IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MOROGORO)

AT MOROGORO

CIVIL APPEAL NO. 2 OF 2022

(Arising from Civil Appeal No. 28/2022 of Morogoro District Court at Morogoro Civil Case No. 94/2022 from Chamwino Primary Court)

VALENTINE EVARIST.....APPELLANT

VERSUS

JOFARIN ENERIKO.....RESPONDENT

JUDGEMENT

Last Court Order on: 26/6/2023

Judgement date on: 31/7/2023

NGWEMBE, J:

The appellant and respondent are relatives, uncle and son respectively. The appellant instituted the instant appeal challenging the decision of the District Court of Morogoro in Civil Appeal No. 28 of 2022 which confirmed the decision of Chamwino Primary Court at Morogoro in Civil Case No. 94 of 2022. The verdict of trial court was to the effect that the appellant should pay the respondent Tsh. 14,900,000/= which amount was misappropriated as an administrator of the estate of respondent's father. the original probate case No. 63 of 2015 was also filed in Chamwino Primary Court, at Morogoro.

For convenient purposes, the background led to this appeal can be briefly narrated as follows; the respondent's father one Eneriko Evarist Balingilaki (the deceased) who was also a blood brother of the appellant. Untimely, the deceased died intestate on 28/05/2015. After the death of Eneriko Evarist Balingilaki, the appellant successfully applied for appointment of administration of the deceased's estate. The Chamwino Primary Court appointed him as an administrator of the deceased estate. Due misappropriation and misuse of the deceased estate especially the heirs' funds, sometimes in year 2022, the respondent filed a Civil Case No. 94/2022 in the same primary court against the appellant claiming for a total of shillings 14,900,000/= alleged to have misappropriated by the appellant. The respondent herein proved by documentary evidences that such amount was deposited in his bank account in two instalments as part of his inheritance from the estate of his father. During depositing of such amount of money to his account the respondent herein was still at the tender age, so his account was managed by the appellant. In the course of managing the respondent's account, the appellant withdrew and misused all sum of money to the detriment of the heir.

In turn, the appellant claimed that, he was only indebted for Tsh. 7,000,000/= as the appellant was taking care of him for over four (4) years, thus the whole amount was used in caring the respondent for those four years. The appellant also raised a counter claim of Tsh. 9,000,000/= from the deceased's estate. However, at the end, Chamwino Primary Court dismissed all counterclaims raised by the appellant herein and decided in favour of the respondent. Finally, the trial court ordered the appellant to refund all sum of money to the tune of TZS. 14,900,000/=

The appellant was dissatisfied, hence appealed to the District Court of Morogoro, which appeal was dismissed and the decision and orders of trial court were upheld with insistence to pay the respondent immediate effect.

This being the second bit of appeal, the appellant ventured to the corridors of this house of justice clothed with five grounds summarized hereunder: -

1. The courts erred in law and facts for not considering that the respondent lived with the appellant for almost more than four years;
2. That, the courts below erred in law and facts without determining the ground on the exhibits that were not admitted in the trial court;
3. That, the trial courts below erred in law and in facts without considering the evidence that the respondent received money during time under care of the appellant;
4. The courts below erred in law and facts without considering the evidence that, the respondent used all money that were under custodian of the appellant; and
5. That, the courts below failed to consider that the appellant's evidence in respect with that amount of money received from Ministry of defence.

On the hearing date of this appeal, parties applied successfully to argue the appeal by way of written submissions. Both parties adhered to the court schedule.

In brief, the appellant submitted that the civil case No. 94 of 2022 claiming the amount of 14,900,000/= from the appellant was wrongly

instituted as civil case. The proper course of action ought to be probate and administration. The plaintiff/respondent could file an objection proceedings against the distribution in question before the same court in the same case file or to apply for either a directive or to revoke the appointment of the appellant in terms of the provision of **rule 9 of the Primary Court (Administration of Estates) Rules GN No. 49 of 1971** and **Paragraph 2 (c), (e), (g), and (h) part 1 Firth schedule** made under **section 19 (1) (c) of the Magistrates' Courts Act [Cap. 11 R.E. 2019].** He supported his argument by referring this court to the case of **Ally Omary Abdi Vs. Amina Khalil Ally Hildid (As Administratrix of the estate of the late Kalile Ally Hildid, Civil appeal No. 103 of 2016** at pages 17, 19 and 20 where it was held: -

