

**IN THE HIGH COURT OF TANZANIA  
(MTWARA DISTRICT REGISTRY)  
AT MTWARA**

**PC CIVIL APPEAL NO. 1 OF 2016**

[From the decision of Masasi District Court (A.H. Mwetindwa, RM) dated 26<sup>th</sup> February, 2016, in Probate Appeal No. 1 of 2016. Originating from Lisekese Primary Court in Probate Case No. 17 of 2015]

**JULIA ESTER SOWANI ..... APPELLANT**

**VERSUS**

**MAGRETH FREDRICK KASEMBE ..... RESPONDENT**

*Date of last order: 15/11/2016*

*Date of Judgment: 06/03/2017*

**JUDGMENT**

The respondent, Magreth Fredrick Kasembe sued the appellant Julia Ester Sowan, the administratrix of the estate of the late Joseph David Sowan, at the Primary Court of Lisekese after being dissatisfied with the share of inheritance given to her. The Primary Court held in favour of the appellant herein. Aggrieved, the respondent successfully appealed to the Masasi District Court. In its decision, the District Court held *inter alia* as follows:

*...I have observed that the point of contention is the house that appellant and her husband were living in before her husband met his death. ...It is the words of the appellant that she was actively involved in building such house while her husband is away so she finds that over all other properties her contribution is more seen in the construction of such house so she think she deserve to be given such house....The court has considered the fact that the appellant and the deceased were staying in one of the house which in pleading is referred as guest house...I think it wise if the widow be*

*given such house...So this court allows the appeal in part that is to say this appellant widow be given a matrimonial home...*

The appellant is aggrieved by the above decision and has filed this appeal seeking to quash and set aside the decision of the District Court and uphold the decision of the Primary Court on the following four grounds:

1. That the District Magistrate erred in law by distributing the deceased estate basing on the contribution made by the respondent in acquiring the said properties.
2. That the Honourable Magistrate erred in law by failing to consider the best interests of the deceased children when distributing the said estate.
3. That the Honourable Magistrate erred in law and fact by saying that the house so called guest house was used as the matrimonial house by the deceased hence be given to the widow.
4. That the Honourable Magistrate erred in law and fact by distributing the deceased estate basing on extraneous matters contrary to the requirements of law.

Before me, the parties had no legal representation and thus appeared in person. By consent, the appeal was argued by way of written submissions.

Submitting on the first ground, the appellant argued that the District Magistrate mixed between the issue of division of matrimonial assets under section 114(1) of the Law of Marriage Act, Cap. 29 (D.F. 2002) and the issue of probate and administration of estate. He viewed that it was wrong for the District Magistrate to consider the contribution made to the acquisition of matrimonial assets when considering the issue of inheritance. That the deceased Joseph David Sowan, a Christian, died intestate and the only law which ought to have been considered in distribution of the deceased estate is section 127 of the Indian Succession Act which requires 1/3 to be given to the widow and 2/3 to the children.

On the second ground the appellant submitted that the exclusion of the said house from the estate of the deceased person deprived the children from reasonable enjoyment of the estate of their father on the ground of being a matrimonial home. That the same is against section 10 of the Law of the Child Act 2009 which provides that "*a person shall not deprive a child a reasonable enjoyment out of the estate of a parent.*"

On the third ground, the appellant submitted that the authority to divide the estate of the deceased who died intestate is vested in the administratrix of the estate who was duly appointed by the court with competent jurisdiction. To support this position, the appellant cited the case of **Somson Kishosha Gabba v Charles Kingogo Gabba** (1990) T.L.R 133 which held:

*The trial court had no power to distribute the estate of the deceased person to the respective heirs, the power of distribution is given to the administratrix of the deceased estate.*

On the strength of the foregoing, the appellant opined that it was wrong for the District Court to pick out only one of the houses (the "so-called" guest house) and give it to the respondent widow. He was of the view that the said house was part of the estate of the deceased and therefore ought to have been distributed according to the laws on probate and administration of the deceased estate. He also cited the case of **Mr. Anjum Vicar Saleem Abdi v Mrs Naseem Akhtar Saleem Zargie**, Probate Cause No. 73 of 2003 (Unreported) where it was held:

