IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF KIGOMA

AT KIGOMA

APPELLATE JURISDICTION

(PC) PROBATE APPEAL NO. 2 OF 2019

(Arising from Probate Appeal No. 1/2019 of the District Court of Kasulu at Kasulu before I.D Batenzi- RM dated 29.11.2019, Original Probate Cause No. 2/2019 of Kasulu Urban Primary Court before R.F. Mtuli dated 24.1.2019)

ADBUL AZIZ HUSSEIN NTUMILIGWA .....APPELLANT

VERSUS

YUNUS HUSSEIN NTUMILIGWA.....RESPONDENT

JUDGMENT

Date of Last Order: 11/3/2020

Date of Judgment: 30/3/2020

Before Hon: A. MATUMA -JUDGE

Both the appellant and the respondent are the children of the late Hussein Ntumiligwa. The appellant had petitioned for and granted letters of administration of the estate of the late Hussein Ntumiligwa in the Primary Court of Kasulu Urban. The Respondent had entered appearance as an objector. The trial Court however overruled the objections and proceeded to appoint the appellant as administrator of the estate in question.

The Respondent appealed to the District Court and the District Court had the view that the appointment of the appellant at the trial Court contravened the long standing practice that clan meeting is to be convened to suggest the would-be administrator of the estate. It thus nullified the appellant's appointment hence this appeal with four grounds of appeal.

Mr. Sadiki Aliki learned advocate for the appellant argued the 1st, 2nd and 3rd grounds of appeal together in that the District Court erred in law to nullify the appointment of the appellant merely because the respondent and some other relatives did not attend the clan meeting which appointed the appellant to petition for letters of administration. He argued that there is no law that requires in every Probate Case, clan meeting to be convened before one petition for letters of administration. He submitted that in some cases, the family are at grudges and it is impossible for them to convene a meeting.

The learned advocate finalized his submissions on the last ground of appeal that the District Court having nullified the appointment of the administrator of the estate in question left the estate of the deceased un-administered and putting it in danger of being misused.

He thus called this Court to quash the findings of the District Court and restore that of the Primary Court so that the deceased's estate is administered.

On his party Mr. Abulkheir Ahmad learned advocate opposed this appeal and argued that the appellant has signs of unfaithfulness which started even during the life hood of the deceased.

He however conceded that there is no law that necessitates a clan meeting to be conducted before one petitions for administration of the estate in the Primary Court.

Frankly speaking, this is one of the cases in which the District Court unnecessarily quashed the decision of the Primary Court. I say so because the respondent had a major complaint that there was no clan meeting

which suggested the appellant to petition for letters of administration. The District Court in rejecting this ground held; -

"First of all, I wish to clearly put that the Probate Act cited by Mr. Abdulkheir is not relevant to the application which is subject of this appeal. The Probate Act, under the interpretation clause spelt out under section 2, does not recognize Primary Courts as Court.

Therefore, it was wrong for Mr. Abdulkheir to fault the Trial Court which is a Primary Court for failure to comply to section 56 (1) of the Probate Act. The law governing administration cases before the Primary Courts is the fifth schedule to the Magistrate's Court Act, Cap.11 R.E 2002, herein after the schedule".

Having so found the District Court proceeded to nullify the appointment of the appellant on a mere reasoning that it is a good practice for family to convene a meeting. That was wrong.

Good practice does not ouster the jurisdiction of the Primary Court to appoint administrator of the estate. In the case of **Mohamed Hassani versus Mayasa Mzee and Mwanahawa Mzee (1994) TLR 225** it was held that Primary Court has powers to appoint administrators of estate and to appoint others in replacement when need arises. Therefore, in the absence of minutes of the clan meeting suggesting for the administrator, the Primary Court can still appoint any one qualified to administer as such. In the instant case, it is clear on record that the parties were born by different mothers and have divided themselves into groups of a certain mother against the other. In the circumstances the District Court ought to have considered such fact and the impossibilities of the two parties to meet together.

It ought to have thus concentrated on whether the appellant qualified to the appointment as administrator of the estate in question or not.

I have gone through the proceedings of the Primary Court and found out that, the Primary Court analyzed properly the issues before it and properly appointed the appellant to administer the estate of the deceased because the responded on his party did not want to go to Court and was satisfied that the Probate in question has already been resolved at Kadhi's Office.

The Primary Court in its considered decision had observed; -

> *"Suala la pili ni kwamba kwa mujibu wa mtazamo uliopo na jinsi familia hii ilivyo ni wazi kuwa haiwezekani kukutana pamoja na kukaa kujadili juu ya mirathi hii sababu wao wenyewe wanasema hawaelewani na walishakaa na kushindwa kufikia muafaka juu ya mirathi na ndiyo maana muda unazidi kupita. Ikiwa mpingaji anaamini kuwa tayari mirathi ilishafanyika mbele ya Kadhi na kusahau kuwa Kadhi hawezi kutoa nakaia ya uteuzi wa mirathi. Na kwa vyovyote vile hawezi kufikiria kuwa kuna ufungaji wa mirathi Mahakamani".*

I stand by such observation of the Primary Court that the estate of the deceased must be administered and an inventory thereof be filed. Up to this juncture only the appellant has shown interest to administer the estate in questions. In fact the evidence from both sides is clear that the deceased himself had proposed four people who may administer his estate after his death. Both the appellant and the respondent are in the list. In the case **Seif Marare versus Mwadawa Salum (1985) TLR 253** it was decided that the duty of the Court is to appoint the administrator of the estate and if there is express wishes of the deceased then the same is to be considered.

Since out of the four people named by the deceased to administer his estate, only the appellant petitioned then it was wrong to nullify his due appointment by the Primary Court.

The worries of the respondent that the appellant might misuse of misapply the estate in question are mere suspicious and speculations which have no legal base nor have any room in Civil Litigations.

Even though if the appellant shall misuse or misapply the estate he shall be liable to make it good as it was held in the case of **Safiniel Cleopa v. John Kadeghe (1984) TLR 198** that an administrator of the estate who misapplies the estate of the deceased or subject it to a loss or damage is liable to make good such loss or damage.

The respondent and his companion are reluctant and they have by themselves not applied for letters of administration. We cannot leave the estate un-administered. I therefore, quash the judgment of the District Court and restore that of the Primary Court.

I direct that the original record be immediately remitted back to the Primary Court for the appellant to accomplish the due processes of administering the estate in question.

I however remind the appellant to administer the estate in question under Islamic Law and in case of any conflict in interpretation, the interpretation by **Imam Shafii** shall take precedence. This is due to the fact that such directive was subject to litigation in the Primary Court and the same ruled out;-

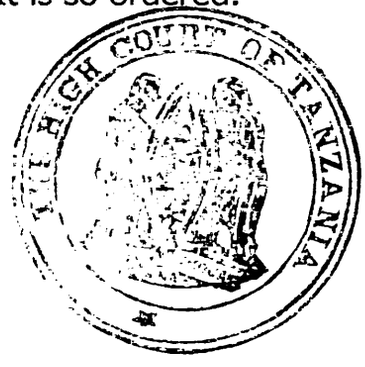
> *"Katika tukio la tatu la shauri hili hakuna ubishi hata kidogo kuwa marehemu alikuwa ni Muislam na muumini mzuri wa dini ya Kiislam hii imejidhihirisha hata kwa familia yake aliyoiacha na hata majibu ya hoja mbalimbali ya mashahidi na hakuna Ushahidi wowote ule kuwa*

marehemu aliishi katika misingi tofauti na ile ya Imani ya Kiislam. Hivyo mfumo wake wa Maisha aliyoishi marehemu ndiyo utaongoza jinsi gani mali zake ziweze kugawanywa".

Having inquired form both parties at the hearing of this appeal about the sect of the deceased in Islam they both told me that the deceased was **Suni Walijamaa** a follower of **Imam Shafii.**

I therefore, direct the appellant once he collects the decease's estate he should immediate distribute to all legal heirs in accordance to Islam law and in case of any dispute to interpretation that of **Imam Shafii** shall supersede.

It is so ordered.



Sgd: A. Matuma,

Judge,

30/3/2020