> *"It seems to us that once parties have submitted probate matters for administration by the Primary courts and the Magistrates' Courts Act [CAP 11 R.E 2002] they must as a consequence thereof follow through the remedies provided by the primary courts concerned"*

Appellant further submitted that, when the collection and distribution of the properties left behind by the deceased have been done by submitting the statement of accounts and inventories if there is no objection from the concerned parties, the probate comes to an end and the court is supposed to make an order closing the matter. In case of an objection from the heirs, the trial court will be at liberty to return them to the administrator for rectification of the distribution of money, assets or properties in dispute or the court may proceed to hear the parties objecting it and then make a ruling on the matter. To justify his

argument, he cited the case of **Nuru Salum and Another Vs. Masudi Juma probate appeal No. 10 of 2019 (H.C) Unreported.**

Further, the appellant submitted that, the trial court may substitute what has been done by the administrator after hearing both parties. Otherwise, it has no power to question or change an act or omission of the administrator in respect of what he has done in respect of the estate. Justified his argument by citing the case of **Beatrice Brighton Kamanga and Another Vs. Ziada William Kamanga, Civil Revision No. 13 of 2020 (H.C) Unreported, at pages 21,22 and 23**

Moreover, appellant submitted that since he had already made the execution of the distribution of money and properties of the deceased estate to all heirs faithful, and that the statement of accounts and inventories were submitted, therefore there was no legal justification for the courts below to entertain a civil case, same was not compatible with judicial exercise of discretion. Cited the cases of **Hadija Said Matika Vs. Awesa Said Matica, PC civil appeal No. 2 of 2016 (H.C) unreported at pages 10 up to 24, Safiniel Vs. John Kadeghe [1984] TLR 198 at page 200.**

Further the appellant questioned the jurisdiction not only of lower courts in a civil case, but also a probate cause No. 63 of 2015 before Chamwino Primary court. He argued that, in terms of **rule 1 firth Schedule, Section 19 (1), (c) of The Magistrates Courts Act** read together with **rule 2 of GN No. 320 of 1964 (Primary Courts Jurisdiction in Administration of Deceased's Estate)**, clearly give a window for a probate and administration cases to be instituted to a Primary court where a deceased person had his fixed place of abode and

the deceased at the time of his death. The deceased fixed place of abode was Karagwe/Bukoba District Kagera region a "haya" by tribe and he was also professing Mlokole/Christianity faith, thus made Bukoba a proper forum to handle the probate case in order to be guided by bahaya customary law and not Morogoro by Primary court of Chamwino.

Rested by arguing that the matters were wrongly handled thus renders the decisions of both probate and civil case nullity subject to be quashed and set aside. Appellant cited the cases of **Marco Elias Buberwa Vs. Agnes K. Elias Buberwa, PC Civil appeal N.39 of 2019 (H.C) unreported** at pages 1-15, **Scolastoca Benedict Vs. Martin Benedict [1993] TLR 1, Mohamed Stambuli Vs. Mwanaharusi Selemani [1968] HCD No. 357.**

The appellant went further to convince this court by referring to this court to **rule 2 order XXXIX of the Civil Procedure Code [Cap. 33 R.E 2019]** read together with **section 2 (3) of the Judicature and Application of Laws Act [Cap 358 R.E. 2019]**, he sought leave of this court to introduce and argue additional grounds of appeal on point of law, that are not in the petition of appeal, he submitted that points of law could be raised at any time even on appeal regardless of whether the lower courts have dealt with the issue or not, he cited series of cases including the case of **Eribariki Malley Vs. Salim H. Karata Civil appeal No. 67 of 2022 (CAT)**, at pages 4 & 5. Appellant submitted that, Chamwino Primary Court was not properly constituted not only for failure to involve two court assessors, but also for failure to inquire and recording the opinions of the court assessors in the judgement and proceedings contrary to provision of section **7 (1) of the Magistrates' Courts Act [Cap. 11 R.E 2019]** as amended by

section 52 of the Written Laws (Misc. Amendments) No. 3 Act 2021 GN No. 41 of 11th October 2021 red together with **rule 3 (1) and (2) of the Magistrates' Courts (Primary Courts) Judgement of the Court Rules GN. No. 2 of 1988**, he also cited various cases to mention a few **Kwiga Masa Vs. Samwel Mtubatwa [1989] TLR 103, Katibu Mkuu Amani Fresh Sports Club Vs. Dodo Ubwa Mamboya and another Civil appeal No. 88 of 2020 (CAT)** pages 9-11, he added that, failure to comply with the procedure is improper and vitiated both the judgement and proceedings of Chamwino Primary Court. He added that, there is no need of this Court to waste it's time to deal with this appeal because the proceedings before which it arises were nullity, except the only option is to quash and setting aside the judgement and decree and whole proceedings of the courts below for being null and void.

Finally, appellant arguing his grounds of appeal generally, by submitting that, first appellate court and trial court erred in law and in fact for failure to fully re- evaluate/ evaluate the evidence thus arriving at unjust decision against the appellant who had fully discharged his duty as the administrator of the said estate of his brother for the best interest of the respondent for over four years and even the respondent admitted to live with him and getting some items and expenses since the respondent was in standard six until he reached form three where the respondent left. Appellant asked why do the courts below failed to believe his testimony that all the moneys he had received in the course of administration had finished? Convincingly argued that had the courts below carefully re-evaluated/ evaluated the evidence given by the appellant they would have believed his testimony that for having lived

with the respondent for four years, the amount of money would not have remained intact and that no parent has ever calculated the number of moneys he spend to his child and that, his evidence was heavier that that of the respondent.

In reply, the respondent on the fist ground he submitted that, he agreed to live with the appellant as his guardian because he was of the tender age, but he did not give him his needs and he suffered, that is, why he decided to run away. That he was denied his rights including right to education as provided for under **Article 11 of the Constitution of the United Republic of Tanzania Cap 2 of 1977 as amended**. Further argued that, the appellant spend all his money from the estate of his brother for his personal interest instead of providing good services and education for better life of the respondent as a result, he decided to return to Morogoro and started a new life to achieve education goal without any support from the appellant.

On the second ground, the respondent submitted that, the court heard all parties as required by the rules of natural justice as provided for in **Article 13 (6)(a) of The Constitution of the United Republic of Tanzania Cap 2 of 1977.** Added that, the court only determine to the fact and evidence which is adduced by parties during trial. Evidences outside the court room by being not adduced in court cannot be considered at all.

On the third ground, the respondent submitted that, in the original case the appellant did not prove how he discharged his duties as administrator of the estate of his late brother for the best interests of the respondent. The respondent suffered hard life caused by the

appellant when he refused to provide him with any support, thus led him run away due to hard life.

Regarding the fourth ground, the respondent submitted that it lacked merits because the appellant failed to prove how he spent all the amount money from the estate of his late brother, while he refused to send him to school and buy him necessities for schooling.

On the last ground, the respondent submitted that, it is evident the appellant received TZS. 14,900,000/= in two instalments and that there are exhibits (bank slips) tendered before trial court to prove that such amount was deposited in the respondent's account. Some of such amount was deposited in his bank account by the Ministry of Defence through his step mother. Therefore, there is no dispute on the fact of existence of that amount of money.

Regarding the new grounds of appeal which raised by the appellant in this court, in respect of proper constitution of the trial court and recording of opinions of wise assessors, the respondent argued that, no one is allowed to introduce new issues in submission, he cited the case of **Q-Bar Limited Vs. Commissioner General, Tanzania Revenue Authority CAT at Dar-es-salaam Civil Appeal No. 163 of 2021**

Appellant further submitted that, in a civil proceedings, whoever alleges bears the evidential burden to prove on balance of probabilities, as per section 110 and 111 of the **Evidence Act [Cap 6 R.E 2019]**, he also cited the case of **Anthony M. Masanga Vs. Penina (Mama Mgesi) & Lucia (Mama Anna), Civil Appeal No. 118 of 2014,** which cited the case of **Geita Gold Mining Ltd & Another Vs. Ignas Athanas, Civil Appeal No. 227 of 2017 (CAT – Mwanza)**

Rested his submission by a prayer that, this Court may dismiss this appeal with cost and upheld the decision of Chamwino Primary Court as well as the District Court.

