IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF BUKOBA
AT BUKOBA

(PC) CIVIL APPEAL NO. 16 OF 2019
(*Arising from civil appeal No.15/2019 of Muleba District Court, originating from Nshamba Primary Court in probate cause No. 19/2018*)

ADELAIDA KEMILEMBE MASILINGI....................................APPELLANT

VERSUS

ADVELA K. RUGALABAMU..RESPONDENT

JUDGMENT

Date of last order 05/05/2020
Date of judgment 08/05/2020

N.N. Kilekamajenga, J.

The appellant and respondent have been battling from the Primary Court and finally landed in this Honourable Court seeking for justice. The appellant is the sister of the deceased, the late Moses Mbaganika Masilingi. The respondent is the wife of the deceased. It is alleged that the deceased died on 14th October 2018 leaving behind the respondent (widow) and a child called Vanesa Moses. On 16th January 2019, the respondent petitioned the Nshamba Primary Court to be appointed the administratrix of the estates of her late husband (deceased). The appellant, on the other hand, objected the respondent's petition. In the objection, the appellant argued that the respondent was not the legal wife of the

deceased though she bore a child with the deceased. The appellant alleged that when their father passed away some years ago, the appellant was placed under the deceased's care. She believed that she also has a share in the deceased's estates. However, the appellant was older than the deceased; she was possibly married and caring for her own family because she was at the age of '50s when the matter was before this Honourable Court. At some point, the appellant hinted that she objected the respondent's petition as she wanted to protect the rights deceased's mother as one of the heirs. On the other hand, the respondent petitioned for the administration of estates to protect her interest and that of her child who was 13 years old when the appeal was heard.

Before, the Primary Court, the appellant's case was supported with five witnesses while the respondent also summoned five witnesses to build her case. Finally, the Primary Court appointed the respondent to administer the estates of the deceased. The decision of the Primary Court aggrieved the appellant who appealed to the District Court of Muleba. She coined seven grounds of appeal thus:

1. *That the trial Magistrate erred in law and fact by granting administration of a deceased estate to the respondent without specifying the applicable law in which the estate of the deceased was intended to be administered.*
2. *That the trial Magistrate having an interest in the matter, erred in law and fact by deciding the matter while he was barred by the law.*

3. *That the trial Magistrate erred in law fact by granting administration of the estates to the respondent basing on questionable evidence as whether she was a wife of the deceased.*
4. *That the trial Magistrate erroneously arrived at such decision basing on a wrong constituted clan meeting that purported to appoint the respondent to apply for and administer the deceased estate.*
5. *That the trial Magistrate erred in law and fact by granting an administration of the estates to the respondent who by evidence, misapplied /subjected the deceased estate to loss/damage.*
6. *That the trial Magistrate erred in law and fact by not including the Court assessors' opinions in its findings.*
7. *That the trial Magistrate erred in law and fact by arriving at a decision which will generate more disharmonies among the deceased beneficiaries and the clan at large.*

The District Court also decided in favour of the respondent. Still aggrieved, the appellant appealed to this Court. In the amended petition of appeal, the appellant advanced three grounds thus:

1. *That, the purported judgment of the trial Primary Court is not a judgment in the eyes of the law.*
2. *That, the District Resident Magistrate erred in law and on facts while sitting on the 1st appellate court for failure to nullify the judgment and proceedings of the trial Primary Court's (sic) that was illegal for failure to record and read out the opinion of gentle assessors hence arriving at the unjust decision.*

3. *That, the District Resident Magistrate erred in law and on facts by upholding the decision of the trial Primary Court that appointed the respondent as the administratrix of the estate of the late Moses Mbaganika Masilingi contrary to the wishes of the deceased or contrary to his will.*

The case was finally called for hearing. The appellant appeared in person under the representation of the learned advocate Mr. Frank John Karoli while the respondent also appeared in person while enjoying the legal services of the learned advocate Mr. Anesius Stewart. During the oral submission, the counsel for the appellant prayed to adopt the grounds of appeal to form part of the submission. He also prayed to argue the first and second ground of appeal. He informed the Court that the respondent was appointed to administer the deceased's estates but the appellant objected. The major reason for objection is a dearth of trust on the respondent to administer the estates. The appellant did not trust the respondent because she was not the wife of the appellant. Mr. Karoli further informed the Court that some of the documents on the deceased's estates were kept by the deceased's mother hence the respondent cannot administer the estates. If the respondent was trusted by the deceased, then such documents could be left in her (respondent) hands.

On the second ground of appeal, the counsel for the appellant argued that the Primary Court's judgment does not contain the assessors' opinion who sat with the magistrate. Besides, the assessors did not sign the judgment and their

opinions were not considered. To buttress the argument, he referred the Court to **section 7 of the Magistrates' Courts Act, Cap. 11 RE 2002.** He argued further that under **section 7(3) of the same Act** assessors are obliged to give their opinions. Mr. Karoli further referred the Court to **Rule 3(1) of The Magistrates' Courts (Primary Courts) (Judgment of Court) Rules G.N. No. 2 of 1988.**

The counsel for the appellant insisted that under the above rule, the Primary Court is obliged to consult the assessors for opinions; the same shall be read before the court. The magistrate and assessors shall sign the judgment. Mr. Karoli informed the Court that the assessors' opinions are missing in the judgment. He cemented the argument with the cases of **Hamisi Athumani v. Jumanne Makambi and two others, Civil Appeal No. 23 of 1999**, CAT at Dar es salaam (unreported) and **Hermelinda Gabriel v. Salvatory Sadoth, Civil Revision No. 7 of 2004**. According to the counsel for the appellant, these cases nullified proceedings and judgment where the assessors' opinions were not considered. He finally urged the Court to quash and set aside the decision of the District Court and Primary Court. By nullifying the decisions of the lower courts, the appointment of the respondent as the administratrix of the deceased's estates will automatically cease.

In turn, the counsel for the respondent urged the Court to dismiss the appeal as it is intended to delay the respondent's rights. He informed the Court that this is the Court of justice and should not be tied-up with legal technicalities. He further argued that the deceased stayed with the respondent until his death. The respondent incurred expenses during the treatment of the deceased. Besides, the deceased bore a child with the respondent. The appellant who wished to administer the deceased's estates does not know the welfare of the deceased's child. The appellant who does not know the child's age cannot care for her welfare. This Court should consider the welfare of the child. Mr. Stewart argued further that there is no evidence proving that the respondent was not the wife of the deceased. However, even under the presumption of marriage, the respondent was the wife of the deceased.

The counsel for the respondent further submitted that the respondent is currently managing the deceased's estates for the interests of the child who is currently attending Form I studies in Bukoba. While the respondent pays for the child's fee, the appellant is misusing the deceased's estates. The child is the only heir to the deceased's estates and the respondent may protect the interests of the child and not the appellant.

In addition, the counsel for the respondent submitted that the assessors signed the judgment and approved its correctness. However, the Court must be moved

by justice than unnecessary legal technicalities. In the case at hand, the immediate victim is the deceased's child. Therefore the Court should protect the interests of the child by not abiding by legal technicalities. The learned counsel challenged the case of **Hamisi Athumani** (*supra*) as it is distinguishable to the case at hand. He finally urged the Court to dismiss the appeal and approved the respondent as the administratrix of the deceased's estates.

In the rejoinder, the counsel for the appellant insisted that the trial Primary Court did not adhere to legal procedures the judgment writing. He also challenged the application of the principle of overriding objective in this case and urged the Court to allow the appeal.

I have considered the grounds of appeal and submissions from the parties and I believe, the second ground, if resolved, may dispose of the whole appeal. On the second ground of appeal, the counsel for the appellant argued that the Primary Court's proceedings were illegal for failure to record and read out the assessors' opinions. In his argument, he moved the Court to consider **section 7 of the Magistrates' Courts Act, Cap. 11 RE 2002** and **Rule 3(1) of the Magistrates' Courts (Primary Courts) (Judgment of Court) Rules G.N. No 2 of 1988**. For clarity and further discussion, I take the discretion to reproduce section 7 of the Magistrates' Court Act. The section reads:

*7 (1) In every proceeding in the primary court, including a finding, the court **shall** sit with not less than two assessors.*

(2) All matters in the primary court including a finding in any issue, the question of adjourning the hearing, an application for bail, a question of guilt or innocence of any accused person, the determination of sentence, the assessment of any monetary award and all questions and issues whatsoever shall, in the event of a difference between a magistrate and the assessors or any of them, be decided by the votes of the majority of the magistrates and assessors present and, in the event of an equality of votes the magistrate shall have the casting vote in addition to his deliberative vote.

*(3) In any proceeding in **any other magistrates' court** in which any rule of customary or Islamic law is in issue or relevant the court **may**, and **when directed by an appropriate judicial authority** shall sit with an assessor or assessors; and every **such assessor shall be required, before judgment, to give his opinion as to all questions relating to customary or Islamic law** in issue in, or relevant to, the proceeding; save that in determining the proceeding the court shall not be bound to conform with the opinion of the assessors.*

Section 7 (1) and (2) of the Magistrates' Courts Act obliges every Primary Court to sit with not less than two assessors in any matter; be it criminal, civil case, or application. Under subsections 1 and 2 of the same section, there is no requirement for the assessors to give their opinions before the magistrate writes the judgment. It is very unfortunate that the learned counsel for the appellant

referred the Court to **section 7(3) of the Magistrates' Courts Act** which is irrelevant to the case at hand. However, for academic purposes, I wish to discuss the contents of subsection 3.

Under **subsection (3) of section 7 of the same Act**, any other Magistrates' Court **may** sit with assessors where customary or Islamic law is in question. In other words, a District Court or Resident Magistrates' Court may sit with assessors when determining any issue involving customary or Islamic law. While it is mandatory for Primary Courts to sit with assessors, it is optional for other magistrates' courts to sit with assessors. The word may is used under **subsection 3** while the word **'shall'** is used under **subsection 1 of section 7 of the Magistrate' Courts Act**.

There are two circumstances under which the magistrates' court apart from the Primary Court may sit with assessors. **First**, the magistrates' court may *suo motto*, depending on the issue to be determined, sit with assessors. **Second**, the magistrate's court may be directed by an appropriate judicial authority to sit with assessors to determine an issue involving the application of customary or Islamic law. Where any other magistrates' court apart from the Primary Court sits with assessors, every such assessor shall be required to give his/her opinion on the issue in question before the magistrate writes the judgment. Nonetheless, in

case the magistrates' court sits with assessors under subsection 3, the court shall not be bound by assessors' opinions.

Therefore, in the instant case, **subsection 3 of section 7 of the Magistrates' Courts Act** is not relevant. In this case, the Primary Court sat with assessors. Therefore, the other relevant law is **Rule 3 of The Magistrates' Courts (Primary Courts) (Judgment Of Court) Rules G.N. No. 2 of 1988**. For the purposes of the discussion, I wish to reproduce Rule 3 thus:

> *3. (1) Where in any proceedings the court has heard all the evidence or matters pertaining to the issue to be determined by the court, the magistrate* ***shall proceed to consult with the assessors present****, with the view of reaching a decision of the court.*
> *(2)* ***If all the members of the court agree on one decision, the magistrate shall proceed to record the decision or judgment of the court which shall be signed by all the members.***
> *(3)* ***For the avoidance of doubt a magistrate shall not, in lieu of or in addition to, the consultations referred to in subrule (1) of this Rule, be entitled to sum up to the other members of the court*** (emphasis added).

According to the above rule, the magistrate may incorporate the assessors' opinions in the following ways: after the evidence from the parties, the magistrate shall consult the assessors who shall give their opinions. The law does not state whether such opinion shall be written down by the magistrate after

consultation. Also, the same rule does not direct the assessors to give their opinions in writing. In line with **Rule 3(3)** above, the magistrate is not obliged to sum-up the opinion to the assessors. Therefore, the magistrate may consult assessors orally, the assessors may also give opinions orally and the magistrate writes the judgment. Under **Rule 3(2),** where there is no dissenting opinion among members of the court (i.e. Magistrate and assessors), the magistrate shall write the judgment which **shall** be signed by all members. Where the judgment is signed by the magistrate and assessors, it means the members agreed on the decision written by the magistrate. In my view, where there is no dissenting opinion, the magistrate does need to state the opinion of each assessor because all members of the court agreed on one decision. It is pertinent for the magistrate to state the opinion of each assessor where one or all of the assessors disagreed with the magistrate. The Court of Appeal of Tanzania when confronted with the same issue in the case of **Neli Manase Foya v. Damian Mlinga, Civil Appeal No. 25 of 2002**, CAT at Arusha, after citing the above rule, had the following observation:

> *'We do not read anything in Rule 3(1) (2) (3) above which demands the assessors to give their opinions on an issue before the court.'*

The Court of Appeal of Tanzania further stated that:

'In answer to the second point of the iaw, assessors are neither required to give their opinions nor to have their opinions recorded by the magistrate.'

Therefore, the argument advanced by the counsel for the appellant that assessors' opinion must be recorded and read in court in not within the purview of the above rule. It is very unfortunate that the learned counsel for the appellant referred the Court to Rule 3(1) and did not proceed to read the other sub-rules. With respect, the learned counsel failed to honour his duty of assisting the Court to do justice. Being an officer of the Court, he was supposed to read all the rules and guide the Court appropriately. His evil motive is further fortified with the cases submitted in Court because all of them do not support his argument. For instance, in the case of **Hamisi Athumani** (*supra*) there was a change of assessors something which is completely different from the case at hand. Also, in the case of **Hermelinda Gabriel** (*supra*) the Court stated that:

'And by the way the procedure of taking opinion from assessors is no longer a valid practice. The magistrates' Courts (Primary Courts) (Judgment of Court) Rules, GN. 2 of 1988 which was published on 1/1/1988 and therefore an effective date has done away with any preliminaries. Assessors are to be consulted for their opinions after the conclusion of the trial. And their opinions need not be in writing as it was done in this case if all agreed on one decision. By taking opinions in writing in my view is not fatal to the proceedings. The same is curable.'

I am not sure whether the learned counsel for the appellant read the above case. If he did, then his advice and argument misdirected the Court something which is contrary to **Regulation 92 of the Advocates (Professional Conduct and Etiquette) Regulations, 2018**.

On the other point, the counsel for the appellant argued that it was not proper to appoint the respondent to administer the deceased's estates because she was not trusted by the deceased. The deceased left some of the documents in the hand of the deceased's mother instead of the respondent. The learned counsel went further to question whether the respondent was the deceased's legal wife. On whether the respondent was trusted by the deceased, this argument has no merit because the deceased's mother is not the party to this suit. Also, there is no evidence suggesting that the deceased trusted the appellant. This argument should not hold me because there is no will left by the deceased showing how his estates ought to be administered.

Furthermore, I have carefully read the records in the court file and found an argument advanced by the appellant that she was placed under the care of the deceased when their father died. However, the appellant was 53 years old when she testified before the Primary Court in 2019. I could feel that the appellant,

who is the deceased's sister, claims a share from the deceased's estates on the ground that she was under the care of the deceased. At some point, the appellant hinted that the deceased's mother might lose her rights if the estates are administered by the respondent. I do not want to go into the issue of who is the right heir of the deceased's estates because the matter before this Court is whether the Primary Court was right is appointing the respondent as the administratrix of the estates.

According to the evidence submitted in the trial Primary Court, the respondent stayed with the deceased since 2006 until his demise in 2018. In their relationship, they were blessed with one child called Vanesa Moses. The child is alleged to be 13 years old. I have carefully scrutinised the evidence submitted in the Primary Court and found out that the appellant does not object the fact that the deceased bore a child with the respondent. The deceased's mother (SM2) also confirmed that the deceased bore a child. Both the appellant and the deceased's mother objected the appointment of the respondent because she (respondent) was not introduced into their family. They also alleged that the respondent never participated in caring for the deceased when he was sick. However, during the trial, the respondent submitted a lot of documents showing how she fought for her husband's life in different hospitals. Furthermore, during the funeral, the respondent and her child appeared in the eulogy. They also

appeared in the list of persons who put the wreath on the deceased's grave. At the funeral, the respondent was recognised as the only wife of the deceased. Currently, she is managing the estates of the deceased and footing the child's school expenses.

Before, I venture into the qualities of an administrator of estates; it is pertinent if I point out how she could be the legal wife of the deceased. **Section 160(1) of the Law of Marriage Act, Cap. 29 RE 2002** provides:

> *Where it is proved that a man and woman have lived together for two years or more, in such circumstances as to have acquired the reputation of being husband and wife, there shall be a rebuttable presumption that they were duly married.*

The fact that the respondent stayed with the deceased as husband and wife in Geita was not rebutted in the trial court by the appellant or any of the appellant's witnesses. The existence of the child (Vanesa Moses) is also undisputed. The appellant does not understand how the wife who was not introduced into the deceased's family could be the legal wife. Nevertheless, the failure to introduce the wife to the family does not render their relationship illegal. In her testimony, the respondent stated that they acquired some properties together. The deceased and respondent built houses in Geita and Muleba, and bought some other properties during the subsistence of their marriage.

In my view, the evidence in the trial Court proves that the deceased lived with the respondent as husband and wife. Again, the evidence was not meant to prove or disprove presumption of marriage, the fact that the deceased left behind a child is undisputed and not challenged. For that reason alone, the child's interests and welfare must be protected. Under **section 10 of the Child Act, 2009**, the law provides:

> *'A person shall not deprive a child of reasonable enjoyment out of the estates of a parent.'*

It is also illegal to discriminate a child based on birth or any other reasons. See, **section 5 of the Child Act, 2009** strictly against discrimination of children. Whoever contravenes the provisions of the Child Act, 2009 commits offence may be guilty and convicted accordingly. See, **section 14 of the Child Act, 2009**.

The major question is who might be the right person to protect the interests of the child? Currently, the child is in the custody of the respondent who is managing the deceased's estates pending the distribution of the same to the heirs. In my view, the respondent is in the best position to protect the interest of the deceased's child than the appellant.

On whether the respondent has the qualities of being the administratrix of the deceased's estates, I wish to consider the case of **Seif Marare v. Mwadawa Salum 1985 TLR 253**, where the Court observed the following:

> *On application for appointment of an administrator of a deceased's estate, the duty of the court is to appoint as* ***administrator a person who has an interest in the estate****, and according to the wishes of the deceased if any are expressed.*

The appellant argued that the clan meeting proposed the respondent to administer the deceased's estates was not chaired clan's chairman. During the hearing of this appeal, the appellant told the Court that she and the deceased's mother did not attend the deceased's funeral because of a fracas within their family. If this information is correct, then the major question is could the appellant attend the clan meeting while she refused to attend the deceased's burial? Doing so could mean that the appellant was eyeing for the deceased's estates and nothing else. In other words, even if the clan meeting could be chaired by the proper chairman, the appellant was not likely to attend. Again, the clan meeting does not appoint an administrator of estates. It simply proposes the administrator of estates who must be appointed by the court. Any person aggrieved by the proposal from the clan meeting may file an objection in court. That is what the appellant did in this case. So, the argument that an improper

clan meeting proposed the respondent as the administrator of estates is devoid of merit.

In conclusion, this Court has an obligation to dispense justice without fear or favour. Under the law, the Court is obliged to protect the best interests of the child. In the case at hand, the Court believes that the respondent has unchallenged interests over the deceased's estates and, being the child's mother, will be able to protect the interests of the child than the appellant. Based on the above brief analysis, the appeal is devoid of merit and it is hereby dismissed. This Court confirms the decisions of the District Court and Primary Court and approves the appointment of the respondent as the administratrix of the estates of the Moses M. Masilingi. The respondent should immediately abide by the duties of an administratrix and distribute the estates to the legal heirs. The distribution of estates should be done as soon as possible to avoid loss of the deceased's estates. Order accordingly.

Dated at Bukoba this 8th May 2020.

Ntemi N. Kilekamajenga
Judge
08th May 2020

Court:

The judgment is delivered in the presence of the counsel for the appellant, Mr. Frank John; the counsel for the respondent, Mr. Anesius Stewart; the appellant and respondent also present in person. Right of appeal explained to the parties.

Ntemi N. Kilekamajenga
Judge
08th May 2020