

IN THE HIGH COURT OF TANZANIA

AT TANGA

PC. CIVIL APPEAL NO. 4 OF 2013

*(Originating from Tanga District Court in Civil Appeal No. 1 of 2013
and Probate Cause No. 101 of 2011 in Tanga Urban Primary Court)*

HAMISI SHEKIONDO.....APPELLANT

VERSUS

REHEMA ALLY.....RESPONDENT

JUDGMENT

U. MSUYA, J.

This is a second appeal. The subject matter in this appeal is an house situated on Plot Number. G. J/A.155 at Mwamboni within Tanga City. Briefly, the facts which gave rise to this appeal are summarized as follows:-

The house in controversy was alleged to be a matrimonial property of both the Respondent, Rehema Ally and Fadhili Hamisi. The latter died in 2011. In his life time, the deceased and the Respondent were blessed with a daughter, Amina Fadhili who is now

six years old. The late Fadhili Hamis was also survived by Hamisi Shekiondo, the father-in-law of the Respondent. Following the death of Fadhili Hamisi, his father, Hamisi Shekiondo successfully applied for letters of administration in Tanga Urban Primary Court which conferred him powers to administer the house in question. The Respondent was aggrieved with such appointment and preferred a revision in the District Court of Tanga on the ground that since the deceased left behind a minor, the Tanga urban Primary Court ought to have appointed more than one administrator to administer the estate in question. Being guided by Rule 7 (4) of the Primary Court (Administration of Estate) Rules in the fifth schedule of the Magistrates Courts Act (Cap. 11 R. E. 2002) which reads:-

"Where any of the heirs or beneficiaries of the estate is a minor or a person under disability without prejudice to any order made under paragraph 2 (g) of the fifth schedule to the Act, not less than two administrators shall be appointed".

The District Court determined the revision and ruled that since the deceased was survived with a minor, Amina Fadhili the Urban Primary Court ought to have appointed more than one administrator. In that regard, the District Court went on to revoke the letters issued to the administrator, Hamisi Shekiondo, remitted the file and directed the Primary Court to abide with the provisions of Rule 7 (4) of the Primary Court (Administration of Estate) Rules (supra). In

compliance with District Court's order and the provisions of law, the Primary Court appointed Ibrahim Shekiondo and Mwanahamisi Ally as co-administrators of the estate question. Further, the Primary Court directed the co-administrators to sell the house in question and distribute the proceeds to the beneficiaries. At a later stage, the court vacated its order and issued a new order to the effect that the house in question should not be sold rather should be jointly occupied by the deceased's father, Hamisi Shekiondo and Respondent. The Respondent was aggrieved with this decision and preferred Civil Appeal No. 01 of 2013 in the District Court of Tanga at Tanga. The District Court allowed the appeal and ordered the Respondent to be given 40% of the whole proceeds from the estate and remaining 60% of the house be distributed to heirs including the Respondent. The appellant was aggrieved with that decision and hence preferred the present appeal. In his this appeal, the appellant is challenging the District Court's decision in the following grounds: One, that the Learned Resident Magistrate erred in law and fact by ordering that the Respondent be given 40% of the proceeds of sale of the house constituting the entire estate of the deceased and whole from the estate and proceeds of sale of the house constituting the entire estate of the deceased and further that she be given an additional share in the remaining 60% of the proceeds of such sale whereas there was no any evidence that the Respondent contributed 40% in the acquisition of the said house. Two, that the Learned Resident Magistrate erred in law by interfering

with the duty of the administrators of the estate of the deceased even before the said administrators had started distributing the said estate. Three, that the Learned Resident Magistrate erred in law and fact by ordering distribution of the estate of the deceased in accordance with “estate law” without stating which estate law she was referring to and with disregard that the estate of the deceased was governed by Islamic law.

In this appeal, the appellant is advocated for by Mr. Akaro whereas the Respondent is not-represented. In prosecuting the same, the parties were allowed to argue the appeal by way of written submissions.

In his written submissions, Mr. Akaro opted to start with the second ground of appeal of which he pointed out that the District Court prematurely decided the ratios of how the proceeds of sale of the house would be shared. By so doing the District Court literally embarked upon the exercise of distributing the estate of the deceased. The Counsel went on to submit that in law, the court should not engage itself in the exercise of distributing the estate of a deceased person. In regard, the Learned Counsel cited the case of *Ibrahim Kusaga V. Emanuel Mweta (1986) T. L. R. 26* to the effect that:

“A (Primary) Court ought not to distribute the estate of the deceased, that is the appointed by the court”.

In concluding the point, Mr. Akaro urged the court to allow the second ground of appeal.

