IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

PROBATE APPEAL NO. 20 OF 2020

(Arising from Probate Appeal No.7 of 2020 before District Court of Moshi at Moshi and Originating from Probate Cause No.1 of 2020 before Mabogini Primary Court)

BERNAD MENRAD MSHANGA ..... APPELLANT

VERSUS

VICTOR AKWILINI TILYA .....RESPONDENT

JUDGMENT

MUTUNGI .J.

This is the second Appeal. In a nutshell, Victor Akwilini Tilya successful petitioned for administration of the estate of the late Yohana Menrad Mshanga at Mabogini Primary Court. As the probate was in progress, the respondent objected the respondent's appointment as the deceased administrator. The raised objection was overruled by the trial court and the respondent dully appointed.

The Appellant unsuccessfully appealed to the District Court, on the grounds that, the trial court had no jurisdiction, the trial Magistrate did not sum up the opinion of assessors, the trial court relied upon the copy of the will which had defects and the trial court failed to evaluate and analyse the evidence adduced before it.

The District Court dismissed all the grounds of appeal. The appellant has now come to this court on the following grounds: -

1. That, the trial Magistrate erred in law and facts for appointing the respondent as an Executor on the basis of a will in the absence of the original.
2. That, both the trial and first Appellate Court erred in law and fact in acting on the will which was made under undue influence and its validity was questionable.
3. That, both trial and first Appellate Court erred in law and fact in deciding that the purported will was valid while ignoring the evidence that the said will contained properties which did not belong to the testator.
4. That, both trial and first Appellate Court erred in law and fact in taking into account evidence adduced

by the Appellant's witnesses at the trial court which were self-contradictory.

5. That, both trial and first Appellate Court erred in law and fact deciding on the validity of the will in the absence of sufficient evidence to prove the same.
6. The first appellate court was wrong to treat the appeal from the primary court as a civil appeal instead of probate Appeal.

When the Appeal came for hearing both parties agreed to proceed by way of written submissions. Submitting on the first ground, appointing the executor on basis of a copy of will, the Appellant contended the trial court in its judgement at page 12 found the deceased left a will and conceded that the original copy was left with the "Mbokomu Parish Priest". The trial court proceed to appoint the executor basing on such copy of the will. The appellant submitted, this was a serious error on the ground that secondary evidence is only admissible under exceptional cases. This is not one of such cases. It was further submitted, the Parish Priest was a competent and compellable witness under **section 127(1) of the Evidence Act, CAP 6 R.E 2019**. In the given circumstances, the trial court was required to issue summons to call him to testify

before the court. He concluded be as it may, the said copy was not certified as required under section 65(a) of the Evidence Act. It was required to be accompanied by the original will as required under **Rule 4(1) (3) of the Primary Court (Administration of Estate Rules) GN No 49 of 1971**. In that regard it was fatal to appoint the respondent relying on the copy of the said will.

On the second ground of Appeal grounded on appointing the Executor on a will which was made under undue influence, the Appellant submitted the late Yohana Menrad Mshanga was sick when she was writing the will as per the evidence of SM2 Felisiana Mshanga at page 23 of the typed proceedings. The Appellant further submitted, the purported will was questionable since Michael Mshanga who was given a large portion of the estate is the one who called the witness to the will at his home. At that time the deceased was residing at his home. In support of his averment he cited the case of **Ramenik Vaghella vs. Mahendra Vangella 2000) TLR 227** and further referred to an Article titled **"A look Complex Issues in the Trust and Probate Arena"** found in a book known as **"Trust and probate litigation."**

The Appellant further submitted, the deceased knew how to read and write and she used to sign her own name 'YOHANA'. It is thus surprising that in the purported will the testator signed using a thumbprint. It makes it difficult to know whose thumbprint it was, yet the trial court overlooked this aspect. It was very fundamental that the signing of the will must have used an identification which was unmistakably ascribed to the testator. This was established in the book by **Burn E.H (1994), Cheshire and Burns': Modern Law** of Real Property, 15th ED, Butterworths: London at page 836 which was also cited in the book of **Nditi, N.N.N (Jr), 2017 Succession and Trust in Tanzania: Theory of Law and Practice, Nairobi: Law Africa Publishing (K) Limited at page 84.** He further cited **Rule 20 of the Local Customary Law Declaration Order GN 279 of 1963** which lays down the same principle.

