IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA SUB REGISTRY

AT MUSOMA

(PC) CIVIL APPEAL NO 50 OF 2022

(Arising from Probate Appeal No. 14 of 2021, of the District Court of Musoma at Musoma, Originating from Probate Case no. 60 of 2020 of Musoma District Primary Court, at Musoma Urban)

ASAPH IBRAHIM MARADUFU

(Administrator of the Estate of the late

Ibrahim Maradufu Nyeburi).....APPELLANT

VERSUS

SILAS JOSIAH MARADUFU

(Administrator of the Estate of the late

Josiah Ibrahim Maradufu).....RESPONDENT

JUDGMENT

27th April & 23rd May 2023
F. H. Mahimbali, J.

The appellant and the respondent are uncle and cousin to each other. Whereas the appellant is the son of his deceased father Ibrahim Maradufu Nyeburi, the respondent is the grandson of the said Ibrahim Maradufu Nyeburi being born by one Josiah Ibrahim Maradufu who is also a deceased. That means, the appellant and the respondent's father

are brothers to their deceased father Ibrahim Maradufu Nyeburi; and thus the respondent is the grandson of the deceased Ibrahimu Maradufu Nyeburi.

It appears the appellant just after the death of his sibling Josiah Ibrahim Maradufu (in 2020), applied for letters of administration of the estate of his deceased father (Ibrahimu Maradufu Nyeburi) who died in 1980; and the respondent later applied for letters of the administration of the estate of his father Josiah Ibrahim Maradufu targeting the share from the estate of his grandfather.

The trial court granted the letters of administration of the late Ibrahimu Maradufu Nyeburi to the appellant who administered it to the finality where he became the sole heir of the said estate upon his siblings (including the respondent's father) had died and filed the final account of the said estate where he became the sole heir of the said estate of the late Ibrahimu Maradufu Nyeburi.

Later, the respondent unsuccessfully challenged the said administration of the said estate by the appellant before the same trial court for being sidelined in inheriting the said estate (of his grandfather) on the share of his father. Aggrieved by the said decision, he appealed before the district court (first appellate court) where then the whole

decision of the trial court was nullified for being nullity for want of assessor's opinions, thus the basis of this current appeal.

Not amused by the findings of the trial court, the appellant has appealed before this court on four grounds paraphrased as follows after one ground had been abandoned:

1. *That the learned magistrate at the first appellate court erred in law and fact for quashing the whole proceedings and judgment of the trial court on account of failure to record the assessors' opinion instead of remitting the trial record for recording the said opinion as per law.*
2. *That the first appellate court (magistrate) erred in law and fact to consider extraneous matters into her judgment which matters were not part of the trial court judgment and proceedings thereof nor submissions at that court as appellate court.*
3. *That the first appellate court failed critically to evaluate the evidence on record and reached to an erroneous decision.*
4. *That the first appellate court failed to discover that the respondent a mere fact of being administrator of his deceased father (Josiah Ibrahim Maradufu), was not an automatic grant of heirship to the estate of his grandfather Ibrahim Maradufu Nyeburi.*

During the hearing of the appeal, the appellant was represented by Mr. Cosmas Tuthuru, learned advocate whereas the respondent was self-represented.

In arguing the first ground of appeal as paraphrased and renumbered above (after the drop of the first ground of appeal), Mr. Cosmas Tuthuru was of the considered view that going through the trial court's records, the assessors' opinions were dully incorporated into the trial court's judgment. However, even if it was noted not incorporated, the best remedy was to remit the trial court record for compliance as per law borrowing the wisdom in the case of **Agness Sylvester Vs. Musa Mdoe** (1989) TLR 164.

With the second ground of appeal, Mr. Tuthuru was of the considered view that the first appellate magistrate imported extraneous matters in her judgment which were not part of the proceedings. He exemplified this at page 3 of the impugned judgment.

With the third ground of appeal, it was submitted that since the respondent's claims were registered after the appellant's had filed the final account of the said estate, there was no any legal cause allowed to re-open the said estate and consider the filed objection as per law. So long as the appellant had fully discharged his duties to the finality, being the administrator had fully discharged his legal obligations. Therefore, the District Court failed to properly evaluate the records and scrutinize properly and thus reached to an improper finding. On this, he relied

support in the case of **Saada Rashid V. Abdalla Rashid**, PC. Civil Appeal No. 12 of 2020, HC Arusha, at page 6.

Lastly, he argued that the respondent being the grandson to the deceased, was not a recognized heir as per law citing the Local Customary Law Declaration Order, **GN 436 of 1963**.

On the other hand, the respondent first prayed that his reply to the petition of appeal be adopted by the Court to form part of his appeal submission. He further added that, all that stated by the first appellate court be upheld by this Court as being proper and justious. He clarified that; in this case he is not appearing at his personal level but as administrator of the estate of his deceased father – Josiah Ibrahim Maradufu. Thus, on that he is not claiming heirship as grandson to the said estate as alleged. Basing on these arguments, he prayed that let this appeal be dismissed with costs.

Having heard the parties' submissions in this case, the vital question to pose is one, whether the appeal is meritorious as per circumstances of this case.

On the issue of assessors' involvement at the trial court as it was in the old position of the law, the judgment of primary court if agreed by

all assessors present, the judgment is only valid if it is dully signed by all the members. It is not a legal requirement that each assessors' opinion is reflected in the judgment unless there is a dissenting decision. By the way, at Primary Court, assessors don't opine but give decision. The decision is by majority of votes. This is pursuant to section **7 (I) & (2)** of the MCA, Cap 11 R.E 2022. The question is whether there is an order or decision passed by the primary court in this case. According to section 7 of the MCA, the assessors who sat with the trial magistrate must take part in the decision making. The way the decision of the primary court used to arrive at when sitting with assessors is as provided for under rule 3 of the Magistrates' Courts' (Primary Courts) (Judgment of Courts) Rules (supra) as follows:

> *"3.(1).Where in any proceedings the court has heard all the evidence or matters pertaining to the issue to be determined by the court, the magistrate shall proceed to consult with the assessors present, with the view of reaching a decision of the court.*
>
> *(2) If all the members of the court agree on one decision, the magistrate shall proceed to record the decision or judgment of the court which shall be signed by all the members.*
>
> *(3) For the avoidance of doubt a magistrate shall not, in leu of or in addition to, the consultations referred to in*

sub-rule (1) of this Rule, been entitled to sum up to the other members of the court."

In fact, I agree with the position of the first appellate magistrate quoting the decision of this Court in **Bikara Erasto** (Supra) that any decision of the primary court which is not signed by the assessors who heard the matter cannot be termed as decision of the primary court (Kisanya J).

However, according to the above cited provisions, the appropriate legal procedure as authorized by law before reaching the court's decision, the trial magistrate and the assessors consult each other in order to arrive at the decision of the primary court. Thereafter, the trial magistrate records the decision or judgment of the court if the members agree on one decision. In any case, the decision or judgment recorded by the trial magistrate shall be signed by all members agreeing on it.

I have perused both decisions of the trial court (that granting the letters of the administration to the appellant and the other on objection proceedings by the respondent), I have noted nothing to fault. Both decisions are dully signed by both assessors present and the trial magistrate. For the avoidance of doubt a magistrate shall not, in leu of or in addition to the consultations referred to rule 3 of the Magistrates'

Courts' (Primary Courts) (Judgment of Courts) Rules, been entitled to sum up to the other members of the court.

As per court's records, it appears the first appellate magistrate has mixed up the positions of assessors taken in the administration of murder cases or land cases. To what I know, the manner the discussion is done in the above quoted provision of the law is relatively different from the discussions conducted in the administration of justice by DLHT when seated with the assessors in land matters and High Court in murder cases. There is a clear difference on that in which the first appellate magistrate must be aware of and there was no need of this court making such a clarification on that. That means, whereas in primary court the majority of assessors' positions could make decision of the court, in DLHT or High Court merely form opinions in which the DLHT or High Court is not bound to follow.

Therefore, borrowing of the stand taken by my brother Kisanya in the case of **Bikara Erasto** (supra), has been wrongly interpreted by the first appellate magistrate. This is because in the above cited case, Kisanya J was faced with a situation that the judgment of the trial court was not signed and dated by the assessors present, thus ruled that there was no judgment to be appealed against before the district court

as well as at High Court. He relied this this position when interpreting the said provision of the law (rule 3 of the Magistrates' Courts' (Primary Courts) (Judgment of Courts) Rules (supra)) as was stated by the Court of Appeal in **Patrick Boniphace vs R**, Criminal Appeal No.2/2017 (unreported). So, whereas the legal position is right, the application of it in the present case was improperly applied by the first appellate magistrate in the appeal before her.

In any case, the decision or judgment of the primary court recorded by the trial magistrate and dully signed by all members (assessors), unless the contrary is established shall be valid judgment of the primary court as per law. That there should be a reflection of what assessors opined is a new invasion suggested, which has no legal basis at all. That said, the order of the first appellate court quashing the proceedings thereof and subsequently nullifying the judgment is not legally justified in the circumstances of this case.

