

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

GEITA SUB REGISTRY

AT GEITA

CIVIL APPEAL NO. 2857/2024

(From Civil Revision No.14 of 2023 of the District Court of Geita Originating from Probate and Administration Cause 10 of 1998 of the Nyankumbu Primary Court)

MAJALIWA JAMES MSOGA *(Administrator of the Estate of the late James Msoga)* **APPELLANT**

VERSUS

ALISON ZABRON KISABA *(Administrator of the Estate of the late Tereza Buhuru)* **RESPONDENT**

JUDGMENT

Date of last order: 22/03/2024

Date of Judgment: 26/03/2024

MWAKAPEJE, J.:

The appeal before this court emanates from the ruling rendered by the District Court of Geita in Civil Revision No. 14 of 2023. In the Revision Application, the Appellant contested the decision issued by the Primary Court in Probate and Administration Cause No. 10 of 1998.

The crux of the matter can be summarised as follows: on 28th July 1998, the Appellant was appointed as the Administrator of the estate of the deceased, James Msoga, who passed away intestate on 19th March 1998, as per Probate and Administration Cause No.10/1998 of the Nyankumbu

Primary Court. The deceased was survived by two wives. The second wife, Tereza Buhuru, had no surviving children, as all three children she had borne had passed away. Following the demise of her husband, Tereza Buhuru petitioned for the letters of administration of the estate to be appointed as the administratrix of the deceased's estate. During the proceedings, a faction of the family members contested the proposed appointment of Tereza Buhuru as the Administrator of the deceased's estate.

The Primary Court conducted a comprehensive hearing and ultimately appointed Majaliwa James Msoga, the son of the deceased. Additionally, the court granted the petitioner specific parcels of land from the deceased's estate, namely the residence where they had resided with the deceased and a farm registered as CT No.40174 in the Rwamgasa area. The remainder of the estate's assets were entrusted to the Administrator, i.e., the Appellant.

The Appellant has persistently contested this decision, asserting that the allocation of the deceased's assets to the late Tereza Buhuru was illegal and full of irregularities since it transpired prior to the appointment of an administrator for the estate of James Msoga. His application for revision to the District Court, seeking to annul the decision of the Primary Court in

Probate and Administration Cause No.10/1998, was dismissed, prompting the present appeal before this Court.

Thus, the Appellant seeks to set aside the District Court's decisions in Civil Revision No.14 of 2023 and that of the Primary Court in Probate and Administration Cause No.10 of 1998. In his appeal, he has put forth four grounds of appeal, which are enumerated as follows:

- 1. That the District Court erred in law by upholding the decision of the Primary Court in Probate and Administration cause No. 10 of 1998, which granted the late Tereza Buhuru the Deceased Properties before appointing an Administrator of the deceased's estate.*
- 2. That the District Court erred in law by upholding the decision of the Primary Court in Probate and Administration cause No. 10 of 1998, which distributed the deceased's estate in the absence of the Administrator of the estate.*
- 3. That the District Court erred in law by disregarding the irregularities committed in the Primary Court decision in Probate and Administration cause No. 10 of 1998, hence resulting in a total denial of the powers of the Administrator of the estate.*
- 4. That the District Court erred in law by going on a bender to accept the alleged presence of the Administrator in the court proceedings*

of the Probate and Administration cause No. 10 of 1998 when the court record shows the Administrator was not part of the proceedings.

When the appeal was called for hearing, Mr Leonard Silvanus represented the Appellant, and Mr Ernest Makene, a learned advocate, represented the Respondent.

In his submission on the first ground, Mr Silvanus stated that the Appellant contests the District Court's endorsement of the Primary Court's decision to grant the deceased's property to Tereza Buhuru before appointing an administrator. He further stated that the Primary Court lacked the authority to handle the deceased's property prior to the appointment of an administrator. He cemented his argument with the case of **Monica Nyamakare Jigamba vs Mugeta Bwire Bhakome & Another (Civil Application 199 of 2019) [2020] TZCA 1820**.

Concerning the second ground, Mr Silvanus was of the opinion that the Primary Court erred in distributing the deceased's property in the absence of the Administrator, contrary to established legal principles, as highlighted in the case of **Ibrahim Kusaga v Emmanuel Mweta [1986] TLR 26**. Furthermore, he challenged the District Court's dismissal of this ground based on an erroneous interpretation of the law.

Addressing the third ground, the advocate for the Appellant contended that the filing and registration of the probate cause were marred by illegality, particularly concerning disputes and the absence of proper parties. Lastly, Mr Silvanus asserted that the distribution of the deceased's property lacked a legal basis, given the absence of an administrator at the time of the Primary Court's decision. This contravened established legal norms, as elucidated in **Ally Linus & 11 others vs THA & another [1998], TLR 5**, which imposes fiduciary duties on individuals involved in estate matters. In conclusion, Mr Silvanus prayed for the appeal to be allowed, the lower courts' decisions to be quashed, and appropriate costs to be awarded.

In reply, Mr Makene, advocate for the Respondent, combined the 1st, 2nd, and 3rd grounds of appeal. He vigorously stated that the Primary Court in Probate and Administration Cause No. 10 of 1998 did not distribute James Msoga's property to Tereza Buhuru. Instead, it recognised her rightful claim to a portion of the property as a partner in the exploration and extraction of minerals business, a claim supported by evidence.

Mr Makene further referred to the case of **Mgeni Seif vs Mohamed Yahaya Khalfani** (Civil Application No. 1 of 2009) [2017] TZCA 258, stating that the circumstances of the case are akin to those. He

demonstrated that the Primary Court exercised its jurisdiction appropriately. Hence, he stressed that the grounds of appeal lack merit and should be dismissed.

Concerning the last ground of appeal, Mr Makene further contended that the Appellant's involvement in the proceedings is evident from the record. He actively participated in the probate proceedings and subsequent appeals, and his attempt to disassociate himself from those proceedings is untenable. Moreover, he contended that the appeal is procedurally flawed, as it contradicts the principles provided in similar matters. Therefore, it should be dismissed for lack of merit and costs awarded accordingly.

In his rejoinder, Mr Silvanus reiterated his position on his submission in chief. He further stated that the Respondent's attempt to justify the Primary Court's actions lacks merit, as the distribution of property in the absence of an administrator contravened established legal norms.

After meticulously considering the parties' submissions and when formulating a judgment, the Court, on its own motion, identified a legal issue crucial to the present appeal. This issue pertained to the provisions under which the District Court was moved to review the Appellant's application. The Applicant's Chamber Summons invoked Section 44(1)(b)

of the Magistrates Act, Cap. 11 R.E. 2019, as well as Order XLIII Rule 2 and Section 79(1)(a) &(c) of the Civil Procedure Code (CPC), Cap.33 R.E. 2019, which the District Court, in its ruling, duly acknowledged and acted upon. Consequently, it became imperative for the Court to summon the parties' advocates to address this matter.

Mr. Leonard Silvanus contended that the Appellant initiated proceedings in the District Court with a chamber summons supported by an affidavit, citing sections 22(1) of the Magistrates Court Act, Order XLIII R. 2, and section 79(1) of the CPC. He noted an inconsistency between his submissions and the District Court's record, which cited section 44(1)(b) of the Magistrates Courts Act instead of section 22(1) of the same.

However, he conceded that provisions under Order XLIII R. 2 and section 79(1) of the CPC were misplaced and could be disregarded by this Court, citing **Bitan International Enterprises Ltd v. Mished Kotak**, Civil Appeal No. 60 of 2012 to bolster his point. Mr. Silvanus further contended that the issue of incorrect citation is remedied by the principle of the overriding objective, citing **Mic Tanzania Limited & Others v. Golden Globe International Services Limited** (Civil Application 1 of 2017) [2017] TZCA 189.

