

TANZANIA / JUDGMENT

damiano edward kakulu vs emmanuel byemerwa another 2024 tzhc 882 15 march 2024

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TZHCDECIDED
15 March 2024

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THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (IN THE DISTRICT REGISTRY OF BUKOBA) AT BUKOBA PC. PROBATE & ADMINISTRATION APPEAL NO. 16 OF 2023 {Arising from the District Court of Kyerwa at Kyerwa in Probate Revision No. 01 of 2022 and Original Probate Cause No. 01/199 from Mabira Primary Court) DAMIANO EDWARD KAKULU..... APPELLANT VERSUS EMMANUEL BYEMERWA 1st RESPONDENT EVARIST BYEMERWA..... 2nd RESPONENT

JUDGMENT

12th March & 15th March 2024 A.Y. MWENDA, J. This appeal emanates from the ruling of the district court of Kyerwa at Kyerwa dated 07th August 2023. In that ruling, the Hon. RM struck out the appellants revisions which was aimed at seeking the court's pleasure to call for and examine records of Mabira Primary Court to satisfy on itself to the correctness, legality or propriety and regularity of the said proceedings and orders. In that application, the respondent challenged the said application and filed a notice of preliminary points of objections which were sustained. The reason for sustaining the said preliminary objections was that since the appellant filed the said application under the power of attorney from ALISTIDESE VALENTINE, JULIETH VALENTINE, ALISTIDIA VALENTINE and VAI LET VALENTINE who are heirs of the estate of the late VALENTINE MICHAEL, who according to him had the right to appeal against the decision of 1 Probate Case No. 01 of 1999 Of Mabira Primary Court, then the appellant ought to have instituted an appeal and not revision. Aggrieved, the appellant preferred the present appeal with one ground which reads:

1. That, the learned Resident Magistrate misdirected himself by upholding the raised preliminary objection against the filing of the Revision by the Appellant on grounds that there was the right of appeal available to the other persons not parties' matter (sic) at the trial Court. With the said ground, the court fixed the matter for hearing. Mr. Lameck John Erasto appeared for the appellant whilst the 1st and the 2nd respondents appeared without legal representation. When he was invited to submit in support of the ground of appeal, Mr.

Lameck John Erasto had it that the Hon. RM erred when he sustained the preliminary objection on the ground that a revision is not a substitute to an appeal. According to him that was not a correct approach as the appellant was not a party to Probate Cause No. 01 of 1999. He stressed that since the appellant has interest in the property of the VALENTINE MICHAEL, then the only remedy to intervene was to file application for revision. To buttress the point, he cited the case of JACQUELINE NTUYABALIWE MENGI & 2 OTHERS VERSUS ABDIEL 2 REGINALD MENGI & 5 OTHERS, CIVIL APPLICATION NO. 332/01 OF 2021. The learned counsel concluded by praying this appeal to be allowed. On his part, the 1st respondent did not oppose this appeal. He was brief in his submission in that applying for revision was the only remedy available to the appellant to claim his rights. Responding to the submission by Mr. Lameck John Erasto, the 2nd respondent had it that he filed the preliminary objection against the applicant's revision filed by the appellant through the power of attorney. He added in that the same was struck out since the probate matter was closed twenty years back. In conclusion, he prayed this appeal to be dismissed. The above is the summary of the submissions for and against this appeal and the issue for determination is whether the present appeal is merited. From the record, it is evident that through the power of attorney granted by ALISTIDESE VALENTINE, JULIETH VALENTINE, ALISTIDIA VALENTINE and VAILET VALENTINE, the appellant filed Probate Revision No. 01 of 2022. The said power of attorney was signed by each of grantor and it was registered before the office of the Registrar of Titles in October 2022. In the said application, the appellant sought to have the decision of the Mabira Primary Court Probate Case No. 01 of 1999 revised. While sustaining the 2nd respondent's preliminary objection, the Hon. Resident Magistrate was of the view that since the grantors of the power of attorney are heirs of the estate of 3 VALENTINE MICHAEL they then have the right to appeal and therefore their instructions to the grantee ought to be lodging an appeal and not to file an application for revision. In law, one factor for consideration in application for revision is whether the prospective applicant was a party to the impugned suit or not. If a party was not, the remedy available to him in case he claims any interest in the subject matter to that suit is to file application for revision. This is so because, he, being not a party to the main suit, has no rights to appeal. In the case of JACQUELINE NTUYABALIWE MENGI & 2 OTHERS VERSUS ABDIEL REGINALD MENGI & 5 OTHERS (supra), the Court of Appeal held, inter alia that: "Despite the Court being conferred with both the appellate and revisional jurisdiction against the decision of the High Court, such powers do not co-exist. Whenever there is a right of appeal then, that right must be pursued first. That being the legal position, in order to invoke the Court's power of revision, there must be no right to appeal and in some peculiar circumstances, a party aggrieved has to demonstrate sufficient and exceptional circumstances-see *Transport Equipment Ltd v. Devram P. Valambhia* [1995] TLR 161". [Emphasis added] 4 In the present matter therefore,, the grantors of the power of attorney to the appellant were not parties to Probate Case No. 1 of 1999. The parties to the said case were EMMANUEL BYEMERWA and EVARISTA BEEBWA. Although the grantors of the powers of attorney are heirs/beneficiaries of the estate of one VALENTINE MICHAEL, that by itself does not make them parties to the suit as they were not impleaded. On that basis, they have no right of appeal and the only remedy available to

them is to file an application for revision. That right extends to the grantee of power of attorney who is the appellant. From the foregoing reasoning, this court is of the view that this appeal is merited. The Ruling of the District court's Probate Revision No. 01 of 2022 of kyerwa District Court Originating from the Probate Cause No. 01 of 1999 of Mabira District Court is hereby reversed. The records are thus remitted to the Kyerwa district Court to proceed with Revision Hearing. Otherwise, there is no order as to costs. It is so ordered. J A.Y. /MwErSla- Judge 15.03.2024 5 Judgment delivered in chamber under the seal of this court in the presence of Mr. Damiano Edward Kakulu the Appellant and in the presence of Mr. Emmanuel Byemerwa & Evarist Byemerwa the respondents. 15.03.2024 6

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