IN THE HIGH COURT OF TANZANIA

AT BUKOBA

PROBATE AND ADMIN. APPEAL NO. 3 OF 2016

(Arising from the District Court of Muleba in Probate and Administration of estates Appeal No.9 of 2015 and Original Probate Cause No.16 of 2013).

JOSUE MAHINJA..... APPELLANT

VERSUS

ADRIAN PANTALINE..... RESPONDENT

JUDGMENT

29.06& 03.08.2018

BONGOLE, J.

The respondent Adrian Panteline, petitioned before the Kashasha Primary court for letters of administration of the estates of the late Yustina Mkalushengwa. The appellant Josue Mahinja, unsuccessfully opposed the petition.

Aggrieved, the appellant appealed to the District court of Muleba. The District court upheld the decision of the Primary court.

Still aggrieved, the appellant preferred the present appeal to this court armed with three grounds in the amended petition of appeal coached thus:-

1. ***That, the appellate court magistrate erred in law and on facts for failure to nullify the proceedings of the trial primary court as the judgment was signed by the assessors as per the requirement of the law.***
2. ***That, the appellate court magistrate erred greatly in law and on facts by failure to allow the appeal and nullify the proceedings of the lower trial court after admitting, hearing and determining the suit that was time barred.***
3. ***That, the Magistrate grossly erred at law and on facts as the first appellate for failure to look at the evidence on record that was overwhelming on the part of the appellant and thus reaching to erroneous decision.***

He therefore prayed this court to allow this appeal with costs.

The respondent filed a reply resisting the appeal.

When this appeal came for hearing, the appellant was represented by Mr. Frank learned Advocate while the respondent was unrepresented. With the permission of the court, the appeal was argued by way of written submission.

In his submission, Mr. Frank opted to abandon ground two and argued grounds one and three holistically. He submitted that the judgment of the primary court contained only the names of the assessors without their signatures. He submitted that this implied that the judgment was not signed by assessors. He argued that by not being signed by assessors meant that the trial magistrate was not assisted by assessors some thing that is contrary to the law. He substantiated his submission with **Rule 3(2) of the Magistrates Courts (Primary courts) (Judgment of the courts) Rules GN No.2/1998** which requires that after the decision is reached at and all the assessors do not dissent they must sign the judgment. He further cited the case **of Mohamed Bishoge v. Mwatatu Bishoge, civil appeal No.1/1992 Hc Bukoba Registry** (unreported) where it was held that it is an error in law for failure to sign the judgment by assessors.

On the 3rd ground he submitted that it was improper for the respondent to apply for letters of administration of the estates of the deceased who passed away in 1952. He submitted that if the respondent had consulted the clan members he would have learnt that the alleged estates had already been distributed to beneficiaries on traditional basis. He argued that due to this state of affairs, there was nothing to administer. In his view, it was

unreasonable to appoint the respondent as administrator. Interestingly he prayed the appeal be allowed with cost while this is a family matter.

In reply, the respondent submitted in respect of failure by the assessors to sign the judgment that, the assessors' signatures are not seen in the certified photocopy but the original judgment was signed. He argued that failure to sign the certified copy is not fatal if the original judgment is signed.

On the issue that the respondent did not consult the clan on the death of the deceased which death occurred in 1952, he submitted that consultation of the clan was done and the same is evidenced on record. He however argued that, consultation is not mandatory in law. He added that he did not petition for letters of administration of estates because by that time he had not yet acquired the age of majority. He argued that appointment of one to be an administrator depends on his reputation and ability to distribute the property faithfully. He supported his submission with **section 2(a)(b) of the 5th Schedule to the Magistrates Courts Act [Cap.11 R.E.2002]** which gives discretion to the court to appoint any reputable person who can distribute the deceased's estates honestly.

He invited this court to dismiss the appeal.

In determining this appeal, I will commence with the issue of signing the judgment by assessors. It was the submission of Mr. Frank that the judgment was not signed by assessors as required by **Rule 3(2) of the Magistrates' Courts (Primary Courts) (Judgment of Court) Rules G.N. No. 2 Of 1988.** In his view, failure of the assessors to sign the judgment is fatal as it is as good as if the trial magistrate was not assisted by assessor. On his part the respondent had it that it was not true that the judgment was not signed. He argued that the original was signed save the certified photocopy was not signed. I have read the record and noted that the original judgment was indeed signed by the assessors at page 18 of the hand written judgment. The trial magistrate was assisted by two assessors namely Adventina Gaspari and Deogratius Angelo on 3/8/2015. Their concurrent opinions and signatures are also found on record. For this reason I find that the argument of Mr. Frank leaned counsel is baseless as it is not supported by the record. As correctly submitted by the respondent, what is looked at is the original record not the certified copies.

Mr. Frank further faulted the appointment of the respondent as administrator arguing that it was unreasonable to administer the

estates of a person who died in 1952. He alluded that if the respondent consulted the clan members he would have learnt that all the estates had already been administered to beneficiaries according to their traditions. On the other hand, the respondent argued that thought the clan meeting is not mandatory, there was a clan meeting which approved him to be administrator. I have paused here and asked myself if there is any evidence on record to prove that the estates were distributed to beneficiaries as contended by Mr. Frank. There is no scintilla of evidence to support what was alleged by Mr. Frank learned Counsel. According to the record there was a clan meeting on 24/8/2013 which approved the respondent as administrator of the estates of Yustina Mkalushegwa. To this end, the argument of Mr. Frank fails. As correctly submitted by the respondent, there is no law that compels one to consult clan members before petitioning for letters of administration of estates. However it has been a good practice so to do so that harmony prevails in the family. I subscribe to the view of my brethren Chocha J. (as he then was) in the case of **Angela Philemon Ngunge v Philemon Ngunge, probate and Administration of estates appeal No. 2 of 2010 High court of Tanzania at Songea Registry**

sitting at Mbinga (unreported). In that case it was held at page 6 thus:-

> ***"There is no where both in the law and the rules, where it is provided that the form shall be accompanied by any annextures(sic) at the time of filling the same. Therefore the need to have the clan minutes as supporting documents to the application for appointment of an administrator, is a matter of practice and not law."***

Equally true in the appeal at hand is that, assuming that the respondent did not consult the clan members, which is not true as per the record; that would not be fatal in view of the above authority.

I uphold the decision of the lower courts for they are unassailable.

In the upshot, this appeal is devoid of merit. It is hereby dismissed. As this is a family matter, ordinarily each party shall shoulder his own costs.

S.B. Bongole

Judge

3/8/2018

Date: 03/8/2018

Coram: Hon. S.B. Bongole, J.

Appellant: Present

Respondent: Present

B/Clerk: A. Kithama

Court:

This appeal comes for judgment and the same is delivered.

S.B. Bongole

Judge

3/8/2018

Right of Appeal explained.

THE HIGH COURT OF TANZANIA * BUKOBA *

S.B. Bongole

Judge

3/8/2018