THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MBEYA)

AT MBEYA

PROBATE APPEAL NO 03 OF 2020

(From the District Court of Rungwe at Tukuyu in Probate Appeal No. 01 of 2019. Originating from Kandete Primary Court in Probate and Administration Cause No. 01 of 2019)

HEZRON MWAKINGWE.....APPELLANT

VERSUS

ELLY MWAKYOMA.....RESPONDENT

JUDGEMENT

Date of Last Order : 18/06/2020
Date of Judgement : 26/08/2020

MONGELLA, J.

The appellant herein is challenging the decision of the District court which upheld the decision of the trial primary court that was decided against him. In his petition of appeal he raised eight grounds to wit:

1. *That the first two appellate courts (sic) erred in law to entertain an application for appointment of an administrator of the estate while it was time barred.*

2. *That the learned first appellate Magistrate grossly erred in law for considering and addressing only the second ground of the*

appellant's appeal and left the other two grounds of appeal unaddressed without assigning any reason to that effect.

3. *That the first appellate district court erred in law by treating the appeal as proceedings for revocation of an administrator of the estate by basing its findings and decision on the grounds and circumstances of revocation while knowing it has no jurisdiction so to do.*

4. *That the first appellate court erred in law for failure to re-evaluate the evidence and findings of the trial court that concerns the factual nature of relationship of the appellant, the respondent and the deceased in appointing the respondent who has no interest over the estate.*

5. *That the first appellate court erred in law for failure to consider the proper and required family/clan meeting of the deceased family for the nomination of the respondent as an administrator was not convened.*

6. *That the first appellate court erred in law for failure to order its discretion (sic) under section 24 (1) (b) to order suspension of the probate proceedings in the trial court pending determination of the appeal.*

7. *That the lower courts erred in law for failure to consider the fact that there is a dispute over ownership of the alleged deceased estate that awaits determination.*

8. *That the lower courts erred by disregarding the hostility between the appointed administrator and the beneficiaries of the estate of the late Ngalipo Mwandelile Sambona.*

The brief facts of the case are as follows: the respondent, Elly Mwakyoma applied before Kandete primary court to be appointed the administrator of the deceased's estate, one Ngalipo Mwandelile Sambona. The appellant, Hezron Mwakingwe objected the application on the ground that the respondent was not a close relative of the deceased. He was however, unsuccessful. Dissatisfied by that decision, he appealed to the District court of Rungwe at Tukuyu whereby he was again unsuccessful as his appeal was dismissed. Still aggrieved he has preferred this second appeal on the above listed grounds.

The appellant enjoyed legal services of Mr. Ignas Ngumbi, learned advocate while the respondent appeared in person. For interest of justice for the unrepresented party, the appeal was argued by written submissions.

Mr. Ngumbi first informed this Court through his submission that he had abandoned the last ground of appeal and proceeded to argue on the seven grounds. Arguing on the first ground, he submitted that it is on the records of the lower courts that the deceased passed away on 18th August 2018, but the respondent petitioned for letters of administration on 02nd January 2019 whereby 138 days had elapsed. He contended that there is nothing on record showing that the respondent applied for extension of time and was granted the same for filing the probate matter

after the expiration of 60 days prescribed under Item 21 Part III of the Schedule to the Law of Limitation Act, Cap 89 R.E. 2019. He contended that the District court failed to address the said irregularity. He cited the case of ***Ramadhan Said Abasi Kambuga & 2 Others v. Mbaraka Abasi Kambuga***, Probate and Administration Appeal No. 1 of 2015 (HC at Sumbawanga, unreported) to support his argument. He concluded that the primary court had no jurisdiction to entertain a petition that was time barred and the findings, decree and orders made therein were a nullity for want of jurisdiction.

Mr. Ngumbi argued collectively on ground two and six. He submitted that the record of the District court of Rungwe shows that the appellant raised three grounds of appeal. However, when the appellate Magistrate was disposing the appeal he decided to address only the second ground leaving other grounds unaddressed without according any reasons. He was of the view that this was incorrect as a matter of principle because courts are bound to consider and decide on parties' arguments and set out reasons for accepting or rejecting the same. He cited the case of ***Tanzania Breweries Limited v. Anthony Nyingi***, Civil Appeal No. 119 of 2014 (CAT, unreported) to buttress his argument. He added that the District court failed to exercise its discretion under section 24 (1) (b) of the Magistrates' Courts Act, Cap 11 R.E. 2019 by ordering suspension of the probate proceedings in the trial court pending determination of the appeal. He referred the court to the case of ***Mbogo and Another v. Shah*** [1968] 1 EA 93 and that of ***Amrattal D. M t/a Zanzibar Silk Stores v. A. H. Jariwala t/a Zanzibar Hotel*** [1980] TLR 31.

On the third ground, Mr. Ngumbi argued that basing on the entire judgment of the first appellate court, the appellate Magistrate misdirected himself by treating the appeal as proceeding for revocation of an administrator of estate while knowing that, the appeal before him was totally on a different premise. He contended that in so doing, the court failed to take into account the grounds raised by the appellant and address on them, something which caused miscarriage of justice on the part of the appellant. He referred the court to the case of ***Mbogo & Another*** (supra) and ***Amrattal*** (supra).

On the fourth ground, he argued that basing on the evidence in the trial primary court, it was undisputed that the respondent is the deceased's cousin. He said that the appellant disputed his petition as administrator of the deceased's estate because he had no interest in the deceased's estate. He referred to the case of ***Sekunda Mbwambo v. Rose Ramadhani*** [2004] TLR 439 which held that the administrator may be anyone but the primary consideration should be that, "one holds an interest in the deceased's estate." He referred the court to the case of ***Naftary Petro v. Mary Protas***, Civil Appeal No. 103 of 2018, (CAT at Tabora, unreported) in which the term "interest in the deceased's estate" was explained. He said that, the respondent being the cousin of the deceased had no interest in the deceased's estate and did not adduce any evidence to that effect.

Arguing on the fifth ground he said that it is not disputed that there is no provision of the law governing matters of probate and administration which provides for mandatory convening of the clan/family meeting before petitioning for administration of the deceased's estate. However,

he argued that it has been a binding practice encouraged by courts. To buttress his point he referred to the case of ***Imelda Yakobo Mlekwa v. Andrea Peter***, PC Civil Appeal No. 28 of 2017 (HC at DMS, unreported). He argued that the primary court disregarded the fact that the clan meeting had 10 members who were not proper for discussing and making decisions because some of the members, like the appellant were not called to the said meeting. He was of the view that the respondent was chosen by the meeting that was not properly constituted.

Finally on the seventh ground, he argued that the lower courts disregarded the fact that during the proceedings before the trial primary court, there was Land Appeal No. 25/2019 arising from Land Case No. 12/2018 which was pending before the District Land and Housing Tribunal of Rungwe at Tukuyu. The said case involved ownership of the deceased's estate. He contended that the lower courts erred in granting letters of administration basing on the property subject to litigation in the Tribunal.

The respondent made a brief reply to the appellant's submission. Responding to the issue of time limitation he contended that, as we stand, there is no legal position which harmonizes the conflicting decisions of the High Court. He argued that there are so far two schools of thought. He said that the first is on the position that there is no limitation in filing an application for letters of administration in the primary court provided in the case of ***Majuto Juma Nshauz v. Issa Juma Nshauzi***, Civil Appeal No. 9 of 2014 (unreported). The second school of thought, he said, is to the effect that there is time limit in filing an application for letters of administration in the primary which was held in the case of ***Ramadhani Said Abasi***

Kambuga & 2 Others v. Mbaraka Abasi Kambuga (supra), cited by Mr. Ngumbi.

He challenged the appellant's reliance on Item 21 of part III of the Schedule to the Law of Limitation Act. He argued that this provision of the law is applicable where the law is silent on the issue of limitation on a particular matter. He contended that the matter at hand is regulated under the Local Customary Law (Declaration) Order (1963), No. 4, G.N. No. 436 of 1967. He particularly referred to the second schedule which provides that "*the estate of the deceased may be distributed as soon as possible, if the beneficiaries have no needs for the estate to be distributed early, there is no need to distribute early.*" Basing on this provision he was of the view that the provisions of the Law of Limitation Act cannot apply in the case at hand.

On the ground that the first appellate court disregarded the other grounds of appeal, the respondent simply stated that the ground lacks merit because all the grounds of appeal were addressed by the first appellate court. He argued that the appeal was for challenging the legality of the overruled objection raised by the appellant at the trial court and the same was very well addressed by the District court. He further contended that this is a new ground as it was not raised during the appeal in the District court and thus cannot be entertained by this Court. He cited the case of ***Festo Domician v. The Republic***, Criminal Appeal No. 477 of 2016 (CAT, unreported) to support his position.

Mr. Ngumbi made a short rejoinder to the respondent's submission. On the issue of limitation he conceded that there are two positions of the law set by this Court. However, he contended that the position set in ***Ramadhani Said Abasi*** (supra) is good law because it is illogical to imagine a situation where there are no time limits in courts of law. He also argued that this decision is very recent compared to the other. He cited the case of ***Zahara Kitindi & Another v. Juma Swalehe & Others***, Civil Application No. 4/05/2017 (unreported) which ruled that in case of conflict between decisions of the Court on the same point, the one which came later should reign.

In addition, he challenged the applicability of the Local Customary Law (Declaration) Order contended by the respondent arguing that the same is not relevant to the matter at hand as it provides for distribution of the deceased's estate and not limitation of time for applying for letters of administration.

Mr. Ngumbi as well challenged the argument by the respondent that the appellant has raised new issues. He argued that this appeal is based on the competence of the findings of the appellate District court on points of law which can be raised at any stage. On those bases he distinguished the case of ***Festo Domician*** (supra).

After considering the rival submissions from both parties I shall deliberate on the grounds of appeal one by one.

Starting with the first ground on limitation of time, it is my settled view that there is no specific provision of the law expressly providing for limitation of time in filing applications for letters of administration. In my view, probate matters are peculiar in their nature and thus cannot be subjected to the general limitation under Item 21 para III of the Law of Limitation Act. This is because family members have to finish the mourning and decide on who is to administer the deceased's estate. Sometimes relatives may wish to have time to cool off from the loss of their loved one before embarking on the properties left behind.

In my view, if time limitation is to be entertained under such applications the beneficiaries shall be subjected to unnecessary hardships by seeking first extension of time. I am thus in line with the decision in ***Majuto Juma Nshauz*** (supra) on the position that there is no limitation of time in filing application for letters of administration in the primary court. This in fact has been the practice in primary courts whereby applications of this nature are admitted regardless of the time limit. Mr. Ngumbi argued that this Court should follow the decision to the effect that applications of such nature are subject to limitation of time because it is the latest. With all due respect, the said decision is from a fellow High Court judge of which I am absolutely not bound to follow no matter how recent the same is. I thus find no merit on this ground and dismiss it accordingly.

On the second ground, the appellant claims that the District court addressed only one ground of appeal and left the rest unattended. I have gone through the record and found that the appellant raised three grounds of appeal. The 1st and 2nd grounds however, present the same

thing as they talk of the respondent being appointed by the family/clan meeting while he is not a close relative and has no share or interest in the deceased's property. The District court in fact dealt with this issue. The third ground was to the effect that the appellant was not involved in the family/clan meeting. I have gone through the trial primary court records and found that this issue was not raised and canvassed. It was thus a new issue raised in the District appellate court and it was therefore correct not to deal with it. See: ***Farida and Another v. Domina Kagaruki***, Civil Appeal No. 136 of 2016.

Mr. Ngumbi argued that the issue was a legal issue thus it could be raised at any stage. I however, do not subscribe to his position. There is no law that provides for holding of the clan/family meeting and much less for the Coram of such meeting. The courts have held the same to be a good practice, but have not held it to be a mandatory procedure of which if not adhered to has an effect of vitiating the proceedings in probate and administration of estates. See: ***Elias Madata Lameck v. Joseph Makoye Lameck***, PC Probate and Administration Appeal No. 1 of 2019 (HC at Musoma, Kahyoza, J. reported at Tanzlii). Therefore, in my considered opinion, though no reasons were assigned, I find the omission by the District court not fatal basing on the observation I have made herein. The deliberation I have made on this ground also determines the issue raised in ground five of the appeal. Both grounds stand dismissed.

With regard to ground six, Mr. Ngumbi argued that the District court failed to exercise its discretion under section 24 (1) (b) of the Magistrates' Courts Act to order a suspension of the probate proceedings in the trial court

pending determination of the appeal. With all due respect, I find this ground being misconceived. The provision first of all is not mandatory, if the appellant wished for such orders to be invoked he should have made a formal application to that effect. Second the provision talks of suspension of execution of the decision or order appealed against and not suspension of proceedings as misconceived by the appellant and his advocate. This ground crumbles down as well.

With regard to the third ground, I have read the judgment of the District court and I find this ground of appeal misconceived. In fact, the District court dealt with the ground that the respondent was not a close relative and ruled that there is no law that requires the administrator to have an interest in the estate. The issue of revocation of administrator was brought up by the court only to explain the steps that can be taken if the appointed administrator is no longer suitable. In my considered view, the Hon. District court Magistrate did not treat the case as one of revocation. He pointed on the issue albeit in passing. This ground is as well dismissed for lack of merit.

To this point I wish to deliberate on ground seven before going to ground four, which shall be last. On this ground, Mr. Ngumbi argued that it was an error for the lower courts to proceed with the application of letters of administration while there was a land case pending involving the deceased's estate. I find this ground also totally misconceived. In my settled view, the pendency of a case involving the deceased's estate does not bar proceedings in probate or administration of estates. In fact, an administrator or executor ought to be appointed for him/her to step

into the shoes of the deceased for the particular case to proceed. This ground thus lacks merit and is dismissed in its entirety.

Coming to ground number four, I agree with the appellant that for one to be appointed an administrator of the deceased's estate in the primary court, he/she has to have an interest in the deceased's estate. This is in terms of sub paragraphs (a) of paragraph 2 of the Fifth Schedule to the Magistrates' Courts Act. The Court of Appeal in the case of ***Naftary Petro v. Mary Protas***, (supra) cited by Mr. Ngumbi, explained what the phrase "a person interested in the deceased's estates" entails. The Court stated that it should be considered in terms of "beneficial interest" which can include an heir, a spouse, a devisee (one bequeathed the property by will), or even a creditor of the deceased.

In the matter at hand, I took the liberty to summon the parties so that they could explain their relationship with the deceased. This is because the records indicate that the deceased did not leave behind any children of her own. The appellant stated that the deceased is his aunt from his father's side, whereby his grandfather (the father of his father) and the father of the deceased are siblings. On the other hand, the respondent stated that the deceased is his cousin whereby his father and the mother of the deceased are siblings. He admitted that he did not have any interest in the deceased's estate as he is not an heir. However, he stated that he was appointed by the family/clan to administer the deceased's estate on behalf of one Juma Mwakilasa and Jones Mupwa, who are the deceased's children in the sense that they are children of the deceased's sister.

Considering the above facts, I am of the view that both parties are not close relatives to the deceased to the extent of claiming an interest in the deceased's estate. This is because the appellant traces his connection to deceased from his grandfather who is a brother to the deceased's father. The relationship is thus remote. Given the fact that the deceased left children through her sister, I consider those children, that is, Juma Mwakilasa and Jones Mupwa, as mentioned by the respondent, to be persons with interest in the deceased's estate compared to the appellant. Having observed as such, I find both parties not having an interest in the deceased's estate. The appointment of the respondent by the clan/family meeting and endorsement by the primary court was a nullity. The respondent on the other hand is also fighting a losing battle because in the presence of Juma Mwakilasa and Jones Mupwa, he cannot claim to have a share in the deceased's estate to the extent of demanding to be involved in the family/clan meeting or challenging the appointment of an administrator to that effect.

Before I pen down, I wish to point out that under sub paragraphs (b) of paragraph 2 of the Fifth Schedule to the Magistrates' Courts Act, a neutral person can be appointed by the primary court to administer the deceased's estate either of its own motion or on an application by any person interested in the administration of the estate. The provision empowers the court to appoint an officer of the court or some reputable and impartial person able and willing to administer the estate either together with or in lieu of an administrator appointed under paragraph (a) of the same provision. Under the circumstances, it is my opinion that Juma Mwakilasa, and Jones Mupwa, whom have been mentioned in the

record to be closely related to the deceased and thus highly interested in the estate, can make an application for a neutral person to be appointed to administer the estate if they feel they need assistance on the same.

Having observed as hereinabove, I hereby quash the decision of both lower courts and nullify the appointment of the respondent as the administrator of the deceased's estate. Being a probate matter, I make no orders as to costs.

Dated at Mbeya on this 26th day of August 2020.

L. M. MONGELLA

JUDGE

Court: Judgement delivered in Mbeya in Chambers on this 26th day of August 2020 in the presence of both parties and Mr. Jerinus Mzanila, learned advocate, holding brief for Mr. Ignas Ngumbi for the appellant.

L. M. MONGELLA
JUDGE