IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MWANZA

AT MWANZA

PC PROBATE APPEAL NO. 04 OF 2021

(Arising from District COURT OF Nyamagana Probate Appeal No. 14 of 2020, originating from Mwanza Urban Primary Court at Mwanza Probate Cause No. 07/2020)

STELLA ERNEST NYANDA.....APPELLANT

VERSUS

ANTONY MAGUNGULI

(As the Administrator of the

Estate of LATE MAGUNGULI ZAKARIA MAGUNGULI) .....RESPONDENT

JUDGMENT

Date of last Order: 16/08/2021
Date of Judgment: 30/09/2021

F. K. MANYANDA, J.

The Appellant Stella Ernest Nyanda is distressed by the decision of the District Court of Nyamagana in Probate Appeal No. 14 of 2020 which dismissed her appeal and upheld the decision of the trial Court in Probate and Administration Cause No. 17 of 2020.

The background of this matter is that the trial Court appointed the Respondent Anatory Magunguli as administrator of the estate of Late Magunguli Zakaria Magunguli who passed on to his next eternal life intestate. When the Respondent was in the course of executing his

duties as administrator of the said estate, the Appellant filed objection proceedings to his appointment as such.

After hearing the objection, the trial Court overruled it. Her first appeal in the District Court was not successful. Hence the Appellant became aggrieved and lodged the instant appeal.

The Appellant raised a total of five grounds of appeal namely: -

1. That the [first] appellate Court erred in law and facts for entertaining the evidence filed through written submission (exhibit B) and whether it was proper to annex evidence on written submissions.

2. That the appellate magistrate grossly misdirected his mind in law and in facts by basing his decision on the respondent's evidence that ought to be contrary (sic) to law and procedure.

3. Whether it was proper for the [first] appellate Court to hold that the appellant hand already taken her share without any evidence.

4. That the (first) appellate Court erred in Law and facts when it failed to revoke the respondents appointment on reasons that the respondent has been depriving and ignoring rightful heirs to inherit in equal share while adding stranger to the inheritance which makes the inventory itself bad in law.

5. That the [first] appellate court erred in law and fact to base its decision on nullified proceedings and judgment of Mwanza Urban Primary Court in Matrimonial Cause No. 66 of 2017

Hearing of the appeal, with the leave of this Court was conducted by way of written submissions. However, with further leave of this Court, the Counsel for the parties were allowed to make brief oral summing up on the backborne of their written submissions.

The Appellant was represented by Mr. Steven Kitale, learned Advocate and the Respondent enjoyed the services of Mr. Jackson Marwa Ryoba, learned Advocate.

Supporting grounds one and two of the appeal, Mr. Kitale submitted that it was an error for the first appellate court to uphold a

decision of the trial court which was found based on nullified evidence and also it wrongly admitted evidence annexed to written submissions.

It was the views of the Counsel for the Appellant that submissions being a summary of arguments, it is neither evidence nor can it be used to tender new evidence.

He cited the case of **Tanzania Union of Industrial vs Mbeya Cement Company Ltd and Commercial Workers (TUICO) at Mbeya Cement Company Ltd and Another**, (2005) TLR 42. In ground two which is closely related to ground one, a result of which made the Counsel for the Appellant to argue together, it was contended that the first appellate court erred in law and facts to act on speculation. The Counsel pointed out that the first appellate court acted on matters which were not submission of the realm of speculation when it introduced matrimonial cause issues in respect of matrimonial cause No. 01 of 2018 and received new exhibit marked exhibit B. The Counsel pointed out that the first appellate court acted on matters which were not part of the submissions of the parties.

It entered upon the realm of speculation when it introduced matrimonial cause issues in respect of matrimonial cause No. 01 of 2018 and received new exhibit marked exhibit B. The Counsel pointed out that the first appellate Court acted contrary to its character and nature when it pronounced a claim that: -

> *" The appellant felt shy after she notified that she was as well as naked after the respondent being shown the truth and that to continue making rejoinder is to undress herself and the best option is to remain silent"*

It was the contention by the Counsel for the Appellant that these issues were not part of the parties submissions. He cited the case of **NBC Ltd and Imma Advocate vs Bruno Vitus Swalo**, Civil Appeal No. 331 of 2019 (unreported) where the Court of Appeal of Tanzania cited with approval a passage in an article by Sir Jack J. H Jacob, titled **"The Present Importance of Pleadings",** page 174 that: -

> *"It is not part of the duty of the Court to enter upon any inquiry into case before it other than to adjudicate upon specific matters in dispute which the parties themselves have raised by the pleadings. In deed the Court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the*

parties. To do so would be to enter upon the realm of speculation."

