IN THE HIGH COURT OF TANZANIA

MWANZA DISTIRCT REGISTRY

AT MWANZA

PC. PROBATE APPEAL NO. 01 OF 2020

(Original from Probate and Administration Cause No. 14/2017 at Sengerema Urban Primary Court Probate Revision No. 03/2018 of the District Court of Sengerema)

MTAKI MAINGU .....APPELLANT

VERSUS

NYAPILYA MAKUKE..... RESPONDENT

JUDGMENT

28th May & 11th August, 2020

TIGANGA, J

On 07/06/2018 Nyapilya Makuke, the respondent was appointed as administratrix of the estate of the late Laurence Maingu Mtaki, the deceased in Probate Cause No. 44 of 2017 before Sengerema Urban Primary Court of Sengerema District.

Before she was appointed, her application was objected by Mtaki Maingu Mtaki, one of the sons of the deceased but from another wife not of administrix. After the administratrix was appointed to administer the estate, on 04/07/2018, a period of less than a month from when she was appointed, the objector Mtaki Maingu filed an application for revision under section 22 (1) and (2) of the Magistrates Courts Act [Cap 11 RE. 2002] and any other enabling provision of the law. In that application, the District

ORIGINAL

Court was moved to call for and examine the records of proceedings in Probate Cause No. 44/2017, to satisfy itself as to the correctness legality and propriety of the findings, the proceedings and judgment recorded and passed by the said court, and also to satisfy itself as to the regularity and procedure of the proceedings of the said subordinate court.

The other prayers were that, the court be pleased to find that the purported will which was heavily relied upon by Sengerema Urban Primary Court in reaching the decision herein challenged is invalid, void and untenable in law, and thus the decision reached based on it, was uncalled for, unreasonable and unjustifiable in law.

The reasons as to why the applicant in that application asked for revision are that, **first**, the will relied upon by the trial Primary Court was forged, **second,** that the minutes which the trial court based was not of the clan but of the family thereby excluding other members of the clan, **third**, that the purported will included the properties of other persons which were not the properties of the deceased, therefore not part of the Estate and last that same of the properties were left out without being mentioned by the administratrix.

The learned Resident Magistrate in the District Court found nothing to fault in the proceedings and findings of the trial court; she dismissed the revision for that reason.

Aggrieved by the decision, the appellant advanced three grounds of Appeal which for purposes of easy reference they are hereunder reproduced.

1. That, the appellant District Court grossly erred in law by upholding the decision of the primary court considering the illegalities of the will which was tendered at the trial court and admitted as exhibit.
2. That the Appellant District Court magistrate misdirected herself by upholding the decision of the primary court on the reason that the appellant ought to have objected the appointment of an administration at the trial court without considering the facts that the Appellant had no dispute with the appointment of an Administratrix. but had dispute on the legality of the purported will of the deceased.
3. That, the Appellate District Magistrate misdirected herself by upholding the decision of the primary court on the reason that the Appellant ought to have objected the appointment of the administratrix at the trial court without considering the fact that the Appellant was a witness at the trial court and he objected the admission of the will hence he could not file new objection proceedings at the same court.

He prayed this court to grant the following orders;

i. To allow the appeal by setting aside the decision of both lower courts an admission of the purported will of the late Laurence Maingu Mtaki.
ii. To declare, that they will tender at the trial court is in valid, void and untenable in law.
iii. Costs of this case from courts bellow to this court be borne by the respondent.
iv. Any other relief(s) it may deem fit and just to grant.

ORIGINAL

By the leave of the court, the appeal was argued by way of written submissions.

The submissions were filed as ordered, with regard to the first ground of Appeal. The counsel for the appellant Mr. Constantine Ramadhani, advocate submitted that before both the trial Primary Court grounds.

Firstly, that the will was invalid for not being witnessed by at least two witnesses. Secondly, that the testator in his will has bequeathed some clan properties which he never owned solely, and thirdly, that the purported will was not the last declaration of the deceased as it is surrounded with fraud suspicion. On the first limb, he supported his argument by the decision of the case of **George A. Mmari vs Anande A. Mmari,** (1995) TLR 146 (HC) in which he submitted that;

> *"for a will drawn up by a literate person to be valid, it must be attested besides the wife (wives) by at least two persons of whom one must be a relative of the deceased".*

He submitted that in this case the will was attested by single witness one Hitler G. Mtabi, which facts vitiated the will. He submitted that, this is in line with Rule 5 and 19 of the Local Customary Law (Declaration) (No. 4) Order (1963) GN No. 436 of 1963, the 3rd schedule, which requirement according to him, was not complied with in the will purportedly relied upon by the trial court.

On the second limb, that the will bequeathed clan properties which did not solely belong to the testator, he submitted that according to paragraph D and E of the purported will in which the testator confessed

that the house located at Ushashi Jineri Bunda and a farm at Kizugwangoma village in Sengerema District are clan properties but he went on to bequeath them to his heirs.