Contrary to Mr Silvanus's position, Mr Makene contended that an application for revision against the decision of the Primary Court is governed exclusively by the provisions of the Magistrates Court Act (MCA), precluding the application of the Civil Procedure Code (CPC). He maintained that Order XLIII R. 2 and Section 79 (1) (a) and (c) of the Civil Procedure Code were inappropriately invoked, as they pertain to revision before the High Court from decisions of the District Court or a Court of a Resident Magistrate. Thus, Mr Makene asserted that the Civil Procedure Code is not germane to the present circumstances.

In the present Appeal, after this Court ascertained itself on the correctness of citation on the first limb, undoubtedly, the District Court was petitioned via a Chamber summons under sections 22(1) of the Magistrates Courts Act, Order XLIII R.2 and Section 79(1)(a) and (c) of the Civil Procedure Code. The doubt was cleared after a filed in-chamber summons was revealed to the Court. As indicated, it is, therefore, the District Court in the ruling that stated otherwise by referring to the section not referred to by the Applicant (Appellant).

On the second limb, the Applicant cited the CPC provisions as part of enabling provisions in the Revision Application in the District Court. The

question is whether irrelevant provisions rendered the application incompetent.

It is settled law that the invocation of inapplicable provisions of the law does not make the application incompetent. The same is cured by ignoring the wrong provisions of the law and retaining the correct ones. This position has been stated in a number of cases, including **Bitan International Enterprises Ltd V. Mished Kotak**, Civil Appeal No. 60 of 2012, quoting with approval the case of **Abdallah Hassani V. Juma Hamis Sekiboko**, Civil Appeal No. 22 of 2007, and **Joseph Shumbusho vs Mary Grace Tigerwa and others**, Civil Appeal No. 183 of 2016. Expressly, in the case of **Joseph Shumbusho vs Mary Grace Tigerwa and others** (supra), it was stated that:

*"To date we still hold the same position of the law that the citation of the superfluous provisions of the law in the chamber application **does not make the application incompetent**. Given the fact that the respondents had cited section 49 of the Probate and Administration Act, which deals with revocation and removal of the Administrator, the citation of the inapplicable provision of the law did not make the respondents' application incompetent, **the failure to cite specific subsection of the law did not make the application incompetent**". [Emphasis supplied]*

Upon due examination of the Appellant's invocation of Section 22(1) of the Magistrate Courts Act as the pertinent statutory authority prompting the petition for the relief sought within the purview of the District Court, it is incumbent upon this Court to eschew extraneous provisions, namely Order XLIII R.2 and Section 79(1)(a) and (c) of the Civil Procedure Code. Thusly, I hereby elect to do so. Accordingly, I proceed with the determination of the appeal forthwith.

After reviewing the grounds of appeal and the arguments presented, this appeal primarily focuses on two key issues. Firstly, it addresses the trial Court's authority to distribute the deceased estate in the absence of an appointed administrator, specifically regarding the 1st, 2nd, and 3rd grounds of appeal. Secondly, it questions whether the Appellant's appointment as the Administrator of the deceased estate automatically granted him status in the trial court proceedings in Probate Cause No. 10 of 1998, especially on the fourth ground of appeal.

Regarding the second key issue, namely the appointment of the Appellant as an administrator in proceedings to which he was not originally a party, this court thoroughly examined the entire record of Probate Cause No. 10 of 1998 to elucidate the circumstances. Upon reviewing the ruling of the District Court on this matter, it became apparent that the Appellant's

appointment was not in line with the 5th Schedule of the Magistrates Courts Act and the Primary Courts (Administration of Estates) Rules G.N. No. 49 of 1971. This determination stemmed from the Primary Court's proceedings in Probate and Administration Cause No. 10 of 1998, specifically, on page 1 of the Primary Court proceedings, it was documented that:

"shauri hili lilipofunguliwa tarehe ya kusikilizwa ilitangazwa kwa muda wa siku 30 ambapo matangazo yalitolewa na tarehe ya kesi kusikilizwa kweli, upande wa familia ya marehemu uliwasilisha mahakamani muhtasari wa ukoo wa marehemu na kuonyesha mtu aliyependekezwa na baraza la ukoo kuwa ni mtoto mkubwa wa marehemu MAJALIWA JAMES MSOGA awe ndiye msimamizi wa mirathi" [Emphasis supplied].

