IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

(Kigoma District Registry)

AT KIGOMA

(PC) PROBATE APPEAL. NO. 1 OF 2020

(Arising from Kibondo District Court Probate Appeal No. 1 of 2019 Original Administration of Estate Application No. 8 of 2017 Kibondo Urban Primary Court.)

JULIETH SHEDRACK DAUDI..... APPELLANT

VERSUS

ABEL LAURENT LUKIMBILI..... RESPONDENT

JUDGMENT

Date of last order: 27/4/2020

Date of Judgement: 28/5/2020

Before: A. Matuma, J

The appellant herein was appointed administrix of the estate of her late husband Laurent Lucas Lukimbili who was an employee of Kibondo District Council.

She was appointed through Probate and Administration Cause No. 8 of 2017, at Kibondo Urban primary Court.

Her appointment was however nullified through Revision Cause No. 1/2018 following her misuse of the estate in question and in lieu thereof the respondent herein the elder son of the deceased was appointed. The Appellant was ordered to make good the misused estate.

The appellant who is a step mother to the respondent was aggrieved with the appointment of the respondent to administer the estate in question. She lodged an appeal to the District Court of Kibondo vide Probate and Administration

Appeal No. 1/2019 but she was unsuccessful hence this second appeal with six grounds whose main complaints are;

i. *That the two lower courts erred to appoint the respondent without assigning reasons for her disqualification.*
ii. *That the two lower Courts erred to appoint the respondent a step son of the deceased who has an interest to serve.*
iii. *That the two lower Courts erred to include children in heritance including the respondent while they have no legal status to inherit from the estate.*
iv. *That the District Court erred to apply retrospective effect in interpreting the law of the child Act No. 21/2009.*
v. *That the clan meeting which suggested and approved the respondent to petition for letters of administration was discriminatory as she was personally not invited.*
vi. *That the two lower Courts wrongly evaluated and assessed the evidence on record.*

At the hearing of this appeal both parties appeared in person. The appellant opted to adopt her grounds of appeal and shortly added that at the time she was appointed to administer the estate, she distributed it all and there is nothing to distribute. She stated that the only disputed estate for administration was a pension of the deceased from LPF amounting to **Tshs 34,561,000/=** which she dully distributed to the heirs including the respondent. She shown me a piece of paper for the Distribution so alleged.

The respondent joined hands with the appellant that in fact, the problem is the manner in which the appellant purportedly distributed the said pension to the heirs of the deceased.

He stated that there were three children of his young mother who were completely denied any share. These are Adelaila Laurent, Eveta Laurent and Grace Laurent. And that even the distributed amount was not whole declared. He added that the appellant in distributing the deceased's estate included her two children which were not born by the deceased but the appellant born them with another man whom she had remarried during separation between her and the deceased.

I would thus determine the grounds of appeal in line with the submission of the parties at the hearing of this appeal along with the trial Courts record.

As about the first ground of appeal, the appellant is lamenting for the appointment of the respondent without assigning reasons for her disqualification. I think this ground is devoid of any merit. The District Court in nullifying the appointment of the appellant stated the reasons that she misused the estate and discriminating other beneficiaries of the estate.

The District Court had also found that she again gave **Tshs 1,000,000/=** to person who was a stranger to the estate while leaving aside some children of the deceased who are protected under section 5 (2) of the Law of the Child and as per the decision in the case of **Elizabeth Mohamed versus Adolf John Magesa (2016) TLS 114.**

I have no reason to disturb this finding by **Hon. F.Y. Mbelwa – RM**. The reasons for her disqualification was thus given and they are legally tenable as an administrator who is discriminatory does not befit any appointment as the estate of the deceased should fairly be distributed to all heirs without discrimination.

The second ground is all about that the respondent being a step son of the deceased ought not to be appointed as he has an interest to serve. I am of the view that this ground has been misconceived.

The respondent is not a step son of the deceased but his biological son. Perhaps the appellant meant a step son to her. If so then the law is very clear as to who may be appointed as administrator of the estate of the deceased person. It is any person who is interested in the administration of the estate and is willing to do so. The Court can even appoint a third party to administer the estate as the administrator is not mandatorily be among the heirs. See **Sekunda Mbwambo versus Rose Ramadhani (2004) TLR 439.**

The respondent is thus not disqualified merely because he is the appellant's step son. In fact, he is an interested person in the estate whom the appellant herself recognized as the elder son of the deceased. The second ground of appeal is therefore dismissed.

