

**IN THE HIGH COURT OF TANZANIA**

**(MTWARA DISTRICT REGISTRY)**

**AT MTWARA**

**PC CIVIL APPEAL NO. 9 OF 2019**

(Arising from District Court of Mtwara at Mtwara in Probate Appeal No. 1/2019)

Originated from Probate Cause No. 45/2018 at Mikindani Primary Court)

**RASHID ABDALLAH KILAMBWANDA.....APPELLANT**

**VERSUS**

**ABDUL ALLY MNAWA.....1<sup>ST</sup> RESPONDENT**

**ABREHEMAN ABDALLAH SULEIMAN.....2<sup>ND</sup> RESPONDENT**

**ASHA ABDALLAH SELEMAN.....3<sup>RD</sup> RESPONDENT**

18 & 24 June, 2020

**JUDGMENT**

**DYANSOBERA, J.:**

The point of contention is substantially centred on the estate (a house, piece of land and a farm) of the late Habiba Abdereheman Abdallah who met her demise on 3<sup>rd</sup> October, 2001. She was the mother of Shabia

Abdallah, Asina Abdallah, Jirani Abdallah and Esha Abdallah. The appellant Rashid Abdallah Kilambwanda was the husband of the deceased and foster father of the mentioned four issues. Before the Primary Court of Mtwara District at Mikindani in Probate and Administration Cause No. 45 of 2018, the appellant applied for letters of administration of the estate of his late wife. The above mentioned issues objected the grant on the ground that the appellant had forged the minutes and was not validly appointed by family members. The appellant admitted to have not been appointed by the members but asserted that he was the legal husband of the deceased and the objectors were mere foster children.

The trial court appointed the appellant together with Abdereheman Abdallah Suleiman, the 2<sup>nd</sup> respondent herein, to be administrators of the deceased's estate. Aside appointing the appellant and 2<sup>nd</sup> respondent, the trial Primary Court made the finding that:-

*"Nyumba, Kiwanja na Shamba alivyovitaja Rashid (the appellant) mali ya Habiba, hivyo siyo mali ya Habiba."*

The judgment was handed down on 31<sup>st</sup> October, 2018. The appellant was not satisfied with this decision and appealed to the District

Court vide Probate Appeal No. 1 of 2019 on three grounds. First that the trial court erred in law and in fact in determining issues of property of deceased prior to appointing the administrators. Two that the trial court erred in law and in fact in holding that the deceased did not leave behind the properties. Three, the evidence was not properly analysed.

In his judgment the learned Resident Magistrate dismissed the appeal after he found the first and second grounds of appeal lacking merit and abandoning the third ground.

Still aggrieved, the appellant has come to this court on the grounds almost similar to those he had advanced at the first trial District Court. When the appeal was called for hearing on 2<sup>nd</sup> June, 2020, the appellant appeared in person in the time, the respondents were represented by Mr. Shedrack Rweikiza, learned advocate.

Both the appellant and learned counsel for the respondents submitted in support and in opposition of the appeal, respectively.

Supporting the appeal, the appellant told this court that he married the deceased by Islamic rites and found her with the property she had inherited from her father. BAKWATA directed that he had the right to

inherit the property of his wife. He then referred the petition before the Primary Court. The appellant argues that his main complaint is the finding that the deceased had no property, the finding which, according to the appellant has no justification.

Opposing the appeal, Mr. Shedrack Rweikiza started his submission in responding to the 1<sup>st</sup> ground of appeal. He contended that the District Court took into account the legal requirements including the appointment of the two administrators and that the appointment was made before the resolution of the issue relating to the deceased's estate. A reference was made at paragraph one, 4th page of the trial court's judgment and Rule 8 (3) of the Primary Courts (Administration of Estates) Rules G.N. No. 49 of 1971 on dealing with disputes arising when the case is proceeding.

As regards the second ground of appeal, learned counsel submitted that the record is clear that the appellant failed to adduce evidence to support that the deceased left the said properties. He contended that there were mere assertions without proof. The Court was referred to page 2 of the trial court's judgment and stressed that what the appellant was testifying was mere hearsay. He cited rules 6 and 10(2) of the GN 312 of

1963 of the Magistrate Court's (Rules of Evidence in Primary Courts) to support his argument.

The court directed itself well in not falling into account the appellant's hearsay evidence. The appellant failed to prove his claims.

With regard to the third ground on the failure to evaluate the evidence adduced by the appellant, learned counsel believed that the record was in support of the fact that the trial Primary Court evaluated the evidence of both parties and came to the just decision. He contended that no exhibit to prove what the appellant asserted and the appellant failed to discharge his duty. He relied on the cases of **Lyamshore Ltd and I S. Niyanju V. Diyanje K and K** [1999] TLR 330 at page 333, **Barelia Karangirangi v. Asteria Nyalwambwa.**'

Learned counsel urged this court not to interfere with the concurrent findings of the lower courts and cited the case of **Alfeo Valentino v.R,** Criminal Appeal No. 92 of 2006 CAT at Arusha (Unreported).

In his rejoinder, the appellant reiterated his submission in chief and asked the court to do justice.

Having considered the records of the lower courts and the rival submissions, I am compelled to agree that the appeal has merit. It is true as stated by the learned counsel for the respondents that the District Court took into account the legal requirements including the appointment of the two administrators and that the appointment was made before the resolution of the issue relating to the deceased's estate. It is equally true that an appellate court should rarely interfere with the concurrent findings of the lower courts. Apart from the cited case of **Alfeo Valentino v. R**, (supra) cited by Mr. Rweikiza, there is also other case laws of the higher court on that authority. For instance, in the case of of **Amratlal Damodar and Another versus A. H. Jariwalla** [1980] TLR 31 had this to say:-

*"Where there are concurrent findings of the facts by the two courts, the court of appeal as a wise rule of practice, should not disturb them unless it is clearly shown that there has been a mis apprehension of evidence, a miscarriage of justice or violation of some principle of law or procedure".*

In the case under consideration, I am satisfied that there has been a miscarriage of justice and violation of some principles of law or procedure. I will explain. The issue, however, is whether the court was justified in

declaring what was and what was not the property of the deceased. I think the appellant is right in his complaint that the trial court had no mandate to declare that the house, the piece of land and the farm the appellant had mentioned were not the property of the deceased. Likewise, the District Court was in gross error in endorsing that faulty finding of the trial Primary Court. This is so because, a probate court or a court granting letters of administration, for that matter, is not concerned with title to property nor does it decide any question of title of the existence of the property itself. The grant of the probate with a copy of the will annexed or the grant of letters of administration on intestacy confers the executor or administrator the power to deal with the deceased's estate according to law. Declaring which was not the property of the deceased as the trial court did was assuming the mandate of the appointed administrators, the power the trial court did not possess.


The appellants' complaints before this court and in the first District Court have legal justification.

I allow the appeal, quash the decisions of both the District Court in Probate Appeal No. 1 of 2019 and the Primary Court in Probate and Administration Cause No. 45 of 2018 on the finding that the house, the

piece of land and the farm the appellant had mentioned did not belong to the deceased and I set them aside. The appellant and his fellow should proceed with the administration of the deceased's estate by marshalling all the deceased's estate, paying the debts, if any, and distribute the rest to the beneficiaries or heirs/ heiresses.

Each party to bear his own costs.




  
W.P. Dyansobera

JUDGE

24.6.2020

This judgment is delivered under my hand and the seal of this Court on this 24<sup>th</sup> day of June, 2020 in the presence of the appellant in person and Mr. Shedrack Rweikiza, learned counsel for the respondent.



  
W.P. Dyansobera

JUDGE