IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: MUGASHA, J.A., KEREFU, J.A and MWAMPASHI, J.A.)

CIVIL APPEAL NO. 337 OF 2020

STEPHEN MALIYATABU.....1ST APPELLANT

SARAH ISSAYA DYOYA.....2ND APPELLANT

VERSUS

CONSOLATA KAHULANANGA..... RESPONDENT

(Appeal from the Decision and Decree of the High Court of Tanzania, at Tabora

(Mugeta, J.)

dated the 17th day of July, 2020

in

Probate and Administration Cause No. 1 of 2016

.....

JUDGMENT OF THE COURT

20th & 22nd March, 2023

MUGASHA, J.A.:

This is an appeal against the Judgment of the High Court of Tanzania at Kigoma in Probate and Administration Cause No. 1 of 2016 (Mugetta, J). The said Judgment was handed down on 17/7/2020 whereby the petition by Stephen Maliyatabu and Sarah Issaya Dyoya, the 1st and 2nd appellants respectively, herein, was dismissed and the caveator Consolata Kahurananga, the respondent herein, was appointed the administratix of the estate of the late Elias Rukonya Maliyatabu (the deceased).

The background underlying this appeal is briefly as follows:

The appellants/petitioners, filed a petition seeking letters of Administration of the estate of the deceased. The respondent filed a caveat to oppose the appointment of the appellants as administrators. The caveat was predicated under the provisions of section 58 of the Probate and Administration of Estate (Act. Cap 352 R.E. 2002) (the PAEA). Pursuant to the caveat, the petitioners/appellants filed an application for citation in terms of section 59 (2) of the PAEA for the caveator respondent to enter appearance. Having entered appearance, the caveator/respondent opposed the petition which rendered the matter contentious and the proceedings took the mode of the suit and as earlier stated, the petition was dismissed whereas the respondent was appointed as the administratrix of the estate of the deceased.

Aggrieved, the appellants have preferred an appeal to the Court. They have lodged a memorandum of appeal fronting fourteen (14) grounds of complaint as hereunder:

1. *That, the Judge erred both in law and fact in applying the principles of the law of marriage on the probate and administration of estates matter.*
2. *That, the Judge erred in law and fact in holding that the caveator has contributed in the acquisition of the house of the deceased while*

declaring the marriage between the petitioner and the deceased valid and the subsequent marriage between the caveator and the deceased void ab initio.

3. *That, the Judge erred both in law and fact in considering the caveator to be a suitable person to administer the estates of the deceased on the basis of disputed documents purported to have been written by the deceased.*

4. *That, the Judge erred both in fact and law in not ordering the appellants who were appointed by the clan meeting as suitable persons for the administration of the deceased's estates in view of the interest they have on the estates.*

5. *That, the Judge erred both in fact and law in finding that the caveator acquired the property on the basis of the evidence of improvement, management of the school as well as securing the loan which was procured unlawfully for lack of proper spousal consent.*

6. *That, the Judge erred both in fact and law in seeking evidence of contribution of the petitioner in acquisition of the deceased's properties while acknowledging the fact that the properties were acquired between 1998 and 2005 when the petitioner and the deceased were*

living together as husband and wife and that they never separated until his death.

7. *That, the Judge erred both in facts and law in applying logic consequently reaching a wrong conclusion that the petitioner could not have acquired properties with the deceased because they were separated at the same time admitting that the properties were acquired between 1998 and 2005.*

8. *That, the Judge erred in law and fact in not recognizing Corney as one of the biological deceased's children consequently denying him his rights to inherit form the estates of his father.*

9. *That, the Juge erred in law and fact by giving letters of administration to the caveator while ruling that she was not the legal wife of the deceased.*

10. *That, the Judge erred in law and fact in making a presumption and in so doing, he ignored the relevant evidence as presented by the parties.*

11. *That, the Judge erred both in law and fact in assuming that the biological deceased's child is fiction despite evidence or record.*

12. *That, the Judge erred both in law and fact in being inconsistent in the interpretation and application of evidence presented during the hearing of the petition.*

13. *That, the Judge erred both in law and fact in assuming the time frame of the alleged separation while the petitioner and the deceased never separated.*

14. *That, the Judge erred both in law and fact in granting letters of administration to the respondent without sureties' bond.*

The parties as well, filed written submissions for and against the appeal which were adopted to constitute an integral part of their submissions in this appeal. At the hearing of the appeal in appearance was Professor Zakayo Lukumay, learned counsel for the appellants who were present in court whereas Mr. Kelvin Kayaga, learned counsel, entered appearance for the respondent who was as well, present in court.

