IN THE HIGH COURT OF TANZANIA

(IN THE DISTRICT REGISTRY)

AT MWANZA

PC. PROBATE APPEAL N0.05 OF 2021

(Arising from Probate Appeal No. 37 of 2020 in the District Court of Nyamagana, Originating from the Probate and Administration Cause No. 13 of 2008 Mkuyuni Urban Primary Court)

LUTAMBI KITAPANDA .... APPELLANT

VERSUS

BELA KITAPANDA .... RESPONDENT

JUDGMENT

Date of last Order: 27.05.2021

Date of Judgment: 31.05.2021

A. Z. MGEYEKWA, J

This appeal is against the decision of the District Court of Nyamagana at Mwanza in Probate Appeal No. 37 of 2020, in which the decision of Mkuyuni Urban Primary Court of in Probate and Administration Cause No. 13 of 2008 was quashed and set aside. Before going into the nitty gritty of the appeal, let me, briefly recapitulate the facts of the case. On 09th July, 1983, the late Kitapanda Mhangwa died intestate. During his lifetime he owned several properties including plots. After his death, as per records, he left behind several heirs or beneficiaries. In 2008, twenty five years after the death of the deceased, the Primary Court appointed one Bellah Kitapanda (the present respondent) to be the administrator of the estate of the late Kitapanda Mhangwa. On 30th April, 2020, Lutambi Kitapanda, the appellant raised an objection before the trial court claiming to be among the heir and beneficiary of the deceased estate. He claimed that the administrator did not give him his shares. The trial court found that the appellant was among the deceased heirs and he was listed as a beneficiary. Hence it decided that the matter in favour of the appellant.

The respondent being the administrator of the estate of the late Kitapanda Mhangwa, successful appealed to the District Court of Nyamagana. The first appellate court decide in his favour.

Thinking the decision of the Primary Court was apposite, the appellant has filed an appeal to this court to impugn the decision of the first appellate court on the five grounds as follows:-

1. *That the appellate learned magistrate grossly erred in law to disinherit the appellant on a mere use of the name of the appellant herein whereas the respondent himself also used to identify him as such in various document tendered in the trial court.*

2. *That the 1st appellate court grossly erred in law and fact to uphold that the appellant was given a plot at Tambuka Reli through a document which was disputed by the appellant to be forged one at paragraph 3 of a page of the trial court proceedings also paragraph 5v of the same page.*
3. *That the 1st appellate court grossly erred in law and fact to hold that there was a legal closure of the estate on the 17/03/2011 still the administrator had concealed some assets and legal heirs. Hence did not properly discharge his administrative duty.*
4. *That the 1st appellate court grossly erred in law and fact for his failure to note that the administrator was concealing the information in regard with estate especially on the part of the appellant's mother who was his sister known by the name Majige.*
5. *That the 1st appellate court grossly erred in law and fact for nullifying the whole proceedings of the estate without ordering trial de Novo thus leaving the rights of the parties/heirs undetermined.*

When the matter was called for hearing on 27th May, 2021 the appellant enjoyed the legal service of Mr. Stephen Kaijage while the respondent appeared in person unrepresented.

Submitting in support of the appeal, Mr. Kaijage avers that the appellant was dissatisfied by the decision of the first appellate court. He went on that, the 1st appellate court erred in law to rely on the name of the appellant that his name is not Lutambi Kitapanda but Nestory Edward. He avers that at a trial court, the appellant tendered a birth certificate and a baptism certificate with the name of Nestory Kitapanda. He valiantly contended that the issue of name was resolved by the trial court and the appellant was included in the list of beneficiaries. He went on to argue that the first appellate court decided that the appellant was required to tender a document to prove his name while the appellant relatives acknowledged before the trial court that the appellant was the son of Majige Katapanda and was a beneficiary of the estate of the late Mhangwa Kitapanda.

The learned counsel for the appellant continued to submit that the first appellant court decided contrary to Rule 8 (c) and (f) of Primary Court Administration of Estate Rules GN No. 49 of 1971. He enlights that, paragraph (c) imposes a primary function over the court to decide on the identification of a person named as an heir, beneficiary, or executor and paragraph (f) on any question relating to the sale, partition, division, or other disposals of the property.

On the 2nd ground, the first appellate court erred in law by holding that the appellant was given a plot at Tambuka Reli. He avers that the appellant was not aware of the plots were allocated and divided by the respondent. Mr. Kaijage contended that the appellant was allocated a plot No. 5 at Bugarika but he did not receive it. He claims that the appellant was listed by the clan members in the clan meeting which was held on 14th June, 2015 but he was not called to attend the meeting and other members including Salima and Nuru Kitapanda disputed to have neither attended the meeting nor received any property from the administrator.

On the third and fourth grounds, he submitted that the 1st appellate court erred to rule out that the administration was closed on 17th March, 2011 contrary to Regulation 10 (1) of the Primary Court Administration of estate Rules of 1971 that requires the administrator to file an inventory within 4 months from the day when he was appointed as an administrator. He went on to argue that, the administrator failed to adhere to the rules thus the first appellate court erred to hold that the administration was closed after 3 years.

The learned counsel for the appellant avers that the first appellate court quashed the proceedings from 30.04.2020 after finding that the objector filed his objection after the closure of the administration. It was his view that the first appellate court erred in nullifying the proceedings without giving any further order such as what step to take after the nullification which prejudiced the rights of the appellant and other beneficiaries. Fortifying his position Mr. Kaijage referred this court to the case of **Beatrice Brington Kamanga & Amanda Brighton Kamanga v Ziada William Kamanga**, Civil Revision No. 13 of 2020 HC at DSM.

On the strength of the above argumentation, Mr. Kaijage beckoned upon this court to quash and set aside the decision of the first appellate court and uphold the trial court decision.

Responding on the first ground, the respondent avers that the clan meeting was conducted and the original Lutambi Kitapanda attended the meeting. He went on to state that members to the meeting told the appellant to prove his name. He claimed that he was not duty bound to prove the appellant's name instead the appellant is the one who was required to prove his name before the first appellate court.

Regarding the division of the properties, the respondent stated that he was appointed by the family members to administer the estate of his late father. He went on to state that Majige is his young brother and he is alive. He went on to state that, no document were tendered in the court by the appellant to prove that Majige was his mother. He insisted that the trial court did not do justice therefore they preferred an appeal to the District Court.

The respondent further argued that, the original Lutambi has already received his portion of inheritance. He claimed that the appellant's mother is one Kahabi Kitapanda and Lutambi, Salima, Nuru and others are grandchildren of Kitapanda Mhangwa who died in 1983. He claimed that he divide the estate to all beneficiaries and thereafter he closed the administration. He admitted that after closure he did not write a letter to the court to officially close the administration. Insisting, the respondent stated that the appellant's mother sold her properties and the appellant was given another plot but he was dissatisfied hence opted to file an objection at the trial court.

Rejoining, the learned counsel for the appellant reiterated his submission in chief. He insisted that the appellant was among the beneficiary and he was not aware that there was a pending probate cause at the trial court. He realized later after noting that he did not receive any portion of the estate of his late grandfather while knowing that he was among the beneficiary. He lamented that the respondent is not truthful.

I have earnestly gone through the lower courts' records and considered both parties submission. I now turn to confront the grounds of appeal in the determination of the appeal before me. In determining this appeal I will determine the issue whether the instant appeal is meritorious or not.

On the first ground, the appellant's Advocate claimed that the first appellate court erred in law to disinherit the appellant on the mere name of which he used in several documents. The trial court' records in Probate and Administration Cause No. 13 of 2008 dated 02nd June, 2020 reveals that Lutambi Kitapanda, the objector clarified before the trial court that his name is Nestory Lutambi, however, before he was baptized his name was Lutambi Kitapanda. Nuru Kitapanda testified as SU2 (the respondent's daughter) testified to the effect that the objector name is Lutambi Kitapanda and Majige Kitapanda is his mother and not Kahabi Kitapanda as alleged by the respondent.

Mussa Kadikilo (SU3) testified to the effect that Lutambi Kitapanda is his cousin, his mother's name is Majige Kitapanda and the respondent is his uncle. SU1, SU2, and SU3 evidence were corroborated by exhibit K which shows that the appellant was baptized in 2013 by the name of Nestory Lutambi, also known as Lutambi Kitapanda and his mother's name is Majige Kitapanda. The respondent claims that the original Lutambi Kitapanda is alive, but he did not summon him to appear before the trial court to testify against the objector. In accordance to Rule 8 (c) of the

Primary Court Administration of Estate Rules of 1971, the trial court was in better position to determine the question as to the identity of a person named as heirs. In my view it was able prove that Lutambi Kitapanda was the one who was listed among the heirs of the late Mhangwa Kitapanda. Therefore, it is my considered view that the appellant was able to prove his name and convinced the trial court that Majige Kitapanda is his mother.

It is settled principle that the one who bears the burden of proof is he who wants the Court to believe him and pronounce judgment in his favour. The Rule finds backing from the provisions of sections 110 and 111 of the Law of Evidence Act, Cap.6 [R.E 2019] states categorically to whom the burden of proof lies as follows:-

> " *110 (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*
>
> *(3) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."*

From the above position of the law, the appellant was able to prove his name. Therefore the respondent's claims are unfounded. This ground of appeal has merit.

On the third grounds of appeal, the learned counsel for the appellant complained that the first appellate court erred to hold that there was a legal closure of the administration of the estate of the late Mhangwa Kitapanda while the respondent had not properly discharged his administrative duties. I have loboured to revisit the trial court proceedings and noted that the trial court in Probate Administration Cause No.13 of 2008, one Bella Kitapanda, the respondent filed a Probate Cause No. 13 of 2008 requesting to be appointed an administrator of the estate of the late Mhangwa Kitapanda, his late father.

The record reveals that the trial court appointed Bella Kitapanda as an administrator of the estate of the late Mhangwa Kitapanda. The trial court issued Form No. II and No. IV to the respondent to collect the properties of the late Mhangwa Kitapanda and distribute the same among his heirs. The trial court also ordered the respondent to file an inventory before the closure of the administration. In 2019, the respondent informed the trial court that the inventory was prepared; Majige Kitapanda and Naomi Kalebi approved the inventory. Thereafter, the trial court issued Form No. V and No. VI to the respondent.

On 30th April, 2020, Lutambi Kitapanda, the appellant filed an objection before the trial court claiming that he is Mhangwa Kitapanda' grandson and was among the beneficiaries of the late Mhangwa Kitapanda. He further lamented that he did not receive his portion from the said division. His witnesses; Nuru Kitapanda who is the respondent's daughter testified to the effect that his cousin was not considered in the division of properties of their late grandfather. One Mussa Kadikilo also claimed that the appellant did not receive any property.

At the conclusion of hearing the objection, the trial court was satisfied that the Lutambi Kitapanda was among the heirs of the late Mhangwa Kitapanda. Therefore, his objection was sustained and the respondent was ordered to hand over the said plots to the appellant. By that time, the inventory was not closed as ruled out by the District Court of Nyamagana. Therefore the appellant's objection was filed before the closure of the administration of the estate of the late Mhangwa Kitapanda.

Reading the court records, it is clear that the administration of estate of the late Mhangwa Kitapanda was not closed. I am aware that Regulation 10 (1) of the Primary Court Administration of Estate Rules No.47 of 1971 requires the administrator to file an inventory within 4 months from the day he was appointed as an administrator. However, the same does not implicate the appellant. The appellant could not file an objection before the distribution of properties but after realizing that he was among the beneficiaries of the late Mhangwa Kitapanda, the distribution took place and he received nothing. This is his main claim. Therefore the first appellate court misdirected itself to rule out that the appellant objection was out of time. This ground is answered in affirmative.

Concerning the fifth ground of appeal, Mr. Kaijage, the learned counsel for the appellant complained that the trial court nullified the proceedings without ordering retrial thus he left the rights of the heirs undetermined. In view of the above findings and analyses, I am in accord with the learned counsel for the appellant that matter before the trial court was not determined to its finality. Therefore, the first appellate court misdirected itself to nullify the trial court proceedings and decisions of the trial court while the matter was not closed. The same prejudice the rights of the appellant and other beneficiaries, therefore, the first appellate decision was void. In the case of **Ridge v Baldwin** [1963] 2 All ER 66 the Court of Appeal of Tanzania held that:-

> " *The consequence of failure to observe the rules of natural justice is to render the decision void...* "

Since the determination of these grounds suffice to dispose of the appeal, I will not consider the second and fourth grounds of appeal, doing so is a mere academic exercise. I am in accord with the learned counsel for the appellant that the appeal has merit and hereby allowed.

In the upshot, I proceed to quash and set aside the proceedings, decision, and the orders of Nyamagana District Court of in Civil Appeal No. 37 of 2020. I uphold the decision of the Primary Court in Probate and Administration Case No. 13 of 2008, I order the trial court to proceed where it ended. Appeal allowed.

Order accordingly.

Dated at Mwanza this date 31st May, 2021.

A.Z.MGEYEKWA

JUDGE

31.05.2021

Judgment delivered on 31st May, 2021 in the presence of both parties.

A.Z.MGEYEKWA

JUDGE

31.05.2021

Right to appeal fully explained.