

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

**(ARUSHA DISTRICT REGISTRY)
AT ARUSHA**

PC CIVIL APPEAL NO. 6 OF 2020

*(Appeal from the District Court of Karatu at Karatu Civil Appeal No.25 of 2019,
Originating from Karatu Primary Court Probate and Administration Cause No. 55 of
2019)*

OLIVER BERNARD APPELLANT

Versus

KORNEL BERNARD RESPONDENT

JUDGMENT

24th August & 18th September, 2020

Masara, J.

Oliver Bernard, the Appellant herein, appeals against the decision of the District Court of Karatu (the first appellate Court) which confirmed the decision of Karatu Primary Court (the trial Court). To appreciate the points of contention in this appeal, it is pertinent that a brief outline of the antecedent facts is given.

The Appellant contracted a Christian marriage with the **late Bernard Songay** (the deceased) in 1992. The deceased died on 22nd May, 2019. They were blessed with seven (7) children. The record also shows that prior to the Appellant's marriage to the deceased, the deceased had four children with another woman, the Respondent's mother, who, according to the

records, was the deceased's first wife. Following the death of the deceased, there emerged a dispute regarding the appropriate person to administer the deceased's estate.

On 23/08/2019, the deceased's clan meeting was convened aiming at appointing a person who would petition for letters of administration of the deceased's estate. The Appellant was appointed, but the clan members wanted her to be appointed along with another person to assist her. The Appellant declined the proposal. The clan members gave her two weeks to go and think about the proposal, with the intention of convening another meeting later. On 27/08/2019, the Appellant, in the absence of the first wife's children and the clan members, convened a meeting which involved her seven children, her neighbours and village leaders. She was appointed to petition for letters of administration of the estate of her late husband by those who attended that meeting.

On 03/09/2019, the Appellant petitioned for letters of administration of the deceased's estate before Karatu Primary Court but her petition was met with a caveat filed by the Respondent on 25/09/2019. The caveat was premised on the ground that the clan minutes relied on in petitioning for letters of administration were not genuine as the heirs of the deceased, especially the four children of the first wife, were not involved. The other ground was that the Appellant could not administer the estate of the deceased fairly since she included in the estate some of the properties that were obtained before she

was married and which properties were jointly acquired by the first wife and the deceased.

Upon hearing of evidence from both sides, the trial Court found merit in the caveat and ordered the Appellant to go back and convene another clan meeting which would involve all the family (clan) members and present genuine clan minutes nominating a person who would petition for the letters of administration. The Appellant was not pleased with that order. She thus appealed to the first appellate Court. The first appellate Court dismissed the appeal and upheld the trial Court's decision. The learned magistrate was of the view that a joint administration was appropriate. The first appellate Court also found out that the marriage between the deceased and the first wife was valid. That decision, as well, did not please the Appellant hence this second appeal which seeks to challenge the decisions of both lower courts on the following grounds:

- a) That, the learned Magistrate erred in law and fact in upholding the decision of the Primary Court without any justifiable and objective grounds known by the law;*
- b) That, the District Court grossly erred in law and fact for its failure to find and hold that the Respondent did not advance any acceptable grounds which could justify the refusal of grant of letters of Administration to the Appellant;*
- c) That, the District Court erred in law and fact in entertaining issues of legality of the deceased's marriage with a third party who was not a party to the case and the issue itself being prematurely made;*
- d) That, the District Court grossly erred in law and fact by mix up issues relating to who are the lawful heirs of the deceased's estate and matters concerning appointment of the administrator of the estate of the deceased hence reached to an erroneous decision;*

- e) That, the District Court grossly erred in law and fact for its failure to sufficiently address all the grounds of appeal that were presented and argued by the Appellant; and*
- f) That, the judgment and decree of the District Court is bad in law for basing solely on the analysis of the judgment of the trial court and impute some quoted words from the said judgment as if are the admissions by the Appellant.*

In the hearing of the appeal, the Appellant was represented by Mr. Emmanuel Shio, learned advocate, while the Respondent had the services of Mr. Patrick Maligana, learned advocate. The appeal was argued by way of written submissions.

