THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA SUB REGISTRY

AT MBEYA

CIVIL APPEAL NO. 13 OF 2022

(Originating from Civil Revision No. 36 of 2021 of the district court of Mbeya at Mbeya in original Administration Cause No. 16 of 2021 of the Mbeya Urban Primary Court)

MONICA APANGE .....APPELLANT

VERSUS

JUHUDI JAMES MAHALI .....RESPONDENT

JUDGMENT

Date of hearing: 8/2/2024

Date of judgment: 15/2/2024

NONGWA, J.

The respondent had been appointed as the administrator of the estates of the late Betty James Mahali @Ngusa Fango Solo before the Primary court of Mbeya District at Mbeya urban, through Administration Cause No.16 of 2021. The appellant being aggrieved, preferred an application for revision of the decision of the Primary court before the district court of Mbeya at Mbeya, vide Civil Revision No. 36 of 2021. The application was dismissed hence this appeal.

Briefly, the parties herein are siblings born from the late Betty James Mahali @Ngusa Fango Solo, their mother, whose life expired on 23/1/2021. Following the demise of their mother, the respondent petitioned and was appointed the administrator of the estates of the deceased in Administration Cause No.16 of 2021. The petition was granted on 23/4/2021. After collecting and distributing assets, the respondent prayed to close the administration in presence of the appellant and other beneficiaries. When the appellant was given chance to comment on the distribution, she objected. On the hearing date on objection 23/8/2021, the appellant denied to be heard, furiously prompting the court to close the matter. It is also in record that on 3/11/2021 the appellant presented objection to distribution of deceased's properties, the court made a finding that it could not reopen the matter after it had closed it. This precipitated the appellant to challenge the proceedings in the district court in the already stated revision proceeding.

In the district court the appellant wanted the court to call and examine the records of the proceedings in Administration Cause No. 16 of 2021 for the purpose of satisfying itself as to the correctness, legality, propriety of the proceedings, decision and orders of the Mbeya urban

primary court and to the regularity of the proceedings therein and to revise such proceedings.

In the affidavit, grounds upon which the revision was being sought was that probate cause was tainted with fraud and miscarriage of justice, that the grant of letter of administration was based on unreliable evidence and invalid will tendered by the respondent and that the respondent did not distribute states to other heirs. After hearing the parties, the district court dismissed the application for devoid of merit.

The appellant is aggrieved, filed petition of appeal containing three (3) grounds of appeal as seen in the amended petition of appeal; **one,** that the trial erred both in law and fact when dismissed the appellant's application for revision for not comprehending that there has been an error material to the merits of the case involving injustice which led to illegal and improper or irregular proceedings and order or judgment; **two,** that the trial court faulted in law when head an application for revision as it was an appeal case where also some of the crucial evidence spoken were not recorded or not seen in the record; and **three,** the trial court records were improperly made before it of which resulted into incompetent judgment and proceedings.

At the hearing of the appeal, Ms Nyasige Kajanja, learned advocate appeared representing the appellant while the respondent was represented by Mr. Felix Kapinga, also learned advocate. By consensus of the parties indorsed by the court hearing was in the form of written submission, parties filed their submission, except no rejoinder was filed by the appellant.

Arguing the first ground, Ms Kajanja stated that the trial record had irregulates mainly for failure to publish probate cause as required by the law. The case of **Rashid Hassan vs Mrisho Juma** [1998] TLR 134 was referred to support the argument.

It was submitted that will bequeathed all properties to the respondent without disclosing reasons for disinheriting other children as per the requirement of rule 34 of the Local customary Law (Declaration) order 4 G.N. 436 of 1963.

Other complaints were that not all properties of the deceased were listed by the respondent and that will was in the custody of the respondent and was prepared in his presence contrary to rule 8(a)(b)(c) and (d) of the Primary Court probate rule. Further that the will did not mention the respondent as executor, with the above, Ms Kajanja was convinced that

the will was invalid. The court was referred to the case of **John Ngomoi vs Mohamed Ally Bofu** [1998] TLR 63.

Advancing more in ground 1, it was submission of Ms Kajanja that the deceased was a Christian and the house was registered making the primary court to lack jurisdiction to entertain the matter. He cited the case of **Salmini vs Abdul Mohamed** [1986] TLR 250 to support the argument.

