IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF MWANZA)

AT MWANZA

PC. PROBATE APPEAL NO. 19 OF 2020

(Appeal from the judgment of the District Court of Ilemela at Ilemela (Kubaja, RM) in DC. Probate Appeal No. 1 of 2020 dated 11th August, 2020)

FATMA ISSA NZOMKUNDA ..... APPELLANT

VERSUS

MARIAM DELAWARY ABDULKARIM ..... RESPONDENT

JUDGMENT

25th March, & 11th June, 2021

ISMAIL, J.

This appeal is against the decision of the District Court of Ilemela at Ilemela (1st appellate court), in DC Probate Appeal No. 1 of 2020. This decision upheld the trial court's grant of letters of administration that gave the respondent the right to administer the estate of the late Abraham Issa Nzomkunda. The view taken by the 1st appellate court is that the

respondent's appointment as an administratrix of her husband's estate was unblemished.

By way of a brief background, the respondent was married to the deceased and were blessed with two children. At some point in their marriage, the duo disagreed and, as a result, the respondent allegedly relocated to Tanga where she lived until 2nd October, 2016, when he met his demise. After attending the burial, the respondent filed a petition for the grant of letters of administration which was acceded to by the Primary Court of Ilemela (Mwakisu, RM) in Probate Cause No. 130 of 2017. The grant of letters of administration was valiantly objected to by the appellant who contended that the respondent had been divorced long before the deceased's demise. The appellant contended that the respondent had disinherited two of the deceased's children who were born out of wedlock. The objection was dismissed for not being meritorious.

On appeal, the 1st appellate court was not convinced. The presiding magistrate, like his trial counterpart, took the view that, in the absence of any evidence of divorce, the appellant's assertion were as wild as the contention of disinheriting children born out of wedlock. The appeal suffered from undesirable consequence, yet again. Bemused, the appellant

has taken the instant appeal. The petition of appeal has three grounds of appeal, reproduced with all their grammatical challenges as follows:

1. *That, the District Court erred in law and fact to hold that the respondent to continue with the administratorship of the estate of the late Ibrahim Issa Nzomkunda while in other ways in his judgment ruled that there was Islamic Divorce between the Respondent and the Deceased.*
2. *That, by recognizing Islamic Divorce by the District Court, the District Court erred in law and fact for not disqualify (sic) the Respondent to be the administratrix of the deceased (sic) estate.*

3. *That, the District Court erred in law and fact for not addressing the issue of deceased children as they are the heirs of the deceased (sic) estate.*

Hearing of the appeal was conducted by way of written submissions the filing of which conformed to the schedule which was drawn by the Court on 25th March, 2021.

Mr. Steven Mhoja, learned counsel who stood in for the appellant argued the appeal following the sequence in which the grounds of appeal were preferred. He argued, in respect of the first ground of appeal, that, having found that the respondent had been divorced by the deceased, through what he referred to as Islamic divorce, then 1st appellate court was

in error when it allowed the respondent to proceed with administration of the deceased's estate. While conceding that the divorce did not follow the court process, learned counsel still contended that the respondent is not a fit person to administer the deceased's estate since she is not expected to benefit out of the estate, and that she is likely to bear a grudge in the course of the administration.

With respect to the second ground, the counsel's contention is that the 1st appellate court strayed into error when it refused to disqualify the respondent from serving as an administrator of the estate. Highlighting the duties of an administrator of the estate, Mr. Mhoja argued that such duties cannot be performed by the respondent faithfully and fairly since the respondent derives no interest from the estate. The learned counsel submitted that the trite law is that a person interested in the deceased's estate can apply for the grant of letters of administration, and it doesn't matter if the grantee is a wife or husband of the deceased. What is important, however, is that the grantee's goodwill should be looked at as a decisive factor.

Submitting on ground three of the appeal, Mr. Mhoja contended that, whereas the deceased left behind four children, two of whom were born

out of wedlock, the respondent feigned ignorance of their existence. It was the counsel's submission that evidence was adduced in court on the existence of the said children but the 1st appellate court cast a blind eye on it, and made no finding in respect thereof. The counsel took the view that this was a failure on the part of the 1st appellate court. The appellant maintained that the respondent's appointment was erroneous and she invited the Court to allow the appeal and set aside the findings of the lower courts.

Submitting in rebuttal was Mr. Godfrey Ernest, learned counsel for the respondent. With respect to the first ground of appeal, his take is that this ground is misconceived as it is clear that neither the deceased nor the respondent filed a petition for divorce. Such failure, he argued, rendered what is claimed to be an Islamic divorce a nullity. With regards to administration, the counsel argued that the respondent was chosen by a clan meeting. If the appellant had any reservation on the respondents appointment that should have been raised at that meeting. In this case, the appellant chose not to.

With respect to the second ground of objection, the respondent's contention is that, since there was no divorce certification certificate issued

by the court, then the 1st appellate court was right in not disqualifying the respondent from administering the estate.

Replying to ground three of the appeal, the counsel argued that the allegation that the deceased had two children born out of wedlock was not proved by the respondent. This, the counsel argued, would be done though procuring attendance of the said children or even birth certificates.

It was the respondent's prayer that the appeal be dismissed with costs, and that the lower court's decision to appoint her as administratrix of the deceased's estate be upheld.

The appellant's rejoinder was insistent on what was submitted in the submission in chief. The appellant disputed the respondent's contention that she was chosen by the clan. The counsel argued that in 2017 and 2019, the respondent instituted separate applications for administration of estate and that separate minutes of the clan meeting were attached. The appellant submitted that the variance pointed to the respondent's untrustworthy behavior. The appellant contended that, whereas in the proceedings instituted in 2017 culminated in the grant of the letters of administration in the respondent's favour, subsequent proceedings were closed by the court. In the appellant's view, this showed that the

respondent was a fraudulent person. He urged the Court to peruse the minutes of the clan meeting in PC Probate Cause No. 46 of 2019 and see if the minutes reflect what was discussed and recorded in the other set of minutes. With regards to the children, the appellant's counsel argued that witnesses who testified during the trial spoke about the four children, and that the respondent acknowledged one of the two children in Probate Cause No. 49 of 2019. The appellant's counsel reiterated his earlier call and urged the Court to allow the appeal.

The parties' contending submissions boil down to two key issues. These are, whether the respondent's appointment as an administratrix was proper; and, secondly, whether the lower courts erred when they failed to consider two illegitimate children as beneficiaries of the estate.

The appellant's unhappiness in the respondent's appointment is mainly premised on the contention that the respondent was divorced from the deceased some years prior to the latter's demise. As such, the respondent was not a widow of the deceased from which position she would not administer the estate. Both of the lower courts were not convinced. They held the view that what is alleged to be a divorce fell short of what it should be, thanks to the spouses' failure to meet the

requirements of the law. As rightly found by the lower courts, the testimony of SNP1, Khamis Almas Bilali, clearly indicated that the alleged 'talak khuluy', which was issued by the respondent failed to conform to basic tenets of Islamic law on divorce, necessary to give it the required legitimacy. This means, therefore, that even if the said Islamic divorce was strong enough to constitute a divorce, the fact that the same was found wanting rendered it ineffectual.

But even assuming that the said 'talak khuluy' was compliant and valid, the trite position is that the finding that the marriage has irreparably broken down is vested in courts, and that issuance of a 'talak' only serves as evidence of the irreparable breaking down of the marriage. This is in terms of section 107 (3) (c) of the Law of Marriage Act, Cap. 29 R.E. 2019. Since no decree of divorce was issued, ordering dissolution of the marriage between the respondent and the deceased, the argument that the respondent had been divorced is, to say the least, unjustified.

I would go further and contend that, even where the appellant would be able to prove that the respondent was legitimately divorced from the deceased, there is no denying that she would still be entitled to apply for and be appointed to administer the deceased's estate. This is in view of

what is provided for under section 33 of the Probate and Administration of Estates Act, Cap. 352 R.E. 2019, which states as follows:

> *"Where the deceased has died intestate, letters of administration of his estate may be granted to any person who, according to the rules for the distribution of the estate of an intestate applicable in the case of such deceased, would be entitled to the whole or any part of such deceased's estate."*

The cited provision has thrown wide open the application of letters of administration on intestacy, subject, of course, to the court's satisfaction that the applicant is a person who has attained the age of majority and whose moral conduct, impartiality and diligence are impeccable. In terms of the holding in ***Sekunda Mbwambo v. Rose Ramadhani*** [2004] TLR 439, such person should, whenever possible, come from amongst the beneficiaries of the estate or, as the Court held:

> *"... such an administrator must be a person who is very close to the deceased and can therefore, easily identify the properties of the deceased. He must also have the confidence of all the beneficiaries or dependants of the deceased. Such a person may be the widow or the widows, the parent or child of the deceased or any other close relatives of the deceased.* ***If such people are not***

available or if they are found to be unfit in one way or another, then the Court has the powers to appoint any other fir person or authority to discharge this duty." [Emphasis supplied]

The respondent would still qualify for appointment under the last category of persons in the quoted excerpt, but as it were, there would be no body better suited for role than the respondent. She is the deceased's widow who can identify the properties constituting the deceased's estate and, so far, the beneficiaries of the estate who happen to be her children have not expressed any lack of confidence in her.

From the totality of all this, I find nothing faulty in the concurrent findings of the lower courts with respect to the respondent's appointment as an administratrix of the deceased's estate. This dismisses the 1st and 2nd grounds of appeal.

The next question relates to the right of the children, allegedly born out the deceased's relationship outside the marriage. The appellant blames the 1st appellate court for not addressing this issue when it handled the 1st appeal. As I delve into this ground of appeal, it behooves me to state, here and now, that the appeal which bred the impugned decision of the 1st appellate court was instituted through a petition of appeal which was

presented for filing on 17th March, 2020. This petition had three grounds, reproduced in verbatim as follows:

(i) That the trial Court erred in law and facts for failure to avail reasons for the decision in the judgment.

(ii) That the trial Court erred in law and fact for failure to evaluate evidence availed by the appellant during the trial.

(iii) That the trial Court erred in law and facts for holding that the respondent did prove her case to the required standard of law in civil cases.

Clearly, the question of inclusion or non-inclusion thereof in the list of beneficiaries did not feature as a point of contention. Expecting the 1st appellate court to deliberate on a matter which did not constitute the appellant's consternation is actually pushing the 1st appellate court to go far overboard, and it would amount to overstepping its mandate. The fact that this issue did not feature as a ground of appeal is a demonstration of the appellant's contentment with the decision of the trial court on that aspect. Raising it at this stage of the proceedings is an afterthought which cannot be allowed to prevail. My view is predicated on several decisions of the Court of Appeal of Tanzania. These include ***Zakayo Shungwa Mwashilingi & 2 Others v. Republic***, CAT-Criminal Appeal No. 78 of 2007; ***Birahi Nyankongo & Another v. Republic***, CAT-Criminal Appeal

No. 182 of 2010; ***Mashimbo Dotto @ Lukubanija v. Republic***, CAT-Criminal Appeal No. 317 of 2013; ***Laurent Kisingo v. Republic***, CAT-Criminal Appeal No. 123 of 2013; and ***Martin Misara v. Republic***, CAT-Criminal Appeal No. 428 of 2016 (all unreported). In the latter, the superior Court held:

> *"It is the law in this jurisdiction, of course founded upon prudence, that the Court will not have jurisdiction to entertain and determine on a complaint not raised in the first appellate court. .... Raising it at this stage is but an afterthought not worthy of consideration by the Court."*

In view of the foregoing, I hold that the second issue which is distilled from the 3rd ground of appeal is misconceived. Accordingly, this ground of appeal is dismissed. In the upshot, this appeal is barren of fruits and the same is hereby dismissed.

Order accordingly.

Right of appeal duly explained.

DATED at **MWANZA** this 11th day of June, 2021.

M.K. ISMAIL

JUDGE

Date: 11/06/2021

Coram: Hon. M. K. Ismail, J

Appellant:

Respondent:

B/C: J. Mhina

Court:

Judgment delivered in chamber in virtual absence of both parties this 11th June, 2021.

M. K. Ismail

JUDGE

At Mwanza

11th June, 2021