He submitted further that, a contradiction raised by a party in a case must be addressed, citing the case of **Tanzania Breweries Ltd vs. Anthony Nyingi Civil Appeal No. 119 of 2014 (CAT)**. The foregoing notwithstanding, it was contended, if at all the deceased was illiterate the will was supposed to be witnessed by four witnesses as per Rule 19 and 21 of the Local Customary Law Declaration Order No

4 of 1963. Since it was signed by two witnesses it lacks proper attestation as held in the case of **Ferdinand Lumbowe vs. Ngaiyamo Kajuna [1992] TLR 142**.

The appellant also submitted, the evidence of the Respondent's witness regarding the properties bequeathed by the deceased varies with the will. The evidence says Rundugai Farm was given to Conrad Mshanga and Feliciana, whilst the said will shows that, it was only given to Conrad Mshanga. Another example is that the deceased's farms were at Mandaka Manono, Kiwalani, kwa Naksa and Mbugani to the contrary the will contained more properties.

Regarding the third ground of Appeal that, the will contained the properties which did not belong to the testator, the appellant submitted the will must relate to the testator's properties. He cited the Local Customary law Declaration Order which defines a will. At page 5 of the purported will shows "shamba la mpunga" was bought by three people that is Conrad Menrad Mshanga, Yohana Ngapani Minde and Feliciana Menrad Mshanga but the same was given to Feliciana Menrad Mshanga and Conrad Menrad Mishanga. In that regard, it was co-owned by the testator and her two children jointly. Upon

her death therefore she had no mandate to dispose the said property as it devolves to the surviving owners.

Submitting on the fourth ground of Appeal on contradictory evidence, the Appellant submitted, there was contradicting explanations as regards the material date on which the will was executed by SU5 and SU6 and referred to page 39 of the trial court's typed proceedings. Such contradiction between the material witnesses present during the writing of the will was fatal by all standards.

On the fifth ground of Appeal that, there was no sufficient evidence to prove the will, the Appellant submitted the will was not original, there was contradiction of the evidence when testifying on the content of the will, contradiction on the material date of execution of the will and the thumbprint by the deceased which was hard to prove whether it was hers, all these put together made the purported will invalid.

Regarding the sixth ground of Appeal, treating the Appeal from primary Court as Probate Appeal by the first Appellate Court, the Appellant submitted he appealed against the appointment of the respondent by the trial

court, yet the first appellate court treated it as Civil Appeal No. 7 of 2020.

In reply to the foregoing, the respondent for the first ground of Appeal stated, the Appellant is the one who tendered the will which he collected from the parish priest as seen at page 21 of the typed proceedings and page 2 of the typed judgement. He cannot therefore deny that which he tendered. He further submitted that it was not fatal to admit the will which was written by the deceased. It was upon the appellant to prove the appointed person is not suitable to be the executor. He cited the case of **Mohamed Hassan Mzee and Mwanahawa Mzee (1994) TLR 225** to support his stance. He further submitted the trial court adhered to all the required procedures in admitting a will.

Regarding the 2nd ground of appeal, it was the appellant's witness who raised the issue of sickness without proof. Moreover, there was no evidence which shows that the will was written at the beneficiary's home as claimed by the appellant. No evidence to show that Michael Mshanga is the one who called the witness. He further submitted that, the question of state of mind was irrelevant, the testator affirmed she was of sound mind.

The assumption by the Appellant that SU2 was present during the time of signing the will lacks evidence since the will was written by the testator with her witness at the advocate's office. He further submitted that, the will was well attested and met all requirements of a written will. There were properties which were bequeathed to the Appellant but due to the grabbing spirit he wants to own all the deceased's properties.

The respondent concluded by summarizing that, there was no evidence to show that, the deceased had health problems at the time of signing the will, hence the appellant is acting on assumptions. There was neither evidence that Michael Mashanga was the one who secured the witness to the will but the truth is that the deceased went on her own with her witness to the witnessing advocate. The deceased did bequeath her properties on her own will and chose to use a thumb to sign the same. Surprising the appellant was one of the beneficiaries to the estate but due to his greedy character he wants to take it all. It was thus the duty of the appellant to prove what he alleges as held in the case of **MELITA NAIKIMINJAL & LOISHILAARI NIKIMINJAL VS SAILEVO LOIBANGUTI (1998) TLR 121**.

On the 3rd and 4th grounds of Appeal, he submitted these were new grounds introduced by the appellate court. The testator had a good memory and she knew all her properties and nothing can invalidate the will. The appellant's ill motive to take away the properties of the deceased was evident even before her death.

Concerning the 5th ground of appeal, the respondent submitted, the copy in dispute was made out of the original and witnesses adduced evidence without variance. To cap it all the testator signed the same together with her witnesses. He concluded that all grounds raised concerning the validity of the said will are baseless.

Replying to the 6th ground of Appeal on the issue of naming the appeal as a civil appeal, the respondent submitted the appellant has forgotten that he is the one who filed this Appeal both in this court and District Court. He had given it a title "Civil Appeal" and is now turning against his own words.

The Respondent concluded by summing up the appeal is devoid of merit and prayed the same be dismissed with costs.

Before entertaining this appeal, let me start by saying that the legal position is that an Appeal Court can only interfere with concurrent findings of the lower courts if there is misapprehension of the evidence, miscarriage of justice or violation of principles of law. See the case of **Amratlal D. M. Zanzibar Silk Stores vs A.H Jariwale Zanzibar Hotel 1980 TLR 31**

Having considered the grounds of appeal, submissions, and proceedings of the trial court I am settled the entire appeal is premised on the validity of the will and contradiction of evidence thereto. Regarding the validity of the will, the Appellant complained that, ***first***, the will was a copy, ***second***, it was made under undue influence, **third**, there was no signature of the testator while she knew how to read and write and ***fourth***, it contains the properties which were not owned by the testator. Concerning the validity of the will the trial court discussed only the existence of the will. The first appellate court found that since the said copy of the will was tendered by both the Appellant and respondent it was worth to be relied upon by the trial court. Further that a thumb when used as a signature it serves the same purpose as a normal signature more so the testator was at liberty to make her will at

Arusha where she was residing at the time. In view thereof the said will was valid.

At this juncture it is worth nothing that the genesis of this appeal was the probate matter instituted by the respondent before the Mabogini Primary Court (No. 1 of 2020). The respondent was seeking to be appointed as the Administrator of the estate of the late YOHANA MSHANGA who passed away on 3/7/2016. Before the respondent could be appointed the appellant raised an objection. It is on record that the reasons in support of the objection were such that, the appellant was not dully notified of the clan meeting which nominated the respondent, of which the trial court found, there was no proof that either the appellant had reasons of absence or was never notified, hence the reason dismissed.

Another reason was that, the respondent was not the deceased's biological child, to this the trial court addressed itself to the law that any person can be appointed an administrator of the estate in issue provided one has to be appointed either by a family or clan meeting or otherwise appointed by the deceased in a will. The trial court found the respondent had passed all the

tests of appointment. For the sake of reference the court stated at page 15 of the judgment that: -

"Mahakama hii ilipata uthibitisho wa kuwa mwombaji anazo sifa za kusimamia na kuomba usimamizi wa mirathi ya marehemu Yohana Menrad kwa kupitia muhtasari wa kikao kilichopokelewa kama kielelezo Mahakamani hapa na vilevile mwombaji alistahili kwani wosia wa marehemu ambao mpingaji na mwombaji walifikisha nakala zao Mahakamani kama kielelezo na hakukuwa na ubishani juu ya wosia huo."

Further the trial court found that the allegation that the respondent was involved in case no. 7/2016 had no legs to stand and dismissed the same.

Lastly, the trial court directed its mind on the procedure followed which the appellant contested. The trial court found the respondent had furnished the court with the deceased's death certificate, the clan minutes dated 2/2/2020, he had also been mentioned by the deceased in her will before she passed on and to cap it all family members (SU2 and SU3), the clan chairman and other clan members had come before the court in support of the respondent's appointment.

In the end the trial court was convinced that, the respondent was the right candidate for the appointment. This is evident from the findings of the trial court at page 16 and I quote: -

"Hivyo Mahakama hii imejiridhisha kuwa pingamizi lake ndugu Bernard Menrad Mshanga halina mashiko kwa kuwa hakuweza thibitisha yote aliyomtuhumu nayo mwombaji."

The foregoing narration goes to show that, the trial court did perform its noble duty that is to hear and determine the appellant's objection and proceed to appoint the respondent. To this the court ruled: -

"Mahakama hii kwa mamlaka iliyopewa na kifungu namba 2(a) cha jedwali la tano sharia namba 11 marejeo ya Mwaka 2004. Mahakama hii kwa kauli moja inatamka kwamba mwombaji ndugu ***VICTOR AKWILINI TILYA*** *maombi yake kuwa msimamizi wa mirathi ya marehemu YOHANA MENRAD MSHANGA yamekubaliwa."*

The court has gathered that, the issue of the will arose when the respondent's application was under scrutiny. This is whether he could qualify as an administrator. It came to light that the respondent was not a stranger in

the appointment but there was justification through the clan members, clan meeting, family members and even mentioned in the deceased's will. It was not that the deceased's will was subject of scrutiny. As already observed the trial court had only one duty and that is to deliberate on the objection raised and appoint an administrator of the said estate.

The argument on the validity of the will is neither here nor there. The trial court did indulge itself into extraneous matters in the cause of its deliberation on the objection raised, one of which is the validity of the will even before the administrator had been appointed. This was a wrong course to take. It was not mandated to discuss the same before the administrator had taken up his duties and distributed the said estate. This is when and only when the beneficiaries could raise their dissatisfaction to the distribution and the ways and means the administrator had taken to arrive at the distribution. It was hence pre-mature for the trial court to determine the validity of the will at the objection stage through it had rightly performed its duties. The first Appellate Court fell in the same trap and proceeded to determine the validity of the will upon complaints from the appellant before even the

respondent could perform his duties as the administrator. It was yet to come to light which ways he would employ in distributing the estate in issue, through a will or otherwise.

In view of the foregoing the parties should revert back to the trial court and let the administrator (Respondent herein) carry out his duties. In the event the appellant or any interested person in the said estate is dissatisfied with the distribution, can then proceed to take legal steps in the proper forum.

In the same vein, this court cannot proceed with the appellant's grounds of appeal as doing so will be putting itself in the shoes of the trial court. It will otherwise be putting the cart before the horse.

In the upshot the appeal is dismissed for lack of merits. The first Appellate Court's judgment, proceedings and orders are accordingly quashed and set aside. Considering that this is a probate matter no order as to costs is issued.

THE HIGH COURT OF TANZANIA

B. R. MUTUNGI
JUDGE
18/3/2021

Judgment read this day of 18/3/2021 in presence of the Appellant and Mr. Michael Mshanga (the Respondent's brother).

B. R. MUTUNGI
JUDGE
18/3/2021

RIGHT OF APPEAL EXPLAINED.

B. R. MUTUNGI
JUDGE
18/3/2021