In the 1st ground of appeal the appellants fault the learned High Court Judge in applying the principles of the Law of Marriage Act on the probate and administration matter. On this, it was submitted that, it was wrong for the learned High Court Judge to apply the principles of the Law of Marriage Act such as, the inability of the 2nd appellant to contribute to the estate of the deceased as a criterion for not appointing her as the administrator of estate without considering that she was the legal wife of the deceased and a salaried employee who used her income towards the acquisition of the matrimonial assets. Instead, it was further submitted, it was incumbent on

the Judge to consider the laws governing probate and administration of estate matters among others being the PAEA in which the criteria to be considered in determining a probate matter is as follows: **One**, properties falling under the estate of the deceased; **two**, the mode of life of the deceased, marital status, beneficiaries of the estate; and **three**, the suitable persons to administer the estate of the deceased. In the circumstances, it was argued that, it was a misdirection on the part of the High Court Judge to hold that, the 2nd appellant was not suitable to administer the estate of her deceased husband, merely because she had not contributed anything towards the acquired properties and the welfare of the deceased's family.

On being probed by the Court as to the propriety of criteria applied by the learned Judge of the High to appoint the respondent as the administrator Prof. Lukumay submitted that, the criteria relied upon such as, extent of contribution on assets acquired during the pendency of the marriage; taking care of the deceased during the illness and servicing the loans of the deceased's project is not prescribed in the law. On the way forward, it was Prof. Lukumay's submission that, since the learned High Court Judge embarked on extraneous matters to determine the caveat, he urged us to find the omission incurable and it vitiated the entire proceedings of the High Court. Thus, he implored us to nullify the proceedings, quash

and set aside the judgment of the High Court and remit the case file to the High Court for a retrial.

On the other hand, initially in the written submissions, the respondent's counsel opposed the appeal on ground that the assessment of contribution made by the High Court Judge was for the purposes of gauging interest which the respondent had in the estate which rendered the respondent to be a suitable person to administer the estate of the deceased. However, at the hearing of the appeal, upon a dialogue with the Court, on a reflection, he conceded that it was irregular for the learned High Court Judge to rely on the principles under the Law of Marriage Act to determine as to who was a suitable person to administer the estate of the deceased instead of section 33 of the Probate and Administration of Estates Act. On this, it was submitted by Mr. Kelvin Kayaga that, on account of the said omission the learned High Court Judge embarked on a nullity and as such, it is deserving that the resultant judgment be nullified and the case file remitted to the High Court for a fresh trial.

Having considered the 1st ground of appeal, the submission of the learned counsel and the record before us, it is crucial to initially determine the propriety or otherwise of the impugned decision in which the learned High Court Judge applied the principles under the Law of Marriage Act to

determine the probate and administration cause which is a subject of this appeal.

Apparently, both learned counsel for the parties were at one that, the criteria used by the learned High Court Judge was irregular. In this regard, we are of a considered view that the determination of this appeal hinges on answering the following crucial questions namely: **One**; what was the matter for adjudication before the High Court; **two**, what was the basis of the decision of the High Court, **three**, whether the High Court decision was in accordance with the dictates of the law.

It is evident on record that, after the petition for letters of administration was filed, a caveat was filed opposing the petition and the matter turned out to be a suit which entailed initially, framing of issues which were to be determined in disposing of the contentious matter. The framed issues are reflected at page 258 of the record of appeal as follows: **One**, who between the 2nd petitioner and the caveator, is a lawful wife of the deceased; **two**, who between the petitioner and the caveator is more suitable to be appointed to administer the deceased's estate; and **three**, what reliefs are parties entitled to.

However, the evidence adduced at the hearing was in relation to whether or not: **one**, the 2nd appellant was the lawful wife of the deceased;

two, the 2nd appellant had contributed to the acquiring of the estate of the deceased; **three,** the 2nd appellant's child was born outside wedlock, **four**; the 2nd appellant took care of the deceased during illness; **five**, the deceased had intimated that the 1st appellant should not be involved in his estate; **six,** who was in possession of the property of the deceased; **seven,** who serviced the loans of the deceased's projects; and **eight,** who was in possession of the properties of the deceased.

Subsequently, the High Court made findings reflected at pages 419 of the record of appeal that: **One**; the 2nd appellant proved existence of marriage between her and the deceased. **Two**, at page 421 of the record the learned Judge observed as follows:

> *"Ordinarily, a legal wife is expected to be better suited to administer her deceased husband's estate. However, this is true where the wife acquired the estate together with the deceased. In this case Sarah, whom I have declared to be lawful wife is expected to qualify for appointment.* ***However, besides mere words, she has not tendered evidence of her participation in the acquisition of the properties left behind by the deceased".***

Three, at page 425 of the record of appeal, the learned High Court Judge concluded as follows:

"In this case Sarah is the widow who could administer the estate. However, from the evidence on record, she is a stranger to the properties forming part of the deceased's estate. At the family level, she has not shouldered the responsibility to take care of the children including her own child Asante. Therefore, she is also a stranger to the children. Sarah has surfaced on account of her Christian marriage with the deceased. It is my view that this is not enough interest in the deceased estate to warrant her appointment as administratrix of the deceased after being separated from him for so long a period. If find her unfit to administer the deceased's estate".

