IN THE COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

PC CIVIL APPEAL NO: 155 OF 2020

(Originating from Probate Appeal No. 14 of 2019 before the district court of Ilala and Mirathi No. 102 of 2019 before Kariakoo primary court)

FARAJI MIRAJI SEIF ..... **APPELLANT**

VERSUS

ABRAHAM CHRISTIAN TARIMO.....**RESPONDENT**

JUDGMENT

Last Order:18/2/2021
Judgment: 6/4/2021

MASABO, J.:-

Faraji Miraji Seif successfully applied for letters of administration of the estate of his father, the late Miraji Seifu, in Mirathi No. 135 of 2005 before Kariakoo primary court. His nephew, Abraham Christian Tarimo, was unhappy. He challenged the appointment in Civil Revision No. 18 of 2019 before the district court of Ilala at Samora Avenue. His application ended successful. The letters granted to the appellant were revoked. Thereafter, the respondent successfully filed a fresh application in Mirathi No. 102 of 2019 before Kariakoo primary court. Sequel to his appointment as administrator, he was ordered by the trial court to award the widow a 1/8 share of the estate.

The Appellant was not amused by the appointment. He appealed to the district court of Ilala in Probate Appeal No. 14 of 2019. In his appeal he fronted 6 grounds of appeal through which he complained that the primary court had no jurisdiction to entertain the matter; the court erred in dividing the deceased's estate; the decision of the trial court was not signed by the assessors; no reasons were advanced in support of the court's decision; and lastly, the decision of the court was based on extraneous matters.

The appeal was partly successful to the extent that, the trial court erred in dictating the distribution of the deceased's estate and that the decision had extraneous matters. Other grounds of appeal were found devoid of merit. The respondent was ordered to proceed with the administration and to distribute the assets in accordance with Islamic law.

The appellant is still disgruntled. He is now before this court seeking reliefs. His memorandum of appeal is based on five grounds as follows;

i. The court erred in law for failing to quash an illegal decision of Kariakoo primary court;
ii. The court erred in law for failing to adhere to legally established precedents;
iii. The court erred in law and fact for determining and making orders thereof of a matter which was not subject to appeal;

iv. The court erred both in law and in fact for failing to find that the appellant was denied the right to be heard;

v. The court erred both law and facts by failing to properly analyze the evidence of the parties herein hence arrived at an unfair decision to the detriment of the Appellant.

When the appeal was called on for hearing on the 11th December, 2021. Ms. Jenifer Sintara, learned counsel assisted by Mr. Benedict Kwigema, learned counsel appeared for the Appellant whereas Mr. Emmanuela Nkona, learned counsel appeared for the respondent.

Submitting in support of appeal, Ms. Sintara abandoned the 4th ground of appeal and proceeded to submit on the rest of the grounds. On the 1st ground she submitted that it is clear on the face of the record of the district and the primary court that the decision of the trial court was tainted with illegality in that: **First**, it ordered distribution of the assets the powers which the court did not have. **Second**, it was tainted by extraneous matters to wit "[the appellant] hana *sifa, hata mjane alilalamika*" which is not reflected in the primary court's proceedings.

She cited section 21 (1) (c) of the Magistrate Court's Act, Cap 11 RE 2019 and proceeded to submit that having realized that there are illegalities the district court ought to quash and set aside the decision of primary court but, to the contrary, it upheld it and directed the administration of the estates in accordance with Islamic laws. Ms.

Sintara argued that the position of law is that, decisions of superior courts bind the lower courts (**JUWATA V Kiwanda Cha Usafirishaji wa Taifa** [1988] TLR 146. Thus, in this case, the court was bound to follow the decision in **Ibrahim Kusaga v Emmanuel Mweta** [1989] where it was held that it was not the duty of the court to distribute the estate.

On extraneous matters, she argued that the Court of Appeal in **Clement Pacras V R, Crim.** Appeal No. 34 of 2013 at Mwanza (unreported) held that it was not open for the judge to introduce extraneous matters which have no basis on the case. Therefore, having found that there were extraneous matters: the court had no option than to quash and set aside the judgment.

On the 3rd ground Ms. Sintara submitted that the mode of distribution of estate was never a ground of appeal but the district court at page 17 of the judgment directed the distribution of the estate and thereby re-affirmed the illegality committed by the primary court. On the 5th ground, she submitted that there were matters of law and evidence which caused the illegality as the district court magistrate failed to analyse the law and evidence. Instead of quashing the decision he directed the administrator to distribute the assets. Therefore, the court contravened the principle laid down in **Albati Mashweko v Adventina Alexsander Mushumbus** Misc. Land Case No. 67 of 2018 the High Court at Bukoba where it was pointed out that once the proceedings are found illegal the remedy open to the parties is to file a fresh suit.

Replying, Mr. Nkoma firmly opposed the appeal. He submitted that the submission made by the appellant's counsel is devoid of legal issues to warrant interference of the decision of Ilala district court. In regard to the 1st ground he argued that the district court did not affirm the decision of primary court rather it subscribed to the appellant's submission in regard to the distribution.

On the extraneous statement, he submitted that at page 6 of the typed judgment the court registered complaints regarding the conducts of the administrator that he occasionally Tshs 10,000/= to the widow who is currently under the custody and care of her granddaughter, a fact which was not disputed by the Appellant in the district court. Mr. Nkoma proceeded to argue that the counsel for the Appellant has misconceived the judgment as there is no illegality in the decision of the district court. He argued that, it is incorrect to blame the court for condoning extraneous matters whereas the judgment vividly demonstrate that it did not. Mr. Nkoma submitted further that the first appellate court did not order distribution of assets rather it stated that distribution be done in accordance with Islamic law.

Regarding the 5th ground. Mr. Nkoma argued that the Counsel for the respondent's counsel has disregarded the evidence tabled before the court and has concentrated on what he consideres to be the

failure of the district court to quash the decision of primary court. He argued further that, since the decision of the court partly it was correct for the court to upheld the orders which were not disputed. In further support of this point, he submitted that, the appeal to the district court had five grounds two of which were upheld and three grounds were dismissed. Therefore, the case of **Alex Mashweko Vs Adventi** (supra) is distinguishable as in the said case the appeal was allowed in entirety.

In rejoinder Mr. Sintara summited that since the counsel for the respondent conceded to her submission that the decision of the superior courts binds the lower court and that the appeal partly succeeded, it is obvious that the court erred in not quashing the appeal because once a decision is tainted with illegalities, it ought to have been quashed.

I have carefully examined the record of appeal and considered the rival submissions advanced by the learned counsels and the authorities relied upon. The arguments raised by the parties and the record from the lower court all converge on two issues. First, contrary to the well-established principles of law, the trial court usurped the duty of the administrator by ordering distribution of the of estate. Second, the statement "hata mjane alilalamika" was extraneous.

Regarding the first point, I have observed that the first appellate court while subscribing to the appellants view, it held that the order that the

widow should get 1/8 of the estate amounted to distribution of the estate. Further, it held that although under Islamic law the widow is automatically entitled to 1/8 of the deceased husband's estate, it was not the duty of the trial court to dictate that the widow should get 1/8 of the deceased husband's estate. In the foregoing, there is no doubt that the finding of the 1st appellate court was in tandem with the authority cited by Ms. Sintara in support of her submission that by prescribing the shares the trial court acted *ultra vires*. To this extent, the argument that the court ignored the binding authority in **Ibrahim Kusaga v Emmanuel Mweta** (supra) is devoid of merit. Similarly, with regard to extraneous matters, the finding of the first appellate court that the trial court erred in entertaining extraneous matters, was well in tandem with the position of the law and the authorities cited by Ms. Sintara.

The contentious issue between the parties with regard to the first and second ground of appeal revolves around reliefs whereby by it has been ardently argued by Ms. Sintara that having found that there were two illegalities, the first appellate court ought to quash and set aside the entire judgment and proceedings of the trial court so that the parties can go back to the drawing board to start afresh. With respect to the counsel, there seem to be a lucid misdirection in her reasoning which suggests that when a ground of appeal is upheld, the only action available to the appellate court is quashing and setting aside the impugned judgment.

I have carefully read the authorities cited by the counsel to discern the point. Starting with the case of **Ibrahim Kusaga v Emmanuel Mweta** (supra), whereas it is true that the lower court decision was quashed, the circumstances of the said case are distinguishable. Unlike in the instant case where the trial court's jurisdiction over the estate is uncontested, in **Ibrahim Kusaga v Emmanuel Mweta** (supra), in addition to distribution of assets, there was yet a fatal irregularity as one of the assets falling under the estate was owned under a registered partnership to which the trial court had no jurisdiction. Resolving this issue, the court held that:

> In the instant case the Primary Court had no jurisdiction to distribute the estate of the deceased for many reasons apart from the fact that the Primary Court ought not to do the work of the Administrator. The estate of the deceased included property which was held under a Registered Partnership No. 16551 datec 1st March, 1962. Partnership property is not covered under Customary Law or Islamic Law." [emphasis added].

In my strong view, the approach taken by the first appellate court as regards this point was appropriate as it rhymes very well with the circumstances of the case. Quashing and setting aside the entire judgment or holding as suggested by the learned counsel would have the effect of nullifying the appointment which was otherwise valid as, unlike in **Ibrahim Kusaga v Emmanuel Mweta** (supra), in the instant

case, administration was sought under Islamic Law which falls squarely witnin the jurisdiction of primary court.

As regards the extraneous matter, I have carefully studied the facts of the instant case in the light of **Clement Pacras v R** (supra). In my considered view, this authority is similarly distinguishable. The decision to quash and set aside the trial court judgment was premised on the fact that instead of being guided by mitigation and aggravating factors in assessing the sentence, the trial court placed total reliance on extraneous matters. To the contrary, in the instant case, although the extraneous matter reflects negatively on the appellant, he was not a party to the probate matter.

As correctly held by the trial court the application was not contentious. The appellant never filed a caveat. Thus, he was never a party but a witness who testified as PW3 and in the course of his testimony he registered his discontentment to the respondent's appointment. In the eyes of the law, since the appointment was uncontested, the extraneous statement although reflects negatively on the appellant, did not prejudice any party and does not warrant nullification of the judgment.

Even if one was to assume that the appellants discontentment sufficed as an objection in the eyes of law, the argument that the extraneous statement sufficed as a ground for quashing and setting

aside the judgment would not hold water because, unlike in **Clement Pacras V R**(supra) where the extraneous matter was the basis for determination of the question in issue, in the present case it did not. Being a probe matter, the main task before the trial court was to determine the eligibility/suitability of the respondent for appointment as administrator in which case, the burden rested upon the objector to rebut the presumption as to respondent's eligibility/suitability for appointment by supplying the court with the necessary materials to impeach the respondent's character but none was adduced. Thus, it would have been terribly wrong and dangerous for the first appellate court to quash the judgment of trial court owing to the extraneous statement which was not the determinant factor for appointment of the respondent. In my firm view, under the circumstances of the present case the extraneous statement was an insufficient cause for quashing and setting aside the whole judgment.

In view of the above, the first ground that the court erred in failing to quash an illegal decision of Kariakoo Primary Court and the second ground that the court erred in failing to adhere to legally established precedents, fail in entirety. Having overruled the first and second ground of appeal, the fifth ground of appeal naturally fails as the submission in support of this ground revolved around these two grounds of appeal.

The third ground vide which the appellant has complained that the court erred in restating the law applicable in the distribution of estate will not detain me as there is nothing wrong in restating the law applicable in the specific case more so in this case where the jurisdiction of the trial court is predicated on the law applicable and the proceedings entertains no doubt that the deceased professed Islam and the parties conduct their affairs in accordance to Islamic Law.

For instance, in his testimony, the appellant herein told the court that, after the demise of her father, his mother was in *Edda*. He also told the court that, he is moslem and has been distributing the rental fees collected from the estate pursuant to Islamic law whereby the widow gets her rightful share (*kithumuni*). It is intriguing how the appellant is now agitated by the court's restatement of the applicable law.

For these reasons demonstrated above, I find no reason to fault the well-reasoned judgment of the first appellate court.

Before I pen down and without prejudicing what I have stated above, let me wind up by saying that, the circumstances of this case dictate that the principle of overriding objective as provided for under Section 3A of the Civil Procedure Code, Cap 33 RE 2019, should prevail so that justice can be served not only to the parties but to the widow who has been in limbo for about nine years since the demise of her husband

on 12/10/2002. I say so because I have observed in the course of scrutiny of the trial court record that, at the time she appeared to testify in court on 15/10/2019 she was 89 years old which means that this year she will turn 91 years. At this age, there can be no better justice than allowing the administration to take place so that she can be availed her respective share of the estate and be able to deal with it in whatever manner she pleases. In any case, letters of administration do not vest in the administrator the right of ownership of the estate nor does it give him a blank cheque to deal with the estate as she/he pleases. The role of administrators is akin to that of an agent. As emphatically stated in **Sekunda Mbwambo v. Rose Ramadhani** [2004] TLR 439.

> The objective of appointing an administrator of the estate is the need to have a faithful person who will, with reasonable diligence, collects all the properties of the deceased. He will do so with the sole aim of distributing the same to all those who were dependents of the deceased during his life-time.

Since the eligibility/suitability of the respondent was unshaken as, it is fair and just that the parties put aside their differences and collaborate to ensure that the estate is properly administered and the widow gets her rightful share out of the estate.

In view of what I have stated earlier, I dismiss the appeal in entirety for want of merit. This being a probate matter, I will restrain from making any orders as to costs.

DATED at DAR ES SALAAM this 6th day of April 2021.

J.L. MASABO

JUDGE