IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IN THE DISTRICT REGISTRY OF ARUSHA)
AT ARUSHA
PC. CIVIL APPEAL NO. 47 OF 2020

(C/F Probate and Administration Appeal No. 12 of 2017 in the District Court of Babati and Babati Urban Primary Court Probate and Administration Cause No. 1 of 2009)

ELIMINATA MASINDA
NICODEMUS CRECENT MASINDA } **.....APPELLANTS**

VERSUS

MASWET MASINDA .....1ST RESPONDENT

JOSEPHAT MASINDA .....2ND RESPONDENT

JUDGMENT

06/04/2021 & 08/6/2021

M. R. GWAE, J

On the 24th July 2017 the respondents, Maswet Masinda and Josephat Masinda successfully instituted an application for revocation of grant of letters of administration in the Babati Urban primary Court at Babati (trial court) against the appellants, Eliminata Masinda and Nicodemus Masinda who were initially granted letters of administration of the estate of Kresent Kwang' Masinda (hereinafter to be referred to as "deceased") in the year 2009 through Probate and Administration No. 1 of 2009.

The essence of the objection proceedings was that, the appellants as administrators had never or not fully distributed the properties of the deceased person to the beneficiaries entitled thereto or distributed in exclusion of other deceased's heirs and worse still, they were complaints that, they had been using the deceased's properties for their own benefits while the deceased person is said to have been married to six surviving wives and that, he was blessed with 41 issues within the marriage and five (5) other children who were borne out of the wedlock but recognized by the decease's family.

The 1st appellant, a widow who was the 6th wife to the deceased and 2nd appellant is the son of the deceased person's 3rd wife whereas the 1st and 2nd respondent are of the 2nd and 5th deceased person's wife respectively. Estate subject of distribution are allocated at different places, to wit; Mbulu District, Babati District and Karatu District. Having heard the objection, trial court accordingly revoked the letters of administration granted in favour of the appellants and it subsequently appointed the respondents as administrators of the deceased person's estate.

Aggrieved by the decision of the primary court, the appellants filed an appeal in the District Court of Babati at Babati (1st appellate court) where they lost their appeal. They then appealed to this court vide Pc. Civil Appeal No.11 of 2018 however the same was struck out on the 16th June 2020 for being filed out

of time. Following the order of the court striking the appellants' appeal, the appellants subsequently filed an application for extension of time to file an appeal out of the prescribed period of 30 days through Misc. Civil Application No. 70 of 2019. Hence, this 2nd appeal to the court comprised of fourteen grounds of appeal, to wit;

1. That, the District Court failed to consider the decision of revocation of the primary court given in Probate and Administration Cause No. 1 of 2009 against the appellants violated Rule 3 of the Magistrate Courts' Rules Made under section 71 of the MCA, Cap 11 Revised Edition, 2002
2. That, the District Court in holding that, the notice of appeal to appeal to the Court of Appeal against the decision of this court (Sambo, J) automatically stood as withdrawn and wrongly validated the said decision of the primary court
3. That, the District Court lacked jurisdiction to make a finding on the validity of the said notice in terms of the provisions of Rule 89 (1) of the Court of Appeal Rules, 2009
4. That, the District Court failed to uphold the primary court's decision dated 6th September 2017 based on incomplete record (duplicate)
5. That, the District Court erred in not holding that the then former trial primary court magistrate, Hon. Semroki wrongly blocked the filing of Form vi by the appellants by arbitrarily refusing to accept it
6. That, the District Court erred in law in holding that the mistake done by Hon. Semroki did not invalidate the entire proceedings

7. That, the District Court erred in not holding that the trial court failed to consider the house No. 549 Block 'R' the main cause of complaint by the respondents is not a part of the estate of the deceased Kresent Masinda
8. That, the District Court without considering the filing of form, Form No. vi was blocked by the former trial magistrate who held that no distribution of estate was done by the appellants as administrators
9. That, the District Court erred in law and fact by holding at page 30 para. 1 line 11-12 by holding that the trial court's revocation was properly made
10. That, the District Court failed to consider that, the decision of the primary court was biased and the said biasedness could not have been known by the appellants before the end of hearing
11. That, the District Court failed to hold that the learned trial court deprived the appellants to present their case fully in violation of the provisions of the Article 13 (6) (a) of the Constitution of the United Republic of Tanzania
12. That, the District Court erred in law by holding that, the principle of law which prohibits entertaining an omnibus application containing two diametrically opposes prayers namely, one of revocation and another on appointment of administrators
13. That, the District Court failed to hold that the appointments of the respondents as joint administrators of the estate of the deceased, Kresent Masinda by the trial court is invalid for non-compliance of the mandatory of mandatory provisions of Rule 5 (2) and (4) of the Primary Courts, Rules No. 49 of 1971. Hence13 (6) (a) of the Constitution of the United Republic of Tanzania

14. The unasked suo moto order of the District Court costs to be paid by the appellants from their own pocket without giving an opportunity to be heard on this issue.

