IN THE HIGH COURT OF TANZANIA

DAR ES SALAAM DISTRICT REGISTRY

AT DAR ES SALAAM.

PC. CIVIL APPEAL No. 108 OF 2018

(Appeal from the Ruling of Hon. A.A. Mwingira, RM Kinondoni District Court in Misc. Application No. 78 of 2018. Arising from Probate Cause No. 26 of 2014 of Kinondoni Primary Court)

RAMADHANI MYONGA.....1st APPELLANT

SAUDA HUSSEIN.....2nd APPELLANT

Versus

ISMAIL JUMA SAID.....RESPONDENT

JUDGMENT

3rdDecember, 2019 - 10th March, 17th March, 2020

J. A. DE'MELLO J;

This is an Appeal from the **Revision of Probate Cause No.26 of 2017** in the **Primary Court of Kinondoni** by the **Kinondoni District Court.** The Appellants had then, petitioned for **Letters of Administration of Estates** of the late **Hawa Yusufu Darabu** who died testate and, successfully granted. This did not impress the Respondent whose application for **Revision** before District Court overruled the lower Court's findings and entered judgement in his favour.

Seven grounds have been preferred as hereunder;

1. **That, the Trial Magistrate erred in law and, fact by entertaining and allowing the Application which was not tenable under the law.**
2. **That, the Trial Magistrate erred in law and, fact by holding that, the non-heirs were only entitled one third 1/3 share of deceased's estates contrary to the deceased's will which was neither objected by the beneficiaries nor by the Court.**
3. **That, the Trial Magistrate erred in law and, fact by entertaining and allowing administrator of the deceased Zainab Hussein to act retrospective contrary to the law.**
4. **That, the Trial magistrate erred in law and fact by appointing one Ismail Juma Said Suo Motto as an Administrator of the Estates of the late Hawa Yusufu Darabu in disregard of the non-contested Will and the law governing the appointment of an Administrator.**
5. **That, the Trial Magistrate erred in law and, fact in deciding the matter on extraneous issues that, were not before her and without hearing the parties.**
6. **That, the Trial Magistrate erred in law and, fact for failure to interpret the contents of the will and the wish of the testator with regard to the disposition of properties subject to the said Will viz-a-viz the beneficiaries.**
7. **That, the Trial Magistrate generally erred in law and, fact for failure to uphold the decision of Kinondoni Primary Court,**

which legally appointed appellants as Administrator of the deceased's estates after following all the procedures prescribed by the law.

Both Parties were represented by **Counsels Joseph Msengezi**and, **Halfani Msumi,** respectively with the Appeal argued by way of written submissions pursuant to the order of this Court.

Challenging the route taken by the Respondent in instituting a Revision as opposed to Appeal as the decision of **Primary Court in Probate Cause No. 26 of 2014** was appealable under the law as opposed to revision. This position was taken in **Moses J. Mwakibete** vs. **The Editor – UhuruShirika la Magazeti ya Chama and National Printing Co. Ltd. [1995] TLR 134** and **Halais Pro Chemicals** vs. **Wella A.G. [1996] TLR 269.**

On his side the Counsel for Respondent submitted that, he was appointed Administrator of Estates of the late **Zainabu Husein,** a sister to the 2nd Appellant and, both daughters of the late **Hawa Yusufu Darabu.** He further submitted that, the Respondent herein one **Ismail Juma Saidi** was not a party in **Probate Cause No. 26 of 2014** hence with no right to Appeal having been blocked byJudicial Process. To support his argument he cited the case of **Mbeya Rukwa Auto parts Transport Ltd.** vs. **Jestina George Mwakyoma [2003] TLR253**

My findings from the submissions of Parties and, in respect of the first ground of Appeal is that, usually, the right to Appeal is exercise when a party in any trial is aggrieved. It is evident and from record that the

Respondent was not party to a **Probate Cause No. 26** of **2016**and with no right not only to feature but worse even to appeal against the decision of the Trial Court. Being the Administrator of the **Estates of the late Zainabu** who was the beneficiary in the above Probate does not automatically give him the right to Appeal.

Now this Appeal is against the Revisional order following Application by the Respondent, whose essence is to move the Court to critically revisit the proceedings or decision or order of the Trial Court with a view satisfying itself of the correctness and, legality of the impugned decision. Distinguishing the cases submitted by the Appellants, the case at hand is that, the Applicant, Respondent herein was not part to the main suit **Probate Cause No. 26 of 2014.** In the case of **The Attorney General** vs. **Wafanya Biashara Soko Dogo Kariakoo Cooperative Society Ltd. & Others, Misc. Civil Application No. 606 of 2015,** the Court of Appeal stated interiliac;

"Revision of a suit or proceedings can be sought by any person with interest to the suit or proceeding, notwithstanding the fact that he was not a party to the suit or proceeding."

Now, since the Respondent was not part of **Probate Cause No. 26** of **2014** but, Administrator of the estates of **Zainabu Husein** who was the beneficiary of the late **Hawa Yusufu,** in that Probate, he surely has interests in the **Probate Cause No. 26 of 2014** and, by virtue of the above authority has the right to bring an Application for the Revision. For the reason this ground of appeal does not hold water hence dismissed. On

the second ground of Appeal, Counsel for the Appellants submitted that, holding that the non-heirs were entitled to one third 1/3 shares of the deceased estates has no legal basis and, for it is the same as varying the contents of the will contrary to the wishes of the Testator knowing that the deceased has the right to dispose the property in manner, he wished. This is a new issue and, immaterial, against the wishes of Testator, not objected by beneficiary. In support of his arguments he made reference to a case **Book on the Law of Succession by; W. Musyoka at page 106** and **the case of Celestine Paulo** vs. **Mohamed Hussein [1983] TLR 291.** However, Counsel for Respondent contends that, the Will was objected by the beneficiaries as, righty observed by the Court. Since the deceased **Hawa Yusufu Darabu** was professing Islam, the Will was intended to be Islamic as well. He cited the case of **Naima Ibrahim** vs. **Isaya Tsakiris, Civil Appeal No. 119 of 2009** where the Court made reference to **Mulla's Principles of Mohamedan Law,** and **A case Book** on the **Law of Succession; W. Musyoka at page 106**. It obvious that the said **Will** did not follow the principles under Islamic law, leading the non-heirs to 1/3 and the remaining 2/3 to the hairs **Zainabu Hussein** and **Sauda Hussein** on equal basis, he observed.

The rival submission by the Parties, draws my mind to look into the manner in which the said **Will** left by the deceased was executed. While in agreement that, a Will is an expression on the manner in which the deceased wishes his/her estates is to be dealt after demise, it is important to consider the applicable law when making such **Will.** There is no dispute and which I am in one with the Respondent that, the deceased **Hawa**

Yusufu Darabu was confessing Islamic Religion, with no evidence that she did not intended the administration of her estates to be under Islamic law. In the case of **Asha Shemzigwa** vs. **Halima A. Shekigenda [1998] TLR 254** the Court observed that;

"Both parties and, the deceased were Moslems, and had been professing Islam, it followed that, Islamic rules were applicable to the dispute concerning administration of deceased estates."

It is even correct that, under Islamic law non heirs are bequeathed only 1/3 of the estates, as was observed in the case of **Waziri Maneno Choka** vs. **Abas Choka, Civil Appeal No. 51 of 1999,** the Court of Appeal of Tanzania made this observation;

"Under Islamic law, if a person makes a Will in favor of a stranger the bequest to the stranger should not exceed one third of the testator's estates."

The above reflects the clear position when dealing with estates according to Islamic Law, where grandchildren are not Quranic heirs making them entitled to one third only 1/3 of the estates. This therefore renders **Zainabu Hussein and Sauda Hussein** entitled to the remaining two thirds, 2/3. For this reason, this ground of Appeal is dismissed for lack of merits. Submitting on the third ground of Appeal, Counsel for Appellant reiterated that, following the demise of **Zainabu Hussein** the Respondent was appointed as Administrator, he ratifying all acts of **Zainab Hussein** including that of not challenging the will. He is legally estopped from denying what was ratified by the late **Zainabu Hussein.** The allegation

that, the Trial Magistrate allowed Administrator to act retrospectively is not true, and if so, it is subject to proof. The Respondent's duty after being appointed as Administrator of Estates, commencing collection the properties of deceased **Zainabu Hussein** to be distributed to the heirs of the deceased according to Islamic law. My finding on the third ground of Appeal is that among the duties of administrator of estates is to identify, collect, distribute and pay or demand outstanding debts to all legal heirs. Being the Administrator of the Estates of the late **Zainabu Hussein** he had that legal duty and more so on undistributed properties as her share from the estates of the late **Hawa Yusufu Darabu.** This enables him to Since step into the shoes of the deceased, with all rights to question or sue in attempt to manage the deceased's estates on behalf of heirs and, this should not be taken as acting retrospectively. Again, this ground of Appeal fails. In addressing the fourth ground of Appeal,

