THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF SHINYANGA

AT SHINYANGA

PC PROBATE APPEAL NO 7 OF 2018

(Arising from Shinyanga District Court Probate Appeal No 4 of 2016, from Original Probate and administration of Estate Case No. 13 of 2916 of Urban Primary Court)

EMMANUEL BASO.............. ....APPLICANT

VERSUS

JACKSON JOHN MPONEJA.................................. ...RESPONDENT

EXPARTE JUDGMENT

Date of the last Order: -26/3/2020
Date of the Judgment: -24/4/2020

MKWIZU, J.

Appellant in this appeal, a son of the deceased, was proposed an administrator of the estate of his deceased father, John Makoye Mponeja who left behind 32 children, in a clan meeting chaired by the respondent. Following that proposal, the appellant petitioned for letters of administration of his late father's estate before Urban primary Court within Shinyanga District . The petition was objected to by the respondent on the ground *inter alia* that, the petitioner has exhibited dishonest in dealing with the deceased's estate and therefore is not suitable for the sought

appointment. The Objector's main contention was that there is no transparency in regards to the properties left by the deceased and that he was not in recognition of the will that was alleged to have been left by the deceased. It was again, the Objectors' complaint that some of the children were said to have been given properties by the deceased without any proper information. He however, respondent had no dispute with the appointment of the appellant as an administrator. After a full hearing, trial court dismissed the objection and proceeded to appoint the appellant administrator of the estate in question.

Dissatisfied, the respondent appealed to the District court. At the District court he complained of four main issues namely that the principle of the law and gravity of the objection were not considered at the trial court, that trial court ought to have identified the law applicable in distribution of the deceased estate by looking at the mode of life of the deceased, trial court did not say whether the tended WILL would be used in the administration of the deceased estate and lastly that it was not proved that the deceased did sale or distribute some of his properties during his life time.

The District court, nullified the trial courts proceedings, and ordered the matter to start afresh after it had concluded that the trial court's proceedings were tented with serious illegalities.

Dissatisfied, appellant who was respondent in the District court has come to this court on eight grounds of appeal.

At the hearing, the appellant appeared in person with no legal representation. On the other hand, respondent defaulted appearance, the court therefore after being satisfied that he refused service, it proceeded with the hearing of the appeal in his absence.

In support of his appeal, appellant prayed the court to take into account his grounds of appeal and that he had not started to collect and distribute the deceased properties. It is the deceased who had distributed some of his properties to his children.

I have unflappably examined the record of appeal and considered the appellant's submissions. 1st and second grounds of appeal tend to disqualify the petition of appeal filed at the District Court on the ground

that, it was not properly drafted contrary to **section 41(1) of the Advocates Act, Cap 341 R.E 2002.**

I have perused the complained document filed by the respondent (Appellant at the District Court) filed on 2/8/2016.It is titled memorandum of appeal insteady of petition of appeal. It is signed by the appellant. Unfortunately, appellant has not told this court the defect on this document. Having revisited the court's record, I find nothing in the proceedings of the District court prejudicial to the appellant. The 1st and 2nd grounds of appeal are baseless.

In his 3rd ground of appeal, appellant faults the District court for holding that the trial court failed to ascertain the law applicable in the administration of the deceased estate.

Going by paragraph 7 of FORM No.1 used by the appellant in petitioning for letters of administration of the deceased estate, deceased's religion is mentioned specifically. The paragraph reads:

> *"7. Marehemu alikuwa (eleza kabila lake)* ***MSUKUMA*** *na alikuwa mfuasi wa dini ya* ***MKRISTO****" (Emphasis added)*

In addition to that, during the hearing, it was stated by the parties that the deceased contracted a Christian marriage in the year 1965 but went on to marrying other wives and he was blessed to get 32 children, two of whom have passed away. In arriving at the complained conclusion, the District court stated at page 9 of its decision that the trial court had to investigate the deceased's mode of life and come into conclusion on the law applicable in his estate's administration.

I wish to observe here that the jurisdiction of the Primary Court in the administration of the deceased's estate is stipulated by sub-paragraphs (1) of Paragraph 1 of the Fifth Schedule, of PART 1 to the MCA. The provisions state as follows:

> *1.-(l) The jurisdiction of a primary court in the administration of deceased's estates, where the law applicable to the administration or distribution or the succession to, the estate is customary law or Islamic law, may be exercised in cases where the deceased at the time of his death, had a fixed place of abode within the local limits of the court's jurisdiction:*
>
> *Provided that, nothing in this paragraph shall derogate from the jurisdiction of a primary court in any proceedings transferred to such court under Part V of this Act."*

From the above provision it is clear that jurisdiction of the primary court on the administration of deceased estate is limited to customary and Islamic law. Basing on the above limited scope of the trial court's jurisdiction, that it was necessary therefore, for the mode of life to be ascertained for the court to be in a position to know whether it had jurisdiction or not. I find nothing to fault the 1st appellate court on this ground.

In respect to the 4th grounds of appeal, appellant pointed a finger on the District Court's finding that the Urban Primary Court was wrong in admitting as evidence the deceased WILL. This ground is a misconception. At page 10 of the District Court's judgement, the District Magistrate found that though the WILL was introduced to the proceedings after the petitioner had stated in Form No 1 that the deceased died intestate and thereafter received by the court as exhibit without the objector being given chance to say whether he object to it being tendered or not , the trial magistrate went ahead to state that the WILL would not be used in the administration of the deceased estate after she had enumerated some illegalities on that document. In other words, The district Magistrate was

satisfied that, the trial court did what it was required to do by **rule 8 (a) and (b) of the Primary courts (Administration of Estate) Rules**.

In grounds 5,6 and 7 the appellant is faulting the District Court for ruling out that there was no evidence tendered at the trial courts to show that the deceased did sale and /or distribute part of his properties to some of the children in his life time. Indeed, the above is the position of the District court decision. During trial, the appellant who was the petitioner along with the tendering of the purported WILL, he also provided a list of properties some said were sold and some were distributed by the deceased to his children during his life time. Some of the alleged sale and distribution was supported by documentary evidence but some were not.

In its decision, the trial Primary court was satisfied that the deceased sold some of his properties and distributed some on his own free will during his life time and therefore the listed documents were ordered not to be part of the deceased estate. On appeal, the District court found that, though some of the documents were tendered to prove that the deceased either sold or bequeathed some of his properties to his children, there was no documentary evidence supporting the allegation by the petitioner and that

even the document tendered were tendered and admitted contrary to the law. On that basis , he said, the properties which are not proved to have been either sold or bequeathed by the deceased should be listed to form part of the deceased's estate subject to distribution by the administrator. On the same line of reasoning, the District court refrained from ordering a retrial, it however, ordered the process of administration of the deceased estate to start afresh.

As correctly stated by the District Courts magistrate, the trial court was mandated to look into any question relating to the sale, partition, division, and any other assets comprised in the estate in question so as to enable the administrator to properly do what he/ she is required by the law including distribution of the deceased's estate to the lawful heir as provided for under **Rule 8 (f) of the Primary court (Administration of Estates) Rules**. The trial court failed to discharge this duty. Apart from entertaining the objectors complaint, it went ahead to allowing some of the properties not proved to have been divided or sold by the deceased during his life time to be excluded from the deceased's estate. This was a mischief which I think, was properly cured by the District Court.

On whether the District Resident Magistrate, should have ordered a retrial or not as complained of in ground No 8, the District Court gave reasons why retrial was not his preference under the circumstances. He said the appellant act of listing some of the deceased properties alleging to have been sold or distributed by the deceased without proof and if I may add that, tendering a will at the state of hearing of the petition while it was not part of the proceedings at the time of filing the petition spoiled the appellant/petitioner position as a trusted proposed administrator of the deceased estate. I also entertain no doubts on this reasoning. It is appropriate in my view, under the circumstance of this case, to have the process of appointing administrator of the deceased estate start afresh.

Basing on the above discussion, I find the appeal devoid of merits. It is hereby dismissed with no order as to costs

Dated at **Shinyanga** this 28th day of **April,** 2020

E.Y. Mkwizu
JUDGE
28/4/2020

Court: Right of appeal explained.

E.Y. Mkwizu
JUDGE
28/4/2020