IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: MUGASHA, J.A., LILA, J.A., And NDIKA, J.A.)

CIVIL APPEAL NO. 103 OF 2018

NAFTARY PETRO .... APPELLANT

VERSUS

MARY PROTAS .... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Tabora)
(Rumanyika, J.)

dated the 5th day of March, 2015
in
PC Civil Appeal No. 12 of 2017

....

JUDGMENT OF THE COURT

25th & 31st October, 2019

NDIKA, J.A.:

On 6th November, 2001, one Eden Petro Minja, a person with business interests and properties in Shinyanga and Moshi, died intestate. He was survived by a widow, Mary Protas, the respondent herein, and two children. Nobody applied for letters of administration of the deceased's estate until May 2012, which was almost eleven years later, when the respondent lodged her application in the Urban Primary Court of Shinyanga. The application was valiantly opposed by the deceased's younger sibling, Naftary Petro, the appellant herein, who entered a caveat on the ground that he was the only person nominated by the deceased's clan members, at a meeting held on

12th November, 2001, to administer the estate. In its decision dated 19th October, 2012, the Primary Court appeared to appease the opposing parties as it appointed both of them co-administrators of the estate. The court reasoned that apart from the fact that the respondent had established herself as a fit person for appointment, the appellant also had proven that he had until then managed the deceased's estateas it should be. It was thus necessary for both of them to be jointly appointed as administrators so as to manage and administer the estate smoothly and effectively.

Being unsatisfied, the respondent unsuccessfully appealed to the District Court of Shinyanga, assailing the validity of her brother-in-law's appointment on six grounds. Undeterred, she further appealed to the High Court at Tabora on a single ground of grievance and this time the tables were turned against her adversary. The High Court (Rumanyika, J.) having revoked his appointment, the appellant now appeals to this Court.

Through the services of Mr. Kamaliza Kamoga Kayaga, learned counsel, the appellant lodged two grounds of complaint as follows:

> *1. That the Honourable Judge, in revoking the appointment of the appellant as a co-administrator of the estate of the late Eden Petro Minja and leaving the*

respondent as the sole administratrix, failed to consider the provisions of Paragraph 2 (a) of the Fifth Schedule to the Magistrates' Courts Act, Cap. 11 R.E. 2002.

2. *That the Honourable Judge wrongly misdirected himself on the evidence on record and wrongly held that the clan meeting (Exh. D.A) was tainted with grievous irregularities.*

When the appeal came up before us for hearing on 25th October, 2019, Mr. Kayaga appeared for the appellant while Mr. Mussa Kassim, learned counsel, represented the respondent.

Before the hearing began in earnest, Mr. Kassim, on reflection, withdrew, with the leave of the Court, a notice of preliminary objection against the appeal, which he had lodged on 22nd October, 2019.

Thereafter, we asked Mr. Kayaga whether the two grounds of complaint raised by the appellant in his Memorandum of Appeal substantially matched what was certified as a point of law by the High Court (Mgonya, J.) on 10th September, 2015 in terms of the provisions of section 5 (2) (c) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2002 (the AJA). We had noted from

the record of appeal at pages 135 and 136 that the High Court certified one ground only thus:

> *"whether the High Court properly considered the provisions of section (sic) 2 (a) of the 5th Schedule to the MCA, Cap. 11 [R.E. 2002]."*

After reflecting on each of the two grounds, Mr. Kayaga abandoned the second ground having conceded that it was not certified by the High Court. The appeal thus remained predicated on the complaint whether the High Court properly considered the provisions of Paragraph 2 (a) of the Fifth Schedule to the Magistrates' Courts Act, Cap. 11 R.E. 2002 (the MCA) in its decision to revoke the appellant's appointment by the Primary Court as a co-administrator.

We find it imperative to observe that the course taken by Mr. Kayaga to abandon the ground lacking the High Court's certification was correct because the certificate on point or points of law predicates the jurisdiction of the Court to hear and determine an appeal pursuant to section 5 (2) (c) of the AJA – see, for example, **Zainab Mwinjuma v. Hussein Abdallah,** Civil Appeal No. 104 of 2009; **Haji Mradi v. Linda Sadiki Lupia,** Civil Appeal No. 25 of 2013; **Shaha salehe Mwinyihija v. Stamili Salehe,** Civil Appeal No. 91 of 2010; and **Ally Swalehe Mtenje v. Awetu Said**, Civil Appeal No.

157 of 2017 (all unreported). In addition, we wish to reiterate what we stated recently in the case of **Yakobo Magoiga Gichere v. Peninah Yusuph,** Civil Appeal No. 55 of 2017 (unreported) that where a certificate on points of law is required:

> *"the grounds of appeal filed in the Court* ***must substantially conform to the points of law which the High Court has certified."*** [Emphasis added]

Submitting on the only certified ground of appeal, Mr. Kayaga contended that the learned High Court Judge revoked the appellant's appointment without having due regard to the provisions of Paragraph 2 (a) of the Fifth Schedule to the MCA. Elaborating, he submitted that, contrary to the aforesaid provisions, the learned Judge paid no due regard to the proven wishes of the deceased that his estate be administered by the appellant. Citing the evidence of the deceased's brother, Heven Minja, at page 29 of the record of appeal, as well as the minutes of the clan meeting (Exhibit D.1), Mr. Kayaga argued that before his demise the deceased handed over all his businesses to the appellant and expressed his wish that the latter should manage his businesses and oversee his family affairs. Acting on that fact, the

clan meeting rightly nominated the appellant for the grant of letters of administration.

On the Court's probing whether the appellant had any interest in the deceased's estate, Mr. Kayaga conceded that he had no interest but maintained that his appointment ought to have been undisturbed in view of the deceased's wishes that he should manage his estate. In conclusion, Mr. Kayaga urged us to allow the appeal without making any order on costs considering that the dispute concerned an administration of a deceased's estate not normally amenable to awarding of costs.

On the other hand, Mr. Kassim stoutly opposed the appeal. He contended that there was no proof by way of an oral will that the deceased expressed his wish that the appellant manage his family affairs and administer his estate. Referring to pages 28 and 29 of the record of appeal where the appellant is shown to have adduced before the Primary Court that in the aftermath of his brother's passing he opened the deceased's shop in Shinyanga and combined it with his own business, Mr. Kassim argued that the appellant had certainly appropriated the deceased's business and made it his own. On that score alone, he contended, the Primary Court, if it had been properly guided, would have not appointed the appellant a co-

administrator. He concluded by supporting the revocation of the appellant's appointment. Accordingly, he urged us to dismiss the appeal.

Mr. Kayaga made no further submission in rejoinder apart from reiterating the thrust of his earlier argument.

We have dispassionately examined the record of appeal and considered the contending submissions of the learned counsel for the parties. The sticking point, as indicated earlier, is whether in revoking the appellant's appointment as the co-administrator of the deceased's estate the learned High Court Judge duly considered the provisions of Paragraph 2 (a) of the Fifth Schedule to the MCA.

We wish to begin our determination by observing that the jurisdiction of the Primary Court for appointing administrators of estates is stipulated by sub-paragraphs (a) and (b) of Paragraph 2 of the Fifth Schedule to the MCA. These provisions state as follows:

> *"2. A primary court upon which jurisdiction in the administration of deceaseds' estates has been conferred may–*
>
> *(a) either of its own motion or on an application by any person interested in the administration of the*

estate ***appoint one or more persons interested in the estate of the deceased to be the administrator or administrators thereof,*** *and, in selecting any such administrator,* ***shall, unless for any reason it considers inexpedient so to do, have regard to any wishes which may have been expressed by the deceased;***

(b) either of its own motion or an application by any person interested in the administration of the estate, where it considers that it is desirable to do for the protection of the estate and the proper administration thereof, appoint ***an officer of the court or some reputable and impartial person*** *able and willing to administer the estate to be administrator* ***either together with or in lieu of an administrator appointed under subparagraph (a).****"* [Emphasis added]

The Court had an occasion to consider the above provisions in **Mohamed Hassani v. Mayasa Mzee & Mwanahawa Mzee** [1994] TLR

225. It took the view that while sub-paragraph (a) above empowers a primary court to make a first appointment of an administrator or administrators of a deceased's estate, sub-paragraph (b) vests in the primary court the jurisdiction to appoint a replacement administrator. In our view, the latter sub-paragraph also permits the appointment of an additional administrator (co-administrator) to manage the estate together with an administrator appointed under sub-paragraph (a).

Since it is clear in the circumstances of this case that the appointment by the Primary Court of the parties herein as co-administrators was supposedly made under sub-paragraph (a) and that the ground of appeal at hand centres on that sub-paragraph, we shall focus our discussion on Paragraph 2 (a).

In our view, sub-paragraph (a) above is unambiguous and thus it should be construed in its plain and ordinary meaning. In essence, it empowers a primary court, either of its own motion or upon an application, to appoint one or more persons **"interested in the estate of the deceased"** to be the administrator or administrators thereof. The primary consideration, therefore, is holding of an interest in the estate of the deceased. The term interest in a deceased's estate has not been given any

statutory definition. But we think it should be looked at as "beneficial interest", which is defined in Black's Law Dictionary, Eighth Edition, at page 828, to mean

> *"a right or expectancy in something (such as a trust or an estate) as opposed to legal title to that thing."*

Thus, any person, who, according to the rules for the distribution of the estate of an intestate applicable in the case of such deceased person, is entitled to a share of the deceased person's estate qualifies as an interested person. Invariably, this will include any heir, a spouse, a devisee or even a creditor of the deceased – see, for instance, **Seif Marare v. Mwadawa Salum** [1985] TLR 253; and **Sekunda Bwambo v. Rose Ramadhani** [2004] TLR 439.

