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

(PC) CIVIL APPEAL No. 42 OF 2020

(Originating from Kyaka Primary Court in Probate Cause No. 04/2018 and Civil Appeal NO. 11/2019 of the District Court of Bukoba)

MARTINA JOSEPH.....APPELLANT

VERSUS

LEONIDAS BAJUMUZI..... RESPONDENT

JUDGMENT

24th May & 04th June 2021

Kilekamajenga, J.

Before the Primary Court at Kyaka, the appellant applied for the administration of estate of the late Joseph Kaizilege who died on 22nd January 2018. The meeting to propose the administrator of the estate convened on 20/03/2018 and the appellant was proposed. It is alleged that the clan meeting proposed the appellant was attended by 116 clan members. However, the appellant's appointment was objected by the respondent, one Leonidas Bajumuzi. In the objection, the respondent alleged that the deceased left a will appointing him to be the administrator of the estate. Based on the respondent's objection, the appellant's appointment was revoked.

The appellant was aggrieved with the revocation order and preferred an appeal to the District Court of Bukoba. At the District Court, the appellant advanced three grounds of appeal; inter alia, she challenged the validity of the will alleging for being adulterated. Finally, the District Court approved the will and upheld the

decision of the Primary Court. Still disgruntled with the decision of the two lower courts, she approached this Honourable Court of justice. This time, she advanced four grounds of appeal coached thus:

1. *That the Appellate Court erred in law and in law in fact by upholding the judgment of the trial Court without considering the fact, a will that was tendered by the Respondent was a forged one.*
2. *That Appellate Court erred in law and in fact determining the matter to its finality without observing that the trial Court jumped a very important legal aspect of issuing a notice of advertisement.*
3. *That, the Appellate Court erred in law and in fact determining the matter to its finality in favour of the respondent without observing that the Appellant was denied her right to be heard in the trial Court.*
4. *That, Appellate Court erred in law and in fact by declaring a will tendered by the Respondent to be valid while the same had more witness than the trial requires.*

The Court invited the parties to argue the appeal. The appellant appeared in person but also enjoyed the legal services of the learned counsels, Mr. Gerace Reuben. On the other hand, the respondent appeared in person and without representation. During the oral submission, the counsel for appellant abandoned the 2nd and 3rd ground and argued the 1st and 4th grounds of appeal. On the first ground, Mr. Reuben argued that the District Court erred in law for upholding the decision of the Primary Court while the will was null and void. He argued further that the Primary Court invoke the will which had no legal effect. On the face of the alleged will, the same is invalid because the name of the proposed

administrator (respondent) was written and later cancelled. Therefore, the will has a myriad of irregularities and doubts and does not reflect the deceased's wishes. On the 4th ground, Mr. Reuben argued that the witnesses to the alleged will were more than four persons, something which is contrary to the law. A written will must be witnessed by two persons only. He was of the view that, the application of the alleged will may invite more conflicts than before. Finally, he invited the Court to allow the appeal and order the appointment of the appellant as the administratrix of the estate of her husband.

When prompted for the response, the respondent submitted that the deceased died in 2017 and left behind two wives and seven children. The major deceased's estates were two houses and a *shamba*.

Having considered the two competing strands of arguments from the parties, this court has an obligation to consider the grounds of appeal. However, the kernel of argument captured by the ground is whether the Primary Court and the District Court rightly considered the respondent's objection. As earlier stated, the appellant's appointment was resisted by the respondent who claimed legality on a will that appointed him to administrator the estates. I have heedfully considered the alleged will and discovered three fatal flaws: **First**, the perusal of the whole file of the Primary Court does not show whether the respondent tendered an original will. What is seen in the court file is a copy of the alleged

will. Under the law all documents must be proved by primary evidence as per section 66 of the Evidence Act, Cap. 6 RE 2019. The section provides:

> *"Documents must be proved by primary evidence except as other wise provided in this Act".*

In the court record, there is dearth of evidence on whether the alleged will fell into the exceptions of **section 67 of the Evidence Act** so as to allow the tendering of the copy. **Second**, the copy of the will available in the court file was not certified as true copy of the original. Therefore, the same failed to benefit from the provisions of **section 65 (a) of the Evidence Act**, which provides that:

> *Secondary evidence includes:*
>
> *a) Certified copies in accordance with the provisions of this Act.'*
> *b) N/A*
> *c) N/A*
> *d) N/A*
> *e) N/A*

Third, according to the alleged will, the name of the so called administrator was written and later cancelled. Thereafter, somebody seemed to sign below to authenticate the cancellation of the name. However, the signature auntheticating the cancellation of the name is completely dissimilar to the signature of the testator. In my view, the will was altered in absence of the original author.

Fourth, the respondent, who claimed that he was proposed by the deceased to administer the estate, also appears as one of the witnesses to the alleged will. It is inappropriate for the proposed administrator of the estate to stand again as the witness to the will. In my view, all these defects are incurable and render the whole will fatally defective. The will and ought not to be considered by the Primary Court in disapproving the appointment of the appellant. Based on these reasons, I hereby allow the appeal and revoke the appointment of the respondent as administrator of estate. The appellant, who was the legal wife and who had with six children with the deceased, was the right person for appointment. I further remit the file to the Primary Court of Kyaka for the appointment of appellant. No order as to costs. Order accordingly.

Ntemi N. Kilekamajenga
JUDGE
04/06/2021

Court:

Judgment delivered this 04th June 2021 in the presence of the appellant and respondent. Right of appeal explained to the parties.

Ntemi N. Kilekamajenga
JUDGE
04/06/2021