

IN THE HIGH COURT OF TANZANIA

AT BUKOBA

(PC) PROBATE AND ADMINISTRATION OF ESTATES

APPEAL NO. 5 OF 2014

(Arising from Muleba District Court in Probate and Administration Cause Appeal No.49/2011 and original Probate and Administration Cause No. 3/2011 Of Nshamba Primary Court)

1. JONAS LAURIAN

2. JOVENARY LAURIN

} APPELLANTS

VERSUS

BRIGHTON LAURIAN RESPONDENT

JUDGMENT

06.03 & 06.04.2018

BONGOLE, J.

At Nshamba Primary court the respondent applied for letters of administration of the estates of his late mother one Paskazia

Balemesa who died in 2011. The appellants who appeared on record as relatives objected albeit their objection was over ruled.

Dissatisfied, the appellant unsuccessfully appealed to the District court of Muleba. Still aggrieved they have appealed to this court armed with four grounds of appeal.

The gist of the grounds of appeal are that the District court erred in law and fact on three aspects one, that it acted on extraneous issue of jurisdiction while it was not raised by the parties. Two that, it did not deal with the grounds of appeal but irreverent matters. And three, that it erred in law and fact to believe forged minutes in appointing the respondent as the Administrator of the estates of the late Paskazia Balemesa.

In reply, the respondent had it that the grounds of appeal are misconception of the law thus baseless. On forged minutes he maintained that there is no proof that the same were forged. He thus prayed this court to dismiss this appeal.

In this appeal, the appellants appeared in person and where as Mr. Frank John learned Advocate championed for the respondent.

By leave of this court the appeal was argued by way of written submissions.

In his submission the appellant reiterated his grounds of appeal faulting the District court's that it was wrong to raise issues of jurisdiction while none of the parties raised it either in the grounds of appeal or the reply thereto. He submitted that as the consequence of that the learned District court magistrate cited irrelevant cases in substantiation of his decision.

He went on faulting the District court's decision in that the learned Magistrate misdirected himself for failure to consider the grounds of appeal instead relied on forged minutes which authorized the appointment of the respondent. That in doing so he failed to appreciate the fact that the trial court Magistrate decided the case against the weight of evidence.

In reply Mr. Frank submitted that the District court had justification to deal with the issue of jurisdiction because the same goes to the root of the case. He argued that as jurisdiction is fundamental it can be raised at any time. On this he relied on the case of **Wakfu and Trust Commissioner v. Abbas Fadhil Abbas and another [2003] TLR No.377** where it was held that the issue on jurisdiction can be raised at any stage of the proceedings. On his appointment as the administrator, he submitted that he was dully appointed by the primary court and not the clan members. He argued that it is not necessary in law

to be appointed by the clan members as the court is enough. He insisted that he did not forge minutes as contended by the appellant.

He further submitted that the trial court's decision was correct as it was reached after evaluation of the evidence of both sides and in consultation of the court assessor. He invited this court to uphold the decision of the two courts below which had concurrent findings on evidence and facts. He cited the case of **AMTLAL DAMODAR MALTASER AND ANOTHER t/a ZANZIBAR SILK STORES V A.H JALIWALLA t/a ZANZIBAR HOTEL [1980] TLR NO.31** in which it was held that whenever two courts reach similar findings the appellate court cannot interfere that decision unless there is misdirection on evidence. He thus prayed for dismissal of this appeal as it has no merits.

In perusing the record of this appeal I have not come across where jurisdiction was discussed as an issue for determination by the District court. What is apparent on record is that the District court cemented the decision of the trial court in appointing the respondent as administrator clarifying that this power was within its jurisdiction. For avoidance of doubt part of the judgment of the District court states: "*Indeed, the*

primary court acted upon its jurisdiction to entertain this matter. That the trial court magistrate arrived a proper (sic) decision and opinion to appoint the administrator of the estates of the late. "

Much as I have understood the learned magistrate in this quotation, it referred to the correctness of the trial court in appointing the respondent as administrator of the estates at hand and not the issue of jurisdiction parse as the appellant tried to put it. That being the case, both the parties misconceived this aspect and wrongly submitted on the same.

In handling the objection before him against the appointment of the respondent, the learned trial magistrate not only considered the weight of evidence of the objectors but also its substance. The basis of their objection was that there were no estates left by the late Paskazia thus no need to appoint administrator and that he could not do justice if appointed in that capacity. In addition they contended that the respondent had forged minutes of the clan meeting. On this, the learned trial court Magistrate was of the view that an administrator be appointed to clarify on the estates. This is noted at page 3 second paragraph from the bottom of the trial court's typed judgment. It reads: "*pili kwa kuwa kuna ubishani juu ya mali zilizo aachwa na marehemu*

ambapo wapingaji wanasema hakuna mali za kugawana na upande wa maombi unasema zipo papo hapo upande wa upingaji unakiri kuwa lipo shamba moja lenye utata.....Basi njia pekee ya kuweza kupatikana mwafaka baina ya warithi pia haki zao ni kupatiakana msimamizi wa mirathi tu.”

From the above version therefore, it was inconceivable both in law and in common sense for the trial Magistrate to appoint those who asserted that there are no estates to administer instead of the one who says such estates do ipso facto exist. In other words, appointment of the objectors would logically be inoperative. All these were considered by the trial court and later on upheld by the District court.

On the complaint that the respondent forged clan meeting minutes, the trial court considered it and found that the objectors evidence was contradictory thus unreliable on this fact. It thus ignored it and appointed the respondent. I have read the evidence of the father of the litigants one Laurian Kilalago (SM2), who testified for the appellants and noted that the issue of forgery of clan meeting minutes had no basis. This is essentially so in consideration of the evidence of latter who said that he was involved in the clan meeting which appointed the respondent. He stated at page 6 of the typed proceedings thus:-


"Nafahamu mwombaji na wapingaji kama watoto wangu wa kuza. Vile vile namkumbuka marehemu Paskazia Laurian kama mke wangu ambaye alifariki dunia tarehe 7/1/2011 huku Kisana Mzinga. Marehemu hakuacha wosia wowote. Ameniacha mimi mume na watoto wetu wanne (4) wakiwamo wadaawa hawa na dada yai aitwaye Sarapia. Pia ameacha mashamba matatu ya migomba na mibuni miwili na moja la miti, pia vitu vya ndani. Ni mimi pamoja na wana ukoo ndio tuliokaa kikao cha ukoo mara baada ya matanga ndio tulimchagua mwombaji kusimamia mirathi ya marehemu mama yao baada ya wapingaji na dada yao kukataa kugawana mali hizo na mwombaji akidai eti marehemu hakumrithisha. Nimeishi na marehemu kwa miaka 52 hadi kufa kwake. Nina amini kuwa mwombaji huyu atasimamia mirathi hii kwa wema na uaminifu."

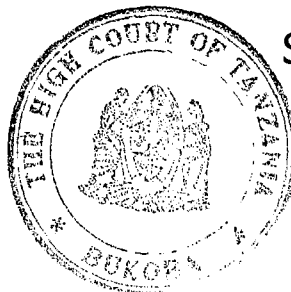
With all this evidence in consideration, it cannot be said with absolute certitude that the decision of the trial court was against the weight of evidence. I agree with the learned trial court Magistrate that the evidence of the applicant outweighed that of the objectors. As correctly submitted by Mr. Frank John learned counsel for the respondent, the concurrent findings of two

subordinate courts on a fact cannot be disturbed unless there existed misdirection on non-direction in evidence. In as far as I am concerned, no misdirection or non-direction in evidence are detected in this appeal as correctly argued by Mr. Frank learned Advocate.

In the upshot, the grounds of appeal and arguments in support thereto though attractive are with no merits and accordingly are hereby thrown overboard. Consequently, the decision of the subordinate courts is sustained /upheld and the appeal stands dismissed as I hereby order.

From the fact that this is a family matter, prudently I give no order as to costs.


S.B. Bongole
Judge
6/4/2018



Date: 06/4/20018

Coram: Hon. S.B Bongole, J.

1st Appellant: Present

2nd Appellant: Present

Respondent: Mr. Frank Advocate

- Present

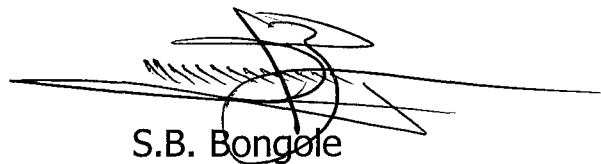
B/C: Kithama

Mr. Frank:

My Lord the appeal comes for judgment and we are ready.

Court:

Judgment delivered.

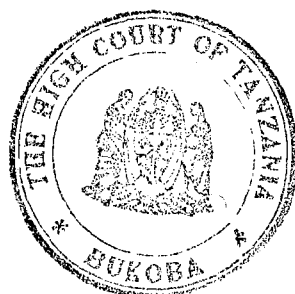


S.B. Bongole

Judge

06/04/2018

Right of Appeal explained.



S.B. Bongole

Judge

06/04/2018