In addition to the above mandatory qualification, the court, in selecting any such administrator, is enjoined to have regard to any wishes which may have been expressed by the deceased unless it considers, for any reason, inexpedient so to do. We should underline that while proof of holding a beneficial interest in the estate is a peremptory requirement, the obligation to consider and give effect to the wishes of the deceased can be waived on account of inexpediency.

It is evident from the record that the learned Judge initially made observations on the intricacy, sensitivity and solemnity of the judicial duty to appoint an administrator and then properly directed himself to assessing the appellant's qualifications. He came to the view that although the appellant had been nominated by the clan members for the appointment, he had not met the "interest in the deceased's estate" requirement. We think we should let the record of appeal, at page 85, speak for itself:

> *"On this one, I am compelled to hold that as a general rule brothers do not inherit but sons, daughters and widows/widowers do."*

Before us, Mr. Kayaga conceded, with remarkable forth rightness, that the appellant had staked no interest in the deceased's estate.

The learned Judge, then, went on to contrast the appellant's lack of interest and qualification from the respondent's position. He recognized that the respondent, as widow, was, together with her two children, entitled to a share in the deceased's estate. On that aspect, the learned Judge concluded, rightly so in our view, at pages 85 and 86 of the record, that the respondent:

> *"had vested interests in the estate. In fact, she was, if anything, the most competent, entitled and qualified*

administratrix. After all, it is not said that [she] was too weak, not trustful and or incapable of administering her deceased husband's estate."

As regards the secondary requirement of giving effect to the deceased's wishes, we are also satisfied that the learned High Court Judge took that aspect into account but that it was not on its own decisive as Mr. Kayaga wanted us to hold. Unlike the Primary Court and the District Court, the learned High Court Judge was of the view that there was no plausible evidence that the deceased had expressly stated his wishes before his passing and that the claim that he wanted his estate to be administered by the appellant amounted "to putting words in the deceased's mouth."

Given the circumstances, we do not find any fault in the learned High Court Judge's reasoning and findings. We are thus satisfied that the annulment of the appellant's appointment was made upon due consideration of the provisions of Paragraph 2 (a) of the Fifth Schedule to the MCA. In view of that, we hold that the sole ground of appeal in this matter is bereft of merit.

Perhaps, as an epilogue, we should observe that this appeal is sadly anarchetypical illustration of needless problems and long-drawn-out struggles

in the appointment of administrators of deceaseds' estates in our country. The battles for appointment are most likely fueled by a misconception of the position and duties of an administrator of an estate. It is purely a position of trust, not personal gain. We think it will be quite instructive to extract, with approval, from the decision of Rutakangwa, J. (as he then was) in **Sekunda Bwambo** (supra) at pp. 443-444 what he described as a classic exposition of qualifications of a fit person for appointment as an administrator as well as the duties and responsibilities of such a person thus:

> *"The objective of appointing an administrator of the estate is* ***the need to have a faithful person who will, with reasonable diligence, collect all the properties of the deceased. He will do so with the sole aim of distributing the same to all those who were dependants of the deceased during hislife-time****. The administrator, in addition, has the duty of collecting all the debts due to the deceased and pay all the debts owed by the deceased. If the deceased left children behind, it is the responsibility of the administratorto ensure that they are properly taken care of and well brought up*

using the properties left behind by their deceased parent. ***After the administrator has so faithfully administered and distributed the properties forming the estate he has a legal duty to file an inventory in the Court which made the appointment giving a proper account of the administration of the estate.*** *This action is intended to help any one of the beneficiaries who feelsaggrieved at the way the property was distributed and thus dissatisfied tolodge his/her complaints to the Court which would in turn investigate the same and decide the matter in accordance with the dictates of the law.* ***In view of all this, it is evident that the administrator is not supposed to collect and monopolize the deceased's properties and use them as his own and/or dissipate them as he wishes, but he has the unenviable heavy responsibility which he has to discharge on behalf of the deceased.*** *The administrator might come from amongst the*

beneficiaries of the estate, but he has to be very careful and impartial in the way he distributes the estate." [Emphasis added]

The outcome of this appeal aside, we can only hope that the parties here in will cooperate to ensure that the deceased's estate is administered properly and smoothly for the benefit of all persons entitled to a share from it.

In the upshot, we dismiss the appeal and order each party to bear its own costs in this Court and the courts below.

DATED at **TABORA** this 30th day of October, 2019

S. E. A. MUGASHA
JUSTICE OF APPEAL

S. A. LILA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

The Judgment delivered this 31st day of October, 2019 in the presence of Mr. Kamaliza Kamoga Kayaga, Counsel for the Appellant and holding brief of Mr. Mussa Kassim for the Respondent is hereby certified as a true copy of the original.

B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL