IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM

CIVIL APPEAL NO. 162 OF 2019
(Arising from Miscellaneous Application No. 2 of 2019 before the District Court of Temeke)

MAULID ABDALLAH SANZE.....APPELLANT
VERSUS
SHABANI ABDALLAH SANZE..... RESPONDENT

JUDGMENT

Date of last order: 22.10.2020
Date of judgment: 30.11.2020

MASABO, J.:-

Maulid Abdallah Sanze, is disgruntled by the decision of the district court of Temeke in Miscellaneous Application No. 2 of 2019 which partly nullified the orders of the Primary Court for Mbagala in Mirathi No. 280 of 2018. In the original matter, Mirathi No. 280 of 2018, the respondent was appointed an administrator of the estate of the late Abdallah Mfaume Sanze.

In a nutshell, the wrangle between the parties, as deciphered from the proceedings, is over a house situated in Plot No. 114 Block D Lusende Street Temeke district in Dar es Salaam (the disputed premise). Both parties agree that the disputed house was part of the estate of their father, the late

Abdallah Mfaume Sanze, who died interstate in 1952 being survived by six children, the parties herein inclusive. 53 years after the demise of Abdallah Mfaume Sanze, one of his children, Shaban Abdallah Sanze, petitioned for appointment as administrator of the estate of his late father in Mirathi No. 280 of 2018 before Mbagala Primary Court. His prayers were granted. On 21/9/2018 he was granted the letters of administration.

It is on record that, during trial the applicant tendered a deed signed by members of the deceased's family in which they agreed that Hawa Sefu Bokonyo, who is the appellant's mother and a surviving widow of the deceased, shall get Tshs 10,000,000/= from the estate. The records have it further that on 28/12/2018, the administrator handed over the above sum to Hawa Sefu Bokonyo. The transaction took place before the court. On the same date, the magistrate attested a deed titled "Hati ya Kiapo cha Makubaliano" signed by the administrator **Shabani Abdallah Sanze** and two other persons **Salama Seleman Mnyamani** and **Fatuma Athuman Sande**. In this deed it was covenanted that the Appellant will be given Tshs 26,000,000/= as part of his inheritance from the estate.

In an inimitable event, 9 days after the above transaction, the administrator moved the district Court for Temeke to review the proceedings of Mirathi No. 280 of 2018. His major complaint was that the proceedings leading to his appointment as administrator was a nullity as he was compelled by the trial magistrate to institute the application for grant of letters whereas the estate of the late Abdallah Mfaume Sanze was completed way back in 1962 and the

ownership of the disputed premise, moved from to the children of the deceased except the Appellant who demanded and was given his rightful share of the inheritance. Thus, he has no entitlement in the house whose ownership has since then been transferred from Abdallah Mfaume Sanze to the five children.

Having heard both parties the court found that the decision of the primary court was erroneous as the ownership of the disputed property had already shifted to the 5 children of the deceased (Zaina Abdallah, Halima Abdallah, Asha Abdallah, Habiba Abdallah and the Respondent herein) since on 9th July 1965. Hence, it could not have been included in the list of estate of the late Abdallah Mfaume Sanze. As for the payment of Tshs 10,000,000/- to Hawa Sefu, it was found to be a nullity and the said Hawa Sefu was ordered to refund the amount of Tshs 10,000,000/= which had already been paid to her. Further, the administrator was ordered to proceed with his administration roles in respect of the estate of his deceased sister one Zainab Abdallah which was interrupted by the proceedings.

Disgruntled by this decision, the appellant has appealed to this court armed with six grounds which can be summarized as follows. **First**, the court erred in holding that the estate of the late Abdallah Mfaume Sanze was concluded way back in 1995 and that the house was registered in the name of the five children whereas there was no administrator of the estate who could have distributed the estate to the heirs. **Second**, the court erred in holding that the respondent was forced to institute Marathi No. 280 of 2018 while he did

everything on his own. **Third**, the decision of the trial court is erroneous in that it purportedly overruled Mirathi No. 320 of 2018 but continued to recognize the respondent as the administrator of the estate. **Fourth**, the court erred in holding that the respondent should not be interrupted in the administration of the estate of his sister the late Zainab Abdallah whereas the issue before the court was not about the estate of the said Zainab Abdallah but the estate of the late Abdallah Mfaume Sanze. **Fifth,** the court erred in holding that the applicant already received his share from the estate prior to 1992 whereas at that material time the administrator of the estate was yet to be appointed. Hence, there was no one to distribute the estate of the late Abdallah Mfaume Sanze to the beneficiaries. **Six,** the magistrate treated and decided the case as if it was an appeal where as it was a revision.

The appeal was argued in writing. None of the parties had representation. Understandably, their submission which I have dully considered were mere restatements of the grounds of appeal.

Having provided the background information, I will now proceed to determine the grounds of appeal. I have taken liberty to start with the second ground. The appellant has sternly contested that the court erred in holding that the respondent was coerced to apply for letters of administration. Having read the impugned judgment, it would appear to me that this ground was misconceived. Nowhere in the ruling did the district court hold that the respondent was compelled to apply for letters of administration. This ground is therefore devoid of any merit.

