

IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY
AT MUSOMA

PC PROBATE AND ADMINISTRATION APPEAL NO. 1 OF 2019
ELIAS MADATA LAMECKAPPELLANT

VERSUS

JOSEPH MAKOYE LAMECK RESPONDENT

(Arising from Probate and Administration appeal No. 1/2019 of Bunda District Court. Original Probate and Administration case No. 41/2018 of Bunda Urban Primary Court)

JUDGMENT

21 & 30/4/2020

Kahyoza, J

Elisa Madata Lameck and Joseph Makoye Lameck are blood brothers. Their father **Lameck Kuhangija Masome** died intestate on the 25th June 2015 at Nyasura village – Bunda District. After three years the deceased's relatives in the absence of Joseph Makoye Lameck convened and nominated Elias Madata Lameck to apply to be appointed to administer of the deceased's estate.

Elias Madata Lameck applied to be appointed to administer the deceased's estate before the primary court. Joseph Makoye Lameck objected on the ground that he did not take part at a meeting which nominated the Elias Madata Lameck. The primary court upheld the objection. The primary court directed the parties to convene another meeting of the family members and nominated a person who should apply to administer the deceased's estate. It ordered the minutes of that meeting to be submitted on the 14/01/2019. The parties could not convene the meeting, which was ordered. The primary court resolved to strike out the application.

Madata, the applicant appealed to the District Court. The District Court upheld the decision of the primary court. It stated –

" I agree with the trial court that all family members must be involved in the family meeting to appoint the administrative if they fail to do so within 30 clear days from today then the applicant will pray for the leave of court to proceed with the former family meeting minutes".

Aggrieved by the decision of the District Court, Madata appealed to this Court. The appellant adduced five grounds of appeal, which boil to one issue, whether it is proper for the appellant and trial court to order a meeting of all clam members to be re-convened to nominate a person to administer the deceased's estate.

I examined the records found that both courts below were of the view that the parties should convene a clam meeting to nominate a person to apply to the court to be appointed to administer the deceased's estate. Both courts below stated that it was a legal requirement without citing the relevant law. I wish to point out that there is no legal requirement that once a person dies intestate the deceased's clan members must convene and appointing a person to administer that person's estate. It is a good and cherished practice, which reduces conflicts among heirs as to who shall administer the deceased's estate. It also serves as a notice to the beneficiaries and heirs of the deceased. It also cuts down costs of informing all beneficiaries and heirs that a person intends to apply to administer the deceased's estate. It is a good practice, it must continue to be cherished. In **Hadija said Matika V. Awesa Said Matika** PC. Civ. Appeal No. 2/2016. His Lordship Mlacha, J had the following to say

regarding a clan or a family meeting convened to nominate a person to administer the deceased's estate. He stated –

"In matters of probate and administration, the clan or family will usually sit to discuss the matter and propose someone to be the administrator. He will be sent to court with some minutes. This practice is encouraged because it makes the work of court easy. But once one or two members of the family have been selected, they should also fill Form No. 1 because filling the form is a legal requirement".

It is therefore, important and it is encouraged that a clan or a family of the deceased meets and appoints a person to be the administrator. The question is what should happen if the deceased's family does not meet and nominate a person to be the administrator of the estate of a person who died intestate? Is it the position of the law that if the deceased's family fails to appoint a person to be the administrator no one can apply to administer the estate?

I will quickly reply that in the absence of minutes of the clan or family meeting to nominate a person to be the administrator, a person with interest in the deceased's estate can still apply and be appointed by the primary court to administer the deceased's estate provided the law is complied with.

Which law must be complied with before one is appointed as an administrator?

It was stated in the case of **Hadija Said Matika**, that a person appointed by the deceased's clan or family to administer the deceased's

estate must fill in "Form 1 and file it with the Court. Likewise an interested person who wishes to apply to administer the deceased's estate in the absence of the minutes of the family meeting, should, fill in Form I. This requirement is provided for by rule 3 of **the Primary Courts (Administration of Estates) Rules G. N. 49/1971** (the Ruls) it states-

"3. An application for the appointment of administrator under paragraph 2(a) or 2(b) of the fifth schedule to the Act shall be made in Form1".

Upon receipt of the application (Form1), the Court has to issue a notice in the appropriate Form (to issue citation) to all persons (other than the applicant) known or alleged to be the near relatives of the deceased person or to have been named in the will as executors, requiring their appearance in the court, on such date and time specified. See rule 5(2) of **the Rules**.

A notice or citation under rule 5(2) of **the Rules** informs interested persons that a particular person has applied to administer the deceased's estate and affords them an opportunity to object to his appointment if they so wish. Such a notice if served properly to all interested parties serves the same purpose as a clan or family meeting. The purpose of the deceased's clan or family meeting is to appoint a person to be the administrator and the purpose of the notice under Rule 5(2) **of the Rules** is to ensure a person is not appointed clandestinely to administer the deceased's estate. Transparency is a key to the process of appointing the administrator to avoid scrupulous administrator to mismanage the deceased's estate. It is important to note that the notices under rule 5(2) should be served in the

same manner as summons in civil cases before the primary court, are served.

The court may consider if it is necessary to cause the notice to be advertised by such means as are used locally to make public announcements or by publication in a newspaper. Advertisement is not mandatory unless the court consider it important, the citation or notices if ordered to may be published it has to be so published in the newspaper having a substantial local circulation.

After notice is served and the court is satisfied that the notice under rule 5(2) of **the Rules** was so served, it may hear the person present and if no objection is raised appoint the applicant. It is not mandatory that all persons served with a notice must attend. Once, the court is satisfied that all interested persons were served it will appoint the administrator in their absence. (See rule 6 of the Rules).

Given what is stated above I will answer the above issue negatively. Thus, the absence of the deceased's clan or family meeting to appoint a person to administer the estate of a person who died intestate is not a bar for a person interested in the estate to apply to the court to be the administrator. Such person may apply and be appointed to administer the deceased estate provided the Court complies with the provisions of the Law stated above.

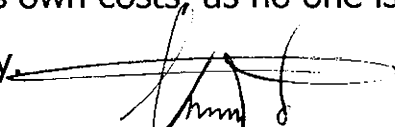
It was therefore, wrong for the trial court to dismiss the application to administer the deceased's estate in the absence of the minutes of the clan meeting appointing the appellant to administer the deceased's estate.

It is trite law that generally a second appellate court should not disturb the concurrent findings of fact unless it is clearly shown that there has been misapprehension of the evidence or a miscarriage of justice or a violation of some principle of law or practice. See **Hamise Mhamed V. R. Criminal Appeal No. 297/2011** (CAT Unreported) and **Amratial Damador Maltaser and Another V. A. H Jariwall Hotel** [1980]T.L.R 32. In that case at hand, it has been shown that the concurrent decision of the courts below were based on the wrong principle of law that a person applying to be appointed to administer the deceased's estate is required by law to produce minutes of the clan or family meeting appointing him. Thus, the second appellate court can interfere.

In the upshot, I allow the appeal, in exercise of my powers under S. 29(b) of the Magistrates' Court Act, [Cap. 11 R.E 2019], quash the proceedings, and set aside the judgment of the two courts below. I further, order the application to be heard afresh by another Magistrate with a new set assessors in compliance with the procedures stated above.

Each party shall bear its own costs, as no one is to blame.

It is ordered accordingly.

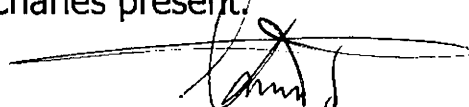


J. R. Kahyoza

JUDGE

30/4/2020

Court: Judgment delivered in the absence of the parties. Copies to be supplied to parties B/C Charles present.



J. R. Kahyoza

JUDGE

30/4/2020