

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

PC. PROBATE APPEAL NO. 3 OF 2018

(Arising from Shinyanga District of Court at Shinyanga in Probate Appeal No. 09/2017, originating from Probate Cause No. 1 of 2017 of Ibadakuli Primary Court)

RICHARD NYOROB.....APPELLANT

VERSUS

MOHAMED DASE.....RESPONDENT

JUDGEMENT

Date of last order: 12.09.2018

Date of Judgement: 18.01.2019

Ebrahim, J.:

The late Kilaga Ngelela passed away on 15th April 2004. Perusing through the proceedings in record, the deceased was survived with 3 widows and 10 children. On 02/11/2016, the respondent petitioned at the Primary Court of Ibadakuli vides Probate Cause No. 1/2016 to be appointed as the administrator of the estate of the late Kilaga Ngelela. Before the court could proceed to hear the petition, the appellant herein filed an

objection that the respondent should not be appointed as an administrator of the deceased estate because he is not the son of the deceased; the deceased estate has already been distributed; and that the petitioner has listed the properties of the late Imakulata Nyorobi of which the case was still pending at the High Court.

After hearing the witnesses from both parties i.e. the objector and the petitioner, the trial court dismissed the probate cause on the basis the petitioner has listed the properties situated at Uzogole; the same properties are said to be a subject of dispute at the High Court; and that petitioner's witnesses said that the administrator has already been appointed by the family who is Rwege Kilaga. The case was dismissed until the finality of the case pending at the High Court.

Aggrieved the respondent lodged an appeal at the District Court of Shinyanga at Shinyanga, Probate Appeal No. 9 of 2017. Upon hearing the submissions of both parties and consideration of the grounds of appeal before him, the appellate court made observations that there is no evidence of the distribution of the deceased estate. The appellate court also made findings on the disturbing attitudes of the respondent and

finally quashed and set aside the decision of the trial court and its subsequent orders thereof.

Richard Nyorobi was dissatisfied with the decision of the District Court and filed an appeal in this court raising 3 grounds of appeal. However going through them they can be grouped into two grounds. That the appellate magistrate erred by quashing the Primary Court decision and order the clan meeting to be called afresh; and that the properties of the late Kilaga Ngelela had already been distributed and the respondent seeks to distribute the properties of the late Immakulata Nyorobi.

At the hearing of the appeal both parties appeared in person, unrepresented.

The appellant adopted his grounds of appeal and added that the properties listed are of his late sister because the properties of the late Kilaga have already been distributed to the rightful heirs.

In response the respondent also adopted his reply to the grounds of appeal. He contended that the properties of the late Kilaga have not been legally distributed and the first family meeting included all Kilaga family

members including children and wives. He prayed for this court to uphold the decision of the District Court.

Rejoining briefly the appellant said that the children of the deceased did not claim the properties of their father.

I shall address the grounds of appeal generally. I have dispassionately gone through the proceedings in record and observed that the genesis of the matter is the appointment of the administrator of the estate of the late Kilaga Ngelela. It is indisputable that there is no administrator of the deceased estate that has been appointed. When the respondent herein lodged the petition to be appointed as one, the appellant herein objected on the main ground that the properties listed are those of the late Immakulata Nyorobi. The trial court entertained such objection.

Indeed, **Section 2(a) of the Fifth Schedule to the Magistrate's Court Act, Cap 11. RE 2002** gives mandate to 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 in the administration of the estate appoint one or more persons interested in the estate of the deceased to the administrator or administrators, thereof, and, in selecting any such administrator, shall, unless for any reason it considers inexpedient so to do,

have regard to any wishes which may have been expressed by the deceased;"

It follows therefore that on a probate matter once a person petitions to be appointed as an administrator the first main objective of the court is to appoint the administrator who shall have legal mandate to oversee the deceased's estate. In the event there is an objection pertaining to why the person should not be appointed as an administrator, the court shall determine that objection first. Such objection shall be confined to the fitness and suitability of the petitioner to be appointed as an administrator. In using the term fitness, 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 is 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".*

My understanding of the holding of this 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 the relationship the

administrator has with the family/heirs, his/her credibility, manner and character but not on the property listed at that preliminary stage.

