

TANZANIA / JUDGMENT

emmanuel mwikombe and another vs christopher said sanga 2020 tzhc 4334 16 december 2020

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THE UNITED REPUBLIC OF TANZANIA JUDICIARY IN THE HIGH COURT OF TANZANIA
(DISTRICT REGISTRY OF MBEYA) AT MBEYA PROBATE APPEAL NO 11 OF 2020 (From the District
Court of Kyela at Kyela in Civil Appeal No. 09 of 2020. Originating from Mbalizi Primary Court in
Probate and Administration Cause No. 37 of 2019) EMMANUEL
MWIKOMBE..... 1st APPELLANT MAPINDUZI E.
SANGA..... 2nd APPELLANT VERSUS CHRISTOPHER SAID
SANGA..... RESPONDENT

JUDGEMENT

Date of Last Order : 03/12/2020 Date of Judgement : 16/12/2020 MONGELLA, J. The appellants are hereby challenging the decision of the District court of Kyela rendered in Civil Appeal No. 09 of 2020. The matter emanated from Mbalizi primary court in Probate Cause No. 37 of 2019. In this matter, the appellants filed an application for revocation of letters of administration of the deceased's estate of one Elika Said granted to Christopher Said Sanga, the respondent herein. The primary court dismissed the appellants' application after making a finding that they had no interest in the deceased's estate. The said findings were upheld by the appellate District court, something which disgruntled the appellants. In their petition of appeal they advanced two grounds to wit:

1. That the appellate District court erred in law and fact for determining the appeal on merit while the proceedings of the trial court were incompetent.
2. That the appellate District court erred in law and fact for failure to discuss the competence of records of the trial court as raised by the appellants thereby reaching at unjust decision. With the above two grounds they are seeking for this court to nullify the decision of the trial Primary court and the appellate District court. While the appellant enjoyed legal services of Mr. Imani Mbwigwa, learned advocate, the respondent appeared in person. The appeal was thus argued by written submissions for interest of justice to the unrepresented party. Arguing on the first ground, Mr. Mbwigwa submitted that it is an established principle of law

that before an appeal is determined on merits the appellate court must ascertain that the proceedings giving rise to the appeal were competent before the trial court. He argued that the trial court record was tainted with irregularities and the appellate District court did not address the grounds regarding the irregularities. It only dealt with merits of the appeal. On this aspect he referred the court to the case of Tanzania Revenue Authority v. Kotra Co. Ltd, Civil Appeal No. 12 of 2009 (unreported) and that of William Mrema v. Samson Kivuyo [2002] TLR 291. In connection with the first ground, Mr. Mbwiga argued on the second ground whereby he pointed the irregularities to be: /. There was infringement of the right to be heard to the 1st appellant;

2. There was a change of trial magistrate without assigning good cause for the same. Submitting on the first point, he argued that the trial court record indicates that the 1st appellant was never given the right to be heard. He said that the 1st appellant, Emmanuel Mwikombe, was not called to testify as one of the prosecution witnesses. He was of the view that if the 1st appellant had waived his right to be heard then the same should have been reflected in the record. He referred to the trial court record, particularly at page 1 whereby the trial Magistrate acknowledged that there were two applicants in the matter. He contended that by not according the 1st appellant the chance to testify while knowing he was party to the suit, the trial Magistrate infringed his right to be heard. To buttress his point, Mr. Mbwiga referred the court to the case of Samson Ngw'alida v. The Commissioner General Tanzania Revenue Authority, Civil Appeal No. 86 of 2008 (unreported) and that of University of Dodoma v. Iddi Mwerangi, Labour Revision No. 10 of 2017 (HC, unreported), which insisted on the right to be heard. < With regard to the second point, Mr. Mbwiga submitted that the trial court record shows that there was more than one magistrate who entertained the matter. Referring to the proceedings he submitted that on 30th January 2020 Hon. N.B. Lyimo scheduled the matter for hearing. On 12th February 2020 the matter came for hearing before Hon. N.B. Lyimo. On 30th March 2020 the matter came for hearing before Hon. N.B. Lyimo. On 04th March the matter came before Hon. H.M. Lyimo and the judgment was prepared and pronounced by Hon. N.B. Lyimo on 13th March 2020. Considering the proceedings as presented above, Mr. Mbwiga submitted that N.B. Lyimo and H.M. Lyimo appear to be different magistrates. He contended that even if it is to be assumed that the two are one person only that it was a typing error, the assumption cannot be entertained because there is a big difference between N.B and H.M. as initials. He thus was of the stance that there was a change of trial magistrates without assigning good reasons. To bolster his point he referred the court to the Court of Appeal decision in Mariam Samburo v. Masoud Mohamed Joshi & Others, Civil Appeal No. 109 of 2016 (CAT at DSM, unreported). Given his arguments he prayed for the court to nullify the decisions of both lower courts. On his part, the respondent opposed the appeal. Though he later submitted on the grounds of appeal, he first averred that the appellants have clandestinely introduced new grounds at this stage. I however do not agree with him as I have gone through the lower courts' records and found that the grounds were in fact raised in the appellate District court. Replying on the first ground he contended that the trial court's proceedings were not tainted

with any irregularities. He supported the decision of the first appellate court arguing that it was reached in consideration of all the grounds of appeal whereby the court found the grounds lacking merit. Arguing on the irregularity concerning the right to be heard, the respondent averred that the claim is not true. He submitted that the trial court never denied the 1st appellant his right to be heard as claimed, but the 1st appellant waived his right to be heard. He said that the 1st and 2nd appellants who are father and son, respectively, filed the application in the primary court challenging his appointment as administrator of the deceased's estate. He further stated that the 1st appellant never entered appearance when the matter was scheduled for hearing and never informed the court of his whereabouts. He was of the view that the 1st appellant is thus estopped from raising such an argument at this stage of appeal. He distinguished the case of Samson Ngw'alida (supra) and University of Dodoma (supra) cited by the appellants' advocate arguing that they have been cited out of context and thus distinguishable. With regard to the issue of change of magistrates, the respondent argued that the matter was never heard by two different magistrates. He was of the view that the appellants' counsel has either misdirected himself or he deliberately wants to mislead the court. Referring to the proceedings in the primary court, he argued that the matter came for mention on diverse dates before Hon. Mwampashe, S. J. RM on 05th August 2019 and Hon. A Njovu on 03rd October 2019. Thereafter, the matter came for hearing before Hon. N.B. Lyimo, RM who heard the case to finality. He challenged the argument by the appellants' counsel that the H.M. Lyimo and N.B. Lyimo are two different persons. On this, he argued that there was a typing error whereby instead of writing N.B. Lyimo, it was written H.M. Lyimo, but the magistrate was in fact the same who determined the matter to its finality. He further argued that, the case of Mariam Samburo (supra) relied upon by the appellants has been cited out of context. He submitted that in that case the CAT ruled that it was fatal for magistrates/judges to be changed without according reasons when the matter is at hearing/trial stage. The same is not fatal where the matter is only coming for mention. He concluded by reiterating his stance that there was no change of magistrate during trial of the matter, but rather a typing error on the name of the magistrate in one session. He prayed for the appeal to be dismissed with costs. After considering the arguments by both parties, I find that the two grounds of appeal are connected and thus I shall deliberate on them collectively. First of all I agree with Mr. Mbwiga's contention that where there are grounds on illegality in the proceedings and decision of the lower court, an appellate court is obliged to deal with them before proceeding to entertain the merits of the appeal. However, since the pointed irregularities are purely on point of law and have been raised for the second time at this stage of second appeal, I shall deliberate on them accordingly. Starting with the first irregularity whereby the appellant claims that the 1st appellant was not given the right to be heard/testify, I had to check the record of the trial court. The record indicates that the said Emmanuel Zanzibar Mwikombe never appeared in court. This fact was also pointed out by the trial Magistrate in his judgment. However, where parties sue jointly under the same cause of action and on the same reliefs, as in the matter at hand, it is not mandatory under the law that they must all testify in court. Further, the trial court record indicates that on 30th January 2020, the second appellant after testifying in court notified the court that they

had two more witnesses. He thereafter proceeded to call one Veronika Emmanuel Sanga and one Philimon Mwaijegele to testify in their favour. In my settled view therefore, if the appellants had intended the said Emmanuel Mwikombe (the 1st appellant) to testify the 2nd appellant, who was present in court and testified, should have informed the court about it and sought for adjournment to accord the 1st appellant a chance to testify. Instead, he informed the court that they had two more witnesses whom he called to testify. Under the circumstances, the appellants cannot blame it on the trial court or benefit from their own mistake. I thus agree with the respondent that the appellants waived the right to be heard when they never informed the court if the 1st appellant, who was absent, was also to testify in court and the 2nd appellant proceeded to close the prosecution case. v The cases referred to by Mr. Mbwiga are distinguishable. In the case of Samson Ngw'alida (supra) the court raised an issue suo motu and proceeded to determine the same without giving parties the chance to address the court on the same. In the case of University of Dodoma (supra), an employee was terminated from employment without being given the right to be heard in a disciplinary committee and the court took note of that. The circumstances in these two cases are different from the one in the case at hand whereby the 1st appellant never attended in court and the 2nd appellant closed the prosecution case something which signified that the 1st appellant had no intention of testifying. This ground lacks merit and thus dismissed. With regard to the second point, it is true from the proceedings that while on the rest of the sessions the name of the trial Magistrate appeared to be N.B. Lyimo, in the proceedings of 04th March 2020 the name appeared to be H.M. Lyimo. The respondent argued that the writing of the trial Magistrate's name as H.M. Lyimo instead of N.B. Lyimo was a typing error as in reality the trial magistrate was never changed. Though Mr. Mbwiga early countered this argument, I am inclined to agree with the respondent's argument that the same is a typing error particularly after I scrutinized the hand written proceedings. This is because, looking closely at the handwritten proceedings, first, I note that the name was written by the court clerk who must have mistakenly typed it. Second, the handwriting and the signature of the presiding Magistrate on the proceedings of 04th March 2020 appears to be the same with the one appearing on proceedings on other sessions. In essence I find this ground also lacking merit. In the upshot, it is my conclusion that the 1st appellant was never denied his right to be heard, but rather, as argued by the respondent, waived his right. There was also no change of magistrate at the trial stage as claimed. Following these observations I find the appeal lacking merit and consequently dismiss it with costs. Dated at Mbeya on this 16th day of December 2020 L. M. MONGELLA JUDGE Court: Judgement delivered in Mbeya in Chambers on this 16th day of December 2020 in the presence of the 2nd appellant and his advocate, Mr. Imani Mbwiga and the respondent appearing in person. L. M. M GELLA JUDGE

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