THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
MBEYA DISTRICT REGISTRY
AT MBEYA
PROBATE APPEAL NO. 06 OF 2020
(Originating from the Decision if the District Court of Ileje Probate Appeal No. of 2020, Original Probate and Administration Cause No. 02 of 2020 at Itumba Primary Court)

ECKSON MTAFYA.....APPLICANT
VERSUS
MAIKO MTAFYA.....RESPONDENT

JUDGMENT

Date of last order: *31/08/2020*
Date of Judgment: *29/09/2020*

NDUNGURU, J.

When I was going through this application, I recalled a Biblical verse (Luke 12:13-14) Jesus was with his disciples, he encountered certain family members who were fighting against the estate of their deceased father, Jesus was asked to intervene. Someone in the crowd said to him, *"Teacher, tell my brother to divide the inheritance with me."* He said to them, *"Watch out! Be on your guard against all kinds of greed; life does not consist in an abundance of possessions".*

I have assertively started with this biblical verse as it resembles what I am about to encounter in this eccentric appeal that I have come across. I said so because the applicant is strongly resisting the appointment of his

own brother as co administrator to their father's estate. Among others, he faults the District Court decision that it had no jurisdiction to appoint the respondent as the co administrator under the small estate without having a formal application.

In order to appreciate the setting of the present appeal, I find it apt to narrate, albeit briefly, the factual background to it as gleaned from the lower court records. It appears that the appellant and the respondent are brothers. They are the sons of the late Asangalwisye Mtafya who died interstate on 30/12/2004. He left behind six children who are alive namely Maiko, Eckson, Rehema, Butusyo, Joseph and Lusayo. To put it differently, the appellant and the respondent are sons of the same father. The properties left behind is 12 acres of land.

The misunderstanding culminated into Probate No. 02 of 2020 in the Primary Court at Itumba in which the appellant successful petitioned for letters of administration of the estate of his father. The mission was to administer the deceased estate in the exclusion of other family members. The respondent filed an objection resisting the appellant to be appointed as the administrator of the estate their deceased father with the reason that he was not called in a clan meeting. The trial court ruled out the objection raised with the reason that there is no law that requires the court to consider the opinion of clan members referring to the case of

Kijakazi Mbegu & Five Others vs. Ramadhan Mbegu [1999] T.L.R 124 (High Court). The trial court therefore issued the grant of letters of administration to the appellant on 17/02/2020. When such appointment came to the knowledge of the respondent, he filed his appeal christened No. 01/2020 at the District Court before Magezi RM with the reason that the letters of administration was granted to the appellant in the absence of the clan meeting and that he is not honest to the properties of their deceased father. The trial court being satisfied with the reasons advanced in such appeal, appointed the respondent as the co-administrator of their beloved father estate on 19/03/2020.

The applicant being undeterred could not hold his grief. He rushed to this court on 26th day of March, 2020 armed with five grounds to wit:

(i) *That the District Court erred in law and facts to appoint the respondent as co-administrator of the late Asangalwisye Mtafya estate on appeal without having such jurisdiction.*

(ii) *That the District Court erred in law and in facts by failing to apply principle of impartiality in delivering its decisions, the result of which occasioned to failure of justice.*

(iii) *That the District Court erred in law and in facts by misconceiving the appointment of administrator of the deceased estates under small estate.*

(iv) That the district court erred in law to appoint the respondent as administrator of the deceased estate without having any formal application for him to be appointment.

(v) That the district court has misconceived of law applicable in appointing the administrator of the deceased estate who died interstate.

The appellant like what has happened to Jesus, wants this court to intervene by allowing this appeal and quash the first appellate court decision and upholds the trial court's decision. It is clear from the record that the parties are siblings. One may wonder why the appellant does not want to administer the estate of his departed father with his own brother. From the analysis of this appeal, the mystery may be solved.

In this appeal, the appellant had the service of Ms Grace Swetbart whereas the respondent did not show up at all times when the case was scheduled for hearing. With the leave of the court, the appellant vide the service of the learned counsel, filed his written submissions in support of his grounds of appeal. He however opted to abandon ground number 5 of his appeal. There was no reply to the written submissions since the respondent was absent.

In submitting to the 1st and 3rd ground of appeal, the learned counsel contended that it is apparent from the citation and wording of Section 6(1)

of the Probate and Admiration of Estate Act, 352 R.E 2002 that the District Court presided over District Magistrate shall have jurisdiction in administration of small estate, with power to appoint administrator of small estate. For her, courts are created by statute and its jurisdiction is purely statutory, the law provides for limited jurisdiction to District Court in administration of deceased estate where its jurisdiction is limited to small estate.

Materials in Ms. Grace argument is that the deceased lived in a customary life and died intestate. For that reason, the jurisdiction to appoint the administrator of the estate of Asangalwisye Mtafya estate was vested to the Primary Court of Itumba since the applicable law is customary law regardless the value of the estates left behind by the deceased. The learned counsel referred to us the case of **Ashira M. Masound vs. Salma Ahmad, PC Civil Appeal No. 213 of 2004, High Court of Tanzania** (unreported). Ms Grace was of the view that the district court acted without jurisdiction to appoint the respondent as co-administrator of decades estate under small estate and the same renders the respondent appointment nullity.

In retorting to the second ground of appeal Ms. Grace contended that the District Court judgment is tainted with biasness of extraneous matters known before it. She invited the court to find an inspiration in the

case of **Sheikh V Highway Carriers (1986-1989) 1 EA 524.** Ms. Grace went on to state that it is trite law that the appointment of the administrator under small estate is done when application is made before the district court. He referred to this court Part VIII, Section 73 (1) of Chapter 352 R.E 2002. The learned counsel underscored that the District Court had no power to appoint the respondent as co-administrator of the deceased estate under small without formal application.

Having heard the submission from the appellant, I will consolidate all grounds together during the determination of this appeal. To start with, I deem it apposite to reiterate the well settled position of the law that Section 3 of Cap 445 R.E 2002 confers jurisdiction in all matters relating to probate and administration of deceased estate. In addition to that Section 5(1) of the Act clearly shows that the Chief Justice has the power from time to time to appoint such magistrates as district delegates. Sub Section 2 of Section 5 confers jurisdiction upon District Delegates in all matters relating to probate and administration, if the deceased had at the time of death, had a fixed abode within the area for which the district delegates is appointed.

Recently after the reign of the present Chief Justice, all district magistrates sitting at the District Courts are Resident Magistrates hence they are automatically district delegates. There is no need to show that

Hon Magezi has been appointed as such. Reference can be made in **Chief Justice Circular No. 1 of 2018** where Professor Ibrahim Hamis Juma, who is Chief Justice of the United Republic of Tanzania appointed every Resident Magistrate sitting at the District Court of Resident Magistrate to be the District Delegates effective from 2nd day of January, 2018.

After such analysis, the pertinent question to deal with is on whether at the appellate stage, the respondent has applied to be appointed as the co administrator of the estate of their deceased father? In his appeal at the District Court, the respondent was challenging the appointment of the appellant as the administrator of his deceased father estate in the absence of clan meeting and was also challenging the integrity of the appellant in administering such estate. In replying to this, it is quite clear and as held by the trial court that clan meeting has never been a requirement when one applies for the grant of letters of administration. It is only the practice that the court used to demand such minutes of the clan meeting in order to ascertain on whether the clan members have time to sit and propose who will administer the estate of their beloved departed one.

Rule 3 of G.N 49/71 (Primary Courts (Administration of Estates) Rules quantifies the manner which the applicant's application shall be made. Therefore, the clan minutes have little value or little impact to influence the court during the selection of who would be the

administrator. The similar stance was highly considered by my Senior Brother Chocha J (as he then was) in **Angela Philemon Ngunge vs. Philemon Ngunge**, Probate and Administration Appeal No. 02 of 2010, High Court of Tanzania at Mbinga. I will therefore join hand with the trial magistrate when overruled the objection entered by the respondent with regard to the relevancy of the clan meeting in probate matters.

There is another outlandish error committed by the first appellate court. Upon hearing the appeal, the court appointed the respondent as the co-administrator to the estate of their deceased father. In his petition of appeal at the district court, there is no where the respondent has prayed for the district court to appoint him as the co-administrator. This was done suo motto by the first appellate court with the reasons of striking the balance of justice. At page 6 of the first appellate court decision, the court stated as follows:

> *"In my considered view and in the interest of striking the balance of the justice for both sides,* ***I find it inevitable to appoint appellant and subsequently allow him with fully power to be co-administrator of the estate left behind by their beloved father." (emphasis added)***

It is my view that the first appellate court highly erred in appointing the respondent as the co-administrator since it was not part of the appeal and that, there are laws that has to be complied with and not with such interest. It is clear that an appeal can only be taken against a decision

made by the lower court and the order or relief that the court is asked to be made in relation to the grounds of appeal **(See Elidhiaha Fadhili vs. The Executive Director Mbeya District Council**, Civil Appeal No. 24 of 2014, Court of Appeal of Tanzania at Mbeya (unreported). The appeal filed at the first appellate court did not include the prayers to be appointed as the co administrator.

The duty to appoint who will be the co- administrator is actually the duty of the first appointing court when there is formal application made or if there is complaint filed and the court may appoint co-administrator after being fully satisfied that there is need to do so. **Section 33(2) of the Probate and Administration of Estates Act (Cap 352 R.E 2002)** permits to court to appoint more than one person applying being granted the letters of administration. The two will become responsible in in collecting and distributing the estate without the exclusion of others. They are also duty bound to file an inventory in the appointing court and pay all the debts (See Sections 107(1) and 108(1) of the Probate and Administration of Estates Act (supra). There is no basis that compels the first appellate court to appoint the respondent suo motto without any move or attempt made by him. The court is not your mother to grant what is not pleaded or asked for.

The appellant has raised the issue that the first appellate magistrate failed to apply the principle of impartiality in delivering his decision. Upon having scrutinized the court records, I didn't see anywhere that the magistrate has acted as such. Both parties were given equal rights to be heard and the analysis was made.

Basing on what I have stated herein above, I will join hand with the appellant that the appointment of the respondent as the co administrator of the estate of the late Asangalwisye Mtafya was made without jurisdiction and was not prayed for by the respondent. I therefore set aside the decision of the district court to that extent. The respondent may wish to file his application at the trial court if so wishes to be appointed as such. Appeal allowed to such extent. Since the parties are siblings, I find it prudent not to award cost, instead each to bear the same.

It is so ordered.

THE HIGH COURT OF TANZANIA

D. B. NDUNGURU
JUDGE
29/09/2020

Date: 29/09/2020

Coram: D. B. Ndunguru, J

Appellant:

For the Appellant: Mr. Gamba holding brief of Ms. Grace Suitbert advocate

Respondent: Absent

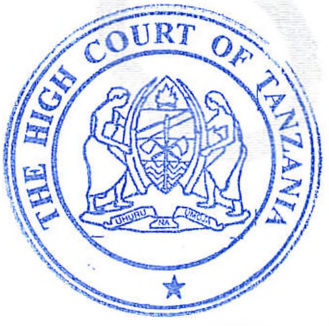
For the Respondent: Absent

B/C: M. Mihayo

Mr. Gamba – Advocate:

I hold brief of Ms. Grace Suitbert for the appellant. The case is for judgment. We are ready.

Court: Judgment delivered in the presence of Mr. Gamba advocate holding brief of Ms. Grace Suitbert and in the absence of the respondent.



D. B. NDUNGURU
JUDGE
29/09/2020

Right of Appeal explained.