Submitting on the first ground of appeal, Mr. Shio contended that there was no justifiable reasons which led to the denial of the Appellant's appointment as the administratrix of the deceased's estate given the fact that the major complaint raised by the Respondent in his caveat is that she was not appointed by the clan members. He added that since the law requires the clan meeting in petitioning for letters, and since the Appellant attached those clan meeting minutes as exhibit P1, it was not therefore proper for the Appellant to be denied the grant of the letters of administration, her being the lawful wife of the deceased.

Submitting on the second ground of appeal, the learned advocate argued that the law requires an objector to prove before the court that the person petitioning for letters of administration is not trustworthy in order to refuse grant of such letters. On the contrary, the Respondent did not prove that to be the position in the petition before the trial Court. He was of the view that

the objection raised by the Respondent was too weak and should have been disregarded.

On the third ground of appeal, Mr. Shio contended that the trial Court was wrong to import its own facts in the dispute before it as whereas the Respondent testified that the Appellant went against customs of the Iraqw tribe, the trial court, in its judgment, went ahead and discussed the legality of the deceased's marriage. He further submitted that the first appellate Court erred in upholding the Trial Court's decision that the deceased person had contracted customary marriage with the Respondent's mother as there was no proof to that effect.

Elaborating on the fourth ground of appeal, the Appellant's counsel submitted that the first appellate Court mixed up issues relating to who are the lawful heirs of the deceased's estate and the appointment of the administratrix of the deceased's estate. He argued that it was improper for the court to discuss the fate of the lawful heirs at that point, because its powers at that moment were only to appoint the administrator of the deceased's estate. In that regard he cited the decision of this Court in ***Ibrahim Kusage Vs. Emmanuel Mweta*** [1986] TLR 26.

Substantiating the fifth ground of appeal, Mr. Shio contended that the first appellate Court discussed only the first and the third grounds of appeal before it, ignoring the second and fourth grounds. He further stated that

failure to discuss those grounds amounted to denial of the right to be heard of the Appellant.

Submitting on the last ground of appeal, Mr. Shio argued that the first appellate Court never went through the proceedings of the Primary Court as it quoted some words which were never testified by the parties, citing specifically page 3 of the judgment. On that basis, the Appellant's counsel prays that the appeal be allowed and the Appellant be appointed as the administratrix of the deceased's estate.

Contesting the appeal, Mr. Maligana submitted that the controversy is on the clan meeting held on 27/08/2019 by the Appellant without involving children of the first wife of the deceased. He argued that the two lower courts' decisions were correct as the Appellant had unlawful intention to use the court's decision to convert the deceased's properties to herself. He added that the Appellant and deceased's marriage was voidable since the deceased and the former wife's marriage was still subsisting, as it was never nullified by any court. He cited the case of ***Sekunda Mbwambo Vs. Rose Ramadhan*** [2004] TLR 439 to back up his argument.

On the second ground of appeal, Mr. Maligana contended that the Appellant did not disclose the weakness she referred to concerning the Respondent's objection. The Appellant did not dispute the existence of a customary marriage between the deceased and his first wife. He was therefore of the view that the deceased had only one legal wife who is the first wife, as the

Christian marriage between the deceased and the Appellant was void *ab initio* for contravening section 38(1) of Cap. 29 [R.E 2002]. He cited the case of ***Gladness Jackson Mjinja Vs. Sospeter Crispine Makene*** [2017] TLS LR 217 to cement his views.

On the fourth ground of appeal, the Respondent's advocate stated that the findings, decision and judgment of the trial court were premised on the faithfulness of the Appellant and the legality of the minutes and not on the heirs as contended. He faulted the said minutes for being signed by children of some of whom were nine years old and thus should not have attended the meeting because they have no capacity to make rational judgments.