Four, at page 423 of the record of appeal, the verdict of the learned High Court Judge was as follows:

"Corney, a child born by Sarah is another proof that Sarah and the deceased separated. From the evidence on record. It is the father of the deceased (PW1) who disclosed that Corney lives with his mother... Consolata produced evidence that she lived with the deceased and his four children... she was firm in her evidence that she is unaware of another child called Corney.... Further, in exhibit D19, a note where the deceased wrote to tell Consolata that he might no recover from his

sickness, he insisted. Consolata to take care of all children whom he named as Asante, Paschal, Baraka and Eric. Corney is not mentioned. This leaves only two possibilities that either this child is fictional (sic) or he is a son of Sarah but not fathered by the deceased".

Five, further, the learned High Court Judge at page 424 said as follows:

"On the control of properties, the evidence is quite clear that all the deceased properties are in actual possession of Consoiata. She is the one who lives in the house of Mwilamvya where the deceased was director of the schools and she is so acknowledged by the two head teachers (DW4 and DW6). Her authority stemmed from exhibits D11 and D12. These are letters by which the deceased delegated to her his functions as director of the schools before he left to Dar es Salaam for treatment where he finally dead".

Finally, at page 426 the learned High Court Judge adduced following reasons as to why the 1st appellant was not suitable to be appointed as administrator having said:

"Stephen is the deceased's sibling. Unfortunately, before the deceased passed on, he left a note to the

effect that the 1st petitioner should not engage with his estate. This Is exhibit D19. ... the relevant parts of exhibit D19 reads.

Nasıkia Stefano anakuja umwambie sitaki kumuona kabisa mtu mbaya sana, hajaanza tu kuwasumbua nyumbani na shuleni uwe naye makini sana uwasisitize wakuu wa shule wawe wanakuona mara kwa mara niliwapa maagizo ya uendeshaji".

We have also noted that, the criteria invoked by the High Court to disqualify the 1st appellant to be appointed as the administrator of the deceased was a note exhibit D1 in which the deceased while in hospital, is alleged to have directed the respondent that the 1st appellant should not be involved in the management of his estate. Since it is on record that, the deceased died intestate, we say no more on account of what will become apparent in due course.

It is on the basis of the aforesaid, the learned High Court Judge dismissed the petition and appointed the respondent. It is glaring that the High Court extensively heard parties and their witnesses on evidence as to among others, who between the 2nd appellant and the respondent had contributed to the estate of the deceased; the paternity of one of the 2nd appellant's children and that it is the respondent who was in actual possession of most of the properties of the deceased.

We are inclined to point out that what is contained in the impugned judgment really taxed our mind because while the matter subject of this appeal is a Probate and Administration Cause, when one looks at the evidence martialed and the impugned judgment the impression is that what was before the High Court is a matrimonial dispute governed by the Law of Marriage Act. This is what made us earlier on, to pose a question as to what was the subject of adjudication before the High Court? It is without dispute that the subject of this appeal was a probate and administration cause. Thus, as earlier intimated, probate and administration matters are regulated by among others, the Probate and Administration of Estates Act whereby section 33 (1) and (2) stipulates as follows:

> *"(1). Where the deceased has died intestate, letters of administration of his estate may be granted to any, person who, according to the rules for distribution of the estate of an intestate applicable in the case of such deceased, would be entitled to the whole or any part of such deceased's estate.*
>
> *(2). Where more than one person applies for letters of administration,* ***it shall be in the discretion*** *of the court to make a grant to* ***anyone*** *or more of them, and in the exercise of* ***its discretion*** *shall take into account greater and immediate interests in*

the deceased's estate in priority to lesser or more remote interest".

[Emphasis supplied]

Although, the court before which the probate cause is filed has discretion to grant letters of administration, the law requires such discretion to take into account greater and immediate interests in the deceased's estate in priority or more remote interest. This entails appointing an administrator who will diligently and faithfully administer the estate of the deceased in order to achieve the judicious exercise of discretion which facilitates and simplifies the task of appointing the administrator of estate of the deceased. The follow up question is whether the High Court judiciously exercised its discretion to appoint the administrator of estate of the late Elias Rukonga Maliyatabu in accordance with the law.? Our answer is in the negative and we say so because it is unfortunate that the High Court considered extraneous factors and proceeded to adjudicate on them which dents a judicious exercise of discretion in appointing a person fit to administer estate of a deceased person. We shall at a later course point out the adverse effect on failure to judiciously exercise discretion.

Next is the basis of the impugned decision which was the second limb of the questions we posed. As earlier stated, the appellants filed a petition in the High Court seeking to be appointed as administrators of the estate of the

deceased and the petition was confronted by the caveat opposing the petition. We earlier on reproduced the agreed issues framed for the purposes of determining the caveat and it is our considered view that, it is difficult to gauge the compatibility thereof with the subject of adjudication and the resulting verdict. We are fortified in that regard because, instead of addressing itself as to who suitable to be appointed as administrator of the estate of the deceased, as earlier stated, the proceedings and the impugned judgment wrongly concentrated on among others, the status of marriage of the 2nd appellant and the respondent, contribution of each on the estate of the deceased, and the issue of paternity of the 2nd appellant's child. Thus, as correctly submitted by the learned counsel for the parties, these are matters regulated by the Law of Marriage Act when resolving a petition for divorce or separation which is between the spouses and not between so to say co-wives. In the premises; the probate and administration of estates matter was not a proper forum to address issues relating to matrimonial disputes. See: **MARIAM JUMA VS TABEA ROBERT MAKANGE**, Civil Appeal No. 38 of 2009 (unreported).

Since it is settled that, the discretion to appoint a suitable administrator must take into account the dictates of the law, we are satisfied that, the discretion was not properly exercised. On this, we had the opportunity of looking at the general principles upon which an appellate court

can interfere with the exercise of discretion of an inferior court or tribunal in **CREDO SIWALE VS REPUBLIC**, Criminal Appeal No. 417 of 2013 relying on the case of **MBOGO AND ANOTHER VS SHAH** (1968) EA 93 the Court said:

> *"(i) If the inferior Court misdirected itself; or*
>
> *(ii) it has acted on matters it should not have not have acted; or*
>
> *(iii) it has failed to take into consideration matters which it should have taken into consideration,*
>
> *And in so doing, arrived at wrong conclusion. Other jurisdictions have put it as "abuse of discretion" and that an abuse of discretion occurs when the decision in question was not based on fact, logic, and reason, but was arbitrary, unreasonable or unconscionable - See **PINKSTAFF VS BLACK & DECKTZ** (US) Inc, 211 S.W 361."*

Thus, we are of the considered view that, it was a misdirection on the part of the learned High Court Judge to have acted on extraneous considerations which resulted into failure to consider the prescribed criteria on the person suitable to be appointed as the administrator of estate of the deceased. This answers our last question that is, the decision of the High Court was not in accordance with the dictates of the law.

Apparently even the learned counsel for the parties at the High Court made no effort to prevent such an unfortunate situation having paraded witnesses to testify on extraneous matters. As to the consequences on the stated infraction, the Court was faced with akin situation in the case of **MARIAM JUMA VS TABEA ROBERT MAKANGE** (supra) and held thus:

> *"The High Court Judge meandered around the status of marriage of appellant, digressing and drifting from the central task before him. He even made a finding that, the appellant's children were not entitling to inherit from the deceased's estate. The High Court Judge did not have the mandate to determine who should be the beneficiary from the deceased estate. This role was to be played by the Administrator of the deceased's estate".*

The Court found the decision not proper and proceeded to nullify it.

On account of what we have endeavored to discuss, it is our considered view that the impugned judgment was not proper as the learned High Court Judge who went beyond the scope exceeding his jurisdiction embarked on a nullify. In other words, since the jurisdiction of courts is a creature of statute, a matrimonial dispute cannot be adjudicated in a probate and administration cause as it transpired in the case at hand. Thus, we agree with the parties that the proceedings and judgment of the High Court are

vitiated and they cannot be spared. We find the 1st ground of appeal merited and it is allowed. The impugned judgment and subsequent orders made by the learned High Court Judge are hereby quashed and set aside. We remit the case file for the petition and caveat filed to oppose the petition to be placed for expedited hearing before another Judge. Given the nature of the proceedings, we make no order as to costs. Since the 1st ground of appeal suffices to dispose of the appeal, we shall not well on determining the remaining grounds of appeal, we make no order as to costs.

It is so ordered.

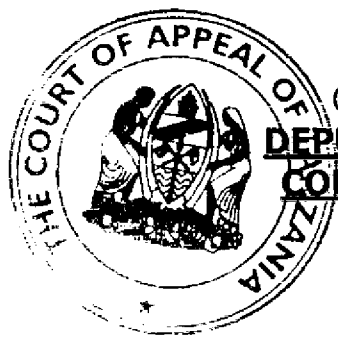
DATED at **TABORA** this 21st day of March, 2023.

S. E. A. MUGASHA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Judgment delivered this 22nd day of March, 2023 in the presence of Mr. Charles Livingstone Ayo, holding brief for Prof. Zakayo Lukumay, learned counsel for the appellants and Mr. Akram William, holding brief for Mr. Kelvin Kayaga, learned counsel for the respondent, is hereby certified as a true copy of the original.



C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL