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

(PC) CIVIL APPEAL NO. 17 OF 2019

(Arising from Civil Appeal No. 16 of 2019 and originating from Probate and Administration Cause No. 25 of 2017 of Nshamba Primary Court)

VENANT ERNEST KASHUNKU.....APPELLANT

VERSUS

EDWARD BAGOKA.....RESPONDENT

JUDGMENT

10th March & 25th May 2021

Kilekamajenga, J.

This matter originates from the Primary Court of Nshamba where the parties have been battling for the administration of estate of the late Ernest Nestory Kashunku since 2017. Initially, one Chrizant Omary applied before Nshamba Primary Court to administer the estates but he was objected by Veronica Ernest and Venant Kashunku. Their objection was centred on the allegation that half of the deceased's children were not involved in the clan meeting that proposed Chrizant Omary to administrator the estates. The Primary court allowed the objection and ordered to re-convene the clan meeting to propose another administrator. The meeting finally proposed the respondent and Division Secretary (Katibu Tarafa) as administrators of estate. When the respondent applied for the administration of estates at the Primary court, the appellant lodged an objection alleging that the respondent does not deserve the

appointment because he has criminal records. The objection was scheduled for hearing but the appellant filed a letter excusing himself from attending to court. The Primary Court dismissed the objection and appointed the respondent as the administrator of estates.

The appellant appealed to the District Court of Muleba where he lost the case hence this appeal. Before this Honourable Court, the appellant was armed with the following grounds of appeal:-

1. *That, the appellate court erred in law and fact for holding that the appellant deliberately absented him (sic) from arguing his raised objection without considering that the respondent didn't pursue that assertion in his written submission and further without regarding that at page 3 of the judgment from the top portrays that the appellant attended in court and complied with the court's schedule.*
2. *That the appellate court erred in law and fact in holding that the dishonest character of the respondent was cleared by the acquittal in the High Court in criminal appeal without considering that no argument of the same shown in the respondent's written submission, also there was no hard copy of the high court's judgment tendered by the respondent before the appellate court.*
3. *That the appellate court erred in law and in fact for failure to fault the judgment of Nshamba Primary court which appointed the respondent to administer the estates of the deceased who is not honest, has no qualifications and mandate as also he was once convicted of criminal*

offence on forgery and who has no any relationship with the deceased's family.

4. *That the appellate court erred in law and fact to misdirect itself that the appellant absented himself and upheld the decision of the trial court which denied to afford an opportunity to the appellant as a caveator to be heard on his objection apart from notifying the court in advance of his absence.*
5. *That the appellant court erred in law and fact by holding that the appointment of the administrators of the estates of the deceased followed procedures.*

The parties finally appeared to argue the appeal and they both appeared in person and without representation. In the oral submission, the appellant argued that the respondent is untrustworthy and lacks the qualities and qualifications to administer the estates. To cement his argument, he informed the court that the respondent was previously convicted in Criminal Case No. 343 of 2003. On 16th September 2009, the respondent was imprisoned for three years. The decision that convicted the respondent has not been challenged at an appellate level.

The appellant further argued that the respondent was convicted in another Criminal Case No. 201 of 2017 before Nshamba Primary court. All these convictions were reached when the respondent was the Village Executive Officer. He invited the court to decide and find the respondent to be a person with criminal records who do not deserve the appointment.

On the second ground, the appellant objected and challenged the letter which alleged to clear the respondent from criminal records because the same letter was not stated in the respondent's submission at the District Court and neither tendered during the trial and therefore denied the appellant's right to challenge it. When submitting on the 1st ground, the appellant argued that he appeared before the Primary Court to defend his objection. On the 5th ground, the appellant submitted that the procedure to appoint the respondent was not properly followed. The opinions of the deceased's children were not considered. The Division Secretary appearing in the records of the court has neither appeared nor participated in the process. The appellant further submitted that there is no evidence suggesting that Veronica Ernest was married to the deceased and there is no certificate to prove the marriage. He urged the court to allow the appeal and set aside the decision of the District Court.

The respondent was finally invited to respond. He argued that he was appointed on 23/08/2018 after the appointment of the first administrator was revoked. All the procedures towards his appointment were followed and that he is a trustworthy person. He further informed the court that he is the secretary of the Abayango clan. Concerning the Criminal Case No. 243 of 2003, the respondent agreed that he was convicted but later appealed to this court where he was

found not guilty. In criminal Case No. 201 of 2017 before Nshamba Primary Court, he was just a witness and not an accused person. He consistently denied being a Village Executive Officer in his life because he was a teacher but retired on 22/07/2016. He denied the criminal records against him and that he is a trustworthy person. He argued further that the appellant was not attending before the court; he only sent a representative. He insisted that Veronica was the deceased's legal wife. In total, the deceased had 21 children including three children from Veronica. The Division Secretary appointed to administer the estates with the respondent was transferred. The appellant has no right to object the appointment because he was also a beneficiary. He finally urged the court to uphold the decisions of the two lower courts.

When rejoining, the appellant insisted that the respondent was previously convicted and that he was the Village Executive Officer. The respondent was not trustworthy and does not deserve to be an administrator of estate.

In determining the instant appeal, I have considered the parties' submission and other information contained in the file. There are two points which also feature in the grounds of appeal advanced by the appellant. First, the appellant alleged that he was not given the right to be heard on the objection raised in Primary Court. Second, the procedures were not followed in appointing the respondent as

the administrator of estate. I wish to exhaust the first point which seems to carry merit as far as this appeal is concerned. As stated earlier, when the respondent applied for the appointment before the Primary Court, the appellant lodged the objection. But, the Primary Court did not afford the appellant the right to be heard on the objection instead the respondent was appointed. The only reason advanced by the Primary Court Magistrate is that the appellant was not attending for hearing after he lodged the objection. As the matter remained in the records of the court for a long time without the appointment of the administrator, the magistrate gave the decision without first hearing the merit or otherwise of the objection.

On this point, I do not say that the objection had merit but the trial court violated one of the fundamental principles of the law which must be observed in the process of administration of justice. The trend of justice has gone an extra mile in the administration of justice by abiding to principles of natural justice which involves the right to be heard. There may be no better reasons for setting aside this constitutional principle provided under **Article 13(6)(a) of the Constitution of the United Republic of Tanzania, 1977**. See, the case of **The Managing Director Kenya Commercial Bank (T) Limited and Albert Odongo v. Shadrack J. Ndege, Civil Appeal No. 232 of 2017**, CAT at Mwanza (unreported). Therefore, any court should not decide on any matter that

affects the parties without affording them, or either of them, the right to be heard. On this point, I wish to reiterate the principles enunciated by the courts in Tanzania. For instance, in the case of **Mbeya-Rukwa Autoparts and Transport Ltd v. Jestina George Mwakyoma [2003] TLR 251** the court stated that:

> *'...natural justice is not merely a principle of the common law, it has become a fundamental constitutional right, Article 13(6)(a) includes the right to be heard among the attributes of equality before the law.'*

Also, in the case of **I.P.T.L. v. Standard Chartered Bank (Hong Kong) Ltd, Civil Revision No. 1 of 2009** (unreported), the court stated that:

> *'no decision must be made by any court of justice, body or authority entrusted with the power to determine rights and duties so as to adversely affect the interest of any person without first giving him a hearing according to the principles of natural justice.'*

The right to be heard should be given to the parties regardless whether the point to be determined is raised by the parties or comes *suo motto*. Where the court raises a new issue during hearing or writing the judgment, the court must invite the parties to submit on that new issue. See, also the cases of **Margwe Erro and 2 others v. Moshi Mohalulu, Civl Appeal No. 111 of 2014** (unreported); **Mire Artan Ismail and Anr v. Sofia Njati, Civil Appeal No. 75 of 2008** (unreported) and **Kluane Drilling Ltd v. Salvatory Kimboka,**

Civil Appeal No. 75 of 2006, CAT at Dar es salaam (unreported). In fact, a party should be given the right to be heard even where the objection or issue to be argued will not change the position of the court. Even where the point advanced by the party seems to be of no merit, in compliance to the law, he/she should enjoy that right. It does not matter whether the right to be heaed will further delay the case hence the maxim '*justice hurried is justice buried'.* In the case of **Halima Hassan Marealle v. Parasistatal Sector Reform Commission, Civil Application No. 84 of 1999** the court observed the following:

> *'The concern is whether the applicant whose rights and interests are affected is afforded the opportunity of being heard before the order is made. The applicant must be afforded such opportunity even if it appears that he/she would have nothing to say, or that what he/she might say would have no substance.*

This reason alone is enough to dispose of the appeal. However, I wish to hint on the second point because it is also very important. Immediately after the appointment of the respondent, the appropriate forms were not filled-in hence the appellant's argument that the procedure towards the appointment of the respondent was not properly followed has value. In the eyes of the law, it is as if the respondent was not appointed because the process ended half-way. Based on the illegality pointed above, I allow the appeal. I hereby quash the

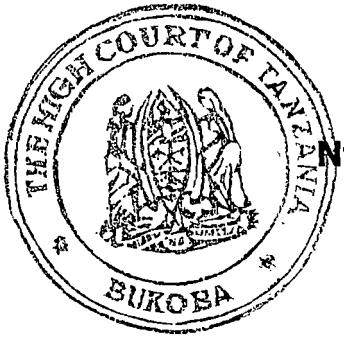
proceedings and set aside the decisions of the Primary Court and District Court because the appellant was not given the right to be heard and the procedure for the respondent's appointment was not completed. I remit the file back to the Primary Court for the re-appointment process. It is so ordered.

Dated at Bukoba this 21st May 2021.

Ntemi N. Kilekamajenga
JUDGE
25/05/2021

Court

Judgment delivered this 25th May 2021 in the presence of the respondent and in the absence of the appellant. Right of appeal explained.



Ntemi N. Kilekamajenga
JUDGE
25/05/2021