IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF BUKOBA

AT BUKOBA

(PC) CIVIL APPEAL NO. 8 OF 2021

(Arising from Muleba District Court in Civil Appeal No. 68 of 2018, The High Court of Tanzania in probate No. 2 of 2020, from Muleba District Court in Misc. Civil Application No. 22 of 2018; Originating from Probate and Administration Cause No. 12 of 2018 of Kamachumu Primary Court)

VEDASTO JOHN..... APPELLANT

VERSUS

MODEST R. MUSHOBOZI.....1st RESPONDENT

GEORGE RUGANGIRA.....2nd RESPONDENT

JOSEPH LUENA.....3rd RESPONDENT

JUDGMENT

20/09/2021 & 04 /10/2021

NGIGWANA J.

On 9th April, 2018, Modest R. Mushobozi, the first respondent, filed a probate cause No. 12/2018 at Kamachumu primary court (the trial court) to be appointed to administer the estates of Leoratha Mkabeyendezi who died in 1995. Before he could be appointed, the appellant together with other 10 persons filed the objection disputing his application. In their objection, they stated that the deceased left no

child. That all of her properties were bequeathed to the appellant, therefore, he is the one who was eligible to administer the estates. And, that the 1st respondent was not faithful to do the job. After hearing the arguments of both sides, the trial court appointed the 2nd and the 3rd respondents to administer the estates. The trial court stated that it could appoint neither the appellant nor the 1st respondent because they were not fit to do the job diligently.

The appellant was aggrieved with that decision. He wished to appeal to the district court (the first appellate court) but the time was no longer on his side. He applied for extension of time to appeal out of time via Civil Application No. 22/2018. The first appellate court was not convinced with the reasons adduced by the appellant, the application was dismissed with costs.

Aggrieved, he approached this court via Land (Probate) Appeal No. 2 of 2020 appealing against the dismissal of his application. For the interest of justice, on 7/12/2020, this court granted 14 days to the appellant to file the appeal. Without ado, on 17/12/2020, the appellant filed the appeal to the first appellate court. However, things did not go as expected. The respondents through their counsel, Mr. Fumbuka, raised the preliminary objections on the competence of the appeal. They alleged that it was improper to file the appeal against the 2nd and the 3rd

respondents because were not parties to Probate No. 12 of 2018. Their arguments clicked to the mind of the learned magistrate; the appeal was struck out with costs.

On the other side, the trial court's file shows that on 17/12/2020 when the appellant filed the appeal to the first appellate court, the 1st respondent filed an application to the trial court seeking for revocation of appointment of the 2nd and 3rd respondents alleging that they had failed to perform their job. He prayed to be appointed the administrator of the estates of the late Leoratha Mkayebendezi. The 2nd and the 3rd respondents were summoned to show cause why their appointment should not be revoked. They readily conceded to their revocation by stating that they had never done the job entrusted to them by the court because there were still appeals to the higher courts. They proposed the 1st respondent to be appointed to administer the estates. While the appeal against the respondent was still pending at the first appellate court, the trial court, on 10/02/2021, revoked the appointment of the 2nd and 3rd respondents and appointed the WEO- Kamachumu to administer the estates. The appointed WEO on supersonic speed, on 16/02/2021 filed the inventory showing how the properties were distributed to the heirs.

Although, the estates were distributed, the dispute continued pending at the first appellate court. The first appellate court delivered its decision on 23/03/2021, striking out the appeal on the reason that the 2nd and the 3rd respondents were improperly sued because they were not parties to Probate No. 12/2018. It stated also that the appellant sued them under their personal capacity, not as the administrators of the estates.

The appellant has again approached this court against that decision. He presented three grounds of appeal which can be paraphrased as follow:- **one** that the learned magistrate erred to strike out the appeal and order its re-institution subject to law of limitation. **Two**, that the 2nd and 3rd respondents were the right parties to be sued and **three,** that the learned magistrate raised and decided **suo motu** the issue of capacity of the 2nd and 3rd respondents without affording the parties the right to be heard.

When the matter was called on for hearing, the appellant was represented by Mr. Derick Zephrine while the respondents enjoyed the service of Mr. Fumbuka Ngotolwa, the learned counsel. The parties through their counsel, prayed and were granted leave to argue the appeal by way of written submissions.

In his submission, the counsel for the appellant contended that as the appeal was filed per order of this court, the order of the appellate

magistrate striking it and order re-institution subject to law of limitation aimed at denying the appellant's right of appeal as the matter would be res-judicata. For that reason, it would be difficult for the appellant to challenge the probate and administration cause No. 12/2018.

On the second ground, he submitted that it was an error for the learned magistrate to sustain the Preliminary objection raised by the respondents that the 2nd and 3rd respondents were not parties to probate cause No. 12/2018. He contended that after being appointed, the 2nd and the 3rd respondents attained the legal capacity to sue and be sued in any matter concerning the estates of the deceased. Therefore, they were rightly sued by the appellant.

Concerning the third ground, Mr. Derick contended that the parties were denied a right to be heard for the matter that was raised suo motu by the court in its ruling. The issue of suing the 2nd and 3rd respondents under their personal capacity was neither raised nor discussed during the hearing of the Preliminary objection, it was raised and determined by the learned magistrate during composing the ruling.

He urged the court to allow the appeal and let the matter be heard on merit.

In reply, the counsel for the respondent spent about 7 pages narrating the background of this case. In reply to the grounds of appeal, the

counsel for the respondent argued that it was proper for the learned appellate magistrate to strike out the appeal. That probate No. 12/2018 was filed by the 1st respondent, if the appellant wished to join the 2nd and 3rd respondents, he was supposed to seek the leave of the court. Also, that, the appellant had no locus stand to appeal against them under their personal capacity, but as the administrators of the estates.

Submitting on the third ground, he alleged that the preliminary objection raised a question of competence of suing the 2nd and 3rd respondents in their personal capacity. He contends that the court explained it in detail, therefore it was not a new issue raised during composing the ruling. That this ground lacks merit and should be dismissed. He urged the court to dismiss this appeal on the reason that this appeal is about the estates of Aloys Rutatenekwa not that of Leoratha Mkabeyendezi whose estates has been successfully administered by the 1st respondent. In conclusion, he prayed the appeal be dismissed with costs.

In rejoinder, the counsel for the appellant stated that, the matter at hand is concerning with the estates of Leoratha Mkabeyendezi not that of Aloys Rutatenekwa. That the 1st respondent abused the court process by rushing to Kamachumu Primary court applying for the revocation of the 2nd and 3rd respondents. For that act, the trial court revoked the appointment of the 2nd and 3rd respondent and illegally appointed the 1st

respondent to administer of estates of Leoratha Mkabeyendezi while the matter is still in higher courts.

After passing through the submissions of both parties, the issue is whether the appeal has merit. Upon passing through the proceedings and the ruling of the first appellate court, it is shown that the respondents through their advocate, raised the objection before it to the effect that the 2nd and 3rd respondents were improperly joined because they were not parties to Probate No. 12/2018. The records show that Probate No. 12/2018 at the trial court dealt with the estates of Leoratha Mkabeyendezi which resulted to appeal No. 22/2018 at the first appellate court of which in the long run have born this appeal. It is shown also that it was the 2nd and 3rd respondents who were appointed to administer the estates of Leoratha Mkabeyendezi, the 1st respondent's application was denied. The records, moreover, show that after being aggrieved by the trial court's decision, the appellant appealed against all the respondents and that had never objected until when he filed civil Appeal No. 68/2020.

Now, who was to be sued in any matter concerning the estates of Leoratha? The answer is simple, the appointed administrators of the estates. From the judgment of the trial court, George Rugangira and Joseph Luena are the ones who were appointed to do the job. And from

that appointment, they stepped into the shoes of the deceased. Therefore, any heir or any person interested in the estates of the deceased was supposed to take action against these two persons. The trial court apart from appointing them according to their title, it even mentioned their names. It named the persons to administer the estates. It is not disputed that Joseph Luena is still the officer of the court and it is not disputed that George Rugangira is the local government worker. Therefore, their appointment is still valid because had never been revoked by any competent court. For that reason, the appellant was right to lodge the appeal against them. The learned magistrate, went astray to say that these were not proper parties to be sued.

Apart from that flaw, the learned magistrate stated that: -

> *"In fact, these are public officers appointed by the court to assist the first respondent to discharge the duties of the administrators."*

The learned magistrate erred on that aspect. The trial court had never appointed the 1st respondent to administer the estates. To put things clear, I would like to quote a part of the decision of the trial court, it stated that: -

> *"Kwa kuwa mwombaji* ***(1st respondent)*** *hana sifa za kuteuliwa pia wapingaji nao wamekosa sifa ya kuwa*

wasimamizi wa mirathi hii, maoni ya mahakama hii kwamba ateuliwe mtu au watu ambao hawatofungamana na upande wowote ule ili waweze tenda haki kwa warithi wote bila upendeleo. Hivyo basi mahakama hii kwa kuzingatia kifungu no 7(2) cha MCA CAP 11 RE 2002 inamteuwa AFISA MTENDAJI WA KATA Kamachumu George Rugangira pamoja na AFISA WA MAHAKAMA Joseph Luena kuwa wasimamizi wa mirathi ya marehemu LEORATHA MKABEYENDEZI..." (Emphasis added by me.)

From that part of judgment, it is clear that the application of the first respondent was rejected and it was the 2nd and 3rd respondents who were appointed. The learned magistrate misdirected herself to say that they were appointed to assist the 1st respondent.

The matter would have ended up there, but, unfortunately, the learned magistrate went further and raised **suo motu**, the issue of the appellant suing them under their personal capacity without showing if they are administrators of the estates. The learned magistrate did not afford the parties a room to argue this **suo motu** raised issue. It is not disputed that the parties were not given a right to be heard on that matter. It has been emphasized by this court and the Court of Appeal that where the

matter has been raised **suo motu**, it should not be decided without hearing the parties on that issue.

For example, in the case of In **Abbas Sherally and Another vs Abdul Sultan Haji Mohamed Fazalboy,** Civil Application No. 33 of 2002, it was said that: -

> *The right of a party to be heard before adverse action or decision is taken against such party ...is so basic that a decision arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice.*

(See also; **Jamhuri Libawa (Administrator of estate of the late Otilia Lyapembe vs Anold Lawrence Matemba and Another** Land Appeal No. 35 of 2018 (H.C); **Samson Ng'walinda vs The Commissioner General of Tanzania Revenue Authority,** Civil Appeal No. 86 of 2008; **R.S.A Limited vd Hanspaul Automechs Limited and Another** Civil Appeal No. 179 of 2016; and **MIC Tanzania limited vs Minister for Labour and Youth Development and A.G,** Civil Appeal No. 103 of 2004(all unreported))

She went on discussing it and she concluded that *"A proper party may re-institute the appeal subject to the law of limitation."* With no doubt, the last sentence added more bitterness on the ruling delivered, it showed that there would raise **another issue of res- judicata**

because the appellant would be required to seek for extension of time for the second time against the same parties while she could have directed the matter to be filed without seeking for extension of time. I join hands with the allegation of the appellant that it was not in the interest of justice to put that order.

However, with the advent of Overriding objectives Principle, the courts of law are much encouraged to look at substantive justice. Technicalities are no longer encouraged because they do not solve the problems rather, they create more problems and matters stay unsolved before the courts for many years. In the case cited by the counsel for the appellant of **Yakobo Magoiga Gichere vs Peninah Yusuph,** Civil Appeal No. 55 of 2017 the Court of Appeal stated that:

> *"With the advent of the principle of Overriding Objective brought by the Written Laws (Miscellaneous Amendments) (No. 3) Act, 2018 [Act No. 8 of 2018] ...requires the courts to deal with cases justly, and to have regard to substantive justice..."*

Therefore, taking into consideration that the parties have been in courts corridors more than once, the learned magistrate would have applied the Overriding Principle and allow the appellant to amend the petition to indicate that the 2nd and 3rd respondents are sued in the capacity of the

administrators of the estates of Leoratha Mkabeyendezi. Also, if would be keen enough, the learned Magistrate would have ordered the withdrawal of the 1st respondent because he was improperly sued. However, the matter was decided otherwise.

I would have ended up here, but I have noted that while the matter was still pending at the first appellate court, there are flaws that happened to the trial court that seem to be contrary to dispensation of justice. It would not be fair to leave them to remain in the court records.

It is shown that before this court had delivered its ruling on 07/12/2020 granting 14 days for the appellant to file the appeal to the first appellate court, the 1st respondent had already prepared an objection applying for revocation of appointment of the 2nd and 3rd respondents to administer the estates alleging that they failed to perform their job. On 10/12/2020, the matter was received by the trial court. While the appeal was still on hearing at the first appellate court, the trial court at the same time continued hearing the application for revocation of the 2nd and 3rd respondents. While the first appellate court had yet determined the appeal, the trial court on 10/02/2021 revoked the appointment of the 2nd and 3rd respondents and appointed the WEO of Kamachumu to administer the estates. That decision of the trial court, preceded the decision of the first appellate court which was delivered on 23/03/2021.

I am of the view that, it was an error for the trial court to hear and determine the application of the 1st respondent while there was still a pending appeal before the higher court. The appointment of WEO Kamachumu was done illegally. Therefore, what was done by the trial court was a nullity. The 2nd and 3rd respondents are still administrators of the estates of Leoratha Mkabeyendezi until legally revoked.

All having said, the appeal is allowed. Taking into consideration of the nature and circumstances of this case, I am of the view that the proper order is to restore Appeal No.68 of 2020 so that it can be heard on merit. For that matter, Appeal No.68 of 2020 is hereby restored. Save for the petition of appeal, the proceedings of the first appellate court are quashed and the decision thereof is set aside. The appellant is directed to pray for amendment of the petition of appeal so as to remove the 1st respondent who was never appointed as an administrator of the estates of the late Leoratha Mkabeyendezi, and reflect the 2nd and 3rd respondents in their administrator- ship capacity for easy and speedy dispensation of justice at the expense of substantive justice. It is further ordered that the restored appeal should be heard before another Magistrate with competent jurisdiction. Each party shall bear its own costs.

It is so ordered.

E. L. NGIGWANA

JUDGE

04/10/2021.

Judgment delivered this 4th day of October, 2019 in the presence the appellant and his Advocate Mr. Remidius Mbekomize, Mr. E M. Kamaleki, Judges' Law Assistant and Gozbert Rugaika B/C but in the absence of the respondents. Right of appeal explained.

E. L. NGIGWANA

JUDGE

04/10/2021.