

TANZANIA / JUDGMENT

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10 December 2024

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THE UNITED REPUBLIC OF TANZANIA JUDICIARY IN THE HIGH COURT OF TANZANIA MBEYA
SUB - REGISTRY AT MBEYA PROBATE APPEAL NO. 25663 OF 2024 (Arising from the Ruling of the
Civil Revision No. 9414 of 2024 of the District Court of Mbeya, from Probate Cause No. 26 of 2022
and Administration Cause No. 26 of 2023 of Iyunga Primary Court) ANNA RAMADHANI
MKENDA..... APPELLANT VERSUS OBADIA ATULINGENYE
SWILA..... RESPONDENT

JUDGMENT

Date: 10 December 2024 & 7 March 2025 SINDA, J.: The appellant in this appeal at the District Court of Mbeya at Mbeya (the District Court) filed Civil Revision No. 9414/2024 challenging the decision in Administration Cause No. 26 of 2023, resulting from Probate Cause No. 26 of 2022 of Iyunga Primary Court (the Primary Court). The application was brought by way of chamber summons supported with an affidavit of the appellant. In reply, the respondent raised a preliminary objection that the application is bad in law since the respondent is functus 1 officio, as the probate was already closed on 23 October 2023. On 13 September 2024, the appellant, through her advocate, conceded with the preliminary objection raised by the respondent that it has merit, and the District Court, on its decision, agreed with the parties that the respondent is functus officio as the probate was already closed on 23 October 2023. Thereafter, the appellant filed a memorandum of appeal with five grounds of appeal as follows;

1. That, the District Court Magistrate erred in both law and fact by holding that the application for revision before him fell under functus officio as the probate matter was closed on 23 October 2023, thus issuing an erroneous decision that favored the respondent.
2. That, the District Court Magistrate erred in both law and fact by issuing an erroneous decision by holding the matter of DNA without any legal justification.
3. That, the District Court Magistrate erred in law and fact by condoned irregularities done by the Iyunga Primary Court, thus infringing the right of the appellant.
4. That, the District and Primary Court Magistrate erred in law and fact by failing to determine that the respondent failed to discharge his 2 duties honestly as an administrator of the probate estate of the late Atulingenye Nikuseke Swila.

5. That, the District Court Magistrate failed to determine the legality of closing the probate and submitting inventories and accounts without the appellant's knowledge.
6. That, the trial and District court Magistrates went astray by ignoring technicalities in making decisions instead of bringing justice to the appellant. During the hearing of the appeal, both the appellant and respondent appeared in person. The appeal was argued by way of written submission. The appellant, on the first grounds of appeal, submitted that the appellate Magistrate erred in law and fact by holding that the application for revision before the court fell under *functus officio* as the probate matter was closed on the 23 October 2023, thus ended to issue an erroneous decision. She referred to the Black's Law Dictionary, 11th Edition 2019, which defines the doctrine of "*functus officio*" to mean "a task performed". She added that from the above definition, it is crystal clear that the doctrine of *functus officio* restricts a Judge, Magistrate, or Arbitrator to perform a function already performed. It means that when a matter is finally determined, it cannot be re-determined. She also referred to the case of *3 Kamundu vs. Republic* (1937) EA and the case of *Bibi Kisoko Medard vs. Minister for Lands Housing and Urban Developments* and Another 1983 TLR 250 to cement her argument. She argued that the principles of *functus officio* do not bar the superior court from examining the proceeding, recording irregularities and setting aside the decision of the subordinate court. She argued that the District Court, under section 22 (1) of the Magistrate Court Act, Cap 11 R.E 2019, has the revision jurisdiction to call for and examine the records of any proceedings in the Primary Court for the District Court to satisfy itself as the correctness, legality or propriety of any decision or order of Primary Court and as to the regularity of any proceedings therein, and may revise any such proceedings. She contended that the District Court went astray for failing to discharge its revision jurisdiction vested by the law and infringed the appellant's right. She further stated that the principle of *functus officio* does not bar the District Court from examining the legality, records, and proceedings of the Primary Court and setting aside its decision. On the second ground of appeal, the appellant avers that the respondent raised the issue of DNA test during the trial and was not conducted by the Primary Court according to the Human DNA Regulation No.8 of 2009 and 4 the Law of the Child Act Cap 13 R.E 2019 section 35(a)(b)(c)(d) and(e). In those circumstances, an order for retrial cannot be avoided. She submitted that the settled position of law is that an order for a retrial arises when the appellate court finds out that the trial court's judgment is defective for leaving contested material issues unresolved and undecided, which error or omission renders the said judgment a nullity and incapable of being upheld. She referred to the case of *Stanslaus Rugaba Kasusura & Attorney General vs. Phares Kbuye* 1982 TLR 192, and the case of *Fatehal Manji Versus Republic* 1966 EA 344. She contended that the District Court erred in law to uphold the matter of the DNA test without issuing an order for the same to be retrial to the Primary Court. She argued the third and fourth grounds of appeal together. She stated that during the trial at the Primary Court, she raised an objection against the administrator of the probate estate for contravening Rule 9(1)(b)(e) of the Primary Courts (Administration of Estate) Rules G.N No.49 of 1971. Still, the Primary Court ignored the objection and allowed the respondent to administer the probate

estate. She reproduced page 5 of the typed ruling of Probate Case No.26 of 2022. 5 She stated that the Primary Court conceded that the administrator failed to discharge his duties according to the law, and the only remedies were revocation or annulment of the grant of administration. The appellant wondered how the respondent could administer the probate while her objection against him was merited. These were irregularities that infringed the appellant's rights at trial. The appellant further argued the fifth and sixth grounds collectively. The appellant avers that the closure of the probate and submission of inventories and accounts was illegal and did not follow the procedure of law as provided under rule 10 (2) and Form VI of GN No. 49 of 1971. The appellant was invited by surprise to close the probate estate. The respondent did not involve her, and the appellant did not swear Form VI of the same GN No.49 of 1971. She learned that the probate estate was already closed when the respondent instituted an Application No. 26/2023 at the Primary Court for eviction of the appellant from the house where she lives by claiming that the same was distributed to the heirs. Furthermore, the respondent included the appellant's house located at Nzovwe in the distribution of probate estate illegally. The children of the deceased, who are the heirs, were left nothing to inherit. 6 This left them suffering because they did not inherit anything from their biological father. This was an injustice to the Primary Court, and the District Court failed to discharge its duty by applying its revision jurisdiction to examine the proceedings, records and legality of the Primary Court. The District Court condoned the irregularities done by the Primary Court but continued to use the *functus officio* principle in making injustice decisions. He stated that the *Functus officio* principle met the legal requirement when the respondent instituted application No. 26 of 2023 for eviction at Iyunga Primary Court and not the revision jurisdiction applied by the appellant at the District Court. Furthermore, the Constitution's principle requires that substantive justice prevails over legal technicalities in administering justice. It requires the court to dispense justice without being tied to legal technicalities that may obstruct it. The District Court Magistrate should administer justice to the beneficiaries and heirs rather than be bound by legal technicalities. She prayed that this court would set aside the decision of both subordinates and remit the matter for retrial at the Primary Court. In reply, the respondent submitted that the District Court correctly ruled that it was *functus officio* regarding the first ground of appeal. While he 7 agrees with the definitions of the phrase *functus officio* as submitted by the appellant, in the case at hand, the court becomes *functus officio* once a probate matter is finalised. He further submitted that it is settled law that the administrator of the deceased person's estate will continue to discharge his/her duties until either his appointment is revoked or completes his duties by filing an accounts and inventory and probate matter closed. When he/she files accounts and inventory, and the court closes the probate matter, then the administrator becomes *functus officio*. He reiterates the position of the law in several cases, including the case of Saada Rashid vs. Abdallah Rashid [2021] TZHC 2688 (Tanzilii), Ahmed Mohamed Al Laamar vs. Fatuma Bakari & Another [2012] TZCA 135 and Hadija Masudi as the Legal Representative of the late Halima Masudi vs. Rashid Makusudi, Civil Appeal No. 26 of 1992. He submitted that the above authorities clearly show that the principle of *functus officio* applies. The appellant never brought any case law supporting her position. On the

second ground of appeal, he submitted that since the matter was already closed, the issue of a DNA test could not arise. The cases cited in 8 favour of retrial are distinguishable and inapplicable to the circumstances of the present case. On the third and fourth grounds of appeal, he stated that these grounds raised nothing to shake the fact that the administrator in this case was *functus officio*. Therefore, the issue of whether he was fit was already overtaken by events. Regarding the fifth and sixth grounds of appeal, he stated that the record is clear that probate proceedings were duly closed by the Primary Court. and complaints came in after such closure. He added that Rule 10 (2) and Form VI of GN No. 49 of 17971 do not help the appellant. That, Rule 10

- (2) provides that the statement and accounts referred to in sub-rule (1) may, on application to the court, be inspected by any creditor, executor, heir or beneficiary of the estate. There is nowhere in the record that the Appellant was denied the right to inspect the accounts. On the issue of technicalities, he stated that the issue of *functus officio* is within the court's jurisdiction and, hence, cannot be termed a mere technicality for the court to dispense with. Therefore, it was proper for the District Court to apply the principle of *functus officio*. He prayed that this appeal be dismissed. 9 I have reviewed court records, grounds of appeal, and submissions filed by parties. I find that the whole appeal can be disposed of under one issue: whether Civil Revision No. 9414 of 2024 was bad in law as the respondent was *functus officio* as the probate matter was already closed. The respondent submitted that the matter is *functus officio* because the probate matter was already closed. It is a settled position of the law that when an administrator files inventory and the court closes the matter, then the administrator becomes *functus officio*. In the case of *Andrew C. Mfuko vs. George C. Mfuko* (Administrator of the Estate of the late Clement N. Mfuko) Civil Appeal No. 320 of 2021 (CAT at Dar es Salaam) at page 5, the court stated that; "On our part, having heard the advocates' submissions to the questions we posed, there is no dispute that the order of the High Court in Probate Cause closed the matter with the result that the respondent ceased to be an administrator. Having vacated office as an administrator, he could not sue or be sued in that capacity. Apparently, both learned advocates agree that it was wrong for the appellant to have sued the respondent in his capacity as an administrator. That means the suit was instituted against a person who had no capacity to act as an administrator regardless of the 10 fact that the order closing the Probate Cause may have been erroneous). Going through trial court records of the Primary Court, I find that on 23 October 2023, Probate Case No. 26 of 2022 was closed. Based on the above authority, I find that it was wrong for the appellant to have filed this appeal against the respondent in the capacity of an administrator because after the court closed the matter, the administrator became *functus officio*. In that respect, I find no need to deliberate on other grounds of appeal because it falls under the same ambit of *functus officio* on the part of the respondent as an administrator. Based on the above deliberation and authority, I find the whole appeal devoid of merit and is dismissed. Right to appeal is explained. DATED at MBEYA on this 7 March 2025. A. A. SINDA JUDGE 11

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Prepared on 13 October 2026 · Esheria