

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(ARUSHA DISTRICT REGISTRY)
AT ARUSHA

PC. CIVIL APPEAL NO. 8 OF 2023

*(Originating from the District Court of Arusha at Arusha in Civil Appeal No. 40 of 2022
coming from Arusha Urban Primary Court on Probate and Administration No. 401 of
2021)*

JULIUS ZAKARIA APPELLANT

VERSUS

LUCY ZAKARIA FILIPO..... RESPONDENT

JUDGMENT

14/09/2023 & 22/12/2023

GWAE, J

Before Arusha Urban Primary Court (trial court), one Lucy Zakaria Filipo now respondent initiated a Probate and Administration Cause No. 401 of 2021 for grant of letters of administration of the estate of Zakaria Filipo Massawe (deceased) who died intestate on the 1st day of August 1995. However, the appellant, Julius Zacharia Massawe, successfully challenged the said Cause. Eventually the trial court granted him the sought letters of administration of the deceased person's estate on the 7th day of February 2022.

As per the records, the deceased person's heirs appeared before the trial court objecting the distribution done by the appellant. The learned

Resident Magistrate (Casmir-Esq) after hearing those aggrieved by the distribution including the deceased's wife one Hellen Zakaria Massawe. On 14th July 2022 the trial court ordered that, the said widow be given a house located in Arusha and also directed the administratrix to amend the inventory and final accounts.

Following the order of the trial court, the appellant on 5th August 2022 physically filed Civil Appeal No. 40 of 2022 before the District Court of Arusha at Arusha (1st appellate court) against the respondent and Zacharia Filipo Massawe (deceased). He is found complaining inter alia that, the trial court manifestly erred in law and fact by dividing the estate of his late father to the beneficiaries, the act which is contrary to law. The appellant's appeal faced a preliminary objection canvassed by the 1st respondent now respondent on three points to wit;

1. That, the appellant has no locus stand to file this appeal under his own capacity/his own name while the matter was probate
2. That, the appeal was (sic) null and void being brought against non-existence (sic) party/2nd respondent who was (sic) deceased
3. That, this honourable court lacks jurisdiction to entertain this appeal

After hearing of PO, the 1st appellate court upheld the 1st respondent's preliminary objections as raised and argued. Hence, this appeal comprised of three grounds of appeal namely;

1. That, the honourable Appellate Magistrate manifestly erred in law and fact for holding that, the appellant had no locus stand while it is openly clear that the appellant was the administrator of the estate of the deceased and omission of his status was not substantially fatal to warrant the upholding of the preliminary objection
2. That, the honourable Appellate Magistrate manifestly erred in law and fact for holding that, the appeal was null and void for being brought against non-existent party that is the 2nd respondent while in reality the second respondent was removed from the record as prayed and granted by the honourable court, the honourable Appellate Magistrate manifestly erred in law and fact that is why even on the official typed ruling of the 1st appellate court itself does not show the name of the said 2nd respondent
3. That, the honourable Appellate Magistrate erred in law and fact by its failure to record the proceedings of the court as was transpiring during appearance of the parties in Court in

the Civil Appeal especially on the orders prayed/sought on the mentioning date 2808/2022 and not 9/8/2022 as mentioned by the 1st appellate court on the impugned ruling and that the same was cancelled

Hearing of this appeal was conducted by way of written submission after the parties' representatives had sought and obtained the leave of the court on 10th August 2023. For the purpose of this appeal, the parties' representatives, were; Mr. Eliakiam Sikawe and Mr. Millan Makwai, both the learned advocates who respectively appeared for the appellant and respondent.

In the 1st ground, the appellant's counsel admittedly stated that, the omission to indicate status of the appellant is not fatal, therefore it could warrant a *dismissal* of appeal. He added that it was a matter of ordering correction of the error. According to him, the 1st appellant ought to have adhered to the provisions of Article 107A (2) (e) of the Constitution of the United Republic of Tanzania, 1977 and the current oxygen principle known as overriding objective principle.