On the 11th February 2021, this appeal was called on for hearing, parties' advocates namely; Bharat Chadha and M. Bungaya Panga for the appellants and respondents respectively sought and obtained leave to dispose of the appeal by way of written submission. The parties' advocates filed their respective written submissions however the respondents filed their reply to the appellants' written submission on the 23rd March 2021 instead of by 22nd March 2021 on the ground that, on 22nd day of March 2021, was a public day.

I have considered that on the 22nd March 2021 a day on which there was a public holiday for the general public to pay last respect to his excellency the late Dr. Magufuli, the former President of the United Republic of Tanzania in Dodoma Region. In my opinion the respondents' act of filing their written submission on the 23rd March 2021 is salvaged by section 19 (6) of the Law of Limitation Act, Cap 89, Revised Edition, 2019 which entails that, where the period of limitation prescribes for the proceeding expires on a day when the court on which such proceeding is to be instituted is closed, such proceeding may be instituted on the day on which the court reopens. Thus, the respondents' act of presenting their written submissions in opposition of this appeal filed on the 23rd day of March 2021 is statutorily salvaged and therefore worth of

consideration by the court without undue regard to the fact that, it was a public holiday which was not even anticipated by the court and the parties that is why the respondents' reply indicates that, the same was duly signed by their counsel on the 22nd March 2021. However, as matter of judicial practice the respondents were supposed to orally pray for an extension of time within which to file reply to the appellants' written submission as correctly argued by the appellants' counsel.

Now, therefore, it is for determination of the appellants' grounds of appeal, I shall be considering the parties' submissions when dealing with the grounds of appeal. Starting with the **1st ground** of appeal. According to Mr. Chadha, the trial magistrate was not legally supposed to record the opinion of assessors as provided under Rule 3 of the Rules unless there was dissenting member which was not the case here.

Although, the trial magistrate was not required to record or sum up the opinion of the assessor whom he sat with nevertheless, in my view, recording of the assessors' opinion by the trial magistrate does not invalidate the decision taking into account of the overriding principle that has been introduced in our laws as the same does not go to the root of the case. Courts of law should not be tied by technicalities but should deal with cases justly and fairly as envisaged by Written Laws (Miscellaneous Amendments) Act (No. 3) Act No. 8 of 2018 which requires the courts to deal with cases justly and to have regard to

substantive justice. Hence this ground of appeal is hereby dismissed for want of merit.

In the **2nd and 3rd** ground, which read that, the District Court erred in law in holding that, the notice of appeal to appeal to the Court of Appeal of Tanzania against the decision of this court (**Sambo, J**) automatically stood as withdrawn and wrongly validated the said decision of the primary court and that, the District Court lacked jurisdiction to make a finding on the validity of the said notice of appeal in terms of the provisions of Rule 89 (1) of the Court of Appeal Rules, 2009.

I have sensibly examined the said notice of appeal filed on the 18th April 2011 and observed that the same is indicative that, the ones who preferred an appeal to the Court of Appeal were; Anna Cresent Masinda and Felista Cresent Masinda against the present appellants. The appellants' advocate is of the opinion that, since the said notice is deemed to have been withdrawn but subject to an order withdrawing, thus, the objection proceeding before the trial court which resulted to this appeal is nothing but a nullity as the notice of appeal is still pending in the Court of Appeal. To support his arguments, Mr. Chadha cited Mohamed **Enterprises Tanzania Ltd v. the Chief Harbor Authority Master**, Civil Appeal No. 24 of 2015 (unreported-CAT)

On the other hand, Mr. Panga argued that the said notice of appeal has already been deemed as having been withdrawn as provided under Rule 91 (1) of the Court of Appeal Rules, 2009 and Rule 84 (a) of the Rules and in the decision of the Court of Appeal in **Colgate Palmolive Company Limited vs Zacharia store and 3 others**, Civil Application No. 67 of 2003 (unreported-CAT). He added that the notice does not institute an appeal, he urged this court to refer to a case of **Mohamed Ally v. Republic,** Criminal Appeal No. 335 of 2014 (unreported-CAT). He added that the parties in the appeal determined by this court and which led to the filing of the said notice of appeal are different from the present matter.

Considering the fact that the respondents were not the ones who filed the said notice of appeal and above an application for revocation can be preferred at any time before retirement of an administrator provided that there is a sufficient ground of doing so particularly when the administrator misuse or squander the estate or fail to administer the estate pursuant to the law or failure to distribute certain deceased's properties so on and so forth. Taking into account that the ones who filed the application for revocation for the 2nd time are **not** those who initially filed the revocation proceeding before the trial court and considering that fact that, the appellants have not filed both inventory and final accounts, the respondents were entitled to file the application for revocation of the letters of

administration granted in favour of the appellants. I am also of the view that, a mere pendency of the notice for more than seven years in the Court of Appeal should not be taken to bar parties or any other persons from taking any legal action. These two grounds of appeal are also dismissed.