Based on the aforementioned findings, the District Court concluded that the Appellant was appropriately appointed as the Administrator of the deceased's estate, which was not the case. The quoted paragraph herein above concerned one Tereza, who filed the letter to be appointed as such, not the Appellant. However, I am afraid I have to disagree with the Respondent's Counsel's assertion regarding the Appellant's presence in the trial court during the hearing.

Even during the trial court's proceedings, it came to light that the Appellant's younger brother, Fikiri James, assumed the identity of the Appellant. The trial court duly recognised this occurrence in its judgment, noting that Fikiri James had impersonated Majaliwa. This documentation is verifiable on page 4 of the typed judgment issued by the trial court, specifically within paragraph 3. In contradiction to the assertions made by counsel for the Respondent, the trial court conclusively determined that Fikiri James had misrepresented himself as the Appellant. Hence, as stated by Mr. Silvanus, the Appellant was, indeed, not present. The trial court further noted that:

"Kuna mambo ya ajabu yaliyojitokeza hapa mahakamani pale alipoitwa Majaliwa akaitika Fikiri James kama Majaliwa na aliendelea kuwepo kizimbani kama Majaliwa James na kuhoji maswali ingawaje mtu huyu mjinga aliandaliwa au alipewa muongozo na mtu mwingine alipomuandikia maswali ya kuuliza ndipo alipoelezwa kuuliza maswali akisema ameyaandika kwenye karatasi na mahakama ilipochukua karatasi hiyo na kukuta ina maswali matatu tu na alipoelezwa kuuliza alishindwa sababu aliandaliwa tu. Mambo ya namna hiyo yalileta sura mbele ya mahakama hii kuwa upande huo wa familia ya marehemu hauna adabu na siyo waaminifu. Hivyo pamoja na kupewa usimamizi wa mirathi watakuwa ni watu wa kuangaliwa sana....."

Significantly, the trial court's findings failed to substantiate the physical presence of the Appellant. Moreover, notwithstanding the acknowledgement of the impropriety in the administration of the estate

by the Appellant's family, the trial court proceeded to appoint an individual who was not physically present in court. The procedural mechanism employed to effectuate the Appellant's appointment lacks legal authority. The prescribed procedure for appointment is meticulously delineated in G.N. No. 49 of 1971, specifically under paragraphs 3, 5, and 7 of the aforementioned Rules, necessitating the submission of an application, proper notice, and fulfilment of other requisites prior to the issuance of letters of administration.

Despite the Appellant's nomination by the clan, the trial court neglected to adhere to the stipulations delineated in the aforementioned paragraphs of the aforementioned Government Notice, i.e., G.N No. 49 of 1971. The District Court, on revision, regrettably failed to address these procedural irregularities. Therefore, as aptly articulated by Mr. Silvanus, the Appellant neither submitted an application for the grant of letters of administration nor was he physically present in court on the relevant date.

This Court deems it fitting to underscore the paramountcy of the applicant's presence during the application for the grant of letters of administration in court. The appointment of an administrator for a deceased estate necessitates meticulous adherence to provisions pertaining to estate administration. Generally, such appointments are

effectuated through a formal application process before the relevant court, as mandated by the 5th Schedule to the Magistrates Courts Act and G.N. No. 49 of 1971.