In respect of ground 2, counsel for the appellant stated that respondent's witnessess testified in his absence. It was added that the appellant objection was rejected because the respondent had already been appointed instead was changed in Criminal Charge No. 538/2021 for contempt of court.

Counsel for the appellant intimidated that because the appellant was not party to probate proceedings, she could only challenge the decision through revision. She referred the court to the case of **Halais Pro-chemie vs Wella A.G** [1996] TLR 26 to drive her point.

More submission in ground 2 was that failure of the trial court to receive his objection, the appellant's right to be heard was curtailed. It was further complained that assessors did not participate in the

proceeding at that time as required by the law by then, adding that some of proceeding was missing.

In ground 3 Ms Kajanja, submitted that the issues presented was improperly recorded. Counsel said that there was extraneous matter in the judgment which was not covered in the affidavit or submission with that submission prayed the appeal to be allowed.

Responding to appellant's submission, the Mr. Kapinga stated that the appellant appeared before the appointing court after the matter being closed, making the trial magistrate unable to reopen the matter, the magistrate was *functus officio*.

Mr. Kapinga made general reply to grounds of appeal, he stated that after the respondent had filed inventory and accounts the probate matter was marked closed. The court was referred to the case of **Ahmed Mohamed Al Laamar vs Fatuma Bakari & Another**, Civil Appeal No. 71 of 2012 [2012] TZCA 135 in which it was held that in law when inventory is present to the court, the probate proceedings were effectively closed from that day.

Advancing more, Mr Kapinga stated inventory was filed on 16/8/2021 and it is from that moment the hands of the court was tied up. That if the appellant had any claim against him, ought to take legal action

against respondent personally for mis appropriation of the deceased properties.

Mr. Kapinga submitted that the appellant was not in good terms with the deceased until she pleaded to ancestors, it is why other children of the deceased did not challenge the appointment of the respondent.

The respondent's side backed the decision of the District Court to dismiss the application because it had no merit after the matter was cconcluded with the filing of form V and VI.

Having considered the rival submission, grounds of appeal and the record the only issue for determination is whether the appeal has merits. Before indulging into the merits of the appeal, it is noteworthy that most of the complaints in this appeal relates to what happened in the primary court the matter not taken for revision in the district court. It is not explained how the district court failed to consider it for the same to be looked by this court.

Notwithstanding, the above it has to be noted that decision subject of this appeal emanates from revision proceedings under section 22(1) of the Magistrates' Court Act [Cap. 11 R: E 2019]. The said provision reads;

> *22.-(1) A district court may call for and examine the record of any proceedings in the primary court established for the district*

for which it is itself established, and may examine the records and registers thereof, for the purposes of satisfying itself as to the correctness, legality or propriety of any decision or order of the primary court, and as to the regularity of any proceedings therein, and may revise any such proceedings.

The above law presupposes that the powers of the court in revision is only to look and satisfy itself on the correctness, legality or propriety of any decision or order of the primary court, and as to the regularity. The terms correctness, legality, propriety and regularity of proceedings is not defined by our statutes. In **Patrick Magologozi Mongella vs The Board of Trustees of The Public Service Social Security Fund**, Civil Application 342 of 2019 [2022] TZCA 216 (TANZLII; 22 April 2022) the court had opportunity to deal with the meaning of correctness, legality or propriety of any decision and regularity when dealing with the application for revision like the present one. After referring to some India Laws and decision, the court stated;

'So, for instance, in determining the legality of a particular decision or order of the High Court, this Court will examine if that decision or order has the quality of being legal; that it has complied with the applicable law or doctrine. As for correctness and propriety of any impugned decision or order, it would involve the same endeavour to determine if it is legal and proper. The inquiry into the regularity of the impugned proceedings will not

go beyond examining whether the proceedings followed the applicable procedure and accorded with the principles of natural justice and fair play. None of these endeavours will involve a re-appreciation or re-appraisal of the evidence on record, which, is what the Court does while exercising its appellate authority on a first appeal by re-hearing the case on fact and law and coming up with its own findings of fact. Any suggestion that the Court can re-hear and re- appreciate the evidence when exercising its revisional jurisdiction will obliterate the distinction between the Court's appellate authority and its power of superintendence, respectively, under subsections (2) and (3) of section 4 of the AJA.'

The above quotation embodies that the revisional jurisdiction of the court for the purpose of satisfying itself as to the correctness, legality, propriety or regularity of such order or proceedings does not involve the authority to re-appreciate the evidence on record.

In the present case after perusing the record in administration No. 16 of 2021 for which revision is been sought, I have found the following not to be in dispute; one, that the respondent was appointed the administrator of the estates of his later mother; two, that the appellant objected to distribution of estates; three, that respondent on 16/8/2021 prayed to close administration cause; four, that the administration cause No. 16 of 2021 was closed on 23/8/2021 and five, that on 3/11/2021

presented letter for appointment of the administration of the respondent to be revoked, which was resolved that the court was functus officio. The purpose of revision is to re-open the proceeding should the application succeed so that the errors can be corrected and the proceedings be right and in the order.

The task of this court is to look whether the appellant placed before the district court material preposition capable of exercising revision powers. At this juncture, the affidavit reveals the following complaints one, that the will was invalid for being kept by the respondent and bequeathing all properties to the respondent alone; two, that there was fraud committed for non-issuing of citation; three, failure to involve her and four; that estate was not distributed to other heirs. In reply the respondent's counsel argued that what had been closed could not be reopened.

From the matter which I have recited as settled, I find no difficult to agree with Mr. Kapinga that the court was *functus officio* after marking the matter closed on 23/8/2021. In **Ahmed Mohamed Al Laamar vs Fatuma Bakari & Another**, Civil Appeal 71 of 2012 [2012] TZCA 135 (TANZLII; 6 July 2012) the court stated;

'... Nothing which has already come to an end can be put to an end or vacated, etc. That's why, for instance, no stay order can be passed to stay execution of a decree which has already been executed.'

Applying the above principle to the case at hand, there is no any proceeding capable of being revised, the administration having been marked closed. This is more so because, all what was done by the administrator while lawfully executing the function of his office cannot be overturned by the court, that is to say what has been already collected and distributed cannot be invalidated unless there is proof of fraud and corruption practice. Even if I have to buy the complaint of the appellant, still what it was done while in the office will stand and remain legal in the eye of the law, because the appointment of the new administrator or executor do not invalidate what was done by predecessor. The successor administrator or executor starts from where the predecessor administrator ended. See **Said Mpambije Kamaga & Another vs Nyamende Swetu Fundikira & Others**, Civil Appeal No. 430 of 2022 [2023] TZCA 17746 (TANZLII; 6 October 2023) and **Dativa Nanga vs Jibu Group Company Limited & Another**, Civil Appeal No. 324 of 2020 [2023] TZCA 39 (TANZLII; 22 February 2023). In **Dativa Nanga** case, the court stated;

'.... since the first administrator had already discharged his duties of distributing part of the deceased's estate whether honestly or otherwise and since, he decided to sell the dispute property, be it as heir or administrator of the deceased estate to the first respondent, the transaction was complete, notwithstanding the revocation of his appointment as an administrator which came later.'

With the above law in place, it is my view that the closed administration cause cannot be revised because the order to close it marks the end of it as if it did not exist. Moreover, the raised grounds of appeal and complaint in the submission requires the court to re-evaluate and appraise evidence which is not the ambit of revision court.

Ordinarily the above finding would entitle the court to dismiss the appeal however, after pepping into the record of the primary court in Administration Cause No. 16 of 2021 I am constrained to take that move so that this court remain seized with the record of lower courts for addressing the illegalities. See **Chama Cha Walimu Tanzania v. The Attorney General**, Civil Application No. 151 of 2008 (TANZLII).

I have reservedly taken that course because the Court cannot justifiably close its eyes on a glaring illegality in any particular case because it has duty of ensuring proper application of the laws by the subordinate courts. There are a range of other cases in which instead of

striking out the matter for being incompetent, the Court took the option of addressing the illegality, at the end of which it invoked its revisionary powers. See the case of **Tryphone Elias @ Ryphone Elias V. Majaliwa Daudi Mayaya**, Civil Appeal No. 186 of 2017, **Tanzania Heart Institute v. The Board of Trustees of National Social Security Fund**, Civil Application No. 10 of 2008 and **The Director of Public Prosecutions v. Elizabeth Michael Kimemeta @ Lulu,** Criminal Application No. 6 of 2012, CAT (all unreported). In the case of **Tryphone Elias @ Ryphone Elias** the court stated;

> *'... because the obtaining circumstances in the instant case are such that we should intervene now, because the illegality pointed out goes to the jurisdiction of the court. That entails that at the end of it all; the decision of the High Court will not escape the wrath of being nullified. Consequently, to tackle the question of illegality at this early opportunity will vouch unnecessary further delays, and also save the parties from unnecessary potential and inescapable expenses.'*

My stance is further reinforced with the advent of the overriding principled under section 3A and 3B of the Civil Procedure Code which enjoin the court to promote an expeditious administration of justice and timely disposal of the proceedings at a cost affordable by the respective parties.