In rejoinder, the appellant reiterated to his submission in chief, added that the submission of the respondent is baseless, brought up in an attempt to confuse the situation and mislead this court and that respondent failed to tackle or address all points at issue and grounds of appeal, instead addressed to the irrelevant points at issue as such he admitted the raised grounds of appeal/points of law.

In determining this appeal, I am attracted to begin with new issues raised by the appellant while advancing his written arguments. I think he was right to point out that points of law may be raised at any time irrespective of whether the issue was raised during trial or otherwise. However, such points of law must be directly related to the jurisdiction of the court, or time limitation and alike. Moreover, such point must be raised as a ground of appeal to inform properly the sitting court as well as the opposite party. Doing otherwise, is an invitation to judicial chaos and procedural injustices.

The second bit of appeal is concerned with issues and grounds raised and determined by the first appellate court. It cannot be right neither in law nor in common sense to entertain new issues which were not raised at the first bit of appeal. The issue of propriate of composition of the trial court was neither raised during trial nor was it an issue at the first appellate court nor was it one ground of appeal in this house of justice. Even if it may be relevant point of law, but raising it at the stage of writing submission, is nothing but invitation to procedural injustice to both the court and the opponent part.

It is settled in our jurisdiction that, this being the second appellate court, it has only jurisdiction to entertain grounds which were raised and determined by the first appellate court. This court cannot entertain new issues which were not raised and determined by the first appellate court. Above all we have an acceptable principle of law that parties are bound by their pleadings. If an issue/ground was not raised to form part of grounds of appeal, how can it be entertained by this court? This position was rightly decided by this court in the case of James **Funke Gwagilo Vs. AG TLR (2001) 455,** where the court quoted the decision of the Court of Appeal in **Brown Vs. Boren [1999] 75 CA** held: -

> *"It is a firmly entrenched principle of appellate practice that litigants must adhere to the theory on which a case was tried, stating otherwise, a litigant may not change his or her position on appeal and assert a new theory. To permit this change in strategy would be unfair to the trial court and opposing litigants"*

The allegations that Chamwino Primary court was not properly constituted is a matter of fact as well as of law, same ought to be determined by the first appellate court. At most ought to be raised as one of the grounds of appeal.

Even if I may pay an eye of consideration, yet same is defeated by operations of law. Section **7 (1) of the Magistrates' Courts Act [Cap. 11 R.E 2019]** as amended by **section 52 of the Written Laws (Misc. Amendments) No. 3 Act 2021 GN No. 41 of 11th October 2021** is quoted hereunder for clarity: -

S. 52. *"The principal Act is amended by-*

(a) repealing section 7 and replacing for it the following: Proceedings which may require assessors;

(1) "In any proceedings in the primary court which involves customary or Islamic law, the court shall, ***where it considers necessary in the interest of justice or upon application by any party to the proceedings,*** *sit with not less than two assessors: Provided that, in deciding matters, the Magistrate shall not be bound by the opinion of the assessors"*

The above provision is self-explanatory, that the requirement for the assessors to sit with the primary court magistrate is no longer mandatory requirement, unless where the court considers necessary in the interest of justice or upon application by any party to the proceedings. In the circumstance of this appeal the trial court committed no fault. It is evident that amendment was introduced on 11/10/2021 while this case was filed at Chamwino Primary Court on 1/9/2022, thus after the amendments. Therefore, Chamwino Primary Court was properly constituted.

Considering the merits of this appeal, the appellant raised five grounds of appeal, but all revolves around failure of both lower courts to evaluate/ re- evaluate the evidences adduced by the appellant, thus arrived into unjust decision.

