IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(ARUSHA DISTRICT REGISTRY)
AT ARUSHA

PC CIVIL APPEAL NO. 11 OF 2019

(Appeal from the District Court of Babati in Probate and Administration Appeal No. 3 of 2015, Originating from Gallapo Primary Court Probate and Administration Cause No. 6 of 2014)

HIITI AWE ..... APPELLANT

Versus

MAGRETH JOSEPH ..... RESPONDENT

JUDGMENT

2nd September & 2nd October, 2020

Masara, J.

The Appellant successfully petitioned for letters of Administration of the Estate of the late Amnaay Tlaqwara Qwaray in Gallapo Primary Court ('the Trial Court') vide Probate and Administration Cause No. 6 of 2014. Before his appointment, the Respondent entered a caveat, which was overruled by the Trial Court on 13th October, 2014.The learned trial Magistrate ruled that the objection had no merits since the Respondent was among the participants in the clan meeting whose minutes appointed the Appellant to petition for letters of Administration. During the hearing of the petition, the Respondent testified as a witness and the deceased's relative (SM6) and tendered a document purported to be a will of the deceased as exhibit. After the Trial Court had appointed the Appellant as the administrator of the deceased's estate, the Respondent appealed to the District Court (the first

Appellate Court) claiming to have been denied the right to be heard by the Trial Court. The first Appellate Court decided that the Respondent was not afforded his fundamental right to be heard. It, therefore nullified all the proceedings of the Trial Court. The Appellant was aggrieved, he has preferred this second appeal on two grounds hereunder:

a) *That, the Appellate District Court erred on point of law and fact in allowing the Respondent's appeal on a sole pretext that the Respondent was not given the opportunity to be heard on the objection she raised at the trial Primary Court; and*
b) *That, the Appellate Magistrate erred on point of law and fact in that he completely failed to comprehend or grasp that on 10/10/2014 the Respondent categorically addressed the court on the objection she raised and the Trial Court overruled the objection as reflected on Page 6 and 7 of the typed copy of the trial Gallapo Primary Court.*

The Appellant prays that the appeal be allowed with costs, the decision of the first Appellate Court be faulted and the decision of the trial Primary Court be accordingly restored.

When the appeal came up for hearing, it was resolved that the appeal be disposed of by way of written submissions. The parties dully filed their written submissions in conformity with the scheduled order. The Appellant was represented by Ms Mariam Saad, learned advocate while the Respondent appeared in court in person, unrepresented.

Submitting in support of the first ground appeal, Ms Mariam stated that the Respondent filed her objection as it can be seen at page 4 of the typed copy of the proceedings, and she was heard on 10th October 2014. In her

objection the Respondent alleged that there was no family meeting convened to appoint the Appellant as the administrator of the deceased's estate. She averred that what the Appellant intended to administer was given to her by the late Amnaay Tlaqwara. She added that according to page 12 of the typed proceedings of the Trial Court, the Respondent admitted to have been present at the meeting which appointed the Appellant to petition for letters of administration.

Submitting on the second ground of appeal, the learned advocate contended that the findings of the first Appellate Court that the Respondent was unheard was surprising as the record shows clearly that the Respondent was fully and adequately heard by the Trial Court. She submitted that the first Appellate Court Magistrate had no genuine reasons to hold that the Respondent was not afforded the right to be heard. The learned advocate invited the Court to allow the appeal.

Contesting the appeal, the Respondent submitted that on 24th October, 2014 she lodged her objection to the Trial Court but the Trial Court denied her the right to be heard as she was not given chance to call her witnesses to support her allegations. She stated that on that day she tendered a Will which was supported by SM6 and SM7 but the trial Court Magistrate refused to call her witnesses to support the Will on the pretext that in the Iraqw tribe, women are not allowed to inherit their deceased father's properties. The Respondent added that on 10th June, 2014, the family sat to finalise the mourning and

paid the deceased's debts but the Appellant and other family members forged the minutes of that day contrary to the law.

Her argument regarding the second ground of appeal was that on 10th October, 2014 the trial Court refused and struck out her objection on the ground that she signed the minutes of the family meeting and considered the same to be minutes purported to have appointed the Appellant as the administrator of the deceased's estate. She stated that during his lifetime, the deceased gave cows to the Appellant and the Respondent was given the farm measuring 6½ acres and a plot witnessed by the hamlet chairman and a Will was made before witnesses. It was her argument that the Appellant and other family members forged the family meeting minutes aiming at depriving her the properties given to her by the deceased and that those properties were sold by Appellant to SM5 without right.

In a rejoinder, Ms Mariam contended that Rule 3 of the Primary Courts (Administration of Estates) Rules, G.N 49/1971 empowers any person with an interest in the deceased's estate to petition for letters of administration. She added that as the law stands, clan meeting minutes are not the requirement of law in petitioning for letters of administration. The learned advocate maintained that even if the Appellant was not appointed by the family members, still he would qualify to be appointed as the administrator of the deceased's estate since he has an interest on the estate of the late Amnaay Tlaqwara. Nevertheless, the learned counsel submitted, the Appellant was appointed by the family members including the Respondent

as evidenced by the minutes filed before the Trial Court. Ms Mariam fortified that the administrator of the deceased's estate is appointed to distribute the estate of the deceased as per the wishes (will) of the deceased if any, or on equal shares to the rightful beneficiaries and not otherwise.

I have carefully gone through the Petition of Appeal, the lower courts' records, the submissions by the advocate for the Appellant as well as the submissions filed by the Respondent, the issue for determination in this appeal is whether the first Appellate Court was justified to nullify the proceedings of the trial Primary Court.

The main point of contention as submitted by the counsel for the Appellant is that the first Appellate Court was wrong in not considering that when the Respondent filed her caveat, it was set for hearing on 10th October, 2014, and the trial Court magistrate after hearing the Respondent he ruled that as the Respondent had attended the family meeting which appointed the Appellant to petition for letters of administration, her objection could not be sustained. They were accordingly dismissed. The Respondent, on the other hand, supports the decision of the first Appellate Court in that as she was not given the right to call her witnesses who could testify on the purported Will, the right to be heard was not accorded to her.

A careful perusal of the trial Court records reveal that the caveat was filed by the Respondent on 19th September, 2014. The Respondent was heard regarding the caveat on 10th October, 2014. When the matter was heard,

she was cross examined by both the Appellant and the court. In her caveat, the Respondent claimed that the deceased's shamba and plot were bequeathed to her by the deceased prior to his death and that she did not participate in the family meeting which appointed the Appellant to petition for letters of administration. The record does not reveal whether the Respondent herein signified that she would call witnesses and whether her prayer was rejected. It was fixed for ruling on 13th October, 2014, and the ruling was delivered whereby the trial magistrate overruled the objection for the reasons that the Respondent participated in the family meeting which had appointed the Appellant to petition for letters of administration.

There is no record that the Respondent objected to the said ruling. Again, the record shows that the Respondent testified as a witness in the petition in which the Appellant was appointed as the administrator of the deceased's estate. She testified as SM6. Having heard all the 7 witnesses, the Trial Court Magistrate appointed the Appellant as the administrator of the deceased's estate.

From the trial Court records, I find the decision of the first Appellate Court to be well out of line because, as rightly submitted by the Appellant's counsel, the Respondent was heard on 10th October, 2014, and again on 24th October, 2014 she testified as the deceased's relative. As stated above, the Respondent's argument in this regard is that she was not given an opportunity to call her witnesses. This appear to be an afterthought since she did not ask the trial Court to accord her the right to summon witnesses

to support her caveat. Further, the Respondent did not contest the ruling which dismissed her caveat. Undoubtedly, she was contented with the trial Court's findings.

This Court is mindful of the fact that violation of the right to be heard vitiates the proceedings and decision of the court. See ***Shaibu Salim Hoza Vs. Helena Mhacha as a Legal Representative of Amerina Mhacha (Deceased)***, Civil Appeal No. 7 of 2012 (unreported); ***Abbas Sherally and Another Vs. Abdul Sultan Haji Mohamed Fazalboy,*** Civil Application No. 33 of 2002 (unreported) and ***Selecom Gaming Limited Vs. Gaming Management (T) Ltd and Gaming Board of Tanzania*** [2006] TLR 200.

In ***Selecom Gaming Limited Vs. Gaming Management (T) Ltd and Gaming Board of Tanzania*** (supra) the following observation was made:

> *"The prayer for the interim injunctive order was given without giving the applicant an opportunity to be heard contrary to the cardinal principle of natural justice that a person should not be condemned unheard, a principle now embodied in Article 13(6)(a) of the Constitution; no reasonable Judge mindful of the duty to act judicially should have made such adverse order against the applicant."*

The case at hand is in my view distinguishable since the Respondent was accorded the right to be heard and the decision regarding her complaint was given in her presence by the trial Court. Therefore, the first Appellate Court Magistrate misdirected himself in holding that the Respondent was not heard. Had he taken time to properly scrutinise the trial Court proceedings,

his decision thereof would have been different. The two grounds of appeal as far as they relate to the issue of the right to be heard are thus upheld.

Having so determined, the next question is whether the Appellant was lawfully appointed as the administrator of the deceased's estate. The procedure in appointing administrators in Primary Courts is provided under Paragraph 2(a) of the Fifth Schedule to the Magistrate Courts Act, Cap 11 [R.E 2019]. For easy of reference it is herein reproduced:

> *"2. A primary court upon which jurisdiction in the administration of deceased's estates has been conferred may-*
> *(a) either of its own motion or on an application by any person interested in the administration of the estate appoint one or more persons interested in the estate of the deceased to be the administrator or administrators thereof and in selecting such administrator, shall, unless for any reason it considers inexpedient so to do, have regard to any wishes which may have been expressed by the deceased.*
> *(b) NA."*

In appointing the administrator of the deceased's estate, the main factor to be considered by the court is the interest that person has in the deceased's estate. This was also stated by the Court of Appeal in ***Naftary Petro Vs. Mary Protas***, Civil Appeal No. 103 of 2018 (Unreported), where it was observed:

> *"In our view, sub-paragraph (a) above is unambiguous and thus it should be construed in its plain and ordinary meaning. In essence, it empowers a primary court, either of its own motion or upon an application, to appoint one or more persons "interested in the estate of the deceased" to be the administrator or administrators thereof The primary consideration, therefore, is holding of an interest in the estate of the deceased. The term interest in a deceased's estate has not been given any statutory definition.*

But we think it should be looked at as "beneficial interest" which is defined in Black's Law Dictionary"

The main complaint made by the Respondent is that she was not involved in the clan/family meeting which appointed the Appellant as the administrator of the deceased's estate, and that the estate to be administered by the Appellant in terms of the 6½ acres farm and a plot were already bequeathed to her prior to the deceased's death. As intimated earlier on, and as rightly argued by the Appellants' counsel, the clan meeting minutes are not a legal requirement in petitioning for the letters of Administration. As stated above, the main factor to consider is the interest the person has on the deceased's estate. In ***Naftary Petro Vs. Mary Protas*** (supra) the Court further stated:

> *"It is evident from the record that the learned Judge initially made observations on the intricacy, sensitivity and solemnity of the judicial duty to appoint an administrator and then properly directed himself to assessing the Appellant's qualifications.* ***He came to the view that although the Appellant had been nominated by the clan members for the appointment, he had not met the "interest in the deceased's estate" requirement."*** (Emphasis added)

The issue that there was a "will" left by the deceased which shows that prior to his death he had bequeathed his properties, including the 6½ acres farm and a plot to the Respondent, was considered by the Trial Court at the last page of the typed judgment. The court was uncertain on whether the document tendered as a will qualifies to be a will. This is not one of the grounds of appeal, therefore I will not deal with it, as the validity of the purported will was neither raised in the first Appellate Court nor in this Court.

Therefore, the findings of the trial Court in that regard ought to be left undisturbed.

Rule 10 of GN 49 of 1971, mandates the administrator to file an inventory and statement of accounts of the assets and liabilities of the deceased's estate which all the lawful heirs and beneficiaries are allowed to inspect. Any heir who is aggrieved by the distribution for any reason can seek the intervention of the court that appointed the administrator. The law also allows criminal charges to be preferred against an administrator who misappropriates the deceased's estate.

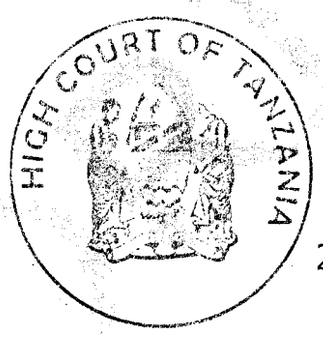
The Respondent does not appear to challenge the suitability of the appointment of the Appellant as the administrator. Her main grievance relates to the properties in the estate. As the estate has more properties than what she is interested in, she has an opportunity to await until the appointed administrator starts his task of administering the deceased's estate so that she could place her claims before him. The course she took seems premature. Her claims relating to land, if not well addressed during the administration of the estate, would be well pursued against the Appellant as the administrator in the appropriate land Tribunals.

The function of courts in probate cases end up with the appointment of the administrators of the deceased's estate. It does not extend to how the distribution will be done. See ***Ibrahim Kusage Vs. Emmanuel Mweta*** [1986] TLR 26. I agree with the Appellant's advocate that the Trial Court

played that role and it was justified to appoint the Appellant as the administrator of the deceased's estate after being satisfied that he has an interest in the deceased's estate.

In the upshot, it is the finding of this Court that this appeal has merits. It is accordingly allowed. The decision of the first Appellate Court is hereby quashed and set aside. The decision of the trial Court which appointed the Appellant as the administrator of the estate of the late Amnaav Qwaray is restored. The Appellant being lawfully appointed, should proceed with the administration of the deceased's estate and file the inventory as well as the statement of final accounts of the estate before the Trial Court with immediate effect. Considering the nature of the case and the parties herein, I direct that each party bears their own costs.

It is so ordered.



Y. B. Masara

JUDGE

2nd October, 2020.