In his oral summing up to the written submissions as far as the complaint on reliance of a nullified judgment in Matrimonial Cause No. 01 of 2018 the Counsel argued that, since the judgment and the proceedings were nullified, the Appellant is a lawful wife of the deceased. He also reiterated his argument in written submissions that it was wrong to admit evidence tendered through written submissions. Relying on the authority in the case of **Matiko vs Matiko**, Civil Appeal No. 02 of 2016 (unreported) invited this Court to nullify the appointment of the Respondent as administrator of the estate of Late Magunguli Zakaria Magunguli and the proceedings generally because he has failed to administer the estate in accordance with the law. He was of the option that the Administrator General be appointed in lieu.

On his side Mr. Ryoba, Counsel for the Respondent argued in respect of the first and second grounds conceding that under Regulation 1(2) read together with Regulation 7 of the Magistrates Court (Rules of Evidence in Primary Courts) Regulations Courts are required not to go outside the evidence tendered during the trial. The Counsel was of

views that even if the exhibits were attached to the written submissions, the first appellate court never acted on the same.

The Counsel submitted further that in the Primary Court, Exhibits XI and X2 were tendered which shows that the Appellant was divorced and received her share in Matrimonial Cause No. 66 of 2017 and to date she is still receiving monthly maintenance. This is the evidence which was acted upon by the first appellate court.

In his summary, the Counsel for the Respondent raised a question whether it is corrected in law for a person who was divorced and took her share of matrimonial properties division to come again for inheritance. He answered this question in negative. Then he raised another question whether it is correct in law for the Appellant who accepted and signed the inventory of division of inheritance for her children to object it later on. He also answered this question in negative.

Rejoining, the Counsel for the Appellant answered the first question in affirmative arguing that once the proceedings were nullified everything on record is a nullity. It was the views of the Counsel for the Appellant that since the Respondent did not come to Court again to

claim what was divided to the Appellant as her share in matrimonial propertied after the divorce was nullified; he cannot be heard complaining now.

As to signing the inventory the Counsel was of the views that the Appellant signed accepting the inventory for her children out of Court therefore she has right to object thereto:-

As far as the first and second grounds of appeal are concerned, those were the submissions by the Counsel for both parties. It is my duty now to determine the same before I go on with other grounds.

Reading from the submissions by the Counsel of both sides it is not in controversy that the Appellant was a lawful wife of the deceased Magunguli Zakaria Magunguli. That the Appellant and Late Magunguli Zakaria Magunguli got divorced before his death. That later on the proceedings and the judgment in matrimonial cause were nullified on appeal. It is also not controverted that the Appellant signed accepting the inventory on division of inheritance for her children.

The Counsel lock horns on issues that after nullification of the matrimonial proceedings whether the Appellant is still entitled to

inheritance of the estate of her husband. The Counsel for the Appellant answered in affirmative while the Counsel for Respondent in negative. The second issue is whether after signing accepting the inventory of inheritance on behalf of her children the Appellant is estopped from objecting the same. The Counsel for the Appellant answered in negative while the Counsel the Respondent answered is affirmative.

Let me start with the first issue. This being more factual issue than legal, I will have to navigate through the evidence on record. I am aware that this been, a second appellate court is not required to re-evaluate the evidence as that is a duty of the first appellate court. The second appellate court can only consider the facts of the appeal as far as points of law or mixed points of law and facts. However, by doing so, it may review the evidence.

I am fortified by the holding of my Hon. Mruma, J. in the case of **Godfrey Chilongola vs Nicodenus Martine and 19 others**, Land Case Appeal No. 29 of 2018 (unreported) where he followed a land mark case of **Pandya vs Republic** [1957] EA 336 and that of **Okena vs. Republic** [1972] EA 32, he stated at page 5 as follows:-

"The second appellate court has no duty to re-evaluate the evidence adduced at the trial but it has the duty to consider the facts of the appeal to the extent of considering the relevant points of law or mixed law and facts as raised in the second appeal. In the process it may review the evidence (ie facts) adduced at appellate court failed to discharge its primary obligation to re-hear the case by subjecting the evidence presented at the trial Court to a fresh and exhaustive scrutiny and re-appraisal before coming to its own conclusion."