It is his submission that these acts vitiated or invalidated the said will as the testator can only legally bequeath his legally owned properties not otherwise.

The appellant also questioned the validity of the will as it is purported to be surrounded with fraud, in the sense that, it was not executed by the deceased that is why the respondent failed to produce it to the family members immediately after the death of the deceased. He further, submitted that Hitler G. Mtabi who purported to have witnessed the deceased executing the alleged will was not called in evidence following the appellants objection on the admission of the said will, thus the alleged illegalities remained unresolved to date. He cited the case of **John Ngomoi vs Mohamed Ally Bofu** [1988] TLR 63 HC, where this court held that the will surrounded by fraud is void.

He submitted that both courts below failed to address this issue and resolve it. In the circumstances, he asked the court to take the deceased to have died intestate and therefore the administration of the Estate to be administered as such.

Regarding the second and third grounds of appeal, which are to the effect that, the District Court misdirected itself when it held that the appellant ought to have objected the appointment of the respondent as administratrix at the trial without taking into account that the appellant had not disputed the appointment but the validity of the will. He insisted that

ORIGINAL

the appellant was not a party to the matter before the trial court, but was involved in evidence as a witness SM4. It is his further submission that in law, the proper remedy available for a third party who wants to challenge the decision or order of the court is by way of revision.

To support his argument on that point, he cited the case of **Tanzania Railways Corporation vs Aljabirri Company,** Civil Application no 05 of 2003, CTA at Mbeya. He submitted that the issue before the trial and District court was the legality and validity of the will, he submitted that, this fact is reflected in the affidavit and the argument before the District Court as well as his evidence before the trial Primary Court, and that the District Court was supposed to confirm himself on that issue.

According to him, failure of the trial magistrate to confine herself on the issue in controversy left the issue in dispute unattended and un resolved, consequence of which is provided in the case of the **National Insurance Corporation and Another vs Sekulu construction Company** (1986) TLR 157 (CA) in which it was held *inter alia* that, failure to address the issue in controversy and decide them renders the decision null and void.

In further support of the preceding legal position, he cited the decision in **Kapapa Kumpindi vs. The Plant Manager Tanzania Breweries Limited,** Civil Appeal No. 32 of 2010 CAT at Mwanza, that predicating the division on the issue not raised, argued or addressed or conversed by the parties renders the decision to be bad in law and liable to be avoided.

He submitted further that, even if we tend to believe that the will was valid, something he dispute, yet still the respondent was not properly appointed as he was supposed to apply under section 24 (1) of the Probate and Administration of Estate Act [Cap. 352 RE. 2019] and the Probate Rules, especially rule 33.

He submitted that the learned appellate magistrate before the District court, erred in her findings, he asked that, the appeal be allowed and the will be declared invalid, null and void, instead the in the alternative the matter be remitted back to the District Court for fresh hearing before another magistrate.

In reply the respondent submitted that the trail court ordered the clan meeting to be conducted that was following the objection regarding the legality of the will. The ordered clan meeting was conducted and resolved that that the deceased estate be administered in accordance with the disputed will. Under that resolution it was inevitable for the trial court to consider the contents of the said will, and in so doing, as it was clearly stated at the first paragraph of the last page of the trial court judgment that the decision reached was based on what was agreed in the clan meeting.

It was further submitted that after the clan meeting all that was agreed were used as evidence including the will itself therefore it is not proper for the appellant to challenge his own evidence.

Regarding the 2nd and 3rd grounds of appeal, particularly in respect of the house in Ushashi Jineri Bunda in Mara Region and a farm at Kizugwangoma village in Sengerema District, he stated that the appellant

ORIGINAL

being a heir has no *locus standi* to claim ownership of the said properties on behalf of other person who are not the party in this matter. He reminded the court of the principle of common law that a person bringing the matter to court should be able to show that, his right or interest has been breached or interfered with. As it was stated in the case of **Haji Chande Said vs. Khorshed Abdulmajid Mula & International Commercial Bank** (T), Land Case No. 76 of 2011, High court of Tanzania at Mwanza (unreported) whereby B.R. Mutungi, J, while relying on the decision of **Lujuna Shubi Ballonzi senior Vs. The Registered Trustees of Chama cha Mapinduzi,** (1996) TLR, in which it was held *inter alia* that,

> *"A person bringing this matter should be able to show that his right or interest has been breached or interfered with"*

He submitted that, it was expected that all those persons whose interests have been interfered with were to come forward and institute land dispute against the administratrix before the competent court or tribunal.

In buttress that point, he submitted that the appellant has failed to prove to what extent the said will, affects his right as heir of the estate. Instead of proving how his interest has been affected, to the contrary it is his conducts which have proved that he intends to deprive the interest of other heirs. Justifying that statement, he submitted that the appellant's unjustifiable action in court has prevented the admnistratrix to fulfill her duties from 2017 when she was appointed, something which prevented the heirs from benefiting the estate.

ORIGINAL

According to the counsel, the respondent was properly appointed and the challenged will was blessed from the clan meeting so as to simplify in a ascertaining heirs and the deceased's properties. That was after members had agreed that it does not affect any heir including the appellant as he is recognized among the heirs. It was further submitted that, if there are properties which were not mentioned, it was the duty of the appellant to collaborate with other heirs and the administratrix in ascertaining the deceased's properties and divide the same to the recognized heirs.

He in the end prayed the arguments to be sustained and the appeal be dismissed with costs as it does not reveal any novel point of law or facts worthy to be considered by this court to nullify the lower court decision, reached in accordance with the interest of all heirs, including the appellant. That marks the argument hence judgment.

From the above summary as reflected by the records and the arguments by the parties. The following are the facts which can be deduced from the evidence on records. When the respondent petitioned before the trial Primary Court to be appointed as administratrix of the estate late Laurence Maingu Mtaki, she was objected by the appellant on three main grounds as follows;

Firstly, that he was suspecting that the respondent would be biased, in her duty as administratrix of the estate.

Secondly, that the purported clan meeting which appointed the respondent and recommended her to be the Administratrix did not involve clan members, but family members. In that, he said some clan members including him were not informed to attend.

ORIGINAL

Thirdly, that the procedure used in recommending the Administratrix was not transparent.

The trial Primary Court sustained his objection, and ordered that the clan meeting which would include all family and clan members should be conducted to discuss the pertinent issues pertaining in that case. That is according to the ruling dated 20th day of April, 2018, which gave them one month to submit the minutes of the meeting with resolution on the pertinent issues.

Following that directive, on 19/05/2018, the clan meeting was conducted which involved among other people, the appellant. That meeting also resolved that the respondent be appointed as the Administratrix of the estate.

It is important here to note that the issue of the validity of the "will" did not arise, this means the validity of will was not among the objection raised.

After the minutes of meeting were submitted to the trial Primary Court, the court heard the merits of the application for appointment of the recommended administratrix of the estate, in which case all family members testified. All of them supported the appointment of the respondent, except the appellant who did not challenge the appointment but for the first time challenged the validity of will on the ground that it included the properties which were not owned by the deceased.

The trial court basing on the evidence, appointed the respondent to administer the estate of the late Laurence Maingu Mtaki.

ORIGINAL

As earlier on pointed out that the appointment did not satisfy the appellant, he filed Probate Revision No. 03/2018 before the District Court of Sengerema in which it was held that there was no revisionable ground established.

As also already indicated that what was challenged in this appeal is not the appointment of the respondent, but the validity of the "will" that it was not witnessed by at least two persons also that in that "will" the testator bequeathed the properties of other persons. The third ground was that the alleged "will" was suspicious that the same was fraudulently made.

From the above analysis, it is obvious that, the appellant did not challenge the "will" before the trial primary court, when he filed his objection. The indication of challenging the "will" was seen in the evidence he gave as PW4 which cannot be taken as the challenge of the "will". That being the case, it was therefore not proper for him to raise the issue before the District Court in revision proceedings, without first challenging it in the objection proceedings before the trial court. Raising the issue in revision is nothing but an afterthought.

As the general principle, a "will" can be challenged through special proceedings instituted by a person who believes and has evidence to prove that;

i. The "will" was not properly signed and witnessed, which fact when proved can be a base for invalidation of the "will",
ii. The testator had no capacity (mental capacity) of making "will" at the time when he purportedly made such "will",
iii. The testator was unduly influenced into making a "will", and

iv. The "will" was procured by fraud.

All these must be alleged at the court before which the probate has been filed and proved before that court. In this case, as earlier on pointed out, the "will" was never challenged before the trial Primary Court, what the appellant did was to raised the issue in the evidence he was giving in support of the petition of appeal, which can not be taken to be challenging the "will".

The issue that the testator included the property of other person is also a valid reason, however it is expected that the same be filed by those persons whose properties have been erroneously included and bequeathed by the testator, and they may do so by filling a suit against the administratrix.

In this case, it was expected that those whose properties have so included, ought to have came forward and challenged, not the "will" but the inclusion of their property. The appellant was expected not, being a heir to come and speak for the persons who have interest in the bequeathed properties.

That being the case, I find that the District court was justified to find that there was nothing to revise.

That said, I hereby dismiss the Appeal for want merits.

It is so ordered.

DATE at **MWANZA** this 11th day of August 2020.

J. C. Tiganga
Judge
11/08/2020

Judgment delivered in the presence of the parties. Right of Appeal explained and guaranteed

J. C. Tiganga
Judge
11/08/2020

THE HIGH COURT OF TANZANIA
MWANZA

ORIGINAL