

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA SUB REGISTRY

AT MUSOMA

PC CIVIL APPEAL NO 29 OF 2022

(Originating from Civil Revision No 4 of 2021 Tarime District Court)

BHOKE AMOS NYAIRAHA APPELLANT

VERSUS

DIANA FRANCIS MARWA (Administratrix of

the estate of the late Amos Nyairaha (Deceased) RESPONDENT

JUDGMENT

14th September & 24th October, 2022

F. H. Mahimbali, J.

The appellant and the respondent are co-wives to the late Amos Nyairaha who died intestate in 2011. Whereas the appellant is the senior wife, the respondent is the junior wife. The respondent – Junior wife successfully applied for letters of the administration of the estate of the late Amos Nyairaha, their husband after the approval of the clan meeting dully convened.

The main controversy of this matter which is the subject of this appeal, is the move of sale and distribution of the house in plot No. 67 Block E located at Tarime Township (Guest House) by the respondent in

fact, she advised the appellant to go back at the trial court and exhaust all the available remedies first and see what would be the verdict of the trial court on her objection.

Dissatisfied by the findings of the District Court on its revisionary jurisdiction, the appellant has knocked the doors of this Court challenging the decision thereof on three grounds of appeal, namely:

- 1. The Honourable revisionary magistrate grossly erred in law for dismissing the application on grounds not supported by record.*
- 2. That the Honourable revisionary magistrate grossly erred in law for deciding that revision acted as substitute of appeal.*
- 3. That the Honourable revisionary magistrate grossly erred in law for raising the issue suo motto and deciding on the same without affording parties with the right to be heard.*

During the hearing of the appeal, the appellant was represented by Mr. Salum Ahmed Fundikira whereas the respondent appeared in person.

Arguing the first and third grounds jointly, Mr. Salum Ahmed Fundikira learned advocate submitted that as per page 26, 32 and 33 of the typed proceedings of Tarime Urban Primary Court, it is clear that there was misnaming of parties as appellant and respondent (at page 26

and 11 which made insistence on the right to be heard. As the appellants were denied their right to be heard then that was a breach of fundamental right of natural justice of the right to be heard.

On the second ground of appeal that the revisionary magistrate had erred in law in considering that the revision application ought not to have been opted but appeal. On this, he submitted that the powers of District Court on revision are pursuant to section 22 (1) of MCA Cap 11 R. E. 2019. The same provides the reasons for revisions are: Correctness of the proceedings, legality, appropriateness of the order, regularity of the court's proceedings. Therefore, the District Court in its revisionary jurisdiction was duty bound to satisfy itself as to correctness, legality, appropriateness and regularity of the Court's proceedings and judgment. In this case, he submitted that has not been done.

It is on the basis of these grounds; he prayed that this court now be mandated to quash the decisions thereof and its proceedings and on this way this appeal to succeed with costs.

The respondent on his part prayed that this Court to rely on her reply to the grounds of appeal, in which she prayed that this Court to

On the correctness of the record, it is also undisputed that the names of the children have been mixed up (repetitive). It is also undisputed that the appellant is the senior wife. The respondent is just an administrator and junior wife. Therefore, this court is in a proper position to guard properly as per law. He prayed that this appeal be allowed on these grounds of appeal dully argued.

In determining this appeal, I have carefully examined the lower courts' findings in record in the light of the contending submissions and judiciously scanned the district court's revisionary ruling (the subject of this appeal).

The main controversy behind this appeal is whether the said house the subject of sale and or distribution forms part of the deceased's estate for it to be administered by the respondent as administratrix of the estate of the deceased – Amos Nyairaha.

According to para 7 of the appellant's affidavit in support of the revisionary application at the District Court is clear on that. The same reads:

That, on 30th August 2021 the applicant lodged an objection against the sale, the accounts and against inclusion of the said Plot to the probate of the deceased.

"The trial court record reveals that, after the applicant filed her objection against the sale of the said house as estate of the late Amos Nyairaha, on 31/08/2021 the applicant herein (objector) appeared while the respondent did not. The court ordered the summons to be issued to the respondent and the case was scheduled for mention on 2/09/2021. On 2/09/2021 the respondent appeared but the applicant did not, the case was then scheduled for mention on 6/09/2021 and both parties were present and the case was then scheduled for hearing of the objection on 7/09/2021. When the case came for hearing on 7/09/2021 the applicant did not appear before the trial court but the respondent did appear and hence the trial court issued the last adjournment until 10/09/2021 for hearing. Again on 10/09/2021 the applicant did not appear the trial court then dismissed it.....

".....The trial court record clearly shows that the applicant's objection at the trial court was dismissed for non-appearance before the trial court.

"... It is settled law that, if the proceeding has been dismissed because of the non-appearance of the plaintiff, the plaintiff may, subject to the law of limitation bring a fresh suit or may apply for an order to set aside the dismissal order, and if the court considers that the plaintiff has produced good reasons for his none-appearance, it may set aside the dismissal order and appoint a day for hearing. See Rules 24, 25 and 28 of the Magistrates Court (Civil Procedure in Primary Court), Rules, GN 310 of 1964 as amended by GN. 119 of 1983. It is only when the applicant's application to set aside the dismissal order is denied by the trial court,

revisionary ruling, I have not seen such a finding. What the revisionary magistrate stated in her ruling at page 4 & 5, if I may quote is this:

"...It is only when the applicant's application to set aside the dismissal order is denied by the trial court, the applicant may have an avenue to appeal against the said decision if she so desires..."

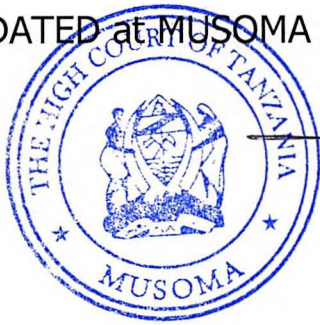
"...Therefore, it is my humble view that this application for revision has been prematurely sought by the applicant and incompetently filed before this court because, the applicant has the right to challenge the dismissal order of her objection proceedings at the trial court the right which she has not yet exhausted, hence she is barred from moving this court to use its revisional jurisdiction.."

That said, all the grounds of appeal argued are devoid of merits. However, as stated above, the main controversy behind this appeal is whether the said house the subject of sale and or distribution forms part of the deceased's estate for it to be administered by the respondent as administratrix of the estate of the deceased – Amos Nyairaha. If this issue is not resolved, there can not be a lasting solution. Since this is not a matter of law but fact as it needs evidence, it is important there be evidence or say active deliberation on that. It is trite law that issues of the case must be clearly traversed and thoroughly responded (See **Swabaha Mohamed Shoshi Vs. Saburia Mohamed Shoshi**, Civil

That said, the appeal is dismissed. However, the supervisory directives take its course. As per nature of this suit, parties shall bear their own costs as it involves a family issue on probate.

It is so ordered.

DATED at MUSOMA this 24th day of October, 2022.




F. H. Mahimbali

Judge

Court: Judgment delivered this 24th day of October, 2022 in the presence of both parties and Mr. Gidion Mugo, RMA.


F. H. Mahimbali

Judge