IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA

AT SHINYANGA

PC. PROBATE APPEAL NO 6 OF 2018

(Arising from the judgment of the Shinyanga District Court in Probate Appeal No. 02 of 2016 and originated from the judgment of probate Case No 3 of 2015 of Itwangi Primary Court)

SELELI DOTTO.....APPELLANT

VERSUS

MAGANGA MAIGE .....1ST RESPONDENT

MISANA MAIGE.....2ND RESPONDENT

JUMANNE MAIGE.....3RD RESPONDENT

PILI MAIGE.....4TH RESPONDENT

JUDGEMENT

Date of Last Order: 05.12.2018

Date of Judgement: 18.01.2019

Ebrahim, J.:

The appellant in this appeal had instituted a Probate Case at Itwangi Primary Court, Probate Case No. 3 of 2015 petitioning to be appointed as an administrator of the Estate of the late Maige Dotto who passed away in 2009. In the process the respondents emerged and filed objection on the basis that they were not involved in the clan process that proposed the

appellant to be an administrator. The trial Court entertained the objection and heard both parties and their witnesses. At the end, the trial Primary Court overruled the objection by the appellants on the basis that the respondents did not want to attend the meeting and that the second respondent is not a faithful person after lying in his testimony. Thus, the court proceeded to appoint the appellant to be the administrator of the deceased estate.

Aggrieved, the respondents lodged an appeal at the District Court of Shinyanga at Shinyanga Probate Appeal No. 2 of 2016 raising three grounds of appeal. They raised an issue of res judicata; the trial court did not receive their important document; and that they did not participate in appointing the administrator.

The appellate magistrate after considering the grounds of appeal, reply to the grounds of appeal and submissions made in elaborations thereof reversed the decision of the trial court. He based his findings on the ground that the respondents did not attend the clan meeting and that there should be two administrators to facilitate easy administration.

The appellant was dissatisfied with such decision and appealed to this Court raising four grounds of appeal faulting the appellate magistrate for basing his decision on his belief instead of law; failing to record and consider submission by the appellant; treating the appellant as the son of the late Maige; and appointing the 2nd respondent as the second administrator while he is not a trustworthy character.

This case proceeded exparte on part of the 1st, 3rd and 4th respondent as there was no proof that the 3rd and 4th defendants were sick nor information supplied on the reason of absence of the 1st respondent.

Both the appellant and 2nd respondent appeared in person, unrepresented.

In elaboration of his grounds of appeal, the appellant prayed to adopt his grounds of appeal and added that he was the one who was appointed by the court to administer the estate of the late Maige Dotto. However, the District Court added another administrator whom he claims he cannot work with as he is already squandering deceased's properties.

In response, the 2nd respondent also prayed to adopt their reply to the petition of appeal and urged the Court to consider that he is the eldest

son of the deceased. He denied all that has been submitted by the appellant and added that he has already distributed the properties to his people. He further admitted that the appellant is the relative of the deceased and that they are two families.

In brief rejoinder, the appellant told the court that there are no two families as all children grew up together in the same house.

In this appeal I shall begin by addressing the second ground of appeal that the appellate magistrate did not record and consider the appellant's submission. I have had the occasion of perusing through the court proceedings both handwritten and typed proceedings. The typed proceedings of the District Court seems to suggest that the appellate magistrate marked the end of submission by each party and scheduled judgement without hearing the respondent (appellant in this appeal). However, going through the handwritten records of proceedings of the District Court, the appellate magistrate immediately after the oral submission of the 4th appellant (4th respondent in this appeal) recorded reply by the appellant. The appellant was recorded saying and I quote:

> *" Your honour I pray this court to adopt my reply to the petition of appeal. I have nothing to add. That is all."*

The appellate magistrate then proceeded to record the rejoinder by the respondents.