As to the **4th, 6th and 10th** ground of appeal on the complaint on use of a duplicate by the trial court and alleged bias on the part of the primary court magistrate known by names of Semoroki. Having carefully examined the parties' submissions, I am of the firm view that, missing of original record files has been a day-to-day cry of the judiciary and that same problem might be associated by various reasons including but not limited, misplacement of the original records due to lack of office spacing (thin files stores) compared to a number of case files, lack of integrity on the part of judicial staff as well as parties' unacceptable behaviors associated with fulfilment of their own interest. I was urged to make a reference to the holding of this court (Mrango, J) in **Primus Kondokwa vs Grace Gervas Sukwa,** PC. Probate and Administration Appeal No. 2 of 2018 (unreported) where it was correctly held that, the appointment of a subsequent administrator ought to have been made in the original case file in which the initial grant of letters of administration were granted is, in my firm opinion, distinguishable to the present case since in this case the issue is not multiplicity of cases but is missing of the original record.

I am further of the thought that, making of an order of retrial will even jeopardize the matter, how can original documents be retrieved after such a long period if the same were not traced in the year 2017, it is possible the same to be available at the moment? The answer is inevitably negative. If the appellants were sincere enough, they ought to have assisted the trial court or even the 1st appellate court in reconstructing the file by bringing copies of the documents necessary to facilitate the court and this is always the practice of our courts in the event of missing of files. Therefore, the order directing opening of the duplicate file was no more than dispensing justice taking into consideration of the nature of the case.

Regarding ground Na. **5, 7, 8** and **9** which are jointly argued by the appellants' counsel. I find that the complaint that, the appellants had filed form vi but the trial magistrate who is seriously alleged to have not been impartial wrongly ordered re-filing of the form vi, has no leg to stand since if it were true as alleged by the appellants that, the appellants filed the requisite form vi they could exhibit a copy of the same be it in the trial court or the 1st appellate court because it is not usual for a party to file a certain document without remaining with a copy of the same. The submission that there is nothing left to administer, is in my view, misplaced since there is no evidence of filing of inventory and final accounts as correctly alleged by the respondents

I further hold the view that, if the 1st appellant is a lawful owner or she claims to be a rightful owner over a house located at Plot 589 Block 'R' and or if the respondents are contending the same plot to be among the deceased's properties, that alone cannot be ground of persisting being administrators or the ground for revocation or appointment of the administrator as any one with such complaints has an access to institute a dispute before a competent court to establish ownership of the said house.

In the ground **11**, on the alleged failure by the trial court to adjourn hearing on the ground of illness. I am alive of the principle of the right to be heard which is not only constitutional but also the universal right. This position has been consistently stressed by our courts to the extent that if one is denied such fundamental right in a proceeding, a decision reached from such violation must be declared a nullity however in our case the alleged violation ought to have been proved by cogent evidence and not mere assertion

Determination of ground **no. 12** of appeal on the complained omnibus application containing prayers of revocation and appointment. As a general principle, combination of prayers in an application is entertainable in law as its essence being to avoid unnecessary variety of case between the same parties for instance an application for extension in order to set aside ex-parte judgment or dismissal order, if these two prayers are combined in one application that would

be saving of precious time of the courts and that of litigants. I am guided by a judicial decision in T**anzania Knitwear Ltd v. Shamshu Esmail** [1989] TLR 48, where the application had combined two distinct applications, one, setting aside a temporary injunction and second, granting of temporary injunction. **Mapigano, J**, (as he then was) had the following to say with regard to the competence of the application;

> "In my opinion the combination of the two applications is not bad in law. I know of no law that forbids such a course. Courts of law abhor multiplicity of proceedings. Courts of law encourage the opposite.

However, even though the court has set this principle, it is not a general rule that, every prayer or reliefs may be joined in one application as each case has to be decided according to its own peculiar set of facts. This position has been consistently emphasized in the case of **MIC Tanzania Limited vs. Minister for Labour and Youth Development & another** Civil Appeal No 103 of 2004 CAT at DSM (Unreported). In this case, the Justices of Appeal plainly encouraged the combination of several applications in a single application with an eye of caution that each case must be decided on the basis of its own facts.

In our present case, there is a combination of two prayers namely; revocation of the grant of letters of administration and appointment of new administrators of the estate of the deceased person was just and fair in the circumstances of the matter unless dispensation of justice is understood vice versa or one has indirect motive.

As to the ground **13** of appeal on the complaint that the deceased's beneficiaries of the deceased person's estate were not duly notified. In my considered view, had the respondents not been chosen by the family members who conveyed their family meeting on the 20th July 2017, the contention by the appellants that there was no notice given to other beneficiaries as required under Rule 5 (2) and (4) of the Primary Courts (Administration of Estates) Rules, GN. 499 OF 1971.

In view of the above discussions and taking into account that an administrator of an estate of a deceased person is not supposed to collect and monopolize the deceased's properties and use them as his own or dissipate them as he wishes but he has unenviable heavy responsibility, which he has to discharge on behalf of the deceased person, of impartially distributing the estate to beneficiaries.

Consequently, this appeal is dismissed in its entirety and the decisions and ancillary orders of the courts below are upheld. The respondents who are heirs of the deceased persons are eligible persons for being appointed administrators of the estate of their late father. Given the parties' relationship, I shall make no order as to costs of this appeal and those at courts below.

It is ordered.

M. R. GWAE
JUDGE
08/06/2021

Right of appeal explained

M. R. GWAE
JUDGE
08/06/2021