IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

TEMEKE HIGH COURT SUB-REGISTRY

(ONE STOP JUDICIAL CENTRE)

AT TEMEKE

PC. CIVIL APPEAL NO. 5272 OF 2024

(*Arising from the judgment and decree of the District Court at the District Court of Temeke at One Stop Judicial Centre in Probate Appeal No. 6 of 2023 and originating from Temeke Primary Court at One Stop Judicial Centre in Probate Cause no. 551/2022)*

SWALEHE ALLY MPINGA..APPELLANT

VERSUS

SEIF ALLY MPINGA...RESPONDENT

(*As administrator of the estate of the late Said Mohamed Mpinga*)

JUDGMENT

03/06/2024 & 21/06/2024

SARWATT, J.;

The appellant, after being aggrieved by the decision of the District Court of Temeke at One Stop Judicial Centre in Probate Appeal No. 6 of 2023,

preferred to challenge it before this Court with three grounds of appeal. The said grounds, as per the petition of appeal, are;

1. *That, the first appellate Court erred in law and, in fact, to hold that the appellant had opted only to argue only one ground out of eight grounds raised in Probate No 551/2022, hence upholding the findings that had denied the appellant's right to be heard on the whole eight grounds raised to revoke the letters of administration granted to the respondent.*
2. *That there was misdirection by the primary Court to rely on one ground out of eight grounds raised by the appellant as grounds to revoke letters of administration granted to the respondent and deny the appellant's right to be heard on the rest of the grounds hence came to the wrong decision.*
3. *That, the first appellant Court erred in law and, in fact for failure to scrutinize the evidence tendered in the primary Court, which showed that there was probate case no 22 of 1991 in respect of the same deceased person, Said Mohamed Mpinga, filed at Kawe Primary Court which letters were granted to Ally Said Mpinga (now deceased) hence come to a wrong decision.*

Therefore, it was the appellant's prayer that the letters of administration granted to the respondent be revoked or, in the alternative, the file be remitted back to the primary Court so the appellant could be heard on the remaining seven grounds.

To understand the present appeal, narration of facts, albeit brief, is necessary. Upon the death of Said Mohamed Mpinga on 26th April 1991, the respondent herein, through Probate cause No. 551 of 2022, petitioned before the Primary Court of Temeke at One Stop Judicial Centre to be appointed to administer his estate. His application was uncontested, and on 8th April 2022, the trial Court appointed him to administer the estate of Said Mohamed Mpinga.

On 16th August 2022, the appellant herein brought before the trial Court an application for the revocation of letters granted to the respondent. In his application, the appellant advanced eight reasons, the major one being that the respondent deceived the Court in making a fresh application while there was already a Probate Cause No. 22 of 1991 before Kawe Primary Court in respect of the same deceased. The application was heard, and upon full trial, the trial Court dismissed the application after being satisfied that there was no Probate Cause No. 22 of 1991 before Kawe Primary Court in respect of

the same deceased. Aggrieved, the appellant unsuccessfully appealed before the District Court and hence the present appeal.

At the hearing of the appeal, the appellant enjoyed the service of the learned counsel, Mkenda M. Pius, while the respondent had the representation of Eliphafra Ally, Learned Advocate, and both parties agreed the appeal should be heard by way of written submissions.

Submitting in support of the appeal, on the first ground, Mr. Mkenda advanced that, the appellant noted, the respondent had unlawfully filed and was granted letters of administration of the estate of the late Said Mohamed Mpinga. In the event, he applied for revocation of his appointment based on eight grounds. According to Mr. Mkenda, during the hearing of the application, the trial Court invited the appellant to address the first issue as it was a pure matter of law, and thereafter, the trial Court composed a ruling leaving the remaining seven grounds unheard.

Arguing further, Mr. Mkenda advanced that if the trial Court hoped that the first ground would dispose of the application, having found that the said ground cannot suffice to dispose of the application, it ought to grant the appellant an opportunity to be heard on the rest of the grounds. The counsel

went further and cited the case of **David Mushi v Abdallah Mshamu Kitwanga**, Civil Appeal No. 286 of 2026, which referred to the decision in the case of **Abbas Sherally and Another v S.H.M Fazalboy**, Civil Application No. 33 of 2002 which insisted on the right to be heard before an adverse action is taken against a party.

