IN THE HIGH COURT OF TANZANIA

AT IRINGA

(PC) CIVIL APPEAL NO. 2 OF 2012

(From the decision of the District Court of Njombe District at Njombe in Civil Appeal No. 8 of 2011 Original Civil Case No. 6 of 2011 of Makambako Primary Court)

1. ERASTO LAMECK NZALI
2. KENAN LAMECK NZALI

..... APPELLANTS

VERSUS

HERBERT JOHNSON NZALI ..... RESPONDENT

27/6/2014 & 29/8/2014

JUDGEMENT

MADAM SHANGALI, J.

This is a second appeal. Before the Makambako Primary Court the respondent applied for appointment of administrator of the Estate of the late Henry Lameck Nzali who died intestate on 29th January, 2010. The appellants filed an objection. After hearing both sides the objection was dismissed and the respondent was duly appointed, administrator of the estate of the deceased.

The appellants were not satisfied with that decision and appointment of the respondent. They preferred their first appeal before the Njombe District Court. After hearing the arguments from both sides the first appellate District Court dismissed the appeal with costs.

Once again, the appellants were not satisfied with that decision. They have filed this second appeal before this court. In their amended petition of appeal the appellants duly represented by Mr. Kingwe, learned advocate presented the following grounds of appeal:-

1. That the judgement delivered by the learned Principal Resident Magistrate was no judgement at all as it failed to consider and decide on all grounds of appeal advanced by the appellants in the District Court of Njombe and instead addressed itself to the first ground of appeal on pecuniary and territorial jurisdiction.

2. That the learned Magistrate in the lower court did not take into consideration the customary procedure of inheritance of the Wabena tribe when he purported to employ Bena customary laws.

3. That the first appellate Resident Magistrate misdirected himself by endorsing one Herbert

Johnson Nzali as the administratix after being contested by the appellants that the administrator of the Estate of, the late Henry Lameck Nzali, in Bena customs could not be appointed by a grandmother.

4. That the first appellate Resident Magistrate miserably misdirected himself and failed to find out that the respondent started to divide, sell and use the property of the deceased before being appointed as the administrator of the estate.

5. That the first appellate Resident Magistrate erred in fact by failing to differentiate the village of Malombwe where the deceased was buried and village of Lyamkena where the purported clan meeting was held.

In this appeal the respondent appeared in person and unrepresented. On 13th March, 2014 the parties were granted leave to argue the appeal by way of written submission. Both have complied with the schedule for filing the written submission.

Submitting on the first ground of appeal Mr. Kingwe started by referring to Order XX Rule 4 of the Civil Procedure Code which stipulates how the judgement ought to be

composed. He claimed that in this case the appellants advanced five grounds of appeal before the first appellate court but the first appellate Resident Magistrate satisfied himself that only two grounds of appeal could dispose the appeal. As a result the first appellate court hopelessly failed to dispose the appeal.

On the second ground of appeal Mr. Kingwe submitted that the lower courts did not take into consideration the customary procedure of inheritance of the Bena tribe when they purported to employ Bena customary laws. He stressed that pursuant to Bena customary laws it is inconsistent, repugnant and inconceivable for a grandchild to be appointed as administrator of the estate of the deceased person while there are other elders full of wisdom and capable to be appointed as administrator of the estate of the deceased.

On the third ground, Mr. Kingwe submitted to the effect that it was wrong for the first appellate Court to endorse the respondent as an administrator because he was appointed by his grandmother contrary to the Bena customs. He argued that a proper procedure as required by the law, there should have been a clan council meeting of which would have appointed and authorize the respondent as administrator of the said estate instead of being appointed by his grandmother who had no authority to do so.

Submitting on the fourth ground of appeal the appellants' counsel contended that in his submission before the trial Primary Court the respondent admitted to have divided, sold and used part of the property of the deceased alleging that he was complying with Bena customary laws which allow some of the property of the deceased to be distributed among relatives after forty days of the deceased death. Mr. Kingwe contended that such custom and practices are not existing in Bena customs. Mr. Kingwe argued that the respondent had no authority to divide, use and sell the said property and there is no evidence to prove on the balance of probability that the respondent was authorized to do what he did. To that effect, Mr. Kingwe prayed the court to set aside his appointment as an administrator and allow the appeal with costs.

In fifth ground, Mr. Kingwe submitted that the first appellate court erred in fact by failing to differentiate the village of Malombwe where the deceased was buried and village where the council meeting was held and concluded that the two areas had no business in the estate of the deceased. He stated that the deceased was laid to rest at Malombwe village Njombe District and the alleged clan council meeting was held at Igowole village and minutes approved at Lyamkena village. He claimed that such irregularities indicate that there was bad intention and manipulation aimed to misappropriate the estate of deceased.

Responding on the first ground of appeal, the respondent submitted to the effect that he considers the judgement of the first appellate District Court to have met the requirements of Order XX Rule 4 of the Civil Procedure Code which provide that a judgement shall contain a concise statement of the case, the points for determination, the reasons thereon and the reason for such decision. He conceeded that the appellants raised five grounds of appeal but having considered them the first appellate Resident Magistrate reduced them into two main grounds after satisfying himself that some of them contained the same content. He stressed that if a court is satisfied that even one ground of appeal overtakes the whole appeal, the court may concentrate on that major ground to dispose off the appeal or may condense the grounds to few important grounds and dispose the appeal as it was done in the first appellate District Court.