Having laid such foundation, it is apposite to preface that people comes to court to seek justice and courts can do justice only in accordance with the law and not otherwise. This is well embodied under Article 107B of our 1977 Constitution which endeavour to render the justice the parties are seeking, in accordance with the law of the land and not otherwise. Justice must not only be done but it must be seen to be done, to achieve this proper application of the laws in place is the paramount duty of the court.

I have perused administration Cause No 16 of 2021 starting with Fomu Mirathi - 1 and found it has a lot to be desired. Looking the said form which initiates administration and probate proceeding in primary court some important items was not filled. For instance, item 6 which requires information regarding will to be disclosed and item 7 which requires properties to fall under hands of administrator was left blank. In the case of **Hadija Said Matika vs Awesa Said Matika,** PC. Civil Appeal No. 2/2016, from which I find inspiration as being the correct position of the law, Mlacha J. (as he then was) stated;

> *'... The jurisdiction of the court is accessed by presenting Form No. I to the court (see rule 3 GN 49 of 1971). This form must be duly filled, signed by the applicant and presented to the court. It assists the applicant to give all the necessary information. He will*

fill in his name and address. He will also fill the name of the deceased and his last place of abode. He will indicate if there is a will or not. It will lead him to show the eligible heirs, a list of the assets of the deceased and their values. There is also a place for the tribe and religion of the deceased. Form No. I must be accompanied by the will of the deceased (if any) ...'

I understand that there are new forms in the primary court, the Magistrates' Court (Approved Forms for the Primary Court) Rules, 2020, G.N. No. 943 of 2020 but the contents in FOMU MIRATHI - 1 are the same making the **Matika's** case decision relevant to the case at hand. In view of the above case failure to fill all parts in form - 1 makes it incomplete and incompetent to initiate the administration proceeding.

Another glaring issue I have discovered is how form - 5 and 6 got their way in the file. On 16/8/2021 the respondent shown his desire to close the administration cause and 23/8/2021 Administration Cause No. 16 of 2021 was closed, there is nowhere proceedings indicate that the form - 5 and 6 was introduced in record of the court by the respondent.

scrutinising form - 5 list of properties, item 1 (a)(b) in particular two houses and cars respectively are listed and it is noted "mkononi mwa Juhudi J. Mahali" literary meaning in hands of Juhudi J. Mahali. In form - 6 statement of accounts, items which requires estimate of assets

mentioned in form - 6 to be put is blank. Item 2 which is money obtained is stated to be Tsh. 52,003,881.47. It is shown that after paying debts, and cost of administration, money left for distribution was 10,105,881.47 and was distributed to heirs, I not that there is not complaint on this aspect.

Reading form - 5 and 6 it is clear to me that houses and cars were not distributed to the heirs because it was in hands of the respondent. Had it been so, then form - 6 would reveal out of the heirs who got what and what went to whom.

I have noted that there is a piece of paper in the file titled KUKUSANYA NA UGAWAJI WA MALI ZA MAREHEMU BETTY JAMES MAHALI @ NGUSA FANGO SOLO dated 16/8/2021, it reads;

1. *NYUMBA MBILI*
    1. *Iliyoko mtaa wa masewe kata ya ilemi inabaki mkononi mwa JUHUDI JAMES MAHALI kulingana na wosia wa mama*
    2. *NYUMBA ILIYOKO SINDE 2 NO 10 BLOCK 66 KATA YA MANGA NAYENYEWE IMEBAKI KWA JUHUDI JAMES MAHALI KULINGANA NA WOSIA WA MAMA*
2. *MAGARI MAWILI*
    1. *CARI NO T111DRC AINA YA SUBARU*
    2. *GARI NO T239DNZ AINA YA IST*

MAGARI YOTE YAPO MKONONI MWA JUHUDI JAMES MAHALI

3. *FEDHA TASLIMU MILI 52,003881.47 ZOTE ZILIWEKWA KWENYE AKAUNTI YANGU JUHUDI JAMES MAHALI KULINGANA NA WOSIA WA MAMA.*

My perusal of the record has discovered that the alleged will was neither mentioned in Fomu Mirathi - 1 and no evidence was led to its existence. Record is silence if it was ever tendered by the respondent or any of his witnesses, how the will got its way in the file leaves a lot to be desired.