Submitting on the second ground, the counsel advanced that, throughout the proceeding, there is nowhere that indicates that the appellant wished to drop the remaining grounds or that the submission advanced did not show any sign of consolidating the grounds. It was improper for the trial Court to deny the appellant an opportunity to be heard.

On the third ground, it was the appellant counsel's contention that, following the death of Said Mohamed Mpinga in 1991, Ally Said Mpinga, who is now deceased, petitioned and was granted the letter of administration through Probate Cause No. 22 of 1991 at Kawe Primary Court. The counsel went on and advanced that the fact that the records of Probate Cause No. 22 of 1991 were misplaced doesn't suffice to rule out that there was no probate case in place. Had the Court thoroughly scrutinized the evidence which was brought before it, including the copy of the letter of administration which was tendered before the Court, it would have come to a different decision.

On his turn, the respondent counsel, in his submission opposing the appeal, decided to submit together both grounds one and two and advanced that the appellant's allegation that he was condemned unheard by the trial Court is unmerited as the key issue for the determination that gave rise to the said eight grounds of appeal was whether Probate Cause No. 22/1991 was filed at Kawe Primary Court or not, and basing on that issue, the trial Court accorded all the parties an equal opportunity to be heard and rightly applied the rule of general consideration of the ground of appeal basing on the said issue for determination.

Submitting further, the learned counsel advanced that, from the raised eight grounds of appeal, one can observe that the first ground of appeal is a decisive ground as it centered on the legality of the respondent to petition for letters of administration while there is already a Probate case in respect of the same deceased, of which the trial Court was satisfied that the said case does not exist.

It was the counsel's contention that Courts are enjoined to consider the ground of appeal presented to it either generally or one by one, as held by the Court of Appeal of Tanzania in the case of **Mwajuma Bakari (administratrix of the estate of the late Bakari Mohamed) v Julita**

Semgeni and Josephine Mwalimu, Civil Appeal No.71 of 2022 and basing on the decision on the said case, the counsel concluded that, the trial Court afforded the parties with full opportunity to be heard.

Submitting on the third ground of appeal, it is Mr. Eliphafra's contention that the trial Court properly scrutinized the evidence as regards the existence of Probate Cause No. 22 of 1991 at Kawe Primary Court, as the trial Court diligently made official communication with Kawe Primary Court on the alleged existing file, and the Magistrate Incharge of Kawe Primary Court replied that, there is no Probate Cause No. 22/1991 in the case register of 1991.

According to the respondent counsel, the only evidence that was required to be considered in resolving the issue of the existence of Probate Cause No. 22/1991 is the letter from the Kawe Primary Court which is alleged to have registered the same. The fact that Court indicated that there is no register for Probate Cause No. 22/1991. The case file did not exist, then the counsel concluded that, the trial Court correctly scrutinized the evidence before coming to the decision.

On rejoinder, the appellant's counsel reiterated what he submitted earlier

and insisted that the fact that the records regarding the existence of Probate Cause No. 22/1991 could not be traced is not the appellant's fault. It does not do away with the existence of the said Probate Cause. Additionally, the counsel provided that, a copy of the letter of administration was tendered at the trial Court, but the trial magistrate provided no comment on the said letter.

On grounds one and two, the appellant counsel added that the power of the Court to consider the ground of appeal either generally or one after another can be exercised when composing judgment after having fully heard all the parties' arguments on all the raised grounds. He also argues that the case of **Mwajuma Bakari(supra),** cited by the respondent counsel, is distinguishable from the present case.

Having gone through the lower Courts records and the rival submissions of both parties, this Court is tasked to determine if the present appeal has merit.

To begin my deliberations, I will address both grounds one and two as they are interrelated. They both address the issue of the appellant being denied the right to be heard. The complaint of the appellant against the trial Court

was the fact that, it denied him the right to be heard on the remaining grounds of revocation, as the Court only gave them a chance to submit on the first ground. The appellant had also complained about the first appellate Court, and on its decision, which remarked that the appellant chose to address a single issue during trial. Therefore, it cannot be faulted.