And having discovered incurable discrepancies in the said **Will** of the deceased, the Trial Magistrate was right to Appoint Co-Administrator. The same is provided in the case of **Joseph Mniko and Others (Probate and Administration Cause No. 48 of 1996, In the matter of an Application for Revocation of Grant of the letters of Administration to Daudi Mahende Kichonge (Unreported).**

Considering the spirit of **section 22** of the **MCA** which confer Revisional power to District Courts, it logically follows the need to correct the illegalities or improvement of the findings of the lower Court. Such correction or improvement, include appointment of Co Administrator to safeguard the wishes of the deceased. The aim is, protecting the estates

for the interests of the beneficiaries, which I see no wrong for the Trial Magistrate to continue appoint co-administrator to 1st and 2nd Appellant. Saying so I find this ground of Appeal unmerited too.

The 5th ground of Appeal Counsel of appellant challenging the appointment of co-administrator, without hearing parties was, undoubtedly violating the principles of natural justice as enshrined in **Article 13(6) of Constitution** as the findings of the Court in **Civil Revision No. 1 of 2009; In the matter of Independent Power Tanzania Limited** and **In the Matter of the Companies Act, 2002** and **Nazira Kamru** vs. **MIC (T) Ltd, civil case No. 111 of 2015,** he shared.

On his side, Counsel for the Respondent submitted that, the issue purported to be extraneous, owes much to the facts and, had it not been the case, would affect the safety of the deceased's estates in its entirety, the facts which was stated in **page 14** of the Ruling. I adopt the findings on the 4th ground of Appeal,, I would like to echo that Revision can be **Suo Motto** where the Court finds it appropriate, as done all in view of, safeguarding the interests of beneficiaries on the deceased's estates. As for ground six of the Appeal, Counsel for Appellants submitted that on page 15 of the Ruling, the Trial Magistrate had directed the manner in which the estates had to be distributed, contrary to the wishes of the deceased, interpreting failure to interpret the contents of the Will.

Rejecting the submissions, Counsel for the Respondent is of the view that the contents of the Will left by the late **Hawa Yusufu Darab** who died a Moslem, need not be interpreted otherwise being governed by

Mohamedan Law, and according to Islamic Law that non heirs are entitled to 1/3 share of the deceased estates.

My findings from this ground, is that the Court has no role whatsoever of directing on the distribution of the deceased's estates but rather to look as to whether or not the said distribution is in compliance with the **WILL** and or Law. My perusal though from the proceedings indicates nothing towards the said allegations that Trial Court directed. On the last ground of appeal, it was submitted that, since the appointment of Administrators of the Estates of the late **Hawa Yusufu Darab** met all the procedural requirements, the District Court ought to have upheld the decision of Primary Court which appointed the Appellants he asserts.

The Respondent opposes this, saying that the Trial Magistrate rightly resorted to the law and reasoning as shown in page 14 by holding that the Will did not meet the requirement under **Islamic Law,** hence appointing a Co-Administrator. The Appellant failed on his duties by not filing returns, thus contravening **section 107 of Cap 352**, rendering him incompetent.

I wish to re state the District Court rightly exercised its Revisional powers over the decision of the Primary Court for the sake of identifying the correctness and illegality occasioned, for the purpose of correcting and, improving the same. The Court went further to appoint co Administrator, satisfied that, the **Will** failed to meet the criteria of Islamic law. See the case of **George A. Mmari and Anande A. Mmari [1995] TLR 146** where a defective will was treated as if there is no will at all, hence

declared null and, void. I conclusively find this ground of Appeal with no merits, as well, hence dismissed.

In the light of the above findings, I find the entire Appeal to be devoid of merits. I accordingly dismiss it with no costs, it being a Probate matter.

J. A. DE-MELLO

JUDGE

17/03/2020