IN THE COURT OF APPEAL OF TANZANIA

AT TANGA

(CORAM: MUSSA, J.A., LILA, J.A. And MKUYE, J.A.)

CIVIL APPEAL NO. 264 OF 2017

MAY MGAYA.....APPELLANT

VERSUS

1. **SALIMU SAIDI (the administrator of the estate of the late SAIDI SALEHE)**
2. **SALEHE SAIDI (the administrator of the estate of the late SAIDI SALEHE)**

.....RESPONDENTS

(Appeal from the decision of the High Court of Tanzania at Tanga)

(Msuya, J.)

dated the 25th day of April, 2016

in

Misc. Civil Application No. 30 of 2015

JUDGMENT OF THE COURT

22nd & 27th February, 2019

LILA, J.A.:

This appeal derives its origin from Miscellaneous Civil Application No. 30 of 2015 in which the appellant moved the High Court at Tanga for the revocation of the respondents' grant of letters of administration and appoint her as the sole administrator of the estate of the late Saidi Salehe. The High Court (Msuya, J.), partly granted the application by annulling the

appointment of the 1st respondent only and appointed the appellant as co-administrator of the 2nd respondent. That decision aggrieved the appellant, hence the present appeal.

Given the nature of the controversy, we are compelled to preface the background of the matter in order to appreciate the facts leading to this appeal.

As alluded to above, the essence of the matter before us is an application by the appellant for annulment of the respondents' grant of letters of administration and her appointment as sole administratrix. The High Court was moved under section 49(1)(d) and (e) as well as sub-section (2) of the Probate and Administration of Estates Act, Cap 352 R. E. 2002 (The Act). In her affidavit in support of the application the appellant advanced three reasons which prompted her to initiate those proceedings. They are well spelt in paragraphs 4, 5, 6 and 7 of her affidavit. Briefly, the reasons are:-

1. That, the respondents willfully and without reasonable cause omitted to exhibit an inventory or account of the deceased's properties.

2. That, the respondents failed to distribute the deceased properties to the beneficiaries and the grant of probate and administration in the original probate and administration cause has become useless an inoperative.
3. That, the respondents have monopolized the deceased's properties and use them as their own and or dissipate them.

The respondents, who were being represented by Mr. Mwita Waisaka, learned advocate, strongly resisted the application in their joint counter affidavit filed on 10/12/2015 and branded them as being untrue and scandalous. Surprisingly, on 13/1/2016, the 1st respondent personally filed another counter affidavit, to a great extent conceding to the averments by the appellant and threw blames to the 2nd respondent for not cooperating with him. Consequent to that Mr. Waisaka withdrew from representing the 1st respondent and on 15/3/2016 filed another counter affidavit for the 2nd respondent only in which he maintained his earlier stance.

When the application was called on for hearing on 13/4/2016, at the High Court the 1st respondent did not enter appearance while Mr. Egbert and Waisaka, both learned counsel, appeared for the appellant and 2nd respondent, respectively. Hearing proceeded in the absence of the 1st respondent.

During the hearing, Mr. Egbert maintained that the respondents have failed to perform their responsibilities hence their appointment as co-administrators should be annulled and the appellant be appointed as a sole administratrix of the estate. For the 2nd respondent, Mr. waisaka, apart from conceding that the respondents were yet to file inventory but attributed that with the 1st respondent's failure to cooperate with the 2nd respondent. He informed the Court that the deceased is survived with five wives, the appellant being one of them and that family meetings were held and the estate tentatively distributed but the problem was that the inventory was yet to be filed in court. On the way forward, Mr. Waisaka proposed thus:-

"The application of the applicant is misconceived because is a co-wife, it will not be

safe to appoint her as an administrator because she has vested interests in the properties.

We hereby submit that in order for this matter to be determined in a judicious manner that the 1st respondent should be ordered to file inventory ordering the final account or the 2nd respondent should be ordered to appoint a neutral administrator of the estate who will lender a proper accounting of the distribution of the estate.....however appointment of the applicant as sole administratix will create more problems and will bring the matter to square one"

After consideration of arguments by the counsel for the parties, the presiding judge was satisfied that the respondents had already collected the assets and distributed the same but had not filed inventory. She, appearing to have accepted Mr. Waisaka's contention that the 1st respondent was the cause of that failure, proceeded to order that:-

"...I order that the first respondent is revoked as an administrator and is removed accordingly.

The applicant is appointed as a co-administrator of the 2nd respondent, for the reason that the inventory is already prepared and distributed although no inventory and account filed. Revoking the appointment of both respondents and or appointing the applicant or independent will cause more delay because they will have to start afresh to collect assets and liabilities of the deceased. As the assets are already collected as stated by both counsels of the applicant and the 2nd respondent. The inventory and account to be filed in court within seven (7) days from the date of this ruling..."

We entertain no doubt that the learned judge exercised her powers under section 49(2) of the Act which empowers the High court to suspend and remove an executor or administrator and provide for the succession of another person to the office of such executor or administrator who may cease to hold office

The ruling and order by the learned judge aggrieved the appellant and has come up with a four point memorandum of appeal. The grounds of

appeal substantially revolve around retention of the 2nd respondent as a co-administrator of the deceased estate.

Before us, Mr. Philemon Raulencio, learned counsel, appeared for the appellant and both respondents appeared in person, fending for themselves.

Material in Mr. Raulencio's argument is that since the two respondents were co-administrators and they did not file inventory within the required time then their appointment as administrators ought to have been revoked. It was improper for the High Court to single out the 1st respondent and annul his appointment, he argued. He accordingly urged the Court to set aside the High Court order and annul the appointment of both respondents and appoint the appellant as a sole successor in office of the administrators.