Further, the above reproduced piece of paper confirms my findings that two houses and cars though acknowledged to be part of the estate of the deceased Betty James Mahali @ Ngusa Fango Solo it was not distributed to heirs and reflected in form - 6.

By way of post-script, the first duty of the primary court upon receiving application for appointment of administrator or executor is to scrutinise if all information required is properly filled. See the case of **Hadija Said Matika** (supra). The second stage will be to look whether the deceased left a will or not as required by rule 8 the Primary Courts (Administration of Estates) Rules, G.N. No. 49 of 1971 which reads;

'Subject to the provisions of any other law for the time being applicable the court may, in the exercise of the jurisdiction conferred on it by the provisions of the Fifth Schedule to the Act,

but not in derogation thereof, hear and decide any of the following matters, namely

a) whether the deceased died testate or interstate;

b) whether any document alleged to be a will of the deceased is the valid will of the deceased or not;

c) to (h) not applicable.' Emphasize supplied.

From the above law it is clear that one of the duty of powers of the court in probate matter is to decide the matter pertaining to existence of the will and its validity. In the matter at hand statement regarding will was not stated in FOMU MIRATHI -1, so did not form part of the record of the primary court. Further the respondent was not appointed as the administrator of the will. Therefore, no property could be distributed to him in accordance with the will as seen in the purported piece of paper which bequeath the houses and cars to the respondent.

Having scanned the primary court record, leaving aside money mentioned in form - 6 to which there is no complaint, I am convinced that the respondent did not distribute the houses and cars owned by the deceased Betty James Mahali @Ngusa Fango Solo to heirs before he closed its administration. The court rushed to close Administration Cause No. 16 of 2021 without first satisfying if form - 5 and 6 was properly filled. The bequeath of the houses and cars to the respondent cannot be

assumed to be properly because the respondent was not the administrator of the will and particularly did not form part of record of the primary.

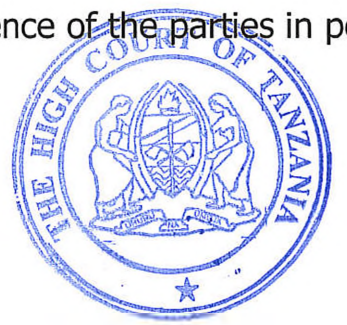
On those circumstance this court cannot leave justice to cry in the desert and close its eye on the pretence that the Administration Cause No. 16 of 2021 was closed. While aware that closed administration cause cannot be re-opened, each case has to be determined according to its own set of circumstances. Circumstances in this case dictates otherwise, because the primary court abducted its duty of scrutinising form - 1 to see if it was filled as required by the law. The matter relating to will and assets to come in hands of administrator was not stated, making form - 1 incomplete to initiate the proceedings in primary court. Furthermore, the variance between assets in form - 5 and those reflected in form - 6 make the matter more doubtful and it cannot be said the matter was conducted properly and in accordance with the law, hence the intervention of this court unavoidable.

In the end I quash and set aside the ruling of the district court, I invoke revisionary power of this court under section 25(1)(b) of the Magistrates' Courts Act [Cap. 11 R.E. 2019] and hereby quash and set aside the proceedings in Administration Cause No. 16 of 2021 from 24/3/2021 onward and spare only the proceedings of 24/2/2021. I remit

the file back to the primary court to start afresh after the application form, that is Fomu Mirathi -1 being amended to comply with the law. Should the respondent not be interested, any other interested heir may indicate willingness before the court in the estate. The matter should be heard before another magistrate expeditiously. I make no order for costs parties are siblings.

V.M. NONGWA
JUDGE
15/2/2024

DATED at and DELIVERED at MBEYA this 15th February 2024 in presence of the parties in persons.



V.M. NONGWA
JUDGE