*The suit land or matrimonial home or property as the trial High Court labelled formed part of the estate of the deceased following his death. Whether the deceased died testate or intestate, its distribution to its beneficiaries, provided it was not disposed of by the deceased inter vivos, was governed by the laws on probate and administration of deceased estates. It was therefore wrong on the part of the learned judge to pick out only this property and give it to the respondent..."*

On the last ground, the appellant submitted that the District Magistrate ought to have considered the relevant laws that govern the distribution of the deceased estate instead of considering extraneous matters. He however did not elaborate. He prayed for the appeal to be allowed with costs.

Responding to the above submissions, starting with the first ground, the respondent submitted that according to the evidence on record, particularly the document titled "*makubaliano mapya ya mgao wa mali za marehemu Joseph David Sowani*" it is the appellant herein, the administratrix of the deceased estate, who distributed the estate. Such distribution was witnessed by the Resident Magistrate, Village Executive Officer and beneficiaries of the deceased estate. For that matter, it was his view that the complaint that the District Magistrate distributed the deceased estate on the basis of the contribution made by the respondent is baseless.

The respondent further highlighted the duty of the administratrix of estate according to the law of collecting all the deceased's properties and distributing them to the beneficiaries as was held in the case of **Sekunda Mbwambo v Pamadhani** (2004) T.L.R 459. That in this case the appellant has discharged her duty of distributing the estate of the deceased to the beneficiaries in accordance with the requirements of the law.

On the second ground, the respondent responded that the allegation that the best interests of the deceased's children was not considered is baseless, because all children who were born out of the wedlock were positively considered in the so called "*makubaliano mapya ya mgao wa mali za marehemu Joseph David Sowani*".

On the third ground the respondent responded that the "so called guest house" was used as a matrimonial house and was acquired by the deceased and the respondent during the subsistence of their marriage. Therefore, in view of the decision in **Bi Hawa Mohamed v Ally Self** (1983) T.L.R 32, there was joint effort in acquiring the said house. She added that the decision to allow the

widow to inherit the said house was reached by the administratrix of estate and the children left by the deceased and therefore there was no error in law.

On the last issue, the respondent submitted that the Magistrate did not distribute any property left by the deceased to the beneficiaries. The trial court confirmed the division of the deceased estate done by the administratrix of the estate, hence there was no extraneous matter as alleged by the appellant.

In his rejoinder, the appellant reiterated her earlier submission and added that the evidence called by the respondent "*makubaliano mapya ya mgao wa mali za marehemu Joseph David Sowani*" cannot be used and interpreted to mean that the distribution of the deceased's assets was done by the administratrix of estate in relation to the disputed house and the plot adjacent to the house, and that when one looks at the said document, it is clear that the respondent was the one who wrote the said document in the form of a letter addressed to the children of the deceased. That part of the said letter reads:

*Mwami Mkozi Kischibe... baada ya kutafakari kwa kina na kufanya maamuzi kama ifuatavyo- kuacha mali zote na miziki kutakua nyumbani kuliwa (guest house) na kwanja kimoja kilihope pembeni na nyumba hiyo bila kujali maamuzi ya mahakama.*

The appellant submitted that the act of the respondent who is not an administratrix of the estate to decide to take the big house and the plot adjacent to it, which has higher value than the other properties, while she knew that the children of the deceased are still young, is contrary to the law. The power of distribution of the deceased property is vested in the administratrix of the estate under section 99 of the Probate and Administration of Estate Act, and not on the respondent. She prayed that the appeal be allowed with costs.

As was before the District Court, the dispute between the parties in this appeal is over the house known as "the guest house", which, according to the appellant, is more valuable than the other properties. The appellant submitted that by giving the respondent the said house the District Court exercised a duty which is solely

vested in the administratrix of the estate. The respondent maintains that the court did not distribute any property of the deceased, but it simply confirmed what was distributed by the administratrix of the estate.

I will begin with one issue that needs this Court's determination. It relates to the contention that the District Magistrate confused the issue of division of matrimonial assets under section 114 (1) of the Law of Marriage Act Cap 29 R.E.2002 with that of probate and administration of estates.

In principle, a person has the right to inherit from the property that wholly belongs to his/her spouse. It is also the law that a wife has an interest in all properties acquired during marriage by joint efforts between him and her husband, even if those properties are in the name of the husband alone. Therefore, when one of them dies, only the interest that wholly belongs to the deceased will be part of the administration of the estate. The interest of the surviving party cannot be part of the administered estate.

Therefore, since the wife's husband's estate may be one of the kinds, the principles applicable in division of matrimonial assets and those of probate and administration of estates cannot be avoided. In this case, the trial Primary Court ought to have considered the efforts of the respondent Margret Fredrock Kasembe in the acquisition of the said property as her personal interest as a wife, which interest was not supposed to have been made part of the administered estate.

I must insist here that the wife can only inherit the property that wholly belongs to her deceased husband (the property in which there is no mixture of her interest and that of her deceased husband). If there is such mixture, the interest of the survivor must first be isolated and should not be made part of the deceased estate). This can be done by receiving evidence on the extent of the effort made by the wife in acquiring the property and a percentage of it be given to survivor. The percentage need not be based on mathematical precision. It is often difficult, if not impossible, in such a case, to be precise. All that the court can do is, as far as possible, to isolate the surviving spouses' interests and leave

the rest of the property to be distributed to the deceased's heirs. It is to be further emphasized that the surviving spouse would also have a share in the remaining part of the estate as his/her share in the estate of the deceased. In this case, the Primary Court did not do so.

When the matter went to the District Court, it gave the respondent the alleged house as part of her inheritance. But the ground for giving her was that she made spousal contribution to the acquisition of the said house. That cannot, of course, be a ground for inheritance. But it can be a ground for separating her matrimonial share from the estate. However, according to the appellant, the disputed house has a higher value compared to other properties. Which means that the District Court's order gave her more than she deserved. Whether this is true or not cannot be done without the said value being determined. That can be done by the administratrix. In case of a dispute, the Court may step in to resolve the issue. But a valuation of the respondent's true contribution must be made. A valuation of the relevant properties would help determine how much was the respondent's contribution and how much was the wife's contribution. The rest of the estate, including the house, is to be divided among the heirs, the respondent included.

Before concluding, it is pertinent to discuss the issue regarding the settlement that the respondent alleges to have been reached between her and the administratrix, leading to her being given the guest house and the piece of land adjacent to it. The appellant contends that there was never such agreement, and that the document the respondent relies upon is a mere letter written by her addressed to the children of the deceased that was never agreed by those with an interest on the property. I agree with her. The wording of the letter, which begins with the words: "*Mimi Magreth Kasembe... nimeamua baada ya kutafakari kwa kina na kufanya maamuzi kama ifuatavyo...*", says it all. This was a bilateral decision by the respondent alone. Unless agreed by the heirs and the administratrix, it cannot form a settlement as the respondent claims.

All in all, therefore, by picking out only the alleged house without there being a total evaluation of the entire estate for consideration, the District Court was in error. But its most fundamental error was by blessing the purported settlement that was no settlement at all, and basing its decision thereon.

In fine, I allow this appeal only to the extent discussed above. I quash and set aside the order of the District Court granting the respondent the guest house and the plot adjacent to it. Exercising this Court's revisional powers, I substitute therefor an order for the original case file to be returned to the trial Primary Court, with the following directions:

1. The Primary Court should take additional evidence from the parties to determine the extent of contribution made by the respondent, Margret Fredrick Kasombe, in the acquisition of matrimonial property jointly owned by her and her deceased husband during the marriage and before the death of the deceased.

Therefore, the Primary Court shall set aside the percentage belonging to the respondent, which shall be the respondent's own property and not part of the deceased's estate.

3. The remaining percentage shall be considered as a whole belonging to the deceased's estate and shall be administered and distributed by the administratrix (appellant) to all heirs (including the children of the deceased and the appellant), according to law.

It is so ordered.

DATED and DELIVERED at Mtwara this 03<sup>rd</sup> day of March, 2017.

**F. A. Twaib**

**Judge**

**06/03/2017**