While the appellant claimed that he had already made the execution of the distribution of money and properties of the deceased estate to all heirs faithfully. Further that he submitted the required statement of accounts and inventories. Equally the respondent supports the appellant's averments that the claim of TZS. 14,9000,000/= is his rightful inheritance from the estate of his father. That such amount of

money is/was misappropriated by the appellant, thus he is claiming for full payment of his amount. That being the case, both subordinate courts decided in favour of the respondent that he is entitled to be paid his money. The question is, if the appellant completed his statutory duties as an administrator and the probate is closed, but later a claim of misappropriation of an heir's rights/shares who was of tender age, how can he recover his money? Since the probate was closed, it means the appellant was no longer an administrator. Thus, defeats the appellant's argument that the respondent ought to go to the trial court which appointed him as an administrator. Instead, the respondent was justified to file an action against the appellant for misappropriation of his money.

Undoubtedly, the appellant was an administrator of the estate of respondent's father. Equally it is not disputed that, a total of TZS. 14,900,000/= was deposited into the bank account of the respondent (NMB Mtoto Account No. 31110026798) in two instalments on 8/2/2017 and 30/5/201 of TZS. 7,979,500.50 and 7,000,000/= respectively. The appellant as an administrator was entrusted to manage the account of a respondent because he was still a minor. The question which I trust the appellant failed to answer is whether the account he managed for the interest of a minor was properly accounted for? Whether the appellant used the respondent's money for the sole interest of that minor?

In responding to those questions, there are certain facts which are not disputed. For instance, it is a fact that the respondent lived with the appellant for the period of four (4) years, however, the appellant was responsible to account for each cent and amount as the minor was

required. Unfortunately, the appellant either by ignorance or by design failed to account for.

I am aware of the most cherished principles of law that, generally, in civil cases, the burden of proof lies on the party who alleges anything in his favour. **Sections 110 and 111 of the Law of Evidence Act [Cap 6 R.E, 2022]** are quoted hereunder that:-

> *Section 110. whoever desires any court to give judgement as to any legal righty dependent on existence of facts which he asserts must prove that those facts exist.*
>
> *Section 111. The burden of proof in a suit lies on that person who would fail if no evidence at all were given on either side".*

Undoubtedly the respondent proved his case on balance of probabilities as required by law. Nonetheless, there is a trite law that, when there are concurrence decisions of two subordinate courts on a point of fact, the second appellate court may, unless there is an apparent error thereon, otherwise, such point of fact should prevail.

Generally, the finding of fact by the lower court deserves not to be interfered with, unless the finding was reached at by a wrong principle or not supported by the adduced evidence. Among the old prominent precedents on this principle include the English case of **Watt Vs. Thomas, [1947] 1 All ER. 582** and the East African Court of Appeal in **Peters Vs. Sunday Post Limited [1958] 1 EA 424** where it was observed and ruled tha: -

> *"It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had advantage of seeing and hearing the*

witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution."

This principle is now part of our law and there are many decisions to that effect. The rationale is on the truth that, the trial court having seen the witnesses, is on a better position to assess their demeanor and credibility, while the appellate court assesses the same from the records.

In this appeal and upon deep consideration in totality of grounds of appeal, I am settled in my mind that, I have no slight doubt the concurrent decision of the subordinate courts was founded in both facts, evidences and the applicable laws. Thus, I find no reason to interfere with those concurrent decisions. Consequently, I proceed to uphold the judgement of the district court which upheld the trial court's judgement and decree. I may add an order of refund of the whole sum of money to the respondent with immediate effect because the respondent being still young is living in a difficulty life while he has his money inherited from his father's estate. For clarity, this appeal lacks merits same is dismissed entirety with costs.

I accordingly order.

DATED at Morogoro this 31 July, 2023

THE HIGH COURT OF TANZANIA

P.J. NGWEMBE

JUDGE

31/7/2023

Court: Judgement delivered at Morogoro in Chambers on this 31st day of July, 2023 in the absence of both parties.

A.W. Mmbando

DEPUTY REGISTRAR

31/07/2023

Court: Right to appeal to the Court of Appeal explained.

A.W. Mmbando

DEPUTY REGISTRAR

31/07/2023