As regards the third ground of appeal, Mr. Akaro pointed out that the evidence on record demonstrates that the deceased professed Islamic faith. That being the case, the Counsel pointed out that the law applicable in administering the estate of the deceased is Islamic law. The Learned Counsel concluded the point that the Learned Resident Magistrate erred in law and fact when she held at the last page of her typed script of the judgment that the deceased having left no will and his custom been not stated, his estate should be distributed in accordance with the estate law. He further pointed out that Islamic law is applicable in distributing the deceased's estate. The learned Counsel conducted by remarking that nothing exists like "**state law**" in Tanzania.

As regard the first ground of appeal, the Learned Counsel pointed out that there is no evidence indicating that the Respondent contributed anything towards the acquisition of the house in question. In that regard, the Learned Counsel pointed out that the District Court erred in law by ordering that the Respondent be given 40% of the proceeds of the sale of the said house. In conclusion, the Learned Counsel urged the court to allow the appeal.

On his part, the Respondent opposed the appeal by the following reasons:

First, that the District Court did not interfere with the duty of the co-administrators in administering the deceased's estate rather the co-administrator's failed to perform their duties. In regard, the respondent insisted that the case of *Ibrahim Kusaga V. Emanucl Mweta (1986) T. L. R. 26* is not applicable in the instant matter.

Secondly, that the Learned Magistrate rightly directed that the deceased's estate be distributed in accordance with state law, which can be Islamic law.

Thirdly, that the evidence on record clearly indicates that the Respondent contributed in the construction of the house in dispute from her own salary and also from the business she was jointly operating with the deceased. In conclusion, the Respondent urged the court to dismiss the appeal with costs.

In rejoinder Mr. Akaro insisted that if the co-administrator's failed to perform their duties, then the District Court ought to have direct a fresh appointment and not to distribute the estate as it did. The Learned Counsel also insisted that whether or not the Respondent contributed to the acquisition of the said house, still the Learned Magistrate erred in going as far as deciding the ratios of distributing of proceeds, from the house in question. He also pointed out that it is not true that by ordering application of "**estate law**" the Learned Resident Magistrate meant Islamic Law, because even certain customary laws are codified as per the Local Customary Law

(Declaration) (No. 4) Order, 1963 made under the Judicature and Application of Laws Act, (Cap. 358 R. E. 2002).

The Learned Counsel emphasized that the under the Principles of Mohamed and Law 9th Edition by M. Hidayatullah and Arshad Hidayatullah, page 48, the appellant is entitled to inherit $\frac{1}{6}$ of his son's estate.

Lastly, he urged the court to allow the appeal.


I will start to determine the second ground of appeal which in my view will disposed by the appeal.

As correctly observed by Mr. Akaro, the record indicated that the Learned Resident Magistrate directed that 40% of the proceeds from the house in question should be given to the Respondent and 60% of the proceeds from the house should be given to beneficiaries including the Respondent. In principle, this was wrong. The duty of distributing the estate of the deceased is vested to the administrator of the estate and not the court. This principle was emphasized in the case of *Ibrahim kusaga V. Emanuel Mweta (1986) T. L. R. 26* where it was stated that:-

"A (primary) Court ought not to distribute the estate of the deceased that is the job of an administrator appointed by the court".

In the present case, distribution of the deceased's estate was made by the court i.e not only the District Court but also the Primary Court. As indicated earlier, this was wrong on account that distribution of the estate of the deceased is the duty of administrator.

Under the circumstances and since the Learned Magistrates exercised the powers conferred to co-administrators then under the provisions of section 29 (b) of the Magistrate Court's Act (Cap. 11 R. E. 2002) the proceedings, judgments of both Primary and District Courts are hereby declared a nullity the orders thereon are hereby, set aside. Further, the co-administrators are hereby directed to discharge their duties according to the law. It is so ordered.



U. MSUYA,
JUDGE.

Date: 06/06/2014

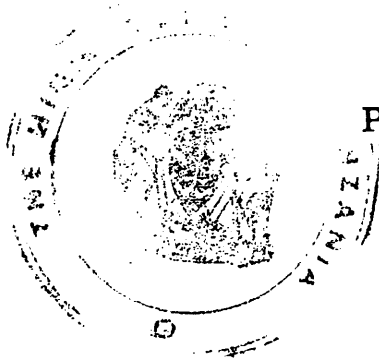
Coram: P.C. Mkeha, DR

Appellant: Present

Respondent: Present

C/Clerk: Sarah

Court: Judgment is delivered to the parties on this 6th day of June, 2014.



P.C. Mkeha
P.C. Mkeha, DR

06/06/2014