In this matter, it is a complaint by the Appellant in ground one that the first appellate court was wrong in law and facts to entertain exhibits which were presented as annexures to the written submissions contrary to the law. Second, it was a misdirection to base a decision on evidence by the Respondent obtained contrary to law and procedure.

In elaboration of the complaints, the Counsel for the Appellant submitted that the Appellant filed objection intending the District Court to revoke the appointment of the Respondent as administrator of estate of his father, the **Late Magunguli Zakaria Magunguli**. One of the reasons in support of the objection was that, she was unjustly omitted form list of widow heirs without valid reason as she was still a lawful

wife of the deceased. The Counsel argued that attempts by the deceased to divorce her failed because the proceedings of the Urban Primary Court of Mwanza (trial court) in Matrimonial Cause No. 66 of 2017 were nullified by the District Court of Nyamagana in its appellate jurisdiction in Matrimonial Appeal No. 23 of 2017. The trial court ignored these facts and dismissed the objection on factual grounds since she did not return to her husband after the nullification of the divorce. Another reason is that she accepted her share in matrimonial properties per her contributions, then constructively, she accepted the divorce, thus she was dully divorced as such. It was the submissions by the Counsel for the Appellant that the first appellate court wrongly upheld the trial court's decision because a judgement of the district court which nullified the divorce proceedings and judgement was tendered before the trial court, but unlawfully ignored.

The second complaint was elaborated that the first appellate court errored when it relied on two exhibits which were attached to the submissions by the Counsel for the Respondent which were annexures "B" the petition for divorce in the Court of the Resident Magistrate in Matrimonial Cause No. 01 of 2018 and "D" the lease agreement for a

guest house. The first appellate court ought to have expunged that evidence.

The Counsel for the Respondent submitted in response conceding that it is true the two documents namely annexures "B" and "D" were annexed to the written submissions, however, the first appellate court did not act on them. Further to that the fact of divorce was borne out in the trial court's proceedings and judgement, where exhibits X1 and X2, been the proceedings and judgement in Matrimonial Cause No. 66 of 2017 which shows that she received her shares in matrimonial properties after the divorce.

This Court has taken the pain to navigate through the proceedings of both the trial and the first appellate court and found that there is evidence which shows that the Appellant was dully married to the deceased **Magunguli Zakaria Magunguli** in 2010. Prior to that, according to the testimony of SU2 **Kamili Luacha,** at page 37 of the typed proceedings, the deceased was married to a woman namely, **Modesta Mgema** in 1993 marriage which marriage came to an end in 2007, when she went to her parents for treatment. Then in 2008, the deceased got married to a second wife one **Saada Said** under

customary marriage, they got separated in 2009 due religious differences. In 2010, the deceased married the Appellant under Christian rituals. However, their marriage life went sour in 2017 when the deceased petitioned for divorce before the Urban Primary Court (trial court) in Matrimonial Cause No. 66 of 2017. The said trial court granted divorce after finding that the marriage was irreparably broken down. Consequently, the deceased paid the Appellant Tshs. 4,000,000/= which he treated as her share of the matrimonial properties they had jointly amassed for a period of seven (07) years of the marriage life.

It is on record also that, the Appellant filed an appeal to the District Court of Nyamagana which was registered as Matrimonial Appeal No 23 of 2017. The said District Court nullified the proceedings and the judgement of the trial court in Matrimonial Cause No. 66 of 2017 on ground that the parties did not refer their matrimonial dispute to the reconciliatory board first before resorting to invoke the court.

The Appellant's Counsel contends that the Appellant is a lawful wife of the deceased because there is no valid divorce so far. On the other hand, the Counsel for the Respondent contends that since there is a decision of the trial court which found that despite of nullification of

the divorce, still the Appellant is a divorcee constructively and received her shares in matrimonial properties, a decision which was upheld by the first appellate district.

Upon close scrutiny of the evidence on record, this Court agrees with the Counsel for the Appellant that there is no valid divorce. I say so because, the District Court in Matrimonial Appeal No. 23 of 2017 clearly nullified all the proceedings and the judgement of the trial court in Matrimonial Cause No. 66 of 2017.