On their part, both respondents were agreed that the inventory has already been prepared and they went ahead to show the same in Court. They insisted that the appellant is among the five surviving wives of their deceased father hence it will not be proper to appoint her as sole administratrix. They contended that the interest of justice requires either they be retained as administrators and the appellant be appointed to join

them as co-administrator or their appointment be annulled and the appellant's appointment also be annulled. Otherwise, they proposed, a neutral administrator be appointed. They were, in fact, ready to go back and hold a family meeting together with the counsel of both sides so as to resolve the matter.

It is clear from the record that the respondents are siblings. They are the sons of the late Said Salehe. And, the appellant is one amongst the five surviving wives of the deceased.

Indeed, the High Court is bestowed with powers to revoke the grant of letters of administration. The reasons for revocation are provided under section 49(1) (a) to (e) of the Act. The relevant part to our case in that section states:-

> *"The grant of probate and letters of administration may be revoked or annulled for any of the following reasons–*
>
> *(a) N/A*
>
> *(b) N/A*
>
> *(c) N/A*
>
> *(d) that the grant has become useless and inoperative;*
>
> *(e) that the person to whom the grant was made has willfully and without*

reasonable cause omitted to exhibit an inventory or account in accordance with the provisions of Part XI or has exhibited under that Part an inventory or account which is untrue in a material respect.

(2) Where it is satisfied that the due and proper administration of the estate and the interests of the persons beneficially entitled thereto so require, the High Court may suspend or remove an executor or administrator (other than the Administrator-General or the Public Trustee) and provide for the succession of another person to the office of such executor or administrator who may cease to hold office, and for the vesting in such person of any property belonging to the estate."

There is no controversy that the respondents were dully appointed joint or co-administrators of the estate of the late Said Salehe who died intestate at Jaegestal Lushoto. Section 33(2) of the Act is permissive of more than one person applying and being granted letters of administration.

As co-administrators the respondents were jointly and together responsible for everything in respect of the administration of the estate including exhibiting in court an inventory containing a full and true estimates of all the properties, debts and credits (section 107(1) of the Act) as well as distributing to the rightful heirs the residue after paying all the debts and liabilities (section 108(1) of the Act). Any default, including the delay in exhibiting the inventory and statement of account, is taken to have been committed by them all. The accusations raised in the counter affidavit by the 1st respondent against the 2nd respondent as being responsible in the delay to exhibit an inventory were vehemently refuted in the counter affidavit by 2nd respondent. More so, Mr. Waisaka raised similar accusations against the 1st respondent during hearing of the application. Unfortunately, the 1st respondent's contentions were not considered by the learned judge in her ruling subject of this appeal. If, at all, either of the respondents wished to have the appointment of either of them to be revoked they, like the appellant, could also have made such an application under section 49(2) of the Act. (See **In the Matter of the estate of the late Walji of Geita** [1971] HCD No.345). They could not do so either by raising accusations in a counter affidavit or by raising accusations during

hearing of the application. If, in the present case, the High Court was satisfied that there was delay in exhibiting inventory then it ought to have held both respondents responsible. It was, therefore, improper for the judge to find that only the 2nd respondent was not responsible with the delay in exhibiting inventory within time and retain his appointment. Both respondents were supposed to face the same consequences. This brings us to an inescapable conclusion that, legally, the learned judge erred to single out the 1st respondent and annul his appointment as administrator and retain the 2nd respondent's appointment. She exhibited double standard in applying the law. That is not legally allowed. This is explicitly clear in the provisions of Article 13 of the Constitution of the United Republic of Tanzania of 1977, which safeguards and guarantees equality of all human beings before the law. That Article and, particularly sub-article (1), in very clear words, provides that all persons are equal before the law and are entitled, without any discrimination, to protection and equality before the law. Further, in sub-article (4), it forbids discrimination of any person by any authority acting under any law or in the discharge of its functions.

It is our considered view that the judge's order which singled out the 1st respondent and annulled his appointment was discriminatory for

violating the constitution and hence illegal. That order cannot be left to stand. We hereby accordingly set it aside.

We are certain that setting aside the High Court order alone does not provide for a conclusive solution to the administration of the estate. This being a first appeal, we are empowered to step into the shoes of the High Court, have our own consideration and views of the entire evidence and give decision thereon or do what that court failed to do if no patent failure of justice was not caused. [See **D. R. Pandya Vs Republic**., [1957] E. A. 336, **Juma Kilimo Vs. Republic,** Criminal Appeal No.70 of 2012, **Mussa Hassan Barie and Another Vs. republic**, Criminal appeal No. 292 of 2011 and **Said Mshangama @ Senga Vs. Republic**, Criminal Appeal No. 8 of 2014 (All unreported)]. After revisiting all the pleadings and arguments of the parties contained in the record we are of the decided view that it is in the interests of the beneficiaries that the administration of the estate is concluded earliest. The administration having taken too long to be completed, we are agreed with Mr. Waisaka's concern that the appointment of the appellant as a sole administrator will cause more delay, for, everything will have to start afresh including collection of the properties and liabilities. There is eminent danger of misappropriation or

deterioration of assets. To that effect, we think and find that to ensure that the interests of the appellant are protected and safeguarded, she is hereby joined as a co-administrator to the respondents. As it seems that the inventory has been prepared, we hereby direct that both the inventory and final account be exhibited or filed in court within three months from the date of this ruling.

In the final analysis this appeal succeeds only to the extent shown above otherwise it is dismissed. Given the nature of the case, each party should bear its own costs.

DATED at **TANGA** this 28th day of February, 201

K. M. MUSSA
JUSTICE OF APPEAL

S. A. LILA
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

E. Y. MKWIZU
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL