

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
THE SUB-REGISTRY OF MWANZA
AT MWANZA

CIVIL APPEAL NO. 5702 OF 2024

(Arising from Probate Appeal No. 10 of 2023 of Nyamagana District Court before Mgendi SRM and original Probate Cause No. 69 of 2010 of Mkuyuni Primary Court)

MASOUD RASHID MUSSA KAOMBWE.....APPELLANT

VERSUS

KULWA RASHID MUSSA KAOMBWE.....RESPONDENT

JUDGMENT

23rd May & 7th June, 2024

CHUMA, J.

This is the second appeal by the appellant who is dissatisfied with the decision of Nyamagana District Court in probate appeal No 10/2023.

The appellant's appeal contains three grounds as here under;

1. That the appellate Nyamagana District Court erred in law and fact to dismiss the applicant's appeal against the decision of Mkuyuni Primary Court.
2. That the appellate Nyamagana District Court erred in law and fact when misconstrued the provisions of Rule 1(1) 5th Schedule of the Magistrate Courts Act Cap 11 RE:2019

3. That the appellate Nyamagana District Court erred in law and fact for failure to take into consideration that the deceased's place of fixed abode at the time of his death was a dwelling house on plot No. 137 Block L Kanyenye area Mkunazini Street Tabora Municipality, Tabora Region.

At the hearing of this appeal, the appellant appeared in person, fending for himself, while the respondent who entered appearance as well enjoyed the legal service of Ms. Lucy Mussa Learned counsel.

In his submission the appellant had this to say; that that the late Rasid Mussa Kaombwe never stayed in Mwanza hence the matter was wrongly instituted and entertained at Mkuyuni Primary Court Mwanza. The late Mussa stayed in Tabora and died in Tabora as well. His properties are also in Tabora, Plot No 137 Block L Kanyenye area. He went on arguing that he was the one who filed the case there out of ignorance but the trial court admitted and heard the matter. And that he did raise jurisdiction concerns to the district court as well but the court dismissed it.

Regarding the second ground, the appellant just repeated his ground that the court failed to construe the provisions of Rule 1(1) 5th schedule of the Magistrate Courts Act Cap 11 RE 2019.

As to the third ground, it was his submission that the District Court erred in law and fact for failure to consider that the deceased place of fixed abode at the time of death was a dwelling house plot No 137 Block L situated at Kanyenye area Tabora. And that he had other assets as well thereat. He insisted that the probate cause was wrongly determined at Mkuyuni Primary Court which is outside the court's jurisdiction. The late Rashid Mussa died in Tabora and all his properties are in Tabora.

He then prayed this court to quash the trial court decision for want of jurisdiction. Two revocations of Silas Isangi as administrator of the deceased's estate. Three the matter be heard afresh in Tabora and any other reliefs this court may deem fit to grant and cost of this case.

In response, Ms Lucy Mussa Learned counsel for the respondent challenged this appeal by arguing only the second ground regarding jurisdiction. Ms Lucy started his submission by admitting that according to Rule 1 (1) 5th schedule of MCA, probate matters have to be filed where the deceased used to live or rather a place of abode. But it is the appellant who filed this matter at Mkuyuni Primary Court following his denial to proceed with the probate filed in Tabora. But also his appeal is overtaken by events because the appointed administrator by the court has already sold the property in issue and the proceeds are kept in court

waiting for distribution to beneficiaries. For those reasons, it was her the first appellate court rightly decided the appeal for want of proof from the instant appellant. She finally urged this court to dismiss this appeal with cost.

In his brief rejoinder, it was the appellant's submission that as submitted by the respondent's advocate the property was indeed ready sold but the proceeds are not yet distributed to beneficiaries. And that this appeal is not overtaken by the event because the said sale has been challenged via application No 69/2010 which is pending in Mkuyuni Primary Court. He however denied the allegation that initially the probate cause was filed in Tabora and he resisted it to proceed there. He concluded by inviting this court to allow the entire appeal.

Having carefully examined the trial court record, decision of the first appellate court and considered the rival submissions of the parties, the issue for determination is whether this appeal has merit. I feel compelled to begin with the second ground of appeal. It is trite law that the jurisdiction of the court is the creature of statute. The court cannot assume jurisdiction not conferred by the law. In the case of **Yohana Balole vs Anna Benjamin Malongo**, Civil Appeal No. 18 of 2020 CAT the court discussed the concept of jurisdiction in the following manner;

*"It is common ground that jurisdiction of courts is a creature of statute and is conferred and prescribed by the law and not otherwise. The term "Jurisdiction" is defined in Halsbury's Laws of England, Vol. 10, paragraph 314 to mean: -"...the authority which a court has to decide matters that are litigated before it or to take cognizance of matters prescribed in a formal way for its decision. **The limits of this authority are imposed by the statute; charter or commission under which the court is constituted, and may be extended or restrained by similar means. A limitation may be either as to the kind and nature of the claim or as to the area which jurisdiction extended or it may partake of both these characteristics.**"*

A similar vein was also decided in the case of **Aloisi Hamsini Mchuwau & Another vs Ahamadi Hassani Liyamata** Criminal Appeal 583 of 2019 CAT.

In the instant matter, the jurisdiction of the primary court is governed by the provisions of section 3 of the Magistrates' Courts Act read together with paragraph 1(1) of the fifth schedule to the Act which reads thus;

Section 3(1) of MCA provides that,

"There are hereby established in every district primary courts which shall, subject to the provisions of any law for the time being in force, exercise jurisdiction within the respective district in which they

are established”

And more specific for the purpose of this matter paragraph 1(1) of the fifth schedule to the Act reads thus;

*“The jurisdiction of a primary court in the administration of deceased's estates, where the law applicable to the administration or distribution or the succession to, the estate is customary law or Islamic law, may be exercised in cases where the deceased at the time of his death, **had a fixed place of abode within the local limits of the court's jurisdiction. (Emphasis added)***

Guided by the above-cited provision of the law and case laws, I find it pertinent to assess whether the trial court and the first appellate court had jurisdiction to entertain probate cause no.69 of 2010 and appeal No.10 of 2023. My perusal of the lower court records probate cause no.69 of 2010 in particular, specifically the death certificate of the deceased and form No.1 indicates that the deceased place of abode was Tabora. Even the property in dispute is in Tabora. On page 4 of the first appellate court decision, the court stated that I quote for ease of reference;

“In the hearing of this appeal, the appellant fails to adduce vivid evidence according to the residence of the deceased person, merely to state that, the deceased reside in Tabora without corroboration evidence as much as his submission lacks strong evidence to support his argument”.

According to the record herein above indicated, it is beyond doubt that the late Rashid Mussa Kaombwe was residing in Tabora. I will then depart from the argument by the first appellate court quoted above on this matter because there is tangible evidence including a death certificate that suffices to ascertain the place of filing probate matters in court.

More so during the hearing of this appeal before me, Ms. Lucy Learned counsel for the respondent said nothing regarding the residence of the deceased rather her submission was that, it was the applicant himself who filed that case at Mkuyuni Primary Court and that the matter is overtaken by the event as the house in issue has been sold. I admit the property in dispute has been sold though its proceeds are still kept to Mkuyuni Primary Court and not yet distributed to the rightful beneficiaries and that there pending application objecting to such sale thereat. I have however asked myself whether a court can entertain the matter beyond its jurisdiction only because it has been filed by the appellant?. I don't want to believe so. This is because the issue of jurisdiction is crucial and the court is supposed to observe and be assured of their jurisdictional position at the first instance of trial before dealing with the matter to its finality.

It is not a matter of who lodged the case in court rather jurisdiction is creature of statutes which can not be assumed even by parties consent

as it was held in the case of **Shyam Thanki and Others V. New Palace Hotel** [1971] 1. EA 199. See also the case of **Mathias Eusebi Soka (As personal representative of the Late Eusebi M.Soka) V The Registered Trustees of Mama Clementina Foundation and two Others** Civil Appeal No 40 of 2001.

But also I decline to join hands with the submission of the Learned counsel for the respondent who tried to convince this court that the issue of jurisdiction has been overtaken by event by mere fact that the property in dispute has been sold.

To this end, I agree with the appellant's submission, that the trial court had no power in terms of territorial jurisdiction to entertain the matter on the ground that the deceased place of abode was not within the geographical limits of Nyamagana District where Mkuyuni Primary Court is found. Mkuyuni Primary Court is far away from Tabora which is another Region. This court in the case of **Hyasinta Kokwijuka Felix Kamugisa vs Deusdedith Kamugisha**, Probate Appeal No. 4 of 2018, had this to say;

"Therefore, the primary court established within the district has geographical jurisdiction within the whole district where it is established. It follows therefore that a person may

institute a case in any primary court within the district where the deceased at (sic) a fixed abode at the time of his death."

I therefore find the trial court seized itself with the jurisdiction not conferred by the law and the first appellate court as well stepped in the same shoes. No court can confer jurisdiction upon itself. The impact of assuming powers that one does not possess was discussed by the Court of Appeal of Kenya in the persuasive case of **Owners of Motor Vessel Lilian V Caltex Oil Kenya Limited (1989) KLR** where inter -alia it was held that;

"Where the court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing."

It suffices also to hold that the question of jurisdiction is a matter of law as it goes to the root of the matter thus it may be raised at any stage even on the appeal stage as it was held in the case of **Tanzania Revenue Authority V. Tango Transport Company Ltd.** In the spirit of the foregoing, the whole trial in both the Primary Court and of District Court is void ab initio for want of jurisdiction as here above explained.

In the foregoing analysis, the second ground of appeal is meritorious and suffices to dispose of this appeal. In the event, I find it inappropriate to venture into the remaining grounds of appeal. Since the lower courts

tried nullity, I therefore, nullify and quash the proceedings and decision of the Mkuyuni Primary Court and that of the first appellate Court and set aside all orders therefrom for want of jurisdiction. The parties if may so wish, can institute another petition before the court with requisite jurisdiction to entertain the same. Owing to the nature of the matter, I desist from making an order as to costs.

I so order.

DATED at **MWANZA** this 7th day of June 2024.



W. M. CHUMA
JUDGE

Judgment delivered in court in the presence of both parties this 7th day of June, 2024.

W. M. CHUMA
JUDGE