

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF MUSOMA

AT MUSOMA

PC PROBATE APPEAL NO. 5 OF 2021

FADHILI JORDAN S/O MWAKYEMBEAPPELLANT

VERSUS

ZAINABU D/O MOHAMED @ SELEMANRESPONDENT

*(Arising from PC Probate Appeal No. 2/2020 of the Serengeti District Court at Mugumu, Original
Probate and Administration Cause No. 15/2020 at Mugumu Urban Primary Court)*

JUDGMENT

11th August & 14th September, 2021

Kahyoza, J.

Fadhili Jordan S/O Mwakyembe (Fadhili) is the son of Jordan Mwakyembe who died intestate on 16/3/2018. Zainabu Mohamed Suleman (Zaina), the respondent is the wife of the late Jordan Mwakyembe. Zainabu is alleged to be the Fadhili's step mother. The family members of the late Jordan Mwakyembe nominated Fadhili to administer the estate of the deceased. He petitioned to the Primary Court of Arusha District at Arusha for letters of administration of the deceased estate. The primary court appointed him. Zainabu applied for revision to the court of the Resident Magistrate of Arusha. The court of Resident Magistrate revised the primary court decision, quashed the proceedings and set aside of Fadhili's appointment. It directed the petition to be filed to either Mara or Mbeya where the deceased had a fixed abode.

The court of the Resident Magistrate gave its decision on 13/3/2020 and on 28/8/2020 Zainabu petitioned for letters of administration of the deceased's estate before the primary court of District of Serengeti at Mugumu urban. Fadhili objected to the appointment of Zainabu because she was not the late Jordan's wife, that she was not nominated by the late Jordan's family members and that she was not trustworthy.

The primary court dismissed the caveat and appointed Zainabu, to administer the estate of the deceased.

Aggrieved, Fadhili appeal to the District Court of Serengeti and lost. Still aggrieved, Fadhili instituted a second appeal to this Court to challenge the decision of the District Court. He raised four grounds of appeal which raised one issue as follows-

1. Was the primary court justified to appoint Zainabu as the administratrix?

Fadhili contended in the primary court erred to appoint Zainabu and the District Court to uphold her appointment for she was not nominated by the deceased's clan members.

I totally agree with the findings of the District Court that there is no law saying that the court should not appoint a person to administer the deceased's estate unless is nominated by the deceased's family members. It is a good practice to convene a meeting and nominate a person to administer the deceased's estate. It operates as a notice to the all family members that the one of them is soon going to step into the shoes of the deceased to administer the estate. This Court (Mlacha, J) held in **Hadija Said Matika V. Awesa Said Matika** PC. Civ. Appeal No. 2/2016 that-

"In matters of probate and administration, the clan or family will usually sit to discuss the matter and propose someone to be the administrator. He will be sent to court with some minutes. This practice is encouraged because it makes the work of court easy. But once one or two members of the family have been selected, they should also fill Form No. 1 because filling the form is a legal requirement".

The purpose of the deceased's clan or family meeting is to appoint a person to be the administrator and it serves as a notice under Rule 5(2) of the **Primary Courts (Administration of Estates) Rules G. N. 49/1971** (the Rules).

It should be noted that before appointing a person to administer the deceased person the primary court must comply with rule 5(2) of the **Primary Courts (Administration of Estates) Rules G.N. No. 49 of 1971(the Rules)**. It must issue a notice or citation to all interested persons to inform them that a particular person has applied to administer the deceased's estate and affords them an opportunity to object to his appointment if they so wish. Such a notice if served properly to all interested parties plays the same purpose as a clan or family meeting. The notice under rule 5(2) of the **Rules**, must be served as summons are served in a civil suit. The primary court must be satisfied that all interested parties have been served.

Fadhili submitted that Zainabu was not nominated by the deceased's family members and that she did not notify them that she had petitioned

for letters of administration of the deceased's estate. All along Fadhili's complaint had been that the Zainabu was not nominated by the deceased's family member. He did not complain that the Zainabu failed to notify them. He has complained for the first time to this Court and he did not do so in his grounds of appeal. He raised the complaint while submitting. It is mandatory for the petitioner of the letters of administration of the deceased's estate to serve the interested parties with notices provided under rule 5(2) of the **Rules**. If the petitioner for letters of administration of the deceased's estate fails to serve notice to interested persons under rule 5(2) of the **Rules**, his appointment is a nullity and it must be nullified. It is mandatory to notify all interested persons. Rule 5 of the **Rules** states-

5. Notice of hearing

(1) As soon as may be after receiving an application under rule 3, the court shall inform the applicant of the date fixed for the hearing of the application.

*(2) Where the court intends to proceed of its own motion under paragraph 2(a) or 2(b) of the Fifth Schedule to the Act, or receives an application under subrule (1) or rule 3, **the court shall issue a notice in the appropriate Form to all persons (other than the applicant) known or alleged to be the near relatives of the deceased person or to have been named in his will as executors**, requiring their appearance in the court on such date and time as may be specified in the notice:*

Provided that where any such person is a minor or is under a legal disability, the notice may be addressed to his guardian or to the person with whom he may be residing.

