IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO. 181 OF 2020

(Arising from the Ruling of the District Court of Kinondoni at Kinondoni in Civil Application No 23 of 2020 before Hon. Donasian, **RM** dated 02nd July, 2020, Original Probate and Administration Cause No. 33 of 2013 before the District Court of Kinondoni)

JOHN SYLVESTER NGUTSE.....1ST APPELLANT

SILVANUS SYLVESTER NGUTSE.....2ND APPELLANT

PATRICIA SILVESTER NGUTSE.....3RD APPELLANT

PASCAL ODAS NGUTSE..... 4TH APPELLANT

VERSUS

ANNA LORI SULLE ..... RESPONDENT

JUDGMENT

10th June, 2021 & 09th July, 2021.

E. E. KAKOLAKI J

In this appeal which is contested by the respondent, the appellants are seeking to assail the decision of the District Court of Kinondoni at Kinondoni in Civil Application No 23 of 2020, handed down on 02nd July, 2020,

dismissing their application for revocation of the letters granted to the respondent as administratrix of the estate of her late husband one **Odas Sylvester Ngutse** having so appointed in Probate and Administration Cause No. 33 of 2013 before the District Court of Kinondoni. The appellants are equipped with three grounds of appeal upon going thus:

1. The decision relied upon by the trial Magistrate to dismiss the applicants' application was per incuriam and hence it led to an erroneous decision by the trial Magistrate.
2. The trial Magistrate erred in law and in fact by totally disregarding the evidence adduced by the appellants regarding the number of the deceased's children, and the unfaithfulness of the Respondent in administering the deceased estate.
3. The trial magistrate erred in law and in fact by considering that the reasons stated by the Respondent are sufficient not to warrant revocation of the letters of administration granted to the Respondent.

In view of the afore stated grounds the appellants are praying this court to allow their appeal by quashing the decision and set aside the orders of the trial court with costs and provide other reliefs as it deems fit.

Before I venture into determination of the raised grounds of appeal by the appellants, I find it apposite albeit so briefly to state the historical background that gave rise to this appeal. The respondent who is a widow sometimes in 2013 before the District Court of Kinondoni in Probate and Administration Cause No. 33 of 2013 petitioned for letters and was dully appointed administratrix of the estate of her late husband one **Odas Sylvester Ngutse**. It was made clear by the respondent during the

proceedings that apart from herself as a wife, the deceased was survived with two children **Sylvester Odas** sired from the respondent and **Pascal Odas** (4th Appellant) begotten out of wedlock. The respondent who under the law was supposed to exhibit the inventory and file the final account of the estate could not do so until when the appellants filed an application before the District Court of Kinondoni at Kinondoni in Civil Application No 23 of 2020, seeking for revocation of the letters of granted to the Respondents for administration of the estate of the late **Odas Sylvester Ngutse**. The ground relied upon by the appellants were that two. **One,** that the respondent had failed to exhibit before the court inventory as well as the final accounts of the estate within six (6) months as required by the law. **Second,** that letters of appointment was obtained basing on false information that the deceased was survived with two children only despite of Respondent's full knowledge of existence of the third child one **Joseph Odas**. And **third,** that they had lost faith in her as the administratrix of the estate after she had asked the money paid to the Court account in favour of the 4th appellant to be reverted back to her without his knowledge or permission.

The respondent resisted the application and countered all the three raised grounds for revocation. On the ground of failure to file inventory and final accounts of estate she submitted the same resulted from the obstruction of the 1st, 2nd and 3rd appellant to allow her collect and repossess as part of the estate the house No. MM/JGO/4 situated at Mbezi kwa jogoo, as at the time of hearing there was a pending case before District Land and Housing Tribunal pending for hearing in Application No. 344 of 2019, duly instituted by the 3rd appellant. As to the second ground she contended the alleged

third child born outside of wedlock was never introduced to her prior to the filing of the petition for her appointment as administratrix of the disputed estate, so could not have included him the list of heirs. And with regard to the last ground she argued, it was necessary for her to claim back the money from the court account for the 4th appellant as the cheque deposited there was about to expire, so it could have been difficult for her to give him his share of the estate. She added however that, the said money never reverted back to her so that was an additional reason as to why she failed to account for the estate collected and divided. Upon hearing both parties the trial court was satisfied with the reasons advanced by the respondent and found them genuine the result of which was to dismiss the application while extending her time to file the inventory soon after finalization of the trial in Application No. 344 of 2019 which is pending in the DLHT for Kinondoni is disposed. It is that decision which aggrieved the appellants hence the present appeal.

During the hearing of the appeal the appellants were represented by the advocate from **B&E Ako Law** whereas the respondent had the services of **Finest Attorneys & Co. Advocates.** With leave of the court both parties agreed to dispose of the appeal by way of written submission and complied to the filing schedule orders though the appellants indicated that would not wish to file their rejoinder submission. I wish also to put the record clear that before the court could set the judgment date it was informed by the counsel for the appellant of the demise of the 3rd appellant. However leave of the court to have her name removed from the list of appellant was sought but subjected to the condition of submitting the death certificate first which order of the appellants failed to comply with, hence this appeal will cover the 3rd

appellant for want of proof of death. In determining this appeal I am prepared to canvass each and every ground of appeal in seriatim.

To start with the first ground it was submitted by Mr. Moses Kimaro for the appellants that, the decision arrived at by the learned trial magistrate was premised on an authority arrived at per incurium as the said decision in **Abraham Ally Sykes Vs. Zainabu Sykes and 2 others**, Misc. Civil Application No. 104 of 2019 (HC-unreported) for being entered in total forgetfulness of the provision of section 49(1)(e) of the Probate and Administration of Estates Act, [Cap. 352 R.E 2019] that refers to failure of the party to exhibit inventory and final accounts of the estate as the reason for revocation of his/her appointment. He argued since there are several decision of this court one of which is **Joseph Mniko and Others**, Probate and Administration Cause No. 48 of 1996 (HC-unreported) where non filing of the inventory and accounts resulted into revocation of the party's appointment, then the trial magistrate ought not to have followed the decision in **Abraham Sykes.**

In riposte Mr. Godwin Nyaisa for the respondent countered that, the submission by the appellant's that the decision relied upon by the trial magistrate to reach the decision made was arrived at per incurium is misconceived as the trial magistrate cited the whole provision of section 49 of Cap. 352 that enumerates the circumstances under which the letters of administration can be revoked and assigned reasons for such decision. He said the reasons assigned were the existence of scramble between appellants and respondent over the house left by the deceased which obstructed the respondent from finalising the process of collection of assets, and failure of the court to remit back to her the monies transferred from the

deceased account at CRDB to the court's account pending distribution of the estate. With regard to concealment of the 3rd child one **Joseph Odas** born out of wedlock the trial magistrate rightly found the same was not backed by sufficient evidence. He said, the respondent heard of him for the first time during the hearing of the application subject of this appeal there was no possibility for her to include him in the list of deceased heirs as the child was never been introduced to her before by either the appellants or other relatives. Mr. Nyaisa argued unlike in this case where the collection of estate is not concluded and there is no allegation of misappropriation of the estate, the case of **Joseph Mniko** (supra) relied upon by the appellants is distinguishable as in that case the administrator who was removed from the office had collected the estate and failed to file the inventory instead he squandered the same. So to him it was right for the trial magistrate to rely on the case of **Abraham Sykes** as the notion that is was arrived at per incurium is incorrect.

Having considered the contesting arguments from both counsels in this ground, I wish to state from the outset that, the consideration and determination as to whether the decision relied upon by the trial magistrate was arrived at per incurium or not is not in the domain of this court but rather the Court of Appeal. Any attempt by this court to so do will amount to making an inquiry on the propriety of the ruling of my fellow judge in **Abraham Sykes' case** the practice which is detested. Commenting on such practice of challenging or setting aside the decision of a fellow judge, the Court of Appeal in the case of **Mohamed Enterprises (T) Limited Vs. Masoud Mohamed Nasser**, Civil Application No. 33 of 2012 (CAT-unreported) had this to say:

"Although there is no statutory law (to the best of our knowledge) which bars one judge from setting aside a decision of a fellow judge of competent jurisdiction, rules of practice, prudence and professional conduct impose restrictions. A judge of the High Court in our jurisdiction is or should know and respect that code of conduct. Failure to so do is to open a pandemonium of unprofessionalism, hitherto unknown in this jurisdiction."