Again when considering the grounds of appeal, the appellate magistrate considered the validity of Civil Appeal No. 40/2010 and concluded that the case has different issue with the present case and dismissed the ground of appeal. The same was the first point of reply by the appellant in his reply to the petition of appeal. The appellate court also considered the issue of the failure by the trial court to admit the exhibit tendered and accordingly rejected that ground of appeal. The appellate court also considered the issue as to whether the respondents participated in the clan meeting and came up with his findings that they did not attend the meeting. From such observation therefore, I find that the appellate magistrate recorded the appellant's submission and considered the same. Therefore the second ground of appeal has no merits and it is accordingly dismissed.

Coming to the three remaining grounds of appeal, I shall address all of them generally. The main issue here is the appointment of the administrator of the deceased estate who shall administer the same faithfully and diligently as per the requirements set by the law.

The appellant is claiming that the appellate magistrate based his decision on his belief instead of law and he erred to appoint the 2nd respondent as a co-administrator. In determining the said grounds of appeal, I find it apt albeit briefly to go through the evidence on record.

At the hearing of the case at the trial, the 1st respondent **(SM1)**testified that they were not availed opportunity to participate in the appointment of the estate of their father, they only heard from the court. He further told the court that after the funeral there was a clan meeting on 29.12.2009 where Misana Maige and Kabula Mali were appointed to administer the estate of the deceased. He told the court that he does not know the appellant and that the appellant is a friend of his father. **SM2, Maganga Maige** briefly told the court that he is objecting because he was not involved in the clan meeting and further there were two administrators who had already been appointed. During cross examination he admitted that the meeting was conducted near his home but he did not go because he does not have good relationship with the appellant. He even told the court that he does not know who the appellant is. He said the clan appointed Kalembe Machibya and Misana Maige. **Pili Maige (SM3)** also denied knowing the appellant and that she did not participate in appointing

the appellant. She said also that those appointed were Kalembe Machibya and Maige Dotto. The last witness for the respondents was **Jumanne Maige**(SM4) who like his siblings denied knowing the appellant and that the appointed administrators were Kalembe Machibya and Misana Maige.

Seleli Dotto (SU1), the appellant testified that he is the brother of the deceased and on 01.03.2009 at "Isabingula" (traditional ceremony) he was appointed by the clan to administer the estate of his brother. On the very same day in the presence of other clan members and "wananzengo" he distributed the deceased estate to all rightful heirs. All the children were satisfied with the distribution until the second respondent started a case at the Ward Tribunal which ended at the DLHT where it was ordered that a probate case be opened, hence the present appeal. He told the court that the respondent denied attending. The testimony of the appellant was supported by **Malale Maneno**, 77 years **(SU2)** and **Henry N. Mihambo (SU3)** 65 years, who are both **"wananzengo"** . They testified to be present when the appellant was appointed by the clan to administer the deceased's estate and they were also present when the appellant distributed the estate to the heirs. SU3 told the court that the appellant is the young brother of the deceased. **Kidana Temi (SU4)**62 years told the

court that the deceased was his cousin and that they appointed the appellant to be the administrator of the deceased estate. He was also present when the appellant distributed the properties to the heirs and they all registered to be satisfied with the distribution. He told the court also that the appellant is the brother of the deceased. **SU5 Makani Kulwa**, a nephew of the deceased testified similar to what was said by SU1, SU2, SU3 and S4. He added that it was one Machiya who was tasked with the duty of informing the respondents but they did not attend. The testimony of **SU6 Kalembe Machibya,** the widow of the deceased supported what was said by the other witnesses for the appellants. She stated also that the appellant is the young brother of the deceased. **SU7 Ester Maige**, daughter of the deceased told the court that after the death of their father their uncle Seleli Dotto distributed the properties however they were stopped by their other siblings. The last witness from the appellant's side was **Machibya Maige (SU8)** deceased's child who supported appellant's testimony and admitted that he was the one who was assigned with the duty of informing all of the respondents of which he did but they did not attend.

Following the brief testimonies of all the witnesses the question now comes as to whether it was correct for the trial court to appoint the appellant as the administrator of the deceased estate; and whether under the circumstances of this case it plausible to add the second respondent as a co- administrator.

Indeed, **Section 2(a) of the Fifth Schedule to the Magistrate's Court Act, Cap 11. RE 2002** gives mandate the Primary Court to appoint one or more administrators. The Section reads:

> ***"A primary court upon which jurisdiction in the administration of deceased'Power of estates has been conferred may either of its own motion or an application by any person interested inthe administration of the estate appoint one or more persons interested in theestate of the deceased to the administrator or administrators, thereof, and, inseiecting any such administrator, shall, unless for any reason it considers inexpedientso to do, have regard to any wishes which may have been expressedby the deceased;"***

It follows therefore that in appointment of the administrator of the estate of the deceased, it is not necessary for the Court to collect clan views. What is required is for the court to consider the application from the facts, evidence and circumstances surrounding the case judiciously. This position was also held in the High Court case of **Kijakazi Mbegu and**

Five Others V Ramadhan Mbegu [1999] TLR 174, 178-179, the decision that I associate myself with.

From my observations above, I shall now respond to the first ground of appeal by the appellant that the appellate magistrate based his decision on his belief instead of law. The appellate magistrate said at page 5 of the typed judgement that much as it is not the requirement of the law for the court to collect the views of the clan meeting, but he found it prudent to have two administrators from two families to administer the estate. I would say at the outset that the consideration or belief of the appellate magistrate does not in any way go against the law because as stated earlier the court is not bound to collect clan views but in appointing the administrator it should consider facts, evidence and circumstances surrounding the case. Therefore what the appellate magistrate did was considering the prevailing circumstances. I therefore find this ground of objection to have no basis as well.

The question that I asked myself after going through the entire evidence on record was whether there was misapprehension of the evidence by the appellate magistrate that led him to come to the conclusion as he did.

I have reproduced brief testimonies of all witnesses who testified at the trial. As it could be gathered from the evidence of the witnesses, firstly it is not true that the respondents had no information on the clan meeting called with a view of suggesting the name of the administrator of the estate for the second time. SM2 when giving his evidence in chief said that he learnt about the meeting which was conducted near his home but he did not go because he does not have good relationship with the appellant. It is therefore evident that it is not true that he had no information on the meeting. Again, appellant's witnesses including SU5, SU6 and SU7 testified under oath that the respondents were informed by Machibya Maige but they refused to go. Therefore, there is overwhelming evidence that the respondents themselves decided to forfeit their participation at the meeting and not otherwise. More importantly as the law requires the court either on its own motion or upon application can proceed to determine administration matter without the minutes of the family meeting.

The appellate magistrate went further and appointed the second respondent as the co- administrator on the basis that the deceased had two families. I do not think under the circumstances of the instant case

that was necessary or rather suitable option as I shall endez-vous to explain.

In appointing the administrator of the deceased's estate the main consideration is the reputation and capability of such person to act faithfully, diligently and impartially in administering the estate to the rightful owners. Therefore court can appoint any reputable person who is not even a member of the family or officer of the court for that matter to be an administrator of the estate of the deceased. I associate myself with the decision of this court where Rutakangwa, J. as he then was held in the case of **Sekunda Mbwambo V Rose Mbwambo**[2004] TLR 439 at pg 444 and 445 that:

> *"An administrator may be widow/widows, parent or child of the deceased or* ***any other close relative,*** *if such person are not available or* ***if they are found to be unfit in one way or another****, the Court has the power to appoint any other fit person or authority to discharge this duty".*

Undoubtedly, what could be discerned from the holding of the court on the use of the words *"unfit in one way or another",* the same carries different meaning depending on the facts of the case. However what I can relate the words with our present case, the unfit could be on the

relationship the administrator has with the family/heirs, his/her credibility, manner and character.