On the second ground of appeal the respondent submitted that when a court determines which law should be applicable if a person dies intestate, it is the life made test which must be used. He cited the cases of **Genge s/o Kumwenda Vs. Fidelis Nyirenda** (1981) TLR 211 and **Abdallah Shamte Vs. Musa** (1972) HCD n. 9. He contended that the deceased Henry Lameck Nzali a bena by tribe was residing in Igowole village within Mufindi District Council hence Bena customary law applied by the lower courts was proper and correct.

On the third ground of appeal the respondent vehemently disputed the allegation that he was appointed or endorsed by his grandmother to be the administrator of the estate of the deceased. He contended that he was duly appointed by a clan council meeting which was held on 1/2/2010 and attended by all clan members including the appellants, brothers, sisters, clan elders and the mother of the deceased. That the said clan council meeting was held at Igowole village and the minutes of the meeting indicate the names and signatures of those who participated.

On the fourth ground the respondent disputed the contention that he divided, sold and used the properties of the deceased estate before being appointed as an administrator. He stated that what was actually done and endorsed by the clan members was to sell some properties of the deceased in order to get some money for the maintenance and up keeping of the deceased mother who was living with the deceased before his demise. He stated that even the alleged properties were not in the list of the properties to be administered by the appointed administrator.

Responding on the last ground of appeal the respondent admitted that the clan meeting was held at Igowole village where the deceased was residing and approved at Lyamukena village. He insisted that most of the deceased relatives reside

at Lyamukena near Makambako. The respondent prayed the court to dismiss the appeal with costs for lack of merit.

In rejoinder, Mr. Kingwe reiterated his submission and stated that all cases referred by the respondent are irrelevant and not applicable in the present case. He contended that the fact in issue is not the application of customary law but rather non adherence to the procedure and customs of Bena tribe. He argued that the respondent and his grandmother failed to honour Bena customary law for appointing a grandson to be the administrator of the estate of the deceased.

Having closely examined the record of proceedings of the lower courts and their decisions and having considered the submission made by the parties, I now proceed to determine the raised grounds of appeal.

On the first ground of appeal I entirely agree with the respondent that in composing a judgement it is not mandatory for the appellate court to decide each and every ground of appeal separately. The court has discretion to condense several grounds of appeal and argue them together where it is satisfied that the grounds are based on the same subject matter or facts. In the present case the first appellate Resident Magistrate stated clearly that the appellants filed five grounds of appeal but reduced them to two broad ones and tacked them. In the case of **Malmo Montagekonsult Ab**

Tanzania Branch V. Margret Gama, Civil Appeal No. 86 of 2001, CA, DSM (*unreported*) the court stated;

> "In the first place, an appellate court is not expected to answer the issues framed at the trial. That is the role of the trial court. It is, however, expected to address the grounds of appeal before it. Even then, it does not have to deal seriatim with the grounds as listed in the memorandum of appeal. **It may, if convenient, address the grounds generally or address the decisive ground of appeal only** or discuss each ground separately." (*Emphasis added*).

That is the position, and for that matter in this very present appeal I would now prefer to determine grounds two and three together because they are both based on non-adherence to the Bena customary law and procedure. On the second ground the main complaint by the appellants is that according to Bena customary law it is inconsistent, repugnant and inconceivable for a grandchild to be appointed an administrator of the estate of the deceased person while there are other elders full of wisdom and capability to perform that duty. On the third ground the appellants complain that the respondent was appointed by his grandmother to administer the estate of the deceased contrary to the Bena customs.

It must be appreciated from the record of proceedings of the lower courts that the appointment of the respondent as an administrator started from the clan council meeting held on 1/2/2010 at Igowole village. According to the available minutes of the meeting, the Chairperson was one John Lameck Nzali, the elder brother of the deceased. The meeting was attended by 35 relatives cum beneficiaries of the deceased including deceased mother whom by all standard of imagination were at better place to understand and appreciate Bena customary law and traditions than the appellants and their advocate. There is no evidence to substantiate the appellants claims that according to Bena customs an adult grandchild is exempted from being appointed an administrator. Again, there is no evidence whatsoever to substantiate the appellants claims that the respondent was appointed by his grandmother to administer the estate of the deceased. The appointment of the respondent as an administrator was effected by the Makambako Primary Court after being endorsed by the lawfully clan meeting held on 1/2/2010. Therefore the allegation that the respondent was appointed by his grandmother to administer the estate of the deceased have no leg to support. In my considered opinion this issue of non-adherence to the Bena customary law and procedure is a non-issue which should not be dragged to waste time.

Likewise the fourth ground of appeal is not tenable because throughout the trial it was not clearly substantiated by the appellants how far the respondent divided, sold and used the property of the deceased before his appointment. However, the respondent reply was straight that every disposition was done with an endorsement from the clan members. In my opinion, the respondent version have truth in it because if he was actually misappropriating the deceased properties before his appointment as alleged by appellants, the clan members would not have appointed him as an administrator.

The fifth ground of appeal is also not strong to disturb the correct decisions of the lower courts because in my view the relative of the deceased are not bound by any law about the place where they can conduct the meeting. The clan meeting may be convened at any convenient place to the members. The fact that the deceased was buried at Malombwe village while the meeting was held at Igowole village is not sufficient ground to impeach the appointment of the respondent as an administrator.

In conclusion and for the foregoing reasons all grounds of appeal have failed. In fact this appeal was filed without sufficient cause. The decision of the two lower courts are hereby upheld. Appeal is hereby dismissed in its entirety and

the respondent is entitled to his costs

M. S. SHANGALI

JUDGE

29/8/2014

Judgement delivered todate 29/8/2014 in the presence of Ms. Mhagama (*Advocate*) holding brief for Mr. Kingwe (*Advocate*) for the appellants and in the presence of the respondent in person. Right of appeal Explained.

M. S. SHANGALI

JUDGE

29/8/2014