

IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

PC PROBATE APPEAL NO 10 OF 2019

(Arising from the decision of Nyamagana District Court at Mwanza in probate Appeal No 4 of 2019. Delivered on 26th August, 2019 and formally originating from Probate Cause No. 177 of 2017 at Mwanza Urban Primary Court)

NURU SALUM

(Administratrix of the Estate of the late **Ally Masoud**)**APPELLANT**

VERSUS

HUSNA ALLY MASOUD JUMA

(Administratrix of the Estate of the late **Ally Masoud**)**RESPONDENT**

JUDGMENT

05 & 14/5/2020

RUMANYIKA, J.:

With respect to the estate of Ally Masoud (the deceased) the 2nd appeal is against decision and order(s) of 28/8/2018 of Nyamagana district court which reversed decision of 5/3/2019 of Mwanza Urban Primary court (the probate court) according to its back ground the co-administrators of the estate having irreparably differed.

The 5 grounds of appeal revolve around points; (1) the 1st appeal court improperly revoked the appellant's letters of administration.

- (2) that with regard to distribution of the estate, the 1st appeal court erroneously found and held that the probate court had assumed powers of the administrators.
- (3) that the 1st appeal court erred in law and fact not upholding decision that the widow appellant was entitled to 50% shares of the matrimonial house.
- (4) that the 1st appeal court erred in law and fact in holding that out of the estate the appellant had taken a lion's share.
- (5) that the 1st appeal court erred in law and fact in holding that Islamic law was applicable under the circumstances.

Messrs B. Sariro and A. Daniel learned counsel appeared for Nuru Salum and Husna Ally Masoud Juma the appellant and respondent respectively.

When the appeal was called on 5/5/2020 for hearing, following the global outbreak of Coronavirus Pandemic and pursuant to my order of 24/3/2020 through their mobile Nos. 0753097479 and 0763188485 respectively the learned counsel were by way Audio Teleconferencing heard as follows;

Mr. B. Sariro learned counsel argued the grounds in groups (the 1st, 2nd and 5th separately and the 3rd and 4th together) that the 1st appeal court had wrongly removed the administratrix and on the issue of distribution of the estate the latter should have faulted the probate court much as probate courts had the powers the respondent therefore she was not entitled to 50% of the appellant's matrimonial house. That as long as the

deceased died intestate nothing therefore suggested that Islamic law wasn't applicable. That is all.

Mr. A. Daniel learned counsel generally submitted that the deceased died intestate yes, but the appellant's certificate indicated that theirs it was Islamic marriage. Islamic law therefore was applicable. That no court had ever removed administratrix of the estate, and with respect to the house and motor vehicle contrary to the law the probate court had assumed role of a civil matrimonial that only administrator of the estate shouldn't have distributed the estate (Case of **Donald Nchembi Njiku V. Happiness John Nchembi and 3 others**, Civil Case No 6/2016 High Court at Mwanza (unreported). Counsel also referred to Part II 5th Schedule to the Magistrates' Court Act Cap 11 RE 2002 (the MCA). That if anything, and upon the two co - administrators of the estate misunderstanding each other, the probate court should have appointed an independent party.

For some reasons the co- administrators may have so much differed that in the eye of the probate court administration by them of the 2017 estate it was next to impossible yes, but the central issue is whether the probate court was in law, with respect to the disputed estate and distribution entitled to seek opinion and work on of the conflicting list of property presented by the co administrators and out of it apportion and divide the property to heirs. As submitted, correctly so in my view by Mr. A. Daniel learned counsel, the magistrate grossly erred. In fact not only contrary to provisions of the MCA the magistrate assumed the role of administrator of an estate but also in disguise she ran the risks and took side (Case of **Donald Nchembi Njiku (supra)**).

It is settled law that judicial officers do not, at their own distribute, order, sale, apportion or divide estates. Unless on the face of it the proposed list was unrealistic and unfair courts are obliged to bless and or whole sale endorse proposals presented by administrators. If anything, with reasons also to be recorded, a probate magistrate may reject or return the proposed division to administrators with the direction that they revisit it with a view to reaching at a fair and just distribution of the estate at issue. Should the administrators reach no consensus like it was the case here, and the probate court did not do the needful, the probate court is hereby directed to revoke the letters of administration and in lieu thereof appoint any other independent administrator of the estate to do the needful. Contrary to that one, Mr. Sariro learned counsel could not be more incorrect.

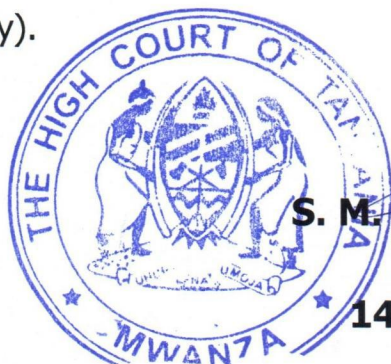
With regard to the alleged matrimonial house, again rightly so like the 1st appeal court ruled and Mr. A. Daniel argued, indeed the probate court assumed ordinary civil jurisdiction of a family court because there had been no matrimonial proceedings before her. Leave alone as said, one getting the 50% unusually and unlawfully apportioned by the magistrate suffice the 3 points to dispose of the appeal. The decision and orders of the 1st appeal court are upheld. Appeal is dismissed given its nature, each party shall bear their costs.

The records are with immediate dispatch remitted back with a view to the probate court revoking the parties' letters of administration and in lieu thereof appoint and grant the District Commissioner for Nyamagana district, Mwanza letters of administration. Basing on the list of property on record presented by the parties, it is my sincere hope that the independent District Commissioner will accordingly and immediately administer the estate.

It is ordered accordingly. Right of appeal explained.


S. M. RUMANYIKA
JUDGE
12.05.2019

It is delivered under my hand and seal of the court in chambers this 14/5/2020 in absence of the parties with notice (copies to be supplied immediately).




S. M. RUMANYIKA
JUDGE
14.05.2019