There was no any subsequent divorce issued by a court of law and there are no circumstances warranting the trial court to draw an inference for a constructive divorce. It is more so because the parties were directed to institute a fresh petition for divorce in the court of law after referring their dispute to the reconciliatory board in accordance with the mandatory requirement of law. In such circumstances, how could the trial court justify to issue constructive divorce while there was a requirement for parties to refer their dispute to the right authorities if they so wished? The answer to this question is in negative.

Moreover, it was the deceased who petitioned for divorce, the causes for the petition for divorce were not exposed before the trial

court because the matter before it concerned probate not matrimonial issues, particularly divorce.

It was also argued for the Respondent that it was correct for the trial court to make a finding that the Appellant accepted the payments of Tanzanian Shillings Four Million as her share in matrimonial properties which the duo amassed during the existence of their marriage. My perusal of the file reveals that the Appellant disputed this allegation stating that it was payment of money which the deceased owned her. It is my considered opinion that such a fact was not conclusively proved. I say so because the same emanates from the nullified proceedings and as stated above, the issue before the trial court was not matrimonial but probate.

This Court finds that the concurrent findings by the lower courts on the validity of the divorce is based on none direction and misdirection on the evidence. Therefore, in law, this Court is entitled to disturb the same because they acted on a nullity, hence their findings are a nullity as well.

As regarding to the use of documents annexed in written submissions, the Counsel for the Respondent conceded that it is true that some documents namely annexures "B" the petition for divorce and "D" the lease agreement for a guest house were annexed to the written submissions, but he quickly stated that the first appellate court did not use the same.

The law is very clear that submissions been arguments are not evidence. Therefore, they cannot be used to adduce evidence but to explain the already admitted evidence. I have gone through the impugned judgement and found that at page 7 thereof the appellate magistrate made reference to Exhibit "B". He stated as follows: -

> *"There is no doubt that the Appellant never went back and live together after the decision of the Mwanza Urban Primary Court being (sic) nullified and that was not enough, she proceeded to institute another matrimonial cause No. 1 of 2018 in the Mwanza Resident Magistrate Court (supra)* ***in pursuant to exhibit B of the respondent's exhibit****." (Emphasis added)*

As it can be gleaned from the quotation above, the first appellate court did in fact use the document annexure "B" and treated it as an

exhibit for the Respondent. My perusal of the file could not lead me anywhere indicating that such an exhibit was tendered and admitted in evidence as exhibit at the trial court or received as such as additional evidence by the first appellate court. The record does not show that the trial court did know about existence of Matrimonial No. 01 of 2018 in the Court of the Resident Magistrate. For the first time it was introduced into the first appellate court through a document marked "B" which was annexed to the written submissions by the Counsel for the Respondent. This document influenced the first appellate magistrate in dismissing the first ground of appeal.

Since the same document was not part of evidence, I find that the first appellate magistrate went astray and contrary to the law on acting on it. Grounds one and two have merit.

The complaint in ground four is that the first appellate court erred in law and facts for failure to revoke the appointment of the Respondent as administrator of the estate of his father, **late Magunguli Zakaria Magunguli** on grounds that he failed to discharge the duties of his office by administer the estate impartially and justly. It was argued for the Appellant that the Respondent has been depriving and ignoring

rightful heirs including the Appellant's children and inviting strangers to the inheritance. The Counsel for the Appellant argued that the act of the Respondent to distribute unequally the estate of the deceased among the rightful heirs contravenes Rule 9(1)(e) of the Primary Courts (Administration of Estates) Rules, GN No. 49 of 1971 which provide two scenarios under which revocation of letters of administration may be invoked. First where the administrator wilfully acts in contravention of the terms of grant to the prejudice of the interests of heirs. The Counsel argued that the Respondent excluded the Appellant from the list of widows. He also added that the Respondent failed to exclude her share in the properties jointly acquired by the Appellant and the deceased as matrimonial properties before starting to distribution.

Second, if the administrator negligently acts in contravention of the terms of grant against the interests of heirs. The Counsel argued that the Respondent acted with negligence for failure to collect the properties of the deceased and failed to declare the money he collected from various investments of the deceased and the money in the bank accounts.

On his side, the Counsel for the Respondent submitted that there is nowhere that show the Respondent as administrator of the estate of **Late Magunguli Zