants to claim that the trial court relied on exhibits P1 and P3 only in its judgment.

Responding to the 3rd ground of appeal, the counsel said the respondent sued for recovery of this amount of loan he gave the deceased. There is no evidence in the record to show the debt was paid. The respondent never claimed for the house which was security for the loan. She claimed for recovery of her money she loaned the deceased. It was the

spouse who was supposed to challenge the exhibit P2 which shows that the house was security for cost and not any other person including the appellants. There is no claim from the deceased spouse, if any, that the property put as security for the loan was a matrimonial home. Bringing the issue to the appeal stage is not proper and proves that the same is an afterthought. This court should not consider the issue at all. There is no spouse affected by the case.

The counsel said on the 4th ground of appeal that the trial court considered the appellants' evidence as seen in the proceedings. The appellants participated during the trial, they framed issues and participated throughout the hearing. The trial court in its judgment determined each issue after testing the evidence available in record from both sides.

On the issue of failure to bring Neema Sanga and Sylvia Mbilinyi as witnesses, the counsel for the respondent said that the typed proceedings of the trial court show on page 40 the counsel for the respondent informed the trial court that Neema Sanga was threatened to testify by appellants. This is the reason Neema Sanga did not testify. The issue of adverse inference does not apply in civil cases. It applies in criminal cases where the

proof is beyond reasonable doubt as it was held in **Simon Mugejwa and Another vs. Ibrahim Magembe**, Civil Appeal NO. 123 of 2020, Court of Appeal of Tanzania at Mwanza, (Unreported), at page 18. The respondent paraded all key witnesses including PW3 and PW5 who witnessed the agreement. These witnesses were sufficient and there was no need to bring other witnesses to testify about the same thing. Thus, the ground has no merits.

The counsel submitted jointly on the 6th, 7th, 8th and 9th grounds of appeal. He said that the respondent was aware of the administration process of the deceased estates as she attended the burial of the deceased. At the burial date, the administrator of the deceased estates was not yet appointed. The respondent informed the deceased relatives at the burial that she owed money to the deceased and was informed to wait until the administrator of the deceased estates was appointed. The procedures for the appointment of an administrator of the deceased estates were not followed and the respondent was not informed of what was going on. In **Beatrice Brighton Kamanga and Another vs. Zaida William Kamanga**, Civil Revision No. 13 of 2020, High Court of Tanzania at Dar Es Salaam District Registry, (unreported), on pages 18 to 20, this court explained the procedure in the

probate case and the duties of the administrator of estates of the deceased. The procedure of advertising and affixing the citation of the probate case of the deceased estate was not followed and the respondent was not knowledgeable of the 1st appellant's appointment as administrator of the deceased estates. The probate case was not closed as there is no order of the Probate Court to close the case. The same position was held by the Court of Appeal in **Andrew C. Mfuko vs. George C. Mfuko**, Civil Appeal No. 320 of 2021, Court of Appeal of Tanzania at Dar Es Salaam, (unreported). In this case, the administrator of the deceased estates was sued together with the beneficiaries of the estates. In the probate case, there are no documents showing the deceased properties have been bequeathed to the beneficiaries. The probate case was not closed and it was proper to sue all appellants at the trial court.

The counsel was of the view that the 11th ground appeal has no merits as the omission to sue the 5th appellant through his next friend was a clerical error. The mistake was done unintentionally by the trial court. The same is curable under section 96 of the Civil Procedure Code Act, Cap. 33 R.E. 2019. The same position was stated in **Victor Meena and Another vs. Arusha Technical Collage**, Civil Appeal No. 515 of 2020, Court of Appeal of

Tanzania at Arusha, (unreported), on pages 11 to 13. The mistake has not prejudiced any party in this case as it does not go to the gist of the case.

The counsel said regarding the last ground of appeal that the suit was never overtaken by event for the reason that the probate cause for the administration of the estates of the late Christopher H. Sanga was not closed. There was no order from the probate court to close the matter. Thus, everything was properly done.

In his rejoinder, Mr. Octavian Mbungani said that the trial court did not consider the evidence of each appellant as their evidence was considered in general. The submission by the respondent that Neema Sanga was threatened to testify is the words of the advocate which was not supported by any proof. The court should decide if the principle of adverse inference applies to the civil case. Nothing on the record shows that the 1st appellant did not comply with the procedures in the probate case including procedures of advertising and affixing the citation of the probate case. The same is not the issue before this court. It has to be raised in the probate court. The cited case of **Beatrice Kamenga** is not binding to this court. The claim that the probate case was not closed was never raised at the trial court. The same is

the new issue raised at the appeal stage. The court should disregard the claim.

The counsel said that the error of the trial court to enter judgment against the 5th appellant who is the minor could not be cured by section 96 of the Civil Procedure Code Act at this stage. The decision of the Court of Appeal in the cited case of **Victor Meena and Another vs. Arusha Technical Collage**, (supra) is distinguished. The Court of Appeal did not state that at the appeal stage, the mistake of entering judgment against the matter could be cured under section 96 of the Civil Procedure Code Act. The counsel retaliated his submission in chief and prayers.

From the submissions, the issue for determination is whether or not the appeal has merits. The court will determine each ground of appeal as submitted by the counsels from both sides.

The appellant's complaint in the first and second grounds of appeal is faulting the trial magistrate for not reading exhibits P1 and P3 after its admission. In contention, the respondent's counsel disputed the appellants' claims and said that the typed proceedings shown on pages 20 and 33 the exhibits P1 and P3 were read loudly to the court after its admission. I agree

with the respondent that exhibits P1 and P3 were admitted and read over after admission as the proceedings revealed on pages 20 and 33 of the typed proceedings. Exhibit P3 was tendered by Stemius Longinus Mdendemi – PW4 after the objection of the appellant's counsel on the relevance of the exhibit was withdrawn. Exhibit P3 was admitted without objection. The 1st and 2nd grounds of appeal have no merits.

The appellants are faulting the trial magistrate for admitting and giving weight to exhibit P2 (document titled Mkataba wa Kukopeshana Fedha Tarehe 20/04/2016) which put the matrimonial house as security for the loan as binding without spouse consent. The counsel for the appellants said the deceased wife did not consent to the mortgage of the matrimonial home as the security for the loan, meaning exhibit P2 was made contrary to the Law. He was of the view that the agreement in exhibit P2 was void and the trial court was not supposed to rely on exhibit P2. In response, the respondent's counsel said the respondent sued for recovery of the loan amount he gave the deceased. There is no evidence in the record to show the debt was paid. The respondent never claimed for the house which was security for the loan. It was the spouse who was supposed to challenge the exhibit P2 which shows that the house was security for cost and not the appellants.

Section 112 (1) (a) and (b) of the Land Act, Cap. 113 R.E 2019, defines "matrimonial home" for the purpose of mortgage to mean the building or part of a building in which the husband and wife ordinarily reside together and includes where a building and its cartilage are occupied for residential purposes only, that cartilage and any outbuildings thereon; and where a building is on or occupied in conjunction with agricultural land or pastoral land, any land allocated by the husband or the wife, as the case may be, to his or her spouse for her or his exclusive use. The Act provides further in section 114 (1) that a mortgage of a matrimonial home is valid only if the document or form used in applying for such a mortgage is signed by the mortgagor and the spouse or spouses of the mortgagor living in that matrimonial home, or the document used to grant the mortgage is signed by or assented to by the mortgagor and the spouse or spouses living in that matrimonial home. The section reads as follows:-

"114.-(1) A mortgage of a matrimonial home including a customary mortgage of a matrimonial home shall be valid only if-

(a) any document or form used in applying for such a mortgage is signed by, or there is evidence from the document that it has been

assented to by the mortgagor and the spouses or spouses of the mortgagor living in that matrimonial home; or

(b) any document or form used to grant the mortgage is signed by or there is evidence that it has been assented to by the mortgagor and the spouse or spouses living in that matrimonial home.”

In **Maria Goreti Katura Mutarubukwa vs. National Bank of Commerce Ltd and Two Others**, Land Case No. 28 of 2004, High Court of Tanzania Land Division, (unreported), this Court nullified the sale of the mortgaged matrimonial home after it found the sale proceeded without spouse consent.

From the provision in sections 112 (2) (a), (b), and 114 (1) of the Land Act, the mortgage is valid only if the document used in applying or granting such a mortgage is signed by the mortgagor and the spouse or spouses of the mortgagor living in the respective matrimonial home.

I have read the available record. The evidence is silent if the mortgagor (the late Christopher Sanga) or any of his spouse were living in the mortgaged house. The evidence of Emma Lupyana Mgaya (DW5) shows that the respondent has been residing in the house since 2015. Moreover, exhibit

P2 was signed by the wife of the late Christopher Sanga known as Sylvia Mbilinyi. This is proved by the testimonies of PW1, PW2, PW5 DW5 and exhibit P2. DW5 said in her evidence she is the wife of the late Christopher Sanga. She said the marriage of her late husband to Sylvia Mbilinyi was illegal since the husband was a Christian. However, there is no evidence in the record proving that the late Christopher Sanga and DW5 contracted Christian marriage. DW5 when answering to cross-examination question said she does not have a marriage certificate. She did not say the form of marriage they contracted. Moreover, her evidence shows that the late Christopher Sanga had two wives and the burial ceremony of the late Christopher Sanga was made at DW5's house and Sylvia Mbilinyi's house. The same proves that the house at issue was not a matrimonial home for mortgage purposes. Hence, the spouse's consent for the mortgage was not needed.

The counsel for the respondent correctly stated that the issue at hand is not the selling or taking of the house at issue which was mortgaged as security for the loan. The claims were for the payment of the loan which the late Christopher Sanga took from the respondent. Exhibit P2 was tendered as proof of the presence of the loan agreement between the respondent and the late Christopher Sanga. Thus, exhibit P2 was a valid document proving

the presence of a loan agreement between the late Christopher Sanga and the respondent. I find the 3rd ground of appeal is meritless.

In the fourth ground of appeal, the appellants are faulting the trial magistrate for not considering the appellants' evidence. The respondent in contention said that the court considered the appellants' evidence in the determination of each issue framed.

Looking at the judgment of the trial court, the evidence of the appellants was considered in the determination of the case. The trial court on pages 15 and 16 of the judgment stated that the appellants did not dispute the evidence showing the late Christopher Sanga took a loan of seventy million shillings to the respondent and they were aware of the debt. The trial court considered the evidence of the first appellant regarding the closure of the probate case on pages 17 and 18 of the judgment.

The nature of the appellants' evidence is that they were not aware that their late father took a loan from the respondent and the respondent did not come forward to claim for the loan until after the deceased estate was distributed to beneficiaries and the probate case was closed. What was different was the evidence of the first appellant (DW6) who was the

administrator of the deceased estates. DW6 in his evidence said he distributed the deceased estates to beneficiaries after following all procedures including advertising the probate. He said the respondent did not come forward to claim for his debt after advertising the probate. As a result, he went on to distribute and file the inventory to the probate court. With such kind of evidence from the appellants, I find that the trial magistrate properly considered their evidence in general and went to consider the evidence of DW6 separately. Thus, the ground has no merits.

In the fifth ground of appeal, the appellants are claiming that the court should draw adverse inference for the respondent's failure to call as witnesses Sylvia Hasani Mbilinyi and Neema Sanga. They were of the view Sylvia Hasani Mbilinyi and Neema Sanga were material witnesses as PW1 testified to give a loan of 70 million Tanzania shillings to the late Christopher Sanga (the deceased) in their presence as a witness of the loan. In response, the respondent's counsel said the respondent paraded all key witnesses including PW3 and PW5 who witnessed the loan agreement. PW3 and PW5 evidence was sufficient and there was no need to bring other witnesses to testify about the same thing. The typed proceedings of the trial court show on page 40 the counsel for the respondent informed the trial court that

Neema Sanga was threatened to testify by appellants as a result they did not call her to testify. He added that the issue of adverse inference does not apply in civil cases. It applies in criminal cases where the proof is beyond reasonable doubt as it was held in **Simon Mugejwa and Another vs. Ibrahim Magembe**, Civil Appeal NO. 123 of 2020, Court of Appeal of Tanzania at Mwanza, (Unreported), at page 18.

In determining the issue, it is important to look at the evidence or proceedings touching Sylvia Hasani Mbilinyi and Neema Sanga. The evidence of PW1 shows that Sylvia Hasani Mbilinyi was the late Christopher Sanga's wife and witness of the loan agreement. But, she was not the only witness to the loan agreement. The evidence of PW1, PW2 and PW5 proved they were present during the loan process and Sylvia Mbilinyi was a witness of the loan agreement. PW2 is signed as the witness of the respondent in the loan document (exhibit P2). PW5 testified to witness PW1 handling the loaned amount to the late Christopher Sanga after signing the loan document in his presence. He said the borrower handled the sale agreement of the house at Mjimwema Block G 253 Plot No. 95 as security for the loan. The court is aware that there is no specific number of witnesses needed to prove facts under section 143 of the Evidence Act, Cap 6 R.E. 2022. What is needed

is the credibility of the witness and even a single witness is sufficient to prove the case as was stated in the case of **Yohanis Msigwa vs. Republic [1990] TLR 148.**

I'm satisfied that there was no need for the respondent to call Sylvia Mbilinyi in this case since PW2 and PW5 testified as witnesses of the loan agreement between the respondent and the late Christopher Sanga. Calling Sylvia Mbilinyi would be a repetition of PW2 and PW5 evidence. For Neema Sanga, PW1 said she was the wife of the late Christopher Sanga who told her that the house was the property of Christopher Sanga. In this case, there is no dispute that the house in issue is the property of the late Christopher Sanga. The same is proved by the evidence of PW5, DW1, DW2, DW3, DW4, DW5 and DW6. Neema Sanga is not a material witness in this case as there is other evidence on record proving the gist of her evidence. Thus, I find Neema Sanga and Sylvia Mbilinyi were not material witnesses and failure to bring them did not prejudice the appellants in any way.

The appellants in the sixth, seventh, eighth and tenth grounds are faulting the trial court for holding that the respondent proved his claim. They said that the trial court erred to hold they were knowledgeable about the

claimed loan, they neglected to pay it, and the respondent was not aware of the appointment of the administrator of the deceased estates. It was their submission that the respondent participated in the whole process of burial of the deceased person and she was informed about the process of appointing the administrator of his estates. The 1st appellant affixed the citation as directed by the probate court and he could not affix the citation at creditors' houses not known to him. In contention, the respondent's counsel said that the respondent attended the burial of the deceased, informed the deceased relatives at the burial ceremony that she owed money to the deceased and she was informed to wait until the administrator of deceased estates is appointed. At the burial date, the administrator of the deceased estates was not yet appointed. The procedures for the appointment of an administrator of the deceased estates were not followed and the respondent was not informed of what was going on.

The evidence of PW1 shows that she attended all three days of the burial ceremony of the late Christopher Sanga. On the burial date, she informed the deceased family that she owed the deceased seventy million shillings. The 1st appellant told PW1 to wait until the administrator of the deceased estates is appointed to claim for her money. PW1 said the

administrator of the deceased estate was appointed without telling her and it was in June 2020, when Emma Mgaya (DW5) and her two children went to her office and claimed the house was given to the beneficiary of the deceased estate in a probate case. The evidence PW1 that she attended the burial ceremony of the late Christopher Sanga and informed his family about the loan she gave the deceased was not challenged in cross-examination by the appellants. Among the appellants, only DW3 said he did not see PW1 at the funeral. The 1st appellant said nothing about the answer he gave to PW1 that she has to claim for her loan after the administrator of the deceased estates was appointed. The respondent evidence (PW1's evidence) proved that she informed the deceased family about the deceased debt on the burial date. The same also proves that by that time the administrator of deceased estates was yet to be appointed.

The respondent (PW1) testified that she was not informed about the appointment of the administrator of the deceased estates. PW1 brought John Martine Mbata (PW3) who was the chairman of Mlando Street to prove that the citation was not affixed in his office. The house which was mortgaged by the late Christopher Sanga as security for the loan was situated at Mlando Street. The 1st appellant (DW6) in cross-examination said he affixed the

citation to the Mwembetogwa Street Office, Kivavi Street Office, the Makambako Primary Court and all deceased houses. He said he did not affix the citation to the creditor's house since he does not know them including the respondent. However, there is evidence of DW5 that the respondent has been residing at the deceased house on Mlando Street since 2015.

The 1st appellant (DW6) said as an administrator of deceased estates he collected four deceased houses and divided them among his beneficiary. Under normal circumstances, it is expected for the 1st appellant to know the respondent as DW5's evidence shows the respondent residing in the deceased house at Mlando Street since 2015. The evidence of PW1 and PW3 proved on the balance of probabilities that the 1st appellant did not affix the citation at the deceased house situated in Mlando Street or at the Mlando Street Office where one of the deceased houses was situated. Under such circumstances, the respondent couldn't have information about the citation of the deceased probate case and appointment of 1st appellant as the administrator of the deceased estates. Also, as PW1 informed the deceased family during the burial ceremony that the deceased has her debt, it was expected for the 1st appellant and deceased family to inform her after the

administrator of the deceased had been appointed so she could bring her claims.

In this case, the respondent proved that she lent seventy million shillings to the deceased who put his house at Mlando Street as security for the loan. The deceased did not pay the debt until his demise. The respondent attended the deceased burial ceremony and informed the deceased family about the debt. They informed her to wait until the administrator of the deceased estates is appointed. The administrator of the deceased estates was appointed without her knowledge and distributed the deceased estates to beneficiaries. The evidence of the respondent is heavier than the appellants, hence he proved her claim on balance of probabilities.

In the ninth and twelfth grounds of appeal, the appellants are condemning the trial court for wrongly suing the 1st appellant since by the time the case was filed he was no longer the administrator of the deceased estates as the probate case has already been closed. In response, the respondent said there is no evidence showing the deceased properties have been bequeathed to the beneficiaries and the probate case was closed.

The record shows that the 1st appellant said in his testimony he had already divided the deceased estates to the beneficiaries and filed inventory. Unfortunately, no inventory was tendered as an exhibit during the trial. The probate case is complete when there is an order from the probate court to close the case as was stated in **Andrew C. Mfuko vs. George C. Mfuko**, (supra). Filing of inventory alone is not proof that the probate case has been closed and the administrator of the deceased estates has been discharged from his duty. The probate case must be closed by the order of the probate court. In absence of the evidence that the probate court closed the probate case, the respondent properly sued the 1st appellant. The grounds have no merits.

In the eleventh ground of appeal, the appellants claimed that the trial court erred in law and fact for entering judgment against the 5th appellant on his own capacity knowing he is a minor. There was an application filed in the trial court by Msafiri Ebron Sanga praying to be the next friend to the 5th appellant which was successful. The counsel for the respondent conceded the presence of the omission to sue the 5th appellant through his next friend and said the omission was a clerical error. He said the mistake is curable under section 96 of the Civil Procedure Code Act, Cap. 33 R.E. 2019.

As it was stated by the counsel for the appellants and conceded by the counsel for the respondent, the evidence available in the record shows that the 5th appellant namely Clifu Sanga was a minor aged 9 years old when the suit was instituted at the trial Court. The record shows the Misc. Civil Application No. 04 of 2021 filed by Msafiri Ebron Sanga to represent the 5th appellant in the main suit was granted by the trial court. Since there is an order of the Njombe District Court granting leave to Msafiri Ebron Sanga to represent the 5th appellant as his next friend, it was wrong for the trial Court not to record in its judgment that the Msafiri Ebron Sanga is the next friend of the 5th appellant. However, as there is an order of the Njombe District Court appointing Msafiri Ebron Sanga as the next friend of the 5th appellant, I'm satisfied that the omission did not prejudice the appellants in any way. The omission is curable under section 96 of the Civil Procedure Code Act, Cap. 33 R.E. 2019, since the mistake does not go to the gist of the case. A similar position was stated in the cited case of **Victor Meena and Another vs. Arusha Technical Collage**, (supra).

Consequently, this court used its revisional powers to order that the name of the 5th respondent in the original suit (Civil Case No. 11 of 2021 at District Court of Njombe at Njombe) to read Msafiri Ebron Sanga as the next

Friend of Clifu Sanga as it was the order of the Njombe District Court in Misc. Civil Application No. 04 of 2021.

Therefore, I find the appeal is devoid of merits and I dismiss it with cost. It is so ordered accordingly.

Dated at Iringa this 31st day of May, 2024.



A.E. MWIPOPO
JUDGE