The trial court appointed the appellant because he is the a close relative of the family and I can say from the evidence there was no concrete evidence adduced by the other party to discredit his credibility or impartiality apart from mere words. Moreover going by the evidence on record it can safely be said that he represents the whole family especially the fact that there are two families. Again he was the one who initially distributed the estate **"kimila"** before the matter escalated to court. I could therefore not fault the trial court on appointing the appellant as the administrator of the deceased estate as there is no evidence to impeach his impartiality.

However, I hesitate to say the same on the second respondent and I would say that his appointment is shrouded in mystery. I am saying so because, as intimated above, an administrator is supposed at the face value exert sincerity, credit worth, impartiality and faithfulness. Without dwelling to the evidence by the witnesses of the appellant who registered their dismay on how the second respondent mistreated them; the appellate court should have considered a lie by SM1 under oath that he does not

know the appellant when he was adducing his evidence in court and that the appellant is a friend of their father. Whilst there is overwhelming evidence on record that the appellant is actually his uncle being a blood brother of his deceased father! The same lie was told by SM3 and SM4. Infact, the second respondent and all his witnesses are not credible people for the court to give their testimonies any value. Having observed that, I am surprised how the appellate court would not consider such important piece of evidence in its decision. If a person could lie on such a very important issue about his lineage, it is not imaginable what he would do if he is given force of law to handle all the properties of the deceased. Verily, this goes contrary to the expected behavior of the administrator as per the scenario described by this court in the cited case of **Sekunda Mbwambo (supra)** that:

> "An administrator of an estate of a deceased person is not supposed to collect and monopolize the deceased's properties and use them as his own and/or dissipate them as he wishes***but he has the unenviable heavy responsibility, which he has to discharge on behalf of the deceased,*** **of distributing the estates to** beneficiaries **impartially"**

The key words that attracted me from the above decision in underlining the heavy responsibility of the administrator among other things is the duty of distributing the properties of the deceased on his/her behalf impartially. The character exuded by the second respondent is far from such requirement for the reasons that I have observed above. The second appellant further told the court that there was another meeting that appointed him as an administrator; however no minutes of such meeting were presented before the court to show that it was himself and Kalembe Machibya who were initially appointed to fulfill such duty. In her own evidence, Kalembe Machibya told the court that the clan appointed the appellant to represent the whole family.

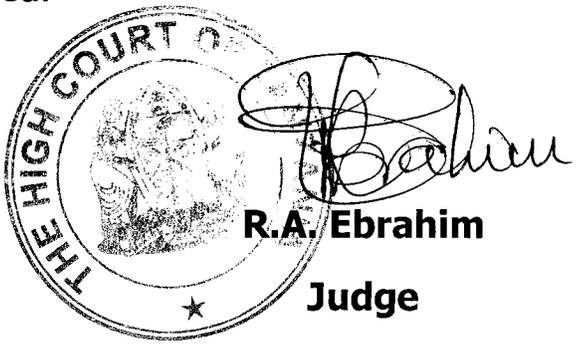
From the above reasons, I find that it was not correct for the appellate court to add the second respondent as the co-administrator of the estate of the late Maige Dotto. Besides, the appellant had managed well previously when he was appointed by the clan; hence he is capable of administering the estate as a sole administrator.

Given the above findings and serve for the grounds of appeal that I have specifically dismissed, I find that appeal has merits and I allow it. I accordingly quash and set aside the judgement and all its resultant

ordersof the District Court of 14.04.2016 in Probate Appeal No. 2 of 2016; and uphold the decision of the Primary Court of Itwangi on Probate Case No. 3 of 2015. Subsequently, the appointment of the second respondent is accordingly revoked and declared to have been terminated.

Having regard to the nature of the case that it involves family members, I shall not order for costs. Each party shall bear its own costs in this appeal.

It is so ordered.



R.A. Ebrahim

Judge

Shinyanga

18.01.2019