Before I move to the next ground, I have found it crucial to comment, albeit briefly, on the merit of this issue as it attracts adverse bearing on impartiality which is fundamental principle in the dispensation of justice. I have keenly studied the case file to unveil the anomaly. In the course of my scrutiny, I have observed from the record that, in his affidavit in support of the application for revision, the applicant deponed that he was compelled by the primary court to file an application for administration which he never intended to file. He told the court that he was summoned to appear in the primary court in respect of a complaint filed by the appellant's mother, one Hawa Sefu who sought to be given a share in the estate of the late Abdallah Mfaume Sanze. That, upon entering appearance in court, he was compelled by the court to institute a probate matter in respect of the estate of the late Abdallah Mfaume Sanze although the estate of the said estate had already been finalized.

There are certainly serious allegations against the court which ought not to have been recklessly raised without there being a concrete proof. In my painstaking perusal of the court record, I have observed that, although there are certain irregularities as it will be demonstrated later, there is nothing to confirm the respondent's assertion. As correctly held by Mushi RM, and as rightly submitted by the appellant, the record in the case file is inconsistent with the respondent's assertion. It is intensely clear from the record that the respondent was the one who initiated the probate proceedings. He personally filed an application for letters of admstration and appeared in

court to prosecuted his application. On 21st September 2018 while testifying as 'SM1' he told the court that members of the family of the late Abdallah Mfaume Sanze has appointed him to act as an administrator. He even rendered minutes of the family meeting (deed of in support of the application and throughout the proceedings he raised neither an objection nor a concern as to the alleged coercion. There is equally no record that he alerted the court that the estate of the said Abdallah Mfaume Sanze has been administered to finality.

To that extent and as correctly found by the district court, the ruling delivered by the primary court appointing the respondent to be the administrator of the estate of the late Abdallah Mfaume Sanze cannot be faulted as there was neither an intimation nor proof that the said estate had been subject to administration proceedings. It is of interest to note that even though the Respondent herein passionately argued that the administration of the estate of the late Abdallah Mfaume Sanze had been conclusively administered, he rendered no proof as to the proceedings of the probate matter. The purported letters of administration were not presented. The name(s) of the administrator was equally not mentioned. All what was rendered by the respondent is a purported agreement of the heirs showing that the appellant received his share of the estate.

Needless to say, the gentlemen's agreement between the parties as to the entitlement of the appellant and the title deed rendered in court to show that the disputed premise was registered in the names of the five children

of the late Abdallah Mfaume Sanze, provided no conclusive proof that the estate of the deceased was properly administered. In my firm view, these documents attest to the fact that the administration if any proceeded outside the realm of the law. Hence, there was nothing to prevent the primary court from appointing the respondent as the administrator of the estate of the late Abdallah Mfaume Sanze.

Let me also note that, I found it rather astonishing that the application for administration of the estate was lodged 53 years after the demise of the late Abdallah Sanze and no explanation was rendered as to the delay. While this would have been impossible in probates administered by this court and the district delegates through the Probate and Administration of the Estates Act [Cap 352 RE 2019] and the Probate Rules, G.N 369 of 1963 as they set a time limit of 3 years with which to institute probate matters, there is seemingly, no corresponding limit in Fifth Schedule to the Magistrate Courts Act [Cap 11 RE 2002]. The jurisprudence is also not even. As demonstrated by Mongella J in **Hezron Mwakingwe v Elly Mwakyoma**, Probate Appeal No.3 of 2020, High Court of Tanzani at Mbeya (unreported) there are two positions, one for and another one against time limitation. It is not my intention to pursue this point further as it is not among the points for determination in this appeal. Suffice to observe that, considering the fragilities of probate matters, a uniform position is of utmost important.

As for the first ground of appeal that the court erred in holding that the estate of the late Abdallah Mfaume Sanze was concluded way back in 1995

and that the house was registered in the names of the five children, I find it to be totally misconceived. In his decision, as appearing in page 10 of the typed judgment, Mushi RM did not find that the estate of the late Abdallah Mfaume Sanze was closed. All he stated is that, as per the title deed presented in court, the rightful owners of the contested house are Zaina Abdallah, Halima Abdallah, Asha Abdallah, Shaban Abdallah, Habiba Abdallah, Shaban Abdallah and Maulid Abdallah in whose names the Offer of the Right of Occupancy for the disputed plot is registered.

During my scrutiny of the record, I have had an opportunity to look at the copy of the Offer of the Right of Occupancy which informed the above finding by the learned magisteate. The content of this documents which was issued on 9th July 1965 confirms that indeed the property is registered in the names of 5 persons, namely Zaina Abdallah, Halima Abdallah, Asha Abdallah, Habiba Abdallah and Zaina Abdallah (as guardian of Shaban Abdallah and Maulid Abdallah (the parties herein) who were then minors. Since there is in place a Letter of Offer of the Right of Occupancy showing that the owners of the disputed premise are the persons above named and no evidence was rendered to controvert the ownership, it would have been fallacious for learned magistrate to bless the inclusion of the premise in the estate of the late Abdallah Mfaume Sanze. Supposing that the appellant who, according to the Letter of Offer, is among the registered owners of the premise (under the guardianship of Zaina Abdallah) have a claim of right, such claim cannot be adjudicated in this matter as it is not a right forum. The appellant is advised to invoke the proper forum to pursue his remedy if any.