In light of the foregoing my duty in the matter before me is to determine whether the trial magistrate was duty bound to follow the decision in **Joseph Mniko's case** and not the **Abraham Sykes' case** both cases being the decision of this Court. On this I endorse Mr. Nyaisa's submission in that the trial magistrate apart from considering other evidential facts which I will consider and determine when addressing the 2nd and 3rd grounds of appeal, was right in following the decision in **Abraham Sykes' case** on the following reasons. **One**, under the doctrine of stare decisis the lower court is duty bound to follow it as the decision of the higher court. **Second**, having two decision of the same court at hand had an option to choose one of them and apply it being guided by the long standing practice which has now became the law in our jurisdiction, that where there are two decision of the same court the most recent is given precedence over other previous authorities. Commenting and applying the said practice this court in the case of **Edna Chambiri Vs. Tanzania Electric Supply Co. Ltd**, Civil Reference No. 04 of 2018 (HC-unreported) observed that:

*"On the two contending views, **I am highly impressed by the decision of my learned sister, Judge Makani. I have three reasons why I have so opted. First, the said decision is***

the most recent. It has as a matter of practice, to be given precedence over the previous authorities. This is in line with the authority of the Court of Appeal *in* ***Arcoper (O.) S.A Vs. Herbert Marwa and Family Investment Co. Ltd and 3 Others,*** *Civil Application No. 94 of 2013 (CAT-unreported) to the effect that*

> *"where the court is faced with the conflicting decisions of its own, the better practice is to follow the more recent of its conflicting decision..." (Emphasis supplied).*

The **third** that, the two decisions have distinguishable facts as rightly submitted by Mr. Nyaisa for the respondent. Whereas in **Joseph Mniko's case** the respondent who had collected the estate and paid all the debts and other costs was faced with accusation of misusing it for his own benefits, those facts did not exist against the respondent in **Abraham Sykes' case**, as the exercise of collection of estate was yet to be finalised and there was no such accusation of misuse of the estate, the facts which are similar to the ones in the case under discussion. With those distinguishing facts together with the stated two reasons alluded to above, I hold the trial magistrate was justified to apply the decision in **Abraham Sykes' case**, in reaching his decision. Thus the first ground has no merit and I dismiss it.

Next for consideration is the second ground of appeal in which the appellants are faulting the trial magistrate for disregarding the evidence adduced by them regarding the number of deceased's children and unfaithfulness of the respondent in administering the deceased estate. It was Mr. Kimaro's submission that, the respondent in her paragraph 4 of the counter affidavit to the appellants' joint affidavit stated, the clan meeting was not held

because relatives were still searching for other children born out of wedlock. Banking on that averment, he argued the appellant through their written submission submitted in court evidence proving that, the respondent was aware of the existence of other children such as **Joseph Odas** as the same was introduced to them by deceased before his death. On allegation of unfaithfulness he contended the respondent denied the 4th appellant of his share of the estate despite of his name being included in the list of heirs, as it was discovered later on that, the respondent had requested the release back of his monies deposited in the court's account under 4th appellant's name. It was his submission therefore that, all this evidence was not considered by the trial magistrate.

Mr. Nyaisa for the respondent resisting the assertions shouldered on the respondent argued that, the trial magistrate considered all the alleged evidence at page 3 and 4 of the ruling of the trial court and rightly held it was hard for the respondent to include the said **Joseph Odas** in the list of heirs for not being known to her before. With regard to the accusation of denying the 4th appellant's inheritance and demanding back the monies transferred into the court account he stated, the respondent did so as it could have been difficult for her to pay the 4th appellant whose whereabout was unknown the share of his inheritance upon expiry of six months of the deposited cheque in court's account. So it was necessary for the said money to revert back to her so that the 4th appellant could be paid by her when available. It was his submission therefore that, the allegation that the 4th appellant was denied of his inheritance at this stage is premature as it was held in the cases of **Abdul Aziz Husseni Ntumilingwa Vs. Yunus Hussein Ntumilingwa,** Probate Appeal No. 2 of 2019 (HC-unreported) and

Abraham Sykes (supra). He thus prayed this court to dismiss the ground for want of merits.