*(3) The provisions of **rule 19 of the Civil Procedure Rules shall apply to the service of notice under subrule (2) as they apply to service of summonses.***

*(4) The court may, if it considers, necessary cause the notice to be advertised by such means as are used locally to make public announcements or by publication in a newspaper having a substantial local circulation, whichever may be appropriate.
(emphasis is added)*

Fadhili's complaint that Zainabu did not notify him and other deceased's relatives that she had petitioned for letters of administration of the late Jordan's estate, came as an afterthought. He did not raise it before the trial court or the first appellate court. I am unable to take it and rely on it to nullify Zainabu's appointment.

It is settled law that a second appellate court cannot entertain grounds of appeal not raised and considered by the first appellate court. See the case of **Simon Godson Macha** (Administrator of the late Godson Macha) v **Mary Kimaro** (Administrator of the late Kesia Zebadayo Tenga) Civil Appeal No 393/2019 where the Court of Appeal upheld the position that-

"As a second appeal court, we cannot adjudicate on a matter which was not raised in the first appellate court.the Court

has repeatedly held that matters not raised at the first appellate court cannot be raised in the second appellate court”

Given the above stated reasons I find the first ground of appeal baseless. I dismiss them.

The appellant contended that the District Court erred to uphold the appointment of Zainabu the administratrix of the deceased's estate, who forged a marriage certificate to show that she was married to the deceased. Zainabu's advocate submitted that she was the deceased's lawful wife.

The evidence on record does not exhibit that Zainabu presented forged certificate of marriage certificate. I therefore see no reason to fault the decision of the primary court or that of the District Court. As the District Court correctly found, Fadhili did not call Eva J. Mtelekesya the alleged lawful wife to testify or tender the marriage. In response to the district court's findings, Fadhili attached a marriage certificate copy between Jordan and Eva to the petition of appeal to this Court. Unfortunately, this is second appeal we do not admit fresh evidence. If there a need for additional evidence this Court may order the trial court or even the District Court to take additional evidence.

I cannot make any finding based on the copy of the certificate of marriage annexed to the ground of appeal. I will not attach any weight. In addition, I wish to point out that this Court is not sitting to decide whether Zainabu was lawfully married to the late Jordan or not. It is a probate court, called upon to decide whether Zainabu is a person fit to administer the deceased's estate. As stated by the District Court, when a court has a

task to determine whether a person is suitable to administer the deceased's estate, it must determine if that person has the qualification provided under paragraph 2 of the Fifth Schedule to the **Magistrates' Courts Act**, [Cap. 11 R.E 2019] (the **MCA**), which states that: -

A primary court upon which jurisdiction in the administration of deceased's estates has been conferred may-

*(a) either of its own motion or an application by any person interested in the administration of the estate **appoint one or more persons interested in the estate of the deceased to the administrator or administrators**, thereof, and, in selecting any such administrator, shall, unless for any reason it considers in expedient so to do, have regard to any wishes which may have been expressed by the deceased; (emphasis is added)*

There is one condition a person to be appointed to administer the estate, he should be a person interested in the estate of the deceased. It is nowhere stated that a person to be appointed must be a wife or husband or child of the deceased. It should be a person interested in the estate. The appellant prayed Zainabu's appointment to be nullified. The law provides an administrator or administratrix may be annulled upon good and sufficient reasons being advanced. See paragraph 2(c) of the Fifth Schedule to the **MCA**. It states that-

A primary court upon which jurisdiction in the administration of deceased's estates has been conferred may-

(a) N/A

(b) N/A

*(C) revoke any appointment of an administrator for **a good and sufficient cause** and require the surrender of any document evidencing his appointment; (emphasis is added)*

The law does not define what amounts to good and sufficient reasons to annul the appointment of the administrator. In my considered opinion I find that lack of faithfulness in the administration would be one often, failure to comply with rule 10 of the **Rules**, and failure to distribute the estate of deceased in accordance with the governing laws i.e. customary, islamic or the Indian Succession Act. The list may go on. Fadhili has not convinced me that Zainabu has done anything that proves that she is dishonest or that she has failed to discharge her responsibility. After all, she has so far done nothing.

Fadhili prayed this Court to annul the appointment of Zainabu and appoint him to administer the deceased's estate. As pointed out above there is no reasons to annul the appointment of Zainabu, however, given the fact that the parties have shown mistrust to one another at a very early stage, I appoint Fadhili to join Zainabu to administer the deceased estate.

Fadhili's appointment will take the interest of the family members and the issues of marriage, if any, between Jordan and Eva. On the other side, Zainabu's appointment will take care the interest of the issues of the alleged marriage between Zainabu and the late Jordan, if, any.

In the end, I uphold the decision of the District Court and the primary court to the extent shown and appoint Fadhili to join Zainabu to administer

the estate of the late Jordan. I further order that the two administrators should file on the 26/10/2021 or before, Form IV in the primary court.

It is ordered accordingly.



J. R. Kahyoza
JUDGE
14/9/2021

Court: Judgment delivered in the presence of the parties. B/C Ms. Millinga Present. B/C MS. Millinga present.



J. R. Kahyoza
JUDGE
14/9/2021