My perusal of the trial Court records reveals that, indeed, in his application for revocation, the appellant advanced eight reasons warranting the Court to revoke letters of administration granted to the respondent, one of which is that there is already a probate case in respect of the same deceased before Kawe Primary Court. On 18/8/2023, counsels for both parties submitted the existence of the said case. The Court ordered both counsels to do a perusal to the Court record so as to satisfy themselves on the existence of the said case before the hearing started.

On 26/9/2022, when the trial resumed for hearing the application, the evidence of both parties was received, and the Court made the decision. Basing on the trial Court records, I agree with the first appellate Court that it is the appellant who decided to give his evidence on the first ground alone.

The appellant's allegation that the trial Court wanted them to submit on the

first ground alone is unfounded because there is no such order on the trial Court record. Despite the appellant being fully aware that in his application, he advanced eight reasons for revocation when he was given a chance to give his evidence, he chose only to provide evidence on the first ground and prayed to close his case. He can not afterward fault the trial Court to have denied him the opportunity to be heard. Under the circumstances, this ground fails, and it is hereby dismissed.

On the third ground, the appellant faulted the trial Court for arriving at a wrong decision, as it failed to scrutinize that there is already Probate Cause No. 22 of 1991 in respect of the same deceased person. On the issue, both the lower Courts made a finding that the said case does not exist. It should be noted that this is a second appeal, and it is a trite principle that the second appellate Court should not interfere with concurrent findings of fact of two lower Courts unless it is shown that there has been a misapprehension of evidence, a miscarriage of justice or violation of some principles of law or procedure.

The principle is enumerated in various cases, including the case of **Wankuru Mwita vs. Republic**, Criminal Appeal No. 219 of 2019, where the Court said;

"....The law is well-settled that on a second appeal, the Court will not readily disturb concurrent findings of facts by the trial court and the first appellate Court unless it can be shown that they are perverse, demonstrably wrong, or clearly unreasonable or are a result of a complete misapprehension of the substance, nature and quality of the evidence, misdirection or non-direction on the evidence, a violation of some principle of law or procedure or have occasioned a miscarriage of justice"

In the present case, this Court has to answer the issue as to whether the said case exists. The records reveal that, before the trial court, the appellant tendered as exhibit a copy of a letter of administration granted to Ally Said Mpinga on the alleged Probate Cause No. 22 of 1991, which was admitted as exhibit XM1, citation and a letter introducing Ally Said Mohamed as being proposed by the family to administer the estate of Said Mohamed Mpinga, which were admitted collectively as exhibit XM2. On a further inquiry on the existence of the said case, the trial Court wrote a letter to Kawe Primary Court, which responded in its letter Kumb: Mirathi No. 22/1991 dated 18/10/2022 that the case file and the case register could not be found.

However, the magistrate in charge provided that they were able to obtain a citation and a letter appointing Ally said Mohamed to administer the estate.

Basing on the above evidence, I agree with the respondent's counsel that the fact that the case file and register for the year 1991 could not be traced is not the appellant's fault. However, that alone can not prove that the said file existed. Despite the appellant tendering of exhibit XM2, which are citation and introduction letter, the trial magistrate rightly pointed out that the appointment of administrator is exhibited by a letter of appointment and not by citation or introduction letter.

Even though the trial magistrate remarked on exhibit XM2, I agree with the appellant's counsel that he did not comment on the existence of exhibit XM1, which is the letter of appointment. Despite that failure, I agree with the first appellate Court that the said letter of appointment, as presented by the appellant, cannot be relied upon, as it indicates that Ally Said Mpinga was appointed to administer the estate of the late Said Mohamed Mpinga on 2/12/2020, through Probate Cause No. 22/1991. The fact that the said form of an appointment indicates that Ally Said Mpinga was appointed on 2/12/2020, more than 29 years since his petition to the Court, creates questions on the legality of the said letter of appointment and absence of

the case file and Court register, this Court is not satisfied on the existence of the said case. Therefore, this ground also fails.

Basing on the above observations, this Court finds that the appeal is devoid of merit, and it is hereby dismissed with no order as to costs.

Dated at **Dar es Salaam** this 21th day of June, 2024.

S. S. SARWATT

JUDGE

Delivered in the presence of appellant and respondent in persons, Michael Mkenda advocate for the and Daniel Nsolwa advocate for the respondent.

The right of appeal is fully explained.