The Respondent's advocate challenged the Appellant's contention in the fifth ground of appeal stating that it is due to the Appellant's laziness in reading and understanding the decision reached by the first appellate Court.

Contesting the sixth ground of appeal, Mr. Maligana supported the first appellate Court in that it reached its own findings after being satisfied with the decision reached by the trial Court. The matter to determine in his view is the legality of the family meeting and the faithfulness of the Appellant. He thus prays that this appeal be dismissed with costs and the judgments of the two lower courts be upheld for being fair and justifiable.

In a rejoinder, Mr. Shio reiterated his earlier submissions adding that at the time the deceased contracted the Christian marriage with the Appellant there

was no objection from the Respondent or any other person. He maintained that the Appellant is the lawfully wife of the deceased. He reiterated that the issue as to who is the lawful wife to the deceased was never raised at the trial court since the alleged first wife did not appear in the trial court. Mr. Shio insisted that the reasons the Respondent advanced for objecting the Appellant were that the Appellant was not appointed by the clan meeting and that she has acted contrary to the Iraqw norms and customs.

I have carefully gone through the Petition of Appeal, the lower courts' records, and the submissions by the advocates for the parties. The issue for determination in this appeal is whether the two lower courts were proper to order the Appellant to reconvene the clan meeting for the purposes of getting a proper administrator of the deceased's estate. The issue seems to cover all the six grounds preferred by the Appellant.

I must state at the outset that both lower courts misdirected themselves in going beyond what the law required of them to do. The core function of the courts in Probate matters, as pointed out by Mr. Shio, is to appoint the administrator of the deceased's estate. This duty is a legal one as provided for under Paragraph 2(a) of the Fifth Schedule to the Magistrates Courts Act, Cap 11 [R.E 2019]. A primary court is vested with powers, either on its own motion or on application by an interested party, to appoint such person to administer the deceased's estate. Such appointment can either be of one or more persons, and not necessarily the beneficiary or the deceased's relative.

The decision in the cited case of ***Sekunda Mbwambo Vs. Rose Ramadhan*** (supra) is instructive on this aspect. The Court had this to say:

"An administrator may be a widow or widows, parent or child of the deceased or any close relative; if such people are not available or if they are found to be unfit in one way or another, the court has the power to appoint any other fit person or authority to discharge this duty."

The legal requirements in appointing an administrator/administratrix of the estate are provided for under Rule 9(1) (a) to (e) of the Primary Court (Administration of Estates) Rules GN 49 of 1971. Regulation 3 thereof provides that the procedure which that application has to be provided is through completion of form No. 1 annexed thereof.

As intimated earlier, the course taken by the two lower courts by delving on discussing who is the lawful wife of the deceased or the legality of the deceased's marriage, instead of appointing the administrator of the deceased's estate, was beyond their statutory powers. As rightly submitted by the Appellant's advocate, the issue as to who was the lawful heirs or wife to the deceased was improperly handled at that stage. This is so primarily because the purported first wife was neither a party to this case nor did she testify in court regarding her marriage with the deceased. Guided by the above position, this Court is of the view that the trial Court abdicated its mandatory duty. The first appellate Court also flouted for it ought to have noted the irregularities apparent in the trial Court's decision and order the trial court to mend it by ordering appointment of the administrator of the deceased's estate.

Although it has been customary for a person interested in petitioning for letters of administration to be appointed by the clan to attach in the application the clan meeting minutes signifying his appointment, none of the advocates provided the provision of the law imposing such requirement. There is no specific provision of the law which makes it mandatory for the clan/family meeting minutes to be a mandatory requirement before appointing a person as administrator or administratrix of the deceased's estate. The procedure in appointing administrators in Primary Court is governed by the law and it is specifically provided under Paragraph 2 (a) of the Fifth Schedule to the Magistrate Courts Act. For easy reference it states:

"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; and
(b) either of its motion or upon application by any person interested in the administration of the estate, where it considers it is desirable to do for the protection of the estate and proper administration thereof, appoint an officer of the court or some reputable and impartial person able and willing to administer the estate to be the administrator either together with or in lieu of an administrator appointed under paragraph (a)."

Therefore, the presence or absence of the clan/family meeting minutes is not a requirement in appointing an administratrix of the deceased's estate as thought by the Trial Court. The primary factor to be taken into consideration when appointing the administrator/administratrix of the

deceased's estate is the interest that person has in the deceased's estate. The Court of Appeal in the case of ***Naftary Petro Vs. Mary Protas***, Civil Appeal No. 103 of 2018 (Unreported) observed that:

"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"

On the issue of clan/family meeting in the above cited case, the Court had this to say;

*"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)

This was reiterated in the decision of ***Angela Philemon Ngunge Vs. Philemon Ngunge***, Probate and Administration Appeal No. 45 of 2009, H.C (unreported), where Chocha, J. had this to say:

"Therefore the need to have the clan minutes as supportive documents to the application for appointment of an administrator, is a matter of practice and not law. This is why clan minutes, will only propose a candidate. The appointment is court's duty. A candidate therefore cannot rely on the clan meetings' minutes as authority for him to function as the administrator. Administrator appointed by the Primary Court shall possess form No. IV issued under paragraph 2 of the 5th

Schedule to the Magistrate Court Act. What happens is the necessity of the clan meeting's minutes legally none. The relevancy or rationale to me is merely to involve the deceased's relatives in the process of appointment."

Precisely and as indicated above, the appointment of the administrator of the deceased's estate cannot be vitiated due to the absence of the clan/family meeting. What is considered by the court, and of course the position of the law, is to give regard to the interest the person with interest in the deceased's estate. In the case at hand, it was not contested that the Appellant was the deceased's wife, and the Respondent was the deceased's son. It does not necessarily mean that the court must have appointed either of them in case it was satisfied that the deceased's estate would be misappropriated. The Appellant's advocate averred that being the surviving wife of the deceased, the Appellant had interest in the deceased's estate which qualified her to petition for letters of administration as per Rule 2(a) of the Fifth Schedule to the Magistrate Courts Act. Considering that there were misunderstandings among the deceased's family, and for the purpose of avoiding further fracas, the trial Court could have appointed the Appellant with some other person or appoint another person distinct from the parties herein in order to have the deceased's estate distributed to the lawful heirs.

It should also be noted that the law is well settled to the effect that the appointed administrator is legally bound 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 may inspect. That is according to Rule 10 of

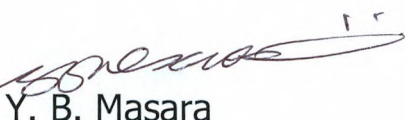
GN 49 of 1971. Thus, any party who thinks that the deceased's estate is not properly administered has a right to use that avenue to take his complaint to the appointing court for revocation.

The other concern raised is that the first appellate Magistrate did not consider the third and the fourth grounds of appeal in his judgment. I find unnecessary to deal with this concern at this stage since the main contest is on the administration of the deceased's estate. The same applies hand in hand with the complaint that the Appellant is not faithful to the deceased's estate. I do agree with the Appellant's advocate that this is subject to proof. It has been made prematurely. This would best be dealt with after the appointment of the administrator.

On the premises, based on what I have endeavoured to state coupled with the authorities cited and reasons whereof, it is the finding of this Court that this appeal has merits. I accordingly allow it to the extent explained. Consequently, I order that the file be remitted back to the trial Court in order for it to expeditiously appoint the administrator/administratrix of the deceased's estate. Considering the nature of the case, I direct that each party shall bear their own costs before this Court and the courts below.

Order Accordingly.




Y. B. Masara
JUDGE

18th September, 2020.