He then invited the court to the decision of the Court of Appeal in **Volatia S.A France vs. Nextgen Solawazi Limited**, Civil Appeal, No. 272 of 2019 (unreported) where it was stated;

"The anomaly is on the aggregate days excluded in the certificate of delay which invalidated the certificate. Given the circumstance of the case and in the interest of justice, we are of the view that the principle of overriding objective is applicable in the situation. This position we have taken, we respectfully think, and as stated above, will augur well with the overriding objective in the resolution of disputes which is provide under section 3A, 3B and Rule 2 of respectively, the AJA and Rules."

As to the 2nd ground of appeal, Mr. Eliakimu argued that, he prayed for omission of the 2nd respondent in the appeal before the 1st appellate court that is why its impugned ruling does not include the 2nd respondent, the deceased. Having argued as herein, Mr. Eliakim prayed for an order of the court allowing the appeal with costs.

On the other hand, the respondent's advocate before responding to the appellant's submissions, he attacked the appellant's appeal that, it was wrong for the appellant to indicate that, this appeal emanates from Matrimonial Cause No.401 of 2021.

Responding to the 1st ground of appeal herein, Mr. Makwai submitted that, the appellant could not sue on own his own name since he was an administrator. He bolstered his argument by the judicial precedent in **John Byombarirwa vs. Agency Maritime International (T) Ltd** (1993) TLR 1, **Laban Airo vs. OlweroObonyo**, Land Case No. 107 of

2021 (unreported) **Lujuna S. Balonzi vs. Registered Trustee of Chama Cha Mapinduzi** (1996) TLR 203. The learned counsel went on arguing that, the appellant ought to have appealed as an administrator pursuant to section 71 of the Probate and Administration of Estate Act, Cap 352, Revised Edition, 2019.

In the 2nd ground, the respondent's counsel submitted that, the 1st appellate court correctly sustained the objection however he repeated his argument relating to the 1st ground of appeal. As far as to the 3rd ground, the respondent's advocate declined to argue anything pertaining with the assertion that the appellant has not argued other ground 3. According to him, he was thus entitled to consider it as not proved by the appellant.

In his rejoinder, the appellant's counsel reiterated his submission in chief. Nevertheless, he remained mute relating to the third issue despite the challenge from opponent side.

That is what briefly transpired before the trial court, 1st appellate court and this court as the 2nd appellate court. Before determining the grounds of appeal raised and argued that is the 1st and 2nd ground of appeal, I would briefly comment on the 3rd ground. In my view, it is the judicial practice, if a party does not wish to proceed with certain grounds of appeal or revision; such party or his advocate must expressly state that,

he or she has abandoned such grounds of appeal. He or she is therefore not going to argue them. Likewise, in this appeal the appellant's counsel ought to have wisely and with courtesy stated to that effect. Nonetheless, the 3rd ground of appeal herein is now considered as abandoned by the appellant.

Coming to the court's determination of **the 1st ground of appeal**, I am convinced by the argument of the 1st appellate court ought to have ordered or caused an amendment of the petition of appeal so that, the name of the appellant would read as an administrator of the estate of the late Zakaria Filipino Massawe. It is true as complained if the appellant or his advocate (Mr. Eliakimu who had the conduct of the appeal before the 1st appellate court as the case here) made such prayer, the 1st appellate court would be required to cause or make an amendment to that effect in line with the overriding objective principle. However, in our instant case, such prayer was never made by the appellant or his advocate the appellant since 5th August 2022 until 1st September 2022 when the respondent filed a notice of the preliminary objection comprised of the said three points of law aforementioned.

I am alive of the principle of overriding principle and provisions of the Constitution of the United Republic of Tanzania, 1977 as amended from time to time especially Article 107A (2) (e) as correctly cited by the

appellant's counsel that courts should dispense justice without being tied by technicalities. Further to that, I am very sound of the current judicial precedents in the circumstances where the overriding objective principle is applicable as rightly argued by the appellant's counsel. However, that is not the case in every situation.

Nevertheless, I find the issue of locus stand is fundamental in such way that, everyone who comes before the court of law must establish it. This position was surfaced in the case of **Lujuna Shubi Balonzi, Senir vs. Registered Trustee of Chama Cha Mapinduzi** (1996) TLR 203 and I am of increasingly view that position of law is still valid depending on the circumstances of each case, in Lujuna's case it is was stated;

"In this county , locus standi is governed by the common law, According that law, in order to maintain proceedings successfully, a plaintiff or an applicant must show not only that the court has power to determine the issue but also that he is entitled to bring the matter before the court."