In the 3rd ground of appeal, the appellant is lamenting that the lower Courts erred to include some children including the respondent in heritance of the estate while they have no legal status to inherit.

This ground need not detain me much as it was well analyzed by the District Court that it is a settled law that children should not be discriminated by way of birth as it used to be on children born out of wedlock. See **Elizabeth Mohamed's case (supra)**. Even though the appellant recognized them and that is why he presented a paper purporting to bear the names of all these children and the distribution she made to them. As such she is estopped to deny them in terms of section 123 of the Evidence Act, Cap 6 R.E 2002. But it is too on record that the deceased's clan recognized all these children as lawful children of the deceased as some were born before the appellant was married

to the deceased, some were born on subsequent traditional marriages during the existing marriage of the Appellant and some were even born at the time the appellant deserted the deceased, as she only came back after the death of the deceased who at the time was living with another woman with whom three issues were born. This ground therefore, too fails.

In the 4th ground of appeal, the appellant laments that the law of the child, 2009 should have not been interpreted retrospectively to cover children who were born before its enactment. I reject this ground and dismiss it right away. It is on record that some of the children were born by the deceased even before the appellant was married to him and were at all time been maintained by the deceased himself. They were not discriminated by a mere fact that they were born out of the Wedlock. Had the appellant intending to deny them, she should have done so during the life hood of the deceased so that they could settle the matter together. Her silence at all times and the fact that even the deceased's clan recognizes them all and that is why they even appointed the respondent to administer the estate in question, necessitates no any construction other than that all the children are entitled to the estate in question.

Most important is that it is not the lower Court who had interpreted the said law of the child as such but this Court vide **Elizabeth Mohamed** case (supra).

About the 5th ground of appeal that the appellant was not invited to the clan meeting which appointed the respondent, it is in evidence that the appellant was a wife of the deceased on a mere fact that she was married to him under Christian rights. But at all times of his sickness to death they were separated and only **Isabera Kagoma** was his concubine living with him to death. The appellant came back after the death just for inheritance and started discriminating who were born by the deceased and the person nursed him to

death. The appellant was fully involved but she was dishonest. She even gave a share of inheritance to two children she personally born out of wedlock during the separation. I therefore, dismiss this ground as well.

The last ground of appeal is all about evaluation of the evidence on record.

If I have to re-evaluate the evidence on record, I won't hesitate to declare the appellant a dishonest woman and unfit to be the administrix of the estate in question. She was under separation with the deceased prior to the death of the deceased. At that period, she born out two other children with another man as evidenced by **Raphael Lucas** the elder brother of the deceased. I even asked her if that fact was not true so that I could order for further evidence through DNA test but she was hesitating and at all times avoiding to reply thereof.

At that time the deceased was living with another woman Isabera Kagoma with whom he had issues and died when Isabera was pregnant. Since the appellant was Christianly married to the deceased, the deceased's family and his children did not discriminate her, they welcomed her back to share the estate and let her be administrix of the estate without objection.

But immediate after her appointment she first concealed the real pension amount from Tshs 34,500,000/= to 15,000,000/= only.

Even though after it was discovered that the pension was Tshs 34,500,000/=, she then took too huge share (a lion's share) without assigning reason. According to her own testimony she took **Tshs. 15,000,000/=** as her share, and gave to her own children including those she born out of wedlock who are not even covered by the law of the child as they are not children born by the deceased, a total of **Tshs 15,000,000/=**.

That makes a total of **Tshs 30,000,000/=** to be taken by her self and her own children including two who were not born by the deceased while distributing a very meager share of **Tshs 4,500,000/=** to the remaining eight (8) children of the deceased. The evidence on record was thus property evaluated and she was properly disqualified. This ground is thus as well dismissed.

I uphold the appointment of the respondent in administering the estate in question and order the appellant to surrender the **Tshs 30,000,000/=** she took with her children to the respondent for the redistribution fairly to all children and the appellant. The respondent shall however in redistributing the said sum put into consideration **Tshs 4,500,000/=** which he himself and other heirs were given meaning that he should deduct from their new share in the re-distribution. In case the appellant fails to surrender the said amount, her personal estate is liable to attachment to make good the estate as it was held in the case of **Sekunda Mbwambo (supra).**

Having said all these this appeal stands dismissed in its entirety with costs and the right of further appeal to the Court of Appeal is fully explained subject to the governing laws. It is so ordered.

A. Matuma
Judge
28/5/2020