

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(TANGA DISTRICT REGISTRY)**

**AT TANGA**

**PROBATE APPEAL NO.8 OF 2020**

(Arising from Probate Appeal No. 27 of 2019 of the District Court  
of Tanga Original Probate cause No. 14/2014 of Primary Court of Pongwe)

**SWALEHE NGAJA** (As Administrator of the estate of the late

**NGAJA BAKARI NGAJA ..... APPELLANT**

**VERSUS**

**HEMED NGAJA BAKARI .....RESPONDENT**

**JUDGMENT**

**MKASIMONGWA, J.**

This appeal is brought by Swalehe Ngaja (As administrator of estate of the late Ngaja Bakari Ngaja) against the decision of Tanga District Court in Probate Appeal No. 27 of 2019 dated 20/02/2020 upholding that of Pongwe Primary Court in Probate Cause No. 14 of 2016 which revoked his appointment as an Administrator of the estate of the late Ngaja Bakari Ngaja.

The Appeal, to which Hemed Ngaja is the Respondent, is based on three grounds which are:

1. That the Honorable Magistrate erred in law and fact by dismissing the appeal for the reason that the appellant did not seek price consultation with all the heirs while the Appellant had prior consultation with the family members before sale of the plots
2. That the Honorable Magistrate erred in law and fact by making a finding that the Respondent's act of filing in the Primary Court an application for revocation of the Appellant's appointment as Administrator of the estate while he was the respondent in Application No. 2 of 2017 in the District Land and Housing Tribunal in which he is one of the Respondents was a pre-emption of the pending Application.
3. That the Honorable Magistrate failed to make a finding that the Application made by the Respondent at the Primary Court for revocation of the Appellant's appointment as Administrator of the estate of the deceased while he was the Respondent in the pending Application No. 2 of 2017 in the District Land and Housing Tribunal in which he is accused of invading one of the deceased estate's property was an abuse of the Court process.

The Respondent objected to the Appeal and to that effect he filed a Reply to the Petition of Appeal.

In the matter the Appellant enjoyed the legal services rendered by Mr. Khalifa S. M (Advocate) whereas the Respondent stood unrepresented. As such on the date the matter came for hearing, before me, appeared Mr. Khalifa, Advocate for the Appellant and the Respondent appeared in person. Before stating submission made by the parties in respect of their respective cases, let briefly the facts of the case be shown. They are as that: Ngaja Bakari, a peasant resident of Pongwe, Tanga died on 30/10/1986 at Pongwe. Latter on 03/05/2016 almost thirty years after the deceased's death, the Appellant one Swalehe Ngaja went to Pongwe Primary Court seeking for an Order appointing him as an Administrator of the estate of the deceased. Going by the Application the deceased was survived by a wife and fifteen children. Similarly it was stated in the Application that the Applicant believed that properties falling within the estate which were likely to come into his hands were thirteen (13) farms. The Application met with objections raised by among the heirs. After hearing the matter the court stated as follows.

*"Mahakama hii kwa ushahidi wa Mwombaji na ushahidi wa pingamizi, kwa kuwa upinzani upo juu ya mali za marehemu zilizokwishagawiwa na hazina ubishi zimekubalika zibakie kama zilivyogaiwa ... na Mahakama inamkubali kuwa Msimamizi wa mirathi ya mali za Marehemu ... Mwombaji ameteuliwa leo hii kuwa msimamizi wa mirathi ya marehemu, Ngaja Bakari Ngaja na mali zake tu na pingamizi la mpinzani limekubalika sehemu ya mali ambayo sio ya marehemu isigawiwe mpaka upatikiane uthibitisho wa mali hiyo kwa mujibu wa Sheria. Mwombaji apewe hati ya usimamizi na kuleta mgawanyo Mahakamani".*

Later on 18/04/2018, the Administrator (Now Appellant) appeared before the Primary Court when he was heard stating as follows:

*"Naomba Mahakama ipokee Taarifa ya Mgawanyo wa mali za marehemu baada ya mirathi kumalizika katika kuwagawia wategemezi mali. Mashamba mengine sijagawa nimewafungulia kesi Baraza la Ardhi Tanga na Kata wanayotumia na waliyauza. Baada ya kesi nilete taarifa nyingine."*

Following that prayer of the Administrator the court made the following order:

*"Kwa kuwa bado hakuna aliyeleta malalamiko na bado mali nyingine haijagawiwa kuna kesi msimamizi anaziendesha*

*kwenye mabaraza ya ardhi atakapoleta taarifa ya mgawanyo yote yatatolewa."*

Later on 30/03/2018 "Familia ya Marehemu Ngaja Bakari Ngaja" wrote a letter to the Magistrate In-Charge of Pongwe Primary Court which was received by the Court on 02/04/2018 seeking for revocation of the Appointment of Swalehe Ngaja as Administrator of the estate of the late Ngaja Bakari Ngaja on grounds that the Administrator has not filed and inventory; the Administrator was misusing properties belonging to the estate; That the Administrator favoured some of the heirs and he hates others. It seems then the record in Probate Cause No. 14/2016 was missing and upon being retrieved, the Court commenced dealing with the request. After hearing both parties, in particular Hemed Ngaja, the court found the grounds of the Application for revocation had been established and it stated as follows:

*"Mahakama inaona kuwa kwa tuhuma zilizopo na hata kwa kuzingatia kuwa watoto wa marehemu wanazaliwa Matumbo tofauti (familia nne), Mahakama inaona kuwa msimamizi amepoteza sifa ya kuendelea kusimamia mirathi kwa sababu ameshindwa kuwamudu warithi wa marehemu katika familia zote nne na tuhuma kwa msimamizi zilizotolewa na wanandugu*

*zimezingatiwa kwani awe na mwenendo unaofaa kwa wategemezi (warithi)”.*

The Court then proceeded by revoking the Appointment. As said earlier, that decision was confirmed by the District Court on appeal preferred by, again, the now Appellant against Hemed Ngaja Bakari.

Coming back to submission, upon being invited to submit on his case, Mr. Khalifa stated, in respect of the first ground of appeal that, the Appellant challenged finding of the first Appellate court that the Appellant did not consult the heirs before selling three plots. The learned advocate contended that, that was not the case as the record is clear to the effect that it was a resolution passed at the meeting of the heirs that the Appellant sells three plots so that he redeems other assets belonging to the deceased's estate. It is from the plots sale proceeds, the Appellant paid fees and costs for instituting and prosecuting the Land Application No. 2 of 2017 before the District Land and Housing Tribunal at Tanga.

As for the Second and Third grounds of appeal, Mr. Khalifa contended that in Land Application No. 2 of 2017 of Tanga District Land and Housing Tribunal the Appellant sued fourteen (14) Respondents including the Respondent. As the matter was due for defence hearing the

Respondent went to Pongwe Primary Court seeking for revocation of the Appellant's appointment as Administrator of the estate of the late Ngaja Bakari Ngaja. The Revocation was granted which decision was confirmed by the District Court on appeal. Mr. Khalifa said the Respondent's act of applying for revocation of appointment of the Administrator and the order granting the Application had the effect of pre-empting the Land Application No. 2 of 2017 pending before the District Land and Housing Tribunal and in fact it defeated justice in the matter. As such the District Court erred when it failed to find that it was an abuse of court process when the Respondent applied for revocation of letters of Administration of the deceased's estate. Mr. Khalifa, prayed the court that, in the circumstances, it allows the Appeal with costs.

On the other hand the Respondent submitted to the effect that, sometime the Appellant was appointed an Administrator of the estate of their late father. He did not challenge the decision because, under customary rites the property left by the deceased had already been distributed to the heirs by their young father save for plots which the Administrator has sold without prior consultation with the heirs. It is when they successfully applied for revocation of the appointment of the

Administrator. By the time the order revoking the appointment was made there was a case pending before the District Land and Housing Tribunal which was eventually determined in favour of the Respondent's on ground that the Applicant has no *locus standi* to sue.

In a brief rejoinder Mr. Khalifa stated that it is said that the deceased's estates were already distributed to the heirs. He submitted that whoever distributed them had no capacity to do so. He added that it is not justified by the Respondent as to why he sought to remove the Appellant from administering the estate while there was a case instituted against the Respondent by the Appellate which was still pending in the Tribunal. He reiterated a prayer to have the Appeal been allowed.

I have considered the submissions along with the record. It is not disputed that Ngaja Bakari Ngaja is dead and that he died at Pongwe on 30/10/1986. It is not again disputed that 05/10/2016 Swalehe Ngaja was appointed an Administrator of the estate of the late Ngaja Bakari Ngaja. In between, that is prior to the appointment of the Administrator, some of the properties falling within the deceased's estate were distributed among the heirs. It is said that this was done under customary rites. Mr. Khalifa (Adv) contended that such a distribution is not legally known as it was done by a

person with no capacity. With due respect, I am not in agreement with the learned counsel. Customary law is recognized as one of the sources of law in our jurisdiction. It applies in among others, probate cases. The probate case at hand was instituted in court after 30 years of the deceased's death. It is no wonder that during the period, customary law could have been invoked in dealing with it. In fact the application for appointment of an administrator by the Appellant seems it was an afterthought. In the premises, it was proper when the Primary Court ordered the Administration of the estate to proceed in respect of those assets not already distributed to heir by the time the Appointment was made.

It is not again disputed that later on 19/08/2019 appointment of the Administration was revoked by the Court. The court did so in terms of Item 2 (c) of Part I of the Fifth Schedule to the Magistrates' Courts Act [Cap 11 R.E 2002]. The item reads as follows:

*"2. A Primary Court upon which jurisdiction of the deceased's estates has been conferred may*

*(c) revoke appointment of an administrator for good reason sufficient cause and require the surrender of any document evidencing the appointment."*

The Court did so upon being satisfied that.

1. The Administrator had failed to account to the court for his administration.
2. Failure to well administer the estate by not consulting heirs in the administration of the estate

The District Court, as said earlier, confirmed that decision. The issue to be determined is whether the above grounds constituted in terms of Item 2 (c) of Part I of the Fifth Schedule to the Magistrates' Courts Act [Cap 11 R.E 2002] a good reason and sufficient cause? My answer to the question regarding to the circumstances of this case is no. Why? In appointing the Administrator the Primary Court did well recognize that there were properties already distributed and that others were yet to be distributed to the heirs. In case there is a dispute over ownership of a certain property alleged to be part of the estate of the deceased, there should first the dispute be dissolved. It is clear from the record that the Appellant had instituted Land Application No. 2 of 2017 in Tanga District Land and Housing Tribunal claiming for a property that he alleged to belong to the estate. He had but already distributed all properties save for those in dispute. On 18/04/2018 he reported that development of the matter to the Court and the Court directed that filing of the Account should be done after

the pending case is terminated and distribution of the properties is fully done. While the matter was pending in Court, the Respondent sought for revocation of the Administrator on ground of failure to file the Account. This could not be done because; it was the directive of the Court that the Administrator files the account after termination of the matter before the Tribunal and upon the distribution is fully done. To the moment the matter was still pending in the Tribunal.

As to whether the Appellant had failed to administer the estate by not consulting the heirs in the administration of the estate, it is important to note here that that where the Administrator of the estate is appointed, administration of the estate remains a sole prerogative of the Administrator. That is why the Administrator, can be sued by the heirs for misusing the deceased's estates. There is no room open to the heirs that they must be consulted by the Administrator where the later takes any action in the administration of the estate. Failure by the Administrator to consult heirs in the administration of the estate, therefore, does not constitute a good reason or sufficient cause warranting the revocation of the administration. It is time to bring to the attention of the Respondent and any interested person in the estate, that let the Administrator smoothly

perform his duties and where one is aggrieved by let say the distribution of the estate, such a person shall have the right to complain to the Court on the distribution and the Court will determine the matter after it has heard the parties. Similarly, where the Administrator misuses the estate the interested parties are not barred and indeed it is their right to sue or even criminally prosecute the Administrator under his personal capacity.

Having that approach in the matter, it is my view that the Appellant was wrongly revoked as Administrator of the estate of the late Ngaja Bakari Ngaja. As such all proceedings involving an application for revocation at issue are quashed. Subsequently the decisions and orders of the Courts are hereby set aside. Considering the nature of the matter, I make no order as to costs.

**DATED at TANGA** this 30<sup>th</sup> of April, 2021.



  
E. J. Mkasimongwa

**JUDGE**

**30/04/2021**