

IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

PC CIVIL APPEL NO. 15 OF 2020

(Arising from Probate Appeal No. 2 of 2019 in the District Court of Liwale District at Liwale. Original Probate Cause No. 17 of 2017 of Liwale Urban Primary Court)

MUDHIHIRI HEMED MEWILE.....APPELLANT

VERSUS

FURAHA CHANDE KIGWALILO.....RESPONDENT

RULING

25 May & 3 June, 2021

DYANSOBERA, J.:

The appellant successfully applied before the Primary Court of Liwale District at Urban for letters of administration of the estate of the late Haji Ally Kigwalilo who died on 15th August, 2017. The grant of letters of administration was made in Probate and Administration Cause No. 17 of

2017. His letters of administration was, however, revoked by the same court. No administrator was appointed on his behalf.

The appellant was aggrieved by the revocation and appealed before the District Court. The appeal was against Furaha Chande Kigwalilo.

In its judgment delivered on 26th day of February, 2020, the District Court, apart from endorsing the trial court's revocation, appointed two administrators, namely Mariam Ally Kigwalilo who was suggested at the clan meeting. Rashid Ally Libago was also appointed to assist her.

The appellant, undaunted, has appealed to this court. The appeal is against Furaha Chande Kigwalilo who was also the respondent at the District Court but who is not an administrator of the deceased's estate.

The respondent has not only resisted the appeal by filing a reply to petition of appeal but also has filed a preliminary objection on the ground that:

"That since the respondent was a party in neither trial court nor first appellate court has no locus standi before this court and argue the appeal"

This ruling is in respect of the said preliminary objection by the respondent taking issue with his (respondent's) being made the respondent in this appeal.

Arguing in support of the preliminary objection, the respondent contended that the law allows only the party to the proceeding to appeal and that the same law does not allow an appeal against the person who was not a party to the proceedings. He explained that in this appeal the respondent was not a party to the proceedings as he was not one of the appointed administrators of the deceased's estate and therefore the decision of this court cannot affect the interest of the respondent bearing in mind that the respondent is neither the rightful heir nor administrator of the estate subject of this appeal. The respondent further explained that if this appeal is entertained in favour of the appellant, the decision will affect the interests of the rightful heirs and administrators who will not be heard. Only, the appeal had to be lodged against interested parties so as to avert violation of their rights. The respondent stressed that the appellant has no right to appeal against the respondent as the respondent has neither locus standi nor right of audience over the matter.

In buttressing his argument, the respondent relied on the provision of section 25 (1) (b) of the Magistrate's Courts Act [Cap. 11 R. E.2019] and

the decision in the case of **Attorney General v. Tanzania Prots Authority and Mr. Alex Msama Mwita**, Civil Application No. 87 of 2016.

Responding to the submission, the appellant pointed out that the preliminary objection is misconceived. He elaborated that whether or not the respondent was a party to the proceedings and a rightful heir or administrator is a question of fact which needs evidence to be established and proved hence disqualifying this point to be a preliminary objection.

The respondent supported his argument by citing the cases of **Mukisa Biscuits v. West Ends Distributors Ltd** (1969) EA 696, **Mwananchi Insurance Company Ltd v. The Commissioner for Insurance**, Misc. Commercial Cause No. 2 of 2016 and the **Soitsambu Village Council v. Tanzania Breweries and another**, Civil Appeal No. 105 of 2011.

In supporting the course the appellant has taken to make Furaha Chande Kigwalilo as the respondent, the appellant told this court that he is the person who initiated the matter at the trial by complaining on behalf of the so called clan members and testified at the trial court and was made the respondent before the first appellate court.

He prayed this preliminary objection to be dismissed with costs.

I have considered the arguments in support and in opposition of the raised objection. I have also taken into account the cited laws, case laws and the materials before me.

In his reasoned judgment, the learned Resident Magistrate at pages 6 and 7 of the typed judgment observed:-

'Before going to the merits of the appeal, this court finds it prudent to dispose first whether it was proper for the appellant to appeal against the respondent. As hereinabove stated respondent in his reply specifically paragraph 1 tried running away from this appeal for reason being not party to the main application/petition. However, counsel for the appellant argue that the respondent made himself a party for responding to the petition of appeal. Also he shows having knowledge of the matter and testified before the trial court.

With due respect to the arguments by counsel for th appellant, appeals from primary courts is regulated by section 20 of the Magistrate's Courts Act. The section does not allow person out of the parties to appeal against the decision f primary court. the

matter in hand particularly is governed by section 20 (1) (b) of Cap. 11 which provides and I quote

save as hereafter provided-

(a) Not relevant

(b) In any other proceedings, any party, if aggrieved by an order or decision of the primary court, may appeal therefrom to the district court of the district for which the primary court is established

The words hereinabove quoted is very clear that only parties to the proceedings have the right to appeal, additional led appealed against. The law always needs consistence of the matter. Allowing every person to apply may cause injustice, abuse of court process especially multiplicity of appeal. Generally, parties to the suit enjoyed the right to appeal and to be appealed against. Unless for special application for revision, a person cannot be added in proceedings at an appeal stage. This was emphasised in the case of **Attorney General v. Tanzania Ports Authority and Mr. Alex Msama Mwita**, Civil Application No. 87 of 2016 CAT at Dar

es Salaam (unreported) at typed page 7 the Court reiterated and I quote:

Accounting for a situation where one can be joined as a n intervener, a person who was not a party to the proceedings below, can challenge the impugned decision by way of revision.

Following above finding appellant is not justified to appeal against respondent. Though counsel for the appellant argued that the respondent responded to the petition of appeal and testified before the trial court hence has knowledge of the matter, the same lacks legal foundation. It is not the requirement of the law to make every witness to become a party to the proceedings. Also mere knowledge of the matter does not accrue right of one to become a party to the proceedings especially at stage of appeal.

As rightly argued by the respondent, the appellant was wrong to appeal against him in view of what the law stipulates and the clear exposition of the law which has been succinctly explained by the learned Resident Magistrate.

It true that the decision to sue is essentially that of the applicant, or plaintiff. The paramount consideration being whether the party concerned

is a necessary for the effectual and complete adjudication of all the questions of involved in the suit. In the present matter, it is my firm but considered view that the respondent cannot be a necessary party for the effectual and complete adjudication of all the questions of involved in the present matter. The decision of the court, even if it is given in the appellant's favour, cannot enforced without posing difficulties.

The preliminary objection is sustained and the appeal is struck out for being filed against an improper respondent.

The respondent is awarded costs of the suit




W.P. Dyansobera

Judge

3. 6.2021

This ruling is delivered this 3rd day of June, 2021 in the presence of the appellant and the respondent.




W.P. Dyansobera

Judge