In consideration of the second ground of appeal, that the first appellate magistrate imported extraneous matters in her judgment which were not part of the proceedings, I view it in another perspective that since there were grounds of appeal before the first appellate court, the appellate magistrate was only bound to confine herself to those

grounds of appeal (See **SIMON EDSON @ MAKUNDI V. R**, CRIMINAL APPEAL NO. 5 OF 2017 [TANZLII, **MOSI S/O CHACHA @ IRANGAMOKIRI and ANOTHER V. THE REPUBLIC,** CRIMINAL APPEAL NO 508 OF 2019). It was not right for herself to formulate her own grounds of appeal and through them reach her verdict. The appellate court is vested with jurisdiction only on the grounds of appeal lodged before it. If in the course of determining the said appeal, any legal issue of justice interest is encountered, then the appellate court is bound to inform the parties first and that they dully make their address on that before making court's verdict. Doing contrary to that, is an absurd which legally cannot stand as it is against the cardinal spirit of the right to be heard which is considered as fundamental breach of natural justice even if the same decision would have been reached had the party been heard (See **Charles Chirstopher Humphrey Kombe V. Kinondoni Municiapal Council**, Civil Appeal No. 81 of 2017, **Yazidi Kassim Mbakileki V. CRDB (1996) Ltd and Another**, Civil Reference No. 14/04 of 2018, **Abbas Sherally and Another Vs. Abdul S.H.M. Fazalboy**, Civil Application No.33 of 2002, **North Mara Gold Mine Limited V. Isaac Sultan**, Civil Appeal No. 458 of 2020, all by Court of Appeal searchable at Tanzlii). That the first appellate magistrate instead of considering the appeal on the basis of the nine grounds of appeal lodged before it, she

formulated her own grounds of appeal as if she was the aggrieved party. That was improper in line with above reasoning.

With the third ground of appeal, that since the respondent's claims were registered after the appellant had filed the final account of the said estate, there was no any legal cause allowed to re-open the said estate and consider the filed objection as per law.

I am of the considered view that so long as the appellant had fully discharged his duties to the finality, being the administrator had fully discharged his legal obligations. Therefore, the District Court failed to properly evaluate the records and scrutinize properly and thus reached to an improper finding. The decision in the case of **Saada Rashid V. Abdalla Rashid**, PC. Civil Appeal No. 12 of 2020, HC Arusha, at page 6 making reference to the case of **Ahmed Mohamed Al Laa Mar Vs. Fatuma Bakari & Asha Bakari,** Civil Appeal No. 71 of 2012, that once an inventory has been filed, the duties of the administrator are over. Any aggrieved party/person in respect of the administration of the said estate is only entitled to recover her share or portion of it (if any) by another legal course and not by objecting a process which was dully closed (See also the case of **Andrew C. Mfuko Vs. George C. Mfuko**, Civil Appeal No. 320 of 2021, CAT at DSM).

From the authorities cited above, the Court of Appeal of Tanzania gave clear remedies to the parties who have claims in the deceased person's estate where the case is closed. I am of the considered view that (Rule2 (h) &3 (1) (h) of the Fifth Schedule of the Magistrates Courts' Act (Supra), do not vest the trial court with jurisdiction to re-open the already closed Probate and Administration Cause as the Form VI and the order closing the Probate and Administration Cause were clear and effective that, the deceased's properties aforementioned have been distributed to the deceased's heir and that such estate shall remain under the care of the said heir. Hence, if any of the beneficiaries does anything contrary to what was mutually agreed by the deceased person's heirs and the same being duly recorded by the trial court, may institute a civil case or criminal case depending on the nature of disputable act (s) as per **Saada Rashid's** position (above) taking the view of **Ahmed Mohamed Al Laa Mar's** case (supra).

In the current case, so long as the respondent's administration was in respect of the estate of his deceased father Josiah Ibrahim Maradufu, it was not necessary and automatic that he had a share in the estate of his grandfather. He could only and validly inherit it, had his deceased father inherited from his father (now grand father to him). As

that was not done, he has no locus standi to challenge the same. Let the settled water remain so. In the circumstances of this case, he only remains an administrator to the estate of his father and not to other estate his father had not acquired/inherited.

That said, the appeal is allowed. The decision of the trial court is thus restored whereas that of the district court is quashed and set aside for being erroneously reached. This being a probate matter, parties shall bear their own costs.

DATED at MUSOMA this 23rd day of May, 2023.

F. H. Mahimbali

Judge

Court: Judgment delivered today the 23rd of May, 2023 before E.G Rujwahuka, Deputy Registrar in the presence of Mr. Cosmas Tuthuru advocate for the appellant, the respondent being present in person and Mr. K.S. Rutalemwa RMA, present in Chamber Court.

Right of appeal is explained.

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Ag - Deputy Registrar.