Therefore, the doctrine of overriding objective should not, in my view, be applied blindly. Rules of procedure should apply accordingly like in the present case where the trial court appointed and granted letters of administration of the estate of his late father to the appellant. If he was aggrieved by the impugned order of the trial court on behalf of the deceased's heirs or some as the here, he must have shown such capacity

in filing the appeal before the District Court. In **Martin D. Kumaliya & 117 Others vs Iron and Steel Ltd.** Civil Application No. 70/18 of 2018, the Court of Appeal observed that,

"We are aware that the Court is enjoined by the provision of the section 3A and 3B of the Appellate Jurisdiction Act,[CAP 141 R.E 2018] introduce recently vide the written laws (Miscellaneous Amendments) (No. 3) Act, No. 8 of 2018 to give effect to the overriding objective of facilitating the just expeditious, proportionate and affordable resolution of disputes while this principle is a vehicle for attainment of substantive justice, it will not help party to circumvent the mandatory rules of the Court. We are loath to accept Mr. Sika's prayers because doing so would bless the respondent's inaction and render superfluous the rules of the Court that the respondent thrashed so brazenly".

The issue of locus stand goes to the root of the case itself. Thus, it is important to look at the nature of defect of case presented to the court before jumping to the application of the overriding objective principle. Assuming that, the error is ignored what, we be the end result, if the house is ordered to be given to the widow and same be declared the property of the appellant in his personal capacity? This will yield other unnecessary cases, thus predictable delay of justice. It is therefore; my decided view that, if the prayer of rectification or amendment of the name

of the appellant appearing in the petition of appeal, the first learned Appellate Court Magistrate would act upon as per law. In the absence of the prayer to that, effect and in the light of the respondent's notice of preliminary objection, nothing could be done by the learned 1st Appellate Court Magistrate except to hear the parties, compose and render the ruling. I must also say these; the appellant or his counsel if immediately refiled the appeal perhaps that would be much easier or quicker as the 1st appellate court did merely strike out the appeal, so he had an opportunity of refiling.

In the 2nd ground of appeal herein above. As rightly skipped by the respondent's learned counsel, it is glaringly clear that, the 1st appellate court, though it did not record the deletion of the deceased's name, yet it vividly canceled that the name in the case file cover. More so, as correctly submitted by the appellant's advocate if the said error was not rectified, the same name (2nd respondent's name) would appear in the questioned ruling.

I am however of the considered view, it is the record of the court of law which is to be believed and not mere assertions. It is usually the court's record, which reveal what transpired. To hold otherwise it will tantamount to entertaining unnecessary complaints. For clarity, perhaps

it is pertinent to subscribe to **Halfani Sudi vs. Abieza Chichili** [1998] TLR 527, at 529 where it was held;

*"We entirely agree with our learned brother; MNZAVAS, J.A. and the authorities he relied on which are loud and clear that court record is a serious document. It should not be lightly impeached" Shabir F.A. Jessa v. Rajkumar Deogra, [CAT-Civil Reference No. 12 of 1994 (unreported)] and that "There is always the presumption that a court record accurately represents what happened": **Paulo Osinya v. R.** [1959} EA 353]. In this matter, we are of the opinion that the evidence placed before us has not rebutted this presumption."*

Considering the reason given in the first place, the cancellation and subsequent omission of the name of the deceased person, Zakaria Filipo Massawe, is an indicative that the prayer of deletion of that name as 2nd respondent was truly made as complained. I have also considered the complaint advanced by the respondent's advocate of the purported indication that this matter is originating from Arusha Urban Primary Court Matrimonial Cause No. 401 of 2021, that is wrong but the same error is rescued by the overriding objective principle.


Consequently, the appellant's appeal is dismissed save for the 2nd ground. Considering the nature of the parties' dispute namely; Probate and administration Cause and for the interest of justice expeditious

resolution of disputes, I order that, the appellant be allowed to properly present his appeal to the District Court within **thirty (30) days** from the date of pronouncement of this judgment. Given the parties' relationship, I make no order as to costs of this appeal and those before the courts below.

It is so ordered.

DATED at ARUSHA this 22nd December 2023




SGD M. R. GWAE
JUDGE