In the instant case, the appellant objected the appointment of the respondent on the main reason that the listed properties are those of the late Immaculata. Unfortunately the trial court considered the objection and involved itself in another case which was not before it. I am saying so because what was before the trial court was a petition for appointment of the administrator and not an objection to the administrator on the list of properties filed before the court that he intends to distribute to the heirs. I find therefore that the genesis of the objection by the appellant was premature and ought not to form basis of dismissing the application by the Primary Court. Legally, there is supposed to be an administrator of the late Kilaga Ngelela. The objection that ought to have been considered by the Primary Court if any at that stage was whether the respondent was a *fit person* I have endeavored to explain above to administer the estate, or whether there was another interested person who is legally recognized to have the quality of being an administrator of the particular deceased person as opposed to the petitioner. As intimated earlier, the objection as to the listed properties came prematurely and the same should have come

and entertained after the administrator has been appointed, collected and listed the properties that he wishes to administer. The properties listed in Form No. I are yet to be the properties that have been endorsed by the court to be inventories by the administrator. It is a mere listing. The trial court ought to have let the administrator of the late Kilaga Ngelela contest with the administrator of the late Immaculata on the issue of properties and ownership where evidence shall be adduced and final determination made. By halting the process, the court actually prohibited the estate of the late Kilaga to be administered and overseen.

The appellate magistrate said that the administrator of the late Immaculata Nyorobi had locus stand to interfere with the appointment of an administrator of the deceased estate because the estate of the late Immaculata was threatened. That is a misconception because the locus of the appellant does not go into objecting the appointment of the administrator of the late Kilaga Ngelela. The appellant objected prematurely because there has to be someone legally recognized whom they can contest on the properties. The trial court should have not gone into the evidence of whether the listed properties are the same or whose properties are at that stage.

Furthermore I find the findings of the appellate court on the petitioner of the letter of administration for the late Kilaga Ngelela are unfounded. Firstly the appeal before him was on the halting of the appointment process by the trial court on the basis of the properties of the deceased. Secondly the petitioner was not contested on the basis of his competence and more still there is room for any person who has not been added to apply to the court either to be added or even to revoke the appointment of the administrator. I therefore find that he involved himself on the issues that were not for him to decide at that stage.

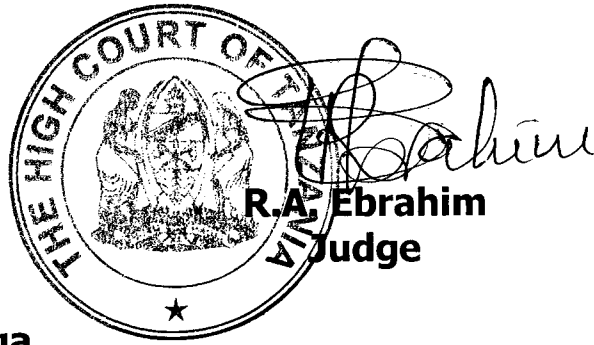
Given the above findings I find that the appeal is devoid of merits and I accordingly dismiss it. I uphold the decision of the appellate court only to the extent that the appointment of the Administrator of the Estate of Kilaga Ngelela should continue and of quashing and setting aside the decision and orders of the trial court.

Otherwise, I quash the order of the District Court of quashing and setting aside the proceedings of the trial court, ordering full involvement of the appellant on the appointment of the deceased estate and recalling afresh of the family/ clan meeting.

That being said it is hereby ordered as follows:

1. The decision of Primary Court of dismissing the appointment of the deceased estate pending the determination of another case is hereby quashed.
2. The trial Primary Court is hereby ordered to proceed with the hearing and determination of the appointment of the Administrator of the Estate of the late Kilaga Ngelela Estate from where it ended on 17.12.2016 as per the requirement of the law.
3. In considering appointment of the administrator, the trial court should not involve itself on the objection pertaining to the ownership or distribution of the properties. The administrators of the deceased shall have the opportunity to contest the properties and ownership on another avenue with jurisdiction to determine the same.
4. 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.



Shinyanga
18.01.2019