The assertion by the appellant that the respondent was in knowledge of existence of **Joseph Odas** but failed to include him in the list of heir in my considered opinion is the fact that needed evidential proof. As submitted by Mr. Kimaro the appellant proved that through their submission. With due respect to the learned counsel's submission I don't purchase the argument. It is trite law that submission being a summary of arguments cannot be used as a platform to adduce evidence, be it during the trial or at the appeal stage. This position of the law was adumbrated in the case of **Tanzania Union of Industrial and Commercial Workers (TUICO) at Mbeya Cement Company Ltd Versus Mbeya Cement Company Ltd and National Insurance Corporation (T) Ltd** [2005] TLR 41 where the Court held thus:

> ***"It is now settled that a submission is a summary of arguments. It is not evidence and cannot be used to introduce evidence.*** *In principle all annexures, except extracts of judicial decisions or textbooks, have been regarded as evidence of facts and, where there are such annexures to written submissions, they should be expunged front the submission and totally disregarded."* [emphasis supplied]

As the evidence of the existence of the said Joseph Odas was done through submission, I hold the submission did not amount to evidence at all to prove his existence. The other evidence relied upon by the appellants was the copy of birth certificate of the said Joseph Odas annexed to their joint affidavit, which was issued on the 23/02/2018 showing he was born on the

19/03/2008 which I find to be doubtful. If at all existence of the said child was known to the relatives or applicant before the grant of letters to the respondent, they should have introduced his existence during hearing of the petition for the respondent to include him in the list of heirs. Since no one amongst the appellants ever did so like the trial magistrate I hold, the respondent cannot be condemned for her omission to include him in the list of heirs. As regard to the assertion of denial of inheritance to the 4th appellant I also don't find merit on it as the same was never averred in the applicants' joint affidavit but rather introduced through submission in contravention of the law as already found when cited the case of **TUICO** (supra) as submission cannot introduce evidence. There is nothing to show or prove that the 4th appellant had approached the respondent before asking for his share and denied nor was the issue of untrustworthiness of the respondent deposed in their joint affidavit to form part of their evidence. Be it as it may this assertion was prematurely brought before the court by the appellants for acting on mere suspicions and speculations which have no legal base nor any room in civil litigation as once stated by this court in the case of **Abdul Aziz Hussein Ntumiligwa** (supra). In this case the court had the following to say:

> ***"The worries of the respondent that the appellant might misuse or misapply the estate in question are mere suspicious and speculations which have no legal base nor have any room in civil litigation.*** *Even though, if the appellanr shall misuse or misapply the estate, he shall be liable to make it good as it was held in the case of Safiel Cleopa Vs. John Kalaghe (1984) TLR 198, that in an administrator of estate*

who misapplies the estate of the deceased or subject it to a loss or damage is liable to make it good such loss or damage ...," (emphasis supplied).

In view of what is stated above, I dismiss the second ground of appeal for want of merits.

Lastly is the third ground of appeal where the complaint is that, the trial magistrate was at fault to find that the reasons advanced by the respondent were sufficient not to warrant revocation of the letter of administration granted to the respondent. It is Mr. Kimaro's argument in this ground that, the trial court in arriving at such conclusion did not take into consideration the period of seven years delayed by the respondent in filing the inventory and accounts of the estate and the fact that at all that time she never applied for extension of time within which to file the required documents in the trial court, which remedy is to revoke her appointment as provided under section 49(1)(c) and (e) of Cap. 352 of the Laws. Instead, he submitted, the trial magistrate erroneously considered the insignificant fact that the respondent had a case pending in the District Land and Housing Tribunal filed in 2019 between administrator of the estate of the late Christine Ngutse and the Respondent. Citing the case of **Beatrice Brighton Kamanga and Amanda Brighton Kamanga Vs. Ziada William Kamanga,** Civil Revision No. 13 of 2020 where this court held the appointment becomes invalid and comes to an end by operation of the law where the inventory and accounts remain unfiled outside the time prescribed by the law, Mr. Kimaro invited this court to find the ground meritorious and allow the appeal by quashing and setting aside the trial court's decision and proceed to revoke

the letters granted to the respondent by appointing the 1st,2nd and 4th appellants herein as joint administrators of the estate at issue.

In riposte on the third ground of appeal Mr. Nyaisa submitted, the reasons adduced by the respondent for her failure to file the inventory were supported by evidence. He mentioned the supporting evidence to be demand letters by the 3rd appellant seeking for vacant possession of the house forming part of the estate which is also subject of the suit pending in the DLHT, the copies of application which were annexed to the respondent's counter affidavit. The other reason mentioned was the trial court's failure to revert back into her possession the monies deposited in its account up to the time of hearing of the application for revocation, for distribution to the heirs, thus failure to file the inventory in time. Mr. Nyaisa distinguished the case of **Beatrice Brighton Kamanga** (supra) relied upon by the appellants submitting that, the respondent in that case had her appointment revoked on the reasons of failure to exhibit the inventory for 30 years and his act of misappropriation of the estate that came into her hand by virtue of her office, while in the present case there is no such allegation of misappropriation of estates since the reasons for delay to file the inventory by the respondent has already been accounted for. He thus prayed the court to find the ground is without merit and dismiss the entire appeal with costs.

I have keenly considered the fighting arguments by the both counsels in this ground of appeal. As the facts and law reads it is not in dispute that more than seven years have passed, since the appointment of the respondent as administratrix of the estate in dispute. It is also uncontroverted fact that the respondent was supposed to file the inventory in six months and later final accounts of the estate within one year from the date of her appointment as

prescribed under section 107(1) of Cap. 352 of the Laws, but failed to so do. Further to that, parties are at one that the respondent did not seek extension of time within which to exhibit the inventory and submit the final accounts of the estate as provided under section 107(2) of Cap. 352 of the Laws, the omission which creates an offence under subsection (3) of the same section, thus bringing to an end by operation of the law the respondent's appointment as well stated in the case of **Beatrice Brighton Kamanga** (supra) the position of the law which I subscribe to. Parties are parting their way when it comes to the issue as to whether there was sufficient reasons adduced by the respondent preventing the trial court to revoke her appointment and instead grant her extension of time within which to file the inventory to the trial court. It is the law under section 49(1)(c) and (e) of Cap. 352 of the Laws that the grant of probate and letters of administration may be revoked or annulled where the grant is obtained basing on untrue allegations of existence of fact essential in point of law to justify the grant or for failure to file the inventory and or final account of the estate or to exhibit the untrue ones. The relevant provision reads:

> *49.(1) The grant of probate and letters of administration may be revoked or annulled for any of the following reasons:*
>
> *(a)....N/A.*
>
> *(b)....N/A.*
>
> *(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant, though such allegation was made in ignorance or inadvertently;*
>
> *(d)....N/A.*

(e) that the person to whom the grant was made has wilfully and without reasonable cause omitted to exhibit an inventory or account in accordance with the provisions of Part IX or has exhibited under that Part an inventory or account which is untrue in a material respect.

My interpretation of the above provision is that the revocation is not automatic merely because the executor or administrator has failed to do, has done or omitted to perform the duties or functions provided or has performed them fraudulently, ignorantly or inadvertently. The court has to consider the reasons that prevented the party from so complying or omitting to do before his/her appointment is revoked. In this matter, there is no material evidence advanced by the appellants to warrant this court to disturb the findings of the lower court as it properly directed itself to the issues and rightly evaluated the evidence made available before it. As submitted by Mr. Nyaisa the respondent provided evidence by annexing the demand letters from the 3rd appellant proving existence of dispute over the land situated at Mbezi kwa jogoo which is part of uncollected estate for not being in the control of the respondent following the pendency of suit before the DLHT. Though the appellants are claiming that the dispute over that landed property is between the administratrix of the late Christine Ngutse and the respondent in person and not as administratrix still it is the same 3rd appellant who is contesting over the property which is alleged to be part of the estate sought to be administered by the respondent. Thus a proof that the respondent is still fighting for possession of the estate which is yet to be in her hand so that can be included in the inventory for submission before the trial court. It was also uncontested fact by the respondent through

paragraph 8(vi) of the Counter Affidavit that, her intention of claiming back the monies transferred the court account from deceased CRDB account was meant to be distributed to the beneficiaries, unfortunately the same did not come into her possession so that she could distribute and account for it. With such evidence and in absence of any other evidence form the appellants to disprove it, I am satisfied the trial magistrate was justified to arrive at the finding that the appellants had failed to supply sufficient reasons to warrant the trial court revoke the respondent's letters of appointment as administratrix of the estates of the late Odas Sylvester Ngutse. The third ground also has no merit and I dismiss it.

In the premises and for the foregoing I find the appeal is wanting and deserves dismissal which I hereby do.

As the dispute involves parties who are family members, for the purposes of maintaining peace and harmony, I order no costs to any party.

It is so ordered.

DATED at DAR ES SALAAM this 09th day of July, 2021.

E. E. KAKOLAKI

JUDGE

09/07/2021

Delivered at Dar es Salaam in chambers this 09th day of July, 2021 in the presence of Ms. Caster Lufungulo advocate for the Respondent and Ms. Asha Livanga, court clerk and in the absence of the appellants.

Right of appeal explained.

E. E. Kakolaki

JUDGE

09/07/2021