

TANZANIA / JUDGMENT

Judgement Probate Appeal No

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THE JUDICIARY OF TANZANIA IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA AT MOSHI PROBATE APPEAL NO. 1181 OF 2023 (C/F Probate Appeal No. 07 of 2023 in Moshi District Court. Originating from Probate Cause No. 86 of 2022 in the Primary Court of Moshi District at Moshi Urban) BERTHA ANSELI MALEWO..... APPELLANT VERSUS RENALDA MALEWO..... RESPONDENT

JUDGEMENT

21st August & 23rd September, 2024 MONGELLA, J. This matter goes as far as 2022 when one Jasper Anseli Malewo filed Probate Cause No. 86 of 2022 in the primary court of Moshi district at Moshi urban (hereinafter, the trial court). He sought to be granted letters of administration with respect to the estate of one Anseli Lyamlawa Malewo who he claimed to be his grandfather, but also raised him as his son. His application was objected by two individuals; one Magdalena Malewo and the respondent herein. Allegedly, both objectors are related to children of the late Anseli Malewo who had survived the deceased. The trial court entertained the objection first and found it unmeritable. It Page 1 of 15 proceeded to entertain the application and appointed the said Jasper Anseli Malewo and the respondent as respectively, the first and second administrators of the estate of the late Anseli Malewo. Aggrieved, Jasper Malewo appealed to the district court vide Probate Appeal No. 13 of 2022 challenging the respondent's appointment on multiple grounds, including allegations that her interests were opposed to those of the deceased and she misappropriated the deceased's estate. In its Judgement delivered on 23.02.2023, the district court dismissed the appeal. In April 2023, the appellant sought for the trial court to revoke the respondent's appointment as administrator of the estate of the late Anseli Malewo. The trial court noted that the allegations geared against the respondent had not been proved. It however proceeded to revoke both, Jasper Malewo and the respondent from such role as administrators as it found that the two were at odds and thus could not administer the estate effectively. The trial court further appointed the appellant as the administrator of the estate. Aggrieved by the appellant's appointment, the respondent appealed to the district court of Moshi at Moshi vide Probate Appeal No. 20 of 2023 (hereinafter, the 1st appellate court). The first appellate court found all 5 grounds of appeal advanced by the respondent without merit. However, it proceeded to fault the appointment of the appellant as a sole administrator while the beneficiaries appeared to be divided. In the premises, it Page 2 of 15 proceeded to quash the decision of the trial court and order trial de novo so that two administrators are appointed from each side. Aggrieved, the

appellant has preferred this appeal on the following grounds:

1. That, the honourable first appellate Magistrate erred in law by allowing the current respondent's appeal while he had rejected all her grounds of appeal.
2. That the honourable first appellate Magistrate erred in law to nullify all the proceedings and judgement of the trial Court, and ordering a fresh trial/retrial de novo without any legal basis.
3. That the honourable first appellate Magistrate erred in law and fact by failing to consider that there are no two rival groups among the heirs of the deceased, since the respondent is not among the heirs of the deceased, she is not a descendant of the deceased, she is neither a parent nor sibling nor a spouse of the deceased.
4. That the honourable first appellate Magistrate erred in law and fact by failing to consider that the Respondent's interests are adverse to the interest of the deceased and his lawful heirs, for the respondent's claim is that the properties listed as part of the deceased's properties belong to the respondent personally. Page 3 of 15 The appeal was argued by written submissions whereby the appellant was represented by Mr. Chiduo Zayumba and the respondent by Mr. Robinson Makundi, both learned advocates. Submitting on the 1st ground, Mr. Zayumba averred that the 1st appellate court dismissed all grounds of appeal, but proceeded to order trial de novo. In his view, the appropriate action was for the 1st appellate court to dismiss the appeal and affirm the trial court's decision. He found the re-trial order amounting to favouring the respondent who had failed to discharge her duties as administrator. With respect to the 2nd ground, the learned counsel faulted the 1st appellate court's nullification of proceedings of the trial court. He considered the decision lacking legal basis considering that the respective court had found the respondent's revocation by trial court justified. Demonstrating on the position of the law regarding retrials, he made reference to the case of CRDB Bank PLC vs. The Registered Trustees of Kagera Farmers Trust Fund & Others (Civil Appeal No. 496 of 2021) [2024] TZCA 94 (23 February 2024) TANZLII. He further challenged that the reason for ordering retrial was founded on protection of group interest and not on legality of the trial or Judgement. Mr. Zayumba further challenged that the parties had appealed to the district court twice and were sent to the primary court twice. That, the primary court had heard the parties on three different applications. In his view therefore, returning the parties back to the primary court would be torturing them considering that the order Page 4 of 15 was unnecessary. Stressing on situations to take into account in ordering retrial, he cited the case of Joseph Lomayani and Others vs. Melekizedek Michael [1997] TLR 195. He emphasized that the 1st appellate court having found the respondent and her co- administrator had failed to fulfil their legal duties, ought to have affirmed the appellant's appointment as the sole administratrix. As to the 3rd ground, Mr. Zayumba alleged that the position of the law is that the court should not appease each group when there is rivalry. Instead, the court should observe whether the appointed person is suitable to be an administratrix of the deceased's estate. He fortified his assertion with the case of Sekunda Mbwapambo vs. Rose Ramadhani [2004] TLR 439. The

counsel further pointed out that the respondent had no relations with the late Anseli Malewo. That, she is not his wife, daughter, parent or granddaughter, but she is his daughter-in-law, having married one Elinami Malewo, a deceased son of the late Anseli Malewo. On the foregoing allegation, Mr. Zayumba contended that he was unaware of any law that provides that a daughter-in-law has an interest in her father-in-law's estate and could administer the same. He contended that the position as provided under paragraph 2 (a) and (b) of the Fifth Schedule to the Magistrates' Courts Act [Cap 11 R.E 2019] is that the appointed person must have an interest in the deceased's estate. He fortified this position with the case of Seif Marare vs. Mwadawa Salum [1985] TLR 253; Hezron Mwakingwe vs. Elly Mwakyoma (Probate Appeal 3 of 2020) [2020] TZHC 2394 (26 August 2020); Naftary Petro vs. Mary Protas (Civil Appeal No. 103 of Page 5 of 15

2018) [2019] TZCA 357 (31 October 2019) and; Godfrey Moses Mapalala vs. Flora Neema Daud (Civil Appeal 51 of 2020) [2023] TZCA 217 (4 May 2023). Mr. Zayumba further argued that the daughters of the late Anseli Malewo, as well as one of his sons, are still alive. He added that the alleged rival group does not include any child or widow of the deceased. In the premises, he found it wrong for the 1st appellate court to compel the trial court to appoint a party that was not closely related to the deceased and without interest in his estate. He further faulted the 1st appellate court for failure to justify the reason for its decision, such as to whether the omission to appoint two administrators would endanger the interests of the respondent herein. In regard to the 4th ground, Mr. Zayumba alleged that the respondent was converting the deceased's properties into her own. He claimed that she has sold some properties and she was claiming ownership over one of the deceased properties. He argued that the claiming of ownership of the deceased's estate was also raised and challenged at the 1st appellate court whereby even the copy of the judgement of the District Land and Housing Tribunal for Moshi at Moshi in Appeal No. 64 of 2016 was attached therein. He explained that in the said matter, the respondent claimed for the deceased's land despite not being an administratrix of his estate, however it was found that she lacked locus standi. He stressed that there was enough proof that she claimed the deceased's land was hers. That, it was also clear on Page 6 of 15 record that she had secured a Right of Occupancy over 7.43 acres of the 20 acres owned by the deceased. That the said Right of Occupancy was also attached by the respondent in her counter affidavit in Miscellaneous Civil Application No. 33 of 2023. The learned counsel insisted that the respondent had demonstrated having adverse interest in the deceased's estate. In such situation, he had the view that she ought to have addressed the same in a different suit rather than objecting appointment of the administrator of the deceased's estate and seeking to be appointed as the administrator of the said estate. To him, this was a conflict of interest serving to show her entire group was also conflicted. He cemented his arguments with the case of Fatima Fatehali Nazarali Jinah vs. Mohamed Alibhai Kassam (Civil Appeal 85 of 2014) [2016] TZCA 642 (20 June 2016) and Samson Kishosha Gabba vs. Charles Kingongo Gabba [1990] TLR 133. Mr. Zayumba argued further that if the matter is remitted to the trial court and the respondent appointed as the administratrix, nothing will

be distributed as she and her group claim ownership of the deceased's properties. He finalized his submissions by praying that the appeal is allowed with costs, the orders of the district court quashed and set aside and the decision of the trial court re-affirmed. In reply, Mr. Makundi commenced his submissions alleging that the matters addressed were remote, outrageously unfounded, baseless and holding no water. Countering the 1st ground, he Page 7 of 15 argued that the 1st appellate court's order for trial de novo was not an error, but a necessary step to ensure a just resolution of the matter. In his view, the court recognized the inherent conflict between the parties that necessitated the appointment of two administrators to safeguard the interest of both sides and ensuring fairness in administration of the deceased's estate. He alleged that the 1st appellate court exercised its discretion under Sections 21(1)

- (c) and 22(2) of the Magistrates' Courts Act. As to the 2nd ground, Mr. Makundi averred that the 1st appellate court's decision was sound in law considering the circumstances of the case. He said that the 1st appellate court identified the need for a fresh trial to resolve the underlying issues and prevent further conflict among the deceased's beneficiaries. He was convinced that this approach was to ensure not only justice is done, but seen to be done. Addressing the 3rd ground, the learned counsel challenged the argument that the respondent had no interest in the deceased's estate terming it as weak. He contended that the respondent had interest in the deceased's estate as the widow of the deceased's son. He claimed that she is a stakeholder in proper administration of the deceased's estate. In those premises, he found the 1st appellate court to have recognized the need to balance the interests of all parties which necessitated appointment of co-administrators. Page 8 of 15 He further alleged that the case law relied on by the appellant overlooked the fact that the court's primary duty is to ensure that administration of estates is carried out effectively and fairly. Commenting on the respondent's actions, he averred that the respondent's opposition to certain actions taken by the appellant does not negate her legal interest in the deceased's estate. Expounding on the 4th ground, Mr. Makundi was of the view that there was no any evidence provided to prove the allegation that the respondent claims ownership over the deceased's properties. On the other hand, he said, the respondent's act of claiming specific properties does not disqualify her from participating in the administration of the deceased's estate. I have considered grounds of appeal, the submissions of both parties' counsels, as well as, the record of both lower courts. The contention herein pertains the 1st appellate court's decision that nullified the trial court's entire proceedings and ordered trial de novo. Upon assessing the parties' submissions on the grounds of appeal, I found the 1st and 2nd grounds both relating to the legality of the nullification of the trial court's proceedings and the order for trial de novo. On the other hand, under the 3rd and 4th grounds, the appellant challenges the status of the respondent and her interest as far as the estate of the deceased is concerned. I prefer to start addressing the 3rd and 4th grounds. On the 3rd ground, the appellant alleged that there were no rival groups among heirs as the respondent was not a beneficiary. On the 4th Page 9 of 15 ground, he alleged that the respondent had adverse interest to those of the deceased. In my observation, I am of the view that these two issues

are new as they were not subject of discussion at the 1st appellate court. It is settled position that the second appellate court cannot entertain new issues that were not canvassed in the 1st appellate court. An inspiration can be borrowed from the case of Hassan Bundala @ Swaga vs. Republic (Criminal Appeal No. 386 of 2015) [2015] TZCA 261 (23 February

- 2015) whereby the Court stated: "It is now settled law that as a matter of general principle this Court will only look into the matters which came up in the lower court and were decided, and not on new matters which were not raised nor decided by neither the trial court nor the High Court on appeal". The exception to this rule is where the new issue raises a point of law. See, Adam Shango vs. Republic (Criminal Appeal 149 of 2020) 2022 TZCA 821 (22 December 2022), in which it was stated: "It is settled law that, a ground of appeal which was not raised and determined by the first appellate court cannot be entertained by the Court in second appeal, unless it involves a point of law." See also; Menald Wenela vs. The Director of Public Prosecutions (Criminal Appeal 336 of 2018) [2021] TZCA 520 (24 September 2021). The argument as to the respondent holding adverse interests to those of the deceased featured in trial court and was found Page 10 of 15 unproved. However, such decision was not challenged in the first appeal. If the appellant wished to challenge the same, she ought to have filed a cross appeal to Probate Appeal No. 20 of 2023, but she did not. Raising the same allegation at this point is an afterthought and contrary to the dictates of the law. The above observation also applies to the question regarding the respondent's status as beneficiary. This issue was not raised at any time in both lower courts. In the foregoing, since neither of the grounds raise a point of law, I refrain from addressing them. Both grounds are hereby dismissed. As to the legality of the orders issued by the 1st appellate court; I have observed the decision of the 1st appellate court and found it apparent that the court found all grounds raised therein without merit. The court still proceeded to nullify the proceedings and Ruling of the trial court and ordered trial de novo. I find it pertinent to hereunder reproduce the relevant excerpt from the Judgement of the 1st appellate court, for ease of reference: "For the reason stated above I cannot hesitate to say that, this appeal has merits. Accordingly, I quash the lower court decision and any other order made thereto, I instead hereby order the case be heard afresh " DE NOVE" before another Magistrate so that two administrators be appointed from each side for the interest of justice. In the surrounding circumstance I have also considered the fact that, this is probate matter and that parties are also relatives, in the same venue I don't burn them with any order as to costs, each party to bear its own costs. (sic) Page 11 of 15 Appeal allowed to that extent." It is well settled that court's, as parties, are bound by the parties' pleadings. This position was also settled in the case of Masaka Musa vs. Rogers Andrew Rumenyela & 2 Others (Civil Appeal No. 497 of
- 2021) [2023] TZCA 17339 (14 June 2023) TANZLII, whereby the Court of Appeal stated: "... it is not only the parties who are bound by their pleadings but the courts are also bound by the said pleadings of the parties. As it is for the parties to suits, who are not allowed to depart from their pleadings and set up new cases, courts are also bound by the parties' pleadings and they are not allowed to depart from such pleadings and create their own case." See also,

Zebra International Enterprises Limited vs. Anthony Mrisho Ngai & Others (Civil Appeal No 536 of 2020) 2024 TZCA 142 (28 February 2024); and Gloria Ipira vs. Sudi Mrisho Ngwambi & Others (Civil Appeal No 27 of 2021) 2023 TZCA 17774 (23 October 2023). It is further settled that courts cannot grant reliefs neither prayed for nor incidental to some specific prayer. This was well expounded in Makasa (supra) whereby the Court stated: "It is a settled position of the law that a relief not sought on the pleadings and which is not incidental to any specific prayer in the pleadings cannot be awarded. See also, Salim Said Mtomekela vs. Mohamed Abdallah Mohamed (Civil Appeal No 149 of 2019) 2023 TZCA 15 (15 February 2023). Page 12 of 15 In line with the above cited decisions, it is apparent that the 1st appellate court violated the two rules. The 1st appellate court was moved vide Petition of Appeal filed by the respondent herein. The Petition and the Reply thereto served as pleadings in the appeal proceedings. The 1st appellate court was thus bound to make its decisions within the confines of the two documents. However, it strayed into error by not only raising concerns pertaining the trial court's act of appointing a sole administrator, but went as far as to quash their appointments and order trial de novo. The question as to the legality of the appointment of the sole administrator as well as the reliefs were both never sought by either party. These were new issues advanced suo motu by the 1st appellate court. Its approach of raising and determining a new issue that was never raised or determined by either party was a clear violation of the rules of natural justice to wit; the right to be heard. This issue verily frowned upon as it contravenes fundamental principles enshrined in our Constitution. Its effect serves to render the issued decision a nullity. See, Mbeya -Rukwa Autoparts & Transport Limited vs. Jesca George Makyoma [2003] T.L.R 251; John Morris Mpaki vs. NBC Ltd and Ngalagila Ngonyani, Civil Appeal No. 95 of 2013 (unreported); Pili Ernest vs. Moshi Musani (Civil Appeal No 39 of 2019) 2021 TZCA 297 (14 July 2021; Petro Robert Mnyavilwa vs. Abel Mwalibeti & Others (Civil Application No 640 of 2021) 2024 TZCA 108 (23 February 2024); National Microfinance Bank PLC Another vs. Lello Laurent Sawe (Consolidated Civil Appeals No 385 A 339 of 2021) 2024 TZCA 17 (6 February 2024). Page 13 of 15 In John Morris (supra), the Apex Court observed: "The law that no person shall be condemned unheard is now legendary. It is trite law that any decision affecting the rights or interests of any person arrived at without hearing the affected party is a nullity, even if the same decision would have been arrived at had the affected party been heard. This principle of law of respectable antiquity needs no authority to prop it up. It is common knowledge." While I do recognize the powers given to the district courts under Sections 21(1) (c) and 22(2) of the Magistrates' Courts Act to quash proceedings and order retrials, I am of the settled view that the same are not arbitrary. They ought to be exercised within mandates of the law. The law is clear that the courts ought to determine all issues raised before them. The question of appointment of one administrator was not part of the issues raised at the 1st appellate court by either party. If the 1st appellate court saw that the appellant's appointment was an important issue that needed to be determined, it ought to have raised the same and have parties submit on it. Further irregularity is found in the order nullifying proceedings of the trial court. Nullifying proceedings and/or quashing a judgement is only done when there is an irregularity in proceedings or the

judgement of the lower court. The 1st appellate court had not resolved any issue that ended up manifesting an irregularity as to the proceedings of the trial court or its Ruling that had the effect of nullifying the proceedings and quashing the Ruling of the trial court. Page 14 of 15 It is also settled that retrial is ordered when the original proceedings are illegal or defective. See; Fatehali Manji vs. Republic [1966] E.A. 343; CRDB Bank PLC vs. The Registered Trustees of Kagera Farmers Trust Fund & Others (supra). Thus, determining all issues raised and finding the appeal without merit was a clear indication that the 1st appellate court found no defect or illegality in the proceedings of the trial court. After such findings, the 1st appellate court had only one role to play, which was to affirm the decision of the trial court. Evidently, the 1st appellate court had no justification to order trial de novo. In the premises, I find the 1st and 2nd grounds with merit. Consequently, from the foregoing observations, I hereby quash the orders for nullification and quashing of proceedings and Ruling of the trial court. In substitute, I uphold the Ruling of the trial court in respect to the revocation of the 2nd administrator and her co- administrator and the appointment of the appellant herein as an administrator of the deceased's estate. Considering the nature of the dispute and the parties' relationship, I make no orders as to costs. Dated and delivered at Moshi on this 23rd day of September, 2024. X L. M. MONGELLA JUDGE Signed by: L. M. MONGELLA Page 15 of 15

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