It is a rarity for a trial court to appoint an administrator in absentia. Typically, the aspirant for administrator status is obligated to actively engage and participate in the proceedings and satisfy all legal prerequisites, including furnishing all necessary documentation and evidencing eligibility for the proper administration of the deceased estate, contrary to the proceedings in the trial court. As stated herein, it is only under extraordinary circumstances that a court with competent jurisdiction consider appointing an administrator in absentia. Such circumstances warrant careful scrutiny and require legal representation or authorisation to uphold due process and equity. Regrettably, the trial court failed to adhere to these standards during the appointment of the Appellant. In my humble assessment, it is evident that the Appellant's appointment as Administrator of the estate of the deceased, James Msoga, was not conducted in accordance with proper legal procedures and, hence, flawed.

Concerning the first key issue, counsel for the Appellant contended that the Primary Court in Probate and Administration of Estate Cause No. 10

of 1998 wrongly distributed the deceased's estate prior to the appointment of the Administrator. On the other hand, Mr. Makene, a learned advocate for the Respondent, was of the opinion that what transpired at the trial court was not the distribution of the deceased person's estate. Rather, it did grant Tereza Buhuru part of her share in her partnership with the deceased.

In our jurisdiction, it is firmly established that the responsibility for distributing the deceased's estate lies exclusively with the appointed Administrator. If any individual wishes to assert a claim regarding the properties comprising the deceased's estate, they should address their concerns to the Administrator; if none has been appointed or petitioned for the grant of letters of administration, they should initiate the appropriate legal process. This was the position in the case of **Mgeni Seifu vs Mohamed Yahaya Khalfani** (*Supra*), where the Court of Appeal stated that:

*".....; it is only a probate and administration court which can empower an **administrator to transfer the deceased person's property.**" [Emphasis supplied]*

This Court visited the proceedings of the trial court in the present to ascertain itself what transpired in the trial court. It is on record on page 4 of the trial court's decision that:

*"....kwa uchambuzi huo mahakama inamuona mjane wa marehemu anayo haki ya kupata sehemu ya mali ya marehemu mme wake kwa mujibu wa sheria nilizokwisha zitaja na hivyo mjane ameshinda sehemu ya madai yake kwa maana ya kwamba **atapewa nyumba ile ile aliyokuwa akiishi na marehemu mme wake** kama sheria inavyoelekeza kwa kuwa yeye alikuwa anafanya shughuli za uzalishaji na marehemu, **pia atapata sehemu moja tu ya kiwanja CT no.40174** eneo la Rwamgasa ili aendelee nalo pia na sehemu ya shamba eneo hilo kwa ajili ya kilimo.....*

AMRI

*Na msimamizi atadai na kulipa madeni ya marehemu pia asiingile eneo ambalo hakuelekezwa na Mahakama **kumiliki kwani eneo hilo sasa ni eneo la mjane wa marehemu TEREZA BUHURU** ambae pia haruhusiwi kuingilia maeneo ambayo **hakupewa kuyamiliki.....**" [Emphasis supplied]*

Looking at the wording above, the trial court indeed did allocate a portion of the deceased's estate to Tereza Buhuru. The rationale behind this allocation was the petitioner's contribution to the acquisition of the estate, stemming from her involvement in activities that generated the properties in question, i.e., she was a partner in the deceased business.

In the case of **Mgeni Seifu vs Mohamed Yahaya Khalfani** (*Supra*), it was further stated that:

"...where a person claiming any interest in the estate of the deceased must trace the root of title back to letters of administration....."

Having ascertained that Tereza Buhuru had obtained a portion of the deceased's estate, I find no more fitting descriptor than that she was distributed a portion of the deceased asset to delineate the transfer of assets from the trial court to herself. Nevertheless, it is incumbent upon the duly appointed Administrator of the deceased's estate, as prescribed by section 5 of the 5th Schedule of the Magistrates Courts Act, Cap 11 R.E 2019, to fulfil this obligation. The said section expressly provides that:

*"5. An administrator appointed by a primary court shall, with reasonable diligence, collect the property of the deceased and the debts that were due to him, pay the debts of the deceased and the debts and costs of the administration and **shall thereafter distribute the estate of the deceased to the persons or for the purposes entitled thereto and, in carrying out his duties, shall give effect to the directions of the primary court.**" [Emphasis supplied]*

In the instant appeal, it was imperative for the trial court to have issued the letters of administration to an abled person, who was consequently obligated to effectuate the distribution thereof to interested parties. It is

firmly established that the right to distribute the estate of the deceased rests with the duly appointed Administrator or Administratrix and not with the court. Consequently, it was not incumbent upon the Primary Court to undertake the distribution of the property to the late Tereza Buhuru. This legal position has been clearly articulated in several cases, including that of **Ibrahim Kusaga vs Emmanuel Mweta** (*Supra*), where it was stated that:

"...the Primary Court had no jurisdiction to distribute the estate of the deceased for many reasons apart from the fact that the Primary Court ought not to do the work of the Administrator."

Also, in the case of **Mariam Juma vs Tabea Robert Makange**, Civil Appeal No. 38 of 2009 (unreported), the Court of Appeal stated that:

*"The High Court Judge did not have any mandate to determine who should be a beneficiary from the deceased's estate; **this role was to be played by the administrator of the deceased estate appointed by the Court**" [Emphasis supplied]*

It is, therefore, generally concluded that, in probate and administration causes, courts have no jurisdiction to determine the beneficiaries and distribution of the deceased's estate. In the case of **Monica Nyamakare**

Jigamba vs Mugeta Bwire Bhakome & Another (*Supra*), it was held that:

*"The probate or letters of administration court has no powers to determine the beneficiaries and heirs of the deceased. Similarly, **it has no power to distribute the estate of the deceased.** The law has vested that power to the grantee of probate or letters of administration." [Emphasis supplied]*

Therefore, contrary to what was stated by the counsel for the Respondent, I agree with the counsel for the Appellant that in the present appeal, the Primary Court had no jurisdiction to distribute the said estate to one Tereza Buhuru. Any person considered to have interests in the estate ought to directly pursue the said interests through the Administrator, who, in the circumstances of this case, has not yet been appointed.

Upon exhaustive scrutiny conducted within the ambit of this appeal, it incontrovertibly appears that the trial court grossly erred in its purportedly appointing the Appellant as an Administrator of the estate of the late James Msoga and the allocation of the decedent's estate, a jurisdictional overreach flagrantly beyond its prescribed authority. Pursuant to the immutable principles of law and probate procedures, the stewardship of the deceased's estate unequivocally falls under the purview of the duly

appointed administrator, vested with the solemn duty of managing its assets, liabilities, and reasonable apportionment.

In light of these manifest transgressions, I hereby allow the instant appeal. I proceed to quash in their entirety the decisions and all orders rendered by the District Court in Revision Application No. 14 of 2023 and those of the trial court in Probate and Administration Cause No. 10 of 1998.

Furthermore, this Court orders the prompt repatriation of all the assets to the deceased's estate forthwith, pending the appointment of the Administrator in accordance with the law. Any person holding a vested interest in said assets is advised to diligently adhere to established legal procedures in asserting their entitlements, consonant with the dictates of probate laws and procedures.

In the circumstances surrounding the appeal, I make no order as to costs.

DATED and DELIVERED at Geita this 26th day of March 2024.



**G.V. MWAKAPEJE
JUDGE**

Judgment is delivered on 26th March 2024 in the presence of Mr Leonard Silvanus, a learned advocate for the Appellant, and the Appellant in person and Mr Alison Zabron Kisaba (Administrator of the Estate of Tereza Buhuru, the Respondent.



A handwritten signature in blue ink, consisting of a stylized, cursive letter 'G' followed by a vertical line that loops back to the top of the 'G'.

G.V. MWAKAPEJE
JUDGE
26/03/2024