

TANZANIA / JUDGMENT

KILINDO JUDGMENT

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DECIDED
26 November 2024

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IN THE HIGH COURT OF TANZANIA (DAR ES SALAAM SUB-REGISTRY) AT DAR ES SALAAM
CIVIL APPEAL NO. 30601 OF 2024 (Appeal from the Ruling and Order of the District Court of
Mkurunga at Mkurunga dated 26th November 2024 in Miscellaneous Civil Application No. 23761
of 2024 before Hon. Mwilolo-PRM) RASHID AHMED KILINDO
APPELLANT VERSUS EVA NDEWALIA JOSEPH NANGELA1 ST RESPONDENT
ASHURA SAIDI NDUNDU.....2ND RESPONDENT

JUDGMENT

17th February & 11th March, 2025 MWANGA, J. This appeal traces its origins from probate and Administration Cause No. 29 of 2018 at Mkurunga Primary Court, where the appellant and the 2nd respondent were appointed as administrators of the estate of the late Arnaldo Amadori, an Italian Citizen, who had investments and residence in Tanzania. It is asserted that deceased family members were unaware of the probate process and thus sent the first respondent to make a follow-up. The 1st respondent, therefore, filed Misc. Civil Application No. 15570 of 2024 before the District Court of Mkurunga at Mkurunga against the applicant and the second respondent, seeking the court to revise the proceedings of Mkurunga Primary Court in Probate Cause No. 29 of 2018. Claiming that the 1st respondent is the citizen of Italy and that has no immovable property in Tanzania, the appellant herein filed Miscellaneous Civil Application No. 23761 of 2024 seeking security for costs amounting 30,000,000/=. After a full trial of the later application, the magistrate court found that the appellant did not produce evidence proving that the first respondent had no property in Tanzania. Thus, the application was dismissed for want of merit. Displeased, the appellant filed an appeal to this court, equipped with three grounds of grievances, namely;

1. That the learned Principal Resident Magistrate erred in law and facts when she required the appellant to prove with direct evidence that the respondent, who is an Italian National and ordinary resident in Italy, has no immovable property in Tanzania.
2. The learned Principal Resident Magistrate erred in law and fact by determining that the first respondent is the administrator of the deceased estate of the late Amadori.

3. The learned Principal Resident Magistrate erred in law and fact when she held that the appellant had not proved that the first respondent had reason to deposit security for costs. At the hearing, both parties had representation; the appellant had representation of Mr. Daimu Khalifani while the 1st respondent hired legal services of Mr. Safari Malata, both learned counsels. In support of the appeal, the appellant sought leave of the court to drop the second ground of appeal and submit on the remaining two grounds. In support of the 1st ground, Mr. Daimu quoted part of the trial magistrate ruling on page 2, submitting that the duty of the appellant in the application of this nature is to show, among others, that the 1st respondent, who is a foreigner and ordinary resident outside Tanzania, has no immovable property in Tanzania. According to him, the positive obligation turns out to be that of 1st respondent to disclose the nature, location, and value of the immovable properties in Tanzania. In his view, the 1st respondent did not and thus elected not to provide evidence of her immovable properties' location, nature, and value. Therefore, the court had to infer that there is no such property and, on that basis, order security for costs. The learned counsel also insists that the issue of fact in the present case is whether the 1st respondent, a foreigner and ordinary resident outside Tanzania (an ordinary resident in Italy) for more than 30 years, has immovable property in Tanzania. He maintained that the 1st respondent has no such property in Tanzania. Still, the 1st respondent has disputed the non-existence or absence of such properties, which means that she maintains such properties. Hence, the 1st respondent had a duty to prove, as per Sections 112 and 115 of the Evidence Act Cap 6 RE 2019, that the immovable properties claimed to exist in Tanzania are within her knowledge. He insisted that the appellant was unaware of the direct evidence the trial magistrate required to prove the application. Regarding the third ground, it was his submission that there are many reasons justifying the 1st respondent depositing security for costs, which the Honourable Principal Resident Magistrate should have considered but did not. He mentioned the following reasons: the 1st respondent is an Italian national and an ordinary resident of Italy. Also, she has been residing in Italy for over 30 years, as stated by the 1st respondent in her affidavit. Again, she has no immovable properties in Tanzania, and the appellant has alleged so. More or so, he does not know any of the 1st respondent's properties, nor has she stated that she has properties in Tanzania, however, she disputes and denies the appellant's averment that the 1st respondent has no immovable properties in Tanzania. In his view, It is the 1st respondent's burden to prove that she has properties in Tanzania as she has sued the appellant in his personal capacity and not as an administrator. In the circumstances, the appellant has to shoulder the costs and expenses of the proceedings instituted against him in his name and not the estate of the late Arnaldo Amadori. In addition, he submitted, the first respondent instituted Civil Revision No. 000015570 of 2024 in her personal capacity. However, she claims to hold the power of attorney of some foreign beneficiaries of the estate of the late Arnaldo Amadori. Thus, she will likely be condemned to pay the appellant the costs of the proceedings. In rebuttal, Mr. Malata contended that the appellant's affidavit supporting the security application contained mere or bare assertions that the 1st Respondent does not own immovable properties in Tanzania. Such an assertion is not evidence upon which any court of law could make a

finding or base a decision to grant an application. He submitted that it is elementary and trite law that courts act and base their decisions on credible evidence adduced by the parties. It is also trite and elementary that he who alleges must prove the allegations. It was his submission, therefore, that the appellant did not prove his allegations against the 1st respondent. Not only that, he did not even attempt to explain what efforts he made to find out if the 1st respondent has or has no immovable properties in Tanzania. He was insistent that, the averment that the first respondent's should have proved that she owns immovable properties in Tanzania is legally erroneous and misconceived. According to him, the first respondent bore no such duty because she was not the applicant or the one making the allegation. He thus implored the court to find no merits in the first ground of appeal and, accordingly, dismiss it. Regarding the third ground of appeal, Mr. Malata believed the same is also legally misconceived and erroneous, with no merits whatsoever. He argued that the nature of the proceedings in which the security for costs application was preferred are ones in respect of the administration of (the Estate of the Late Amadori. He said, ordinarily, and that is the law, such proceedings involve and/or concern family members of the deceased as beneficiaries of the estate. He submitted that probate and administration matters are not directly governed by the provisions of the Civil Procedure Code ("the CPC"), under which the security for costs application was predicated. To the contrary, those proceedings are governed by elaborate and detailed provisions of the Probate & Administration of Estates Act, Cap. 258 and R.E. 2029 and Rules and Regulations made pursuant thereat. The counsel contended further that the costs of administering any estate are recoverable and paid from the estate, not the administrators in person. Thus, the administrators of deceased estates are expected to recover the costs they incur from the estates and include those in the final accounts and/or inventory which they are enjoined to file. He said that the application for security for costs was misconceived in this matter because the revision application was not and is not personal to either the appellant or the first respondent. In winding up, he implored this court to find no merit on each ground of appeal, dismiss it in its entirety with costs for being devoid of merit, and uphold the district court's decision. I have dispassionately considered the contending submissions by the learned counsels from both sides with keen interest. The calling issue is whether this appeal has merit. The answer to this question is straightforward in negative. The reasons for that answer are not far-fetched; Firstly, this is an appeal against an interlocutory order, thus is contrary to section 74 (2) of the CPC. It is apparent that Section 74 (1) and Order XL of the CPC provide for orders that can be appealable, and security for cost is not among those orders; thus, the same falls under Section 74 (2) of the CPC. For clarity, the section provides that; "(2) Notwithstanding the provisions of subsection (1), and subject to subsection (3), no appeal shall lie against or be made in respect of any preliminary or interlocutory decision or order of the District Court, Resident Magistrate's Court or any other tribunal, unless such decision or order has the effect of finally determining the suit". Going by definition, as per Black's Law Dictionary 8th Edition 2004 at page 2384. Interlocutory order, judgment, appeal, means; "interim or temporary not constituting a final resolution of the whole controversy." In the case of Tanzania Motors Services Ltd & Another vs. Mehar Singh t/a Thaker Singh, Civil Appeal No.

115 of 2005, the Court of Appeal, when determining whether the decision was interlocutory or not, sought guidance from the case of *Bozson vs. Artinchm Urban District Council* (1903) 1KB 547 where Lord Alverston stated as follows; “It seems to me that the real test for determining this question ought to be this: Does the judgment or order, as made, finally dispose of the rights of the parties? If it does, then I think it ought to be treated as a final order, but if it does not, it is then, in my opinion, an interlocutory order”. Emphasis supplied. In the present appeal, the decision that the appellant seeks to challenge does squarely fall within the definition of interlocutory proceedings or order, so it is not appealable. That notwithstanding, the application subject to this appeal arose from a probate matter, and under the circumstances surrounding Misc. Civil Application No.15570 of 2024, filed before the District Court of Mkuranga by the respondent, it is apparent that CPC is not applicable; thus, the application for security for costs was misplaced. Moreover, as a matter of law, the costs of administering any estate are recoverable and paid from the estate, not the administrators in person. Administrators of deceased estates are expected to recover the costs they incur from the estates and include those in the final accounts and/or inventory which they are enjoined to file. Since the first respondent filed a revision for the estate's interest, the application for security for cost was unfounded. For the reasons I have endeavored to provide, the appeal lacks merit, and I hereby dismiss it in its entirety. It is so ordered. Dated at Dar es salaam this 11th day of March, 2025. H.R. MWANGA JUDGE 11/03/2025 COURT: Judgment delivered in chambers today, 11th March 2025, in the presence of Mr. Safari Malata, learned counsel for the appellant, also holding the brief of Daimu Halfani, learned counsel for the respondent H.R. MWANGA JUDGE 11/03/2025

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