The third ground of appeal which is closely related to the second ground of appeal is in my firm view, similarly devoid of merit. The records in the case file demonstrate vividly clear that the leaned magistrate did not overrule the proceedings in Mirathi No. 320 of 2018 as purported by the appellant. Rather it overruled the subsequent order for payment of Tshs 10,000,000/= to the appellant's mother, Hawa Sefu and ordered refund of the monies already paid to her.

I entirely subscribe to the finding by the learned magistrate. Granted, the payment of the above-mentioned sum and the deed attested by the court were all inconsistent with the law pertaining to probate matters and the jurisdiction the court in administration matters. Item 1(1) (a) of the Fifth Schedule to the Magistrate Courts Act [Cap 11 RE 2019] from which the jurisdiction of primary courts in probate matters derives provides inter alia that,

> " a primary court upon which jurisdiction in the administration of deceased' estates has been conferred may- either of its own motion or 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 the administrator or administrators.....;

(b) either of its own motion or on application by any person interested in the administration of the estate, where it considers that it is desirable so to do for the protection of the estate and the proper administration thereof, appoint an officer of the court or some reputable and impartial person able and willing to administer the estate to be administrator either together with or in lieu of an administrator appointed under sub-paragraph [emphasis added]

The confines of these powers have been widely litigated in our court. There now exist a rich jurisprudence in this area. The decision of this court in **Kusaga V Emmanuel Mwetu**, [1986] TLR 26; and in **Chande H. Kihalage V Stephen Mogella** (PC) Civil Appeal No 139 of 1999 HC at Dar es salaam (Unreported) suffices to illustrate. In **Chande H. Kihalage V Stephen Mogella** (PC) Civil Appeal No 139 of 1999 HC at Dar es salaam (Unreported) it was emphatically held that:

"the court is only required to appoint an administrator of the deceased's estate and not taking part in the distribution of that estate to the heirs." [emphasis added]

The Court further held that:

> "the powers of the primary court in the administration of the deceased's estate are governed by the Magistrates Courts' Act, No 2/1984, the Fifth Schedule whereby rule 2 gives the primary court powers either of its own motion or an application by any person interested in the estates of the deceased to be administrator or administrators. After that appointment, the administrator is duty bound under part II of the 5th schedule, rules 5 after paying all costs distributes the estates of the deceased to the persons or for the purposes entitled thereto. [emphasis added]

Therefore, as correctly held by the learned magistrate, the court had no role in distribution of assets. Such role vests in the administrator who upon appointment becomes responsible for collecting the property of the deceased and his dues. Upon collection of the assets and dues and upon payment of the debts and costs of the administration, the next role of the administrator is to distribute the residuals thereto to the beneficiaries. The administrator is further required to submit to the court a true complete statement showing the assets and liabilities of the deceased person and the distribution thereto. The record is silent on compliance with these crucial steps which suggest that there was noncompliance with the law. I will not dwell on the appropriate of the 'hati ya makubaliano' attested by the magistrate as it was discussed in extenso by the learned magistrate. Suffice it to note that I fully subscribe to the finding that in endorsing the payment of Tshs 10,000,000/=

to Hawa Sefu and in attesting the 'hati ya makubaliano' the primary court magistrate offended the law and usurped the jurisdiction he was not clothed with. This ground of appeal fails in entirety.

Coming to the fourth ground that the court erred in holding that the respondent should not be interrupted in the administration of the estate of his sister the late Zainab Abdallah whereas the issue before the court was not about the estate of the said Zainab Abdallah but the estate of the late Abdallah Mfaume Sanze, I fully subscribe to the appelants view. Whereas the two probate matters are to some extent interwoven, what was before the court was the estate of the late Abdallah Mfaume Sanze. Therefore, it was certainly wrong for the court to make a findings or any order in respect of the estate of the late Zainab Abdallah to which the court was not seized to determine. Grievances if any regarding the administration of the estate of the late Zainab Abdallah ought to be determined independently through a different forum.

The fifth ground will not hold me as I have extensively covered it while I was dealing with the first and the second ground of appeal. Having determined that suit premise has been under the ownership of the above-named person since 9th July 1965 as per the letter of offer, there is no value in discussing the gentleman's agreement purporting to give the appellant a share in the house.

The last ground that the magistrate treated and decided the case as if it was an appeal whereas it was a revision is entirely baseless. The approach used by the learned magistrate was befitting the powers of the district court in revisional matters. As expressly provided for under the section 22 of the Magistrate Courts Act, when exercising revisional jurisdiction, a district court shall have all the powers conferred upon it the exercise of appellate jurisdiction.

Based on what I have endevoured to demonstrate above, I dismiss all the grounds of appeal save for the fourth ground which I have found to be meritorious. As the appeal emanates from a probate matter, I refrain from making any orders as to costs.

DATED at DAR ES SALAAM this 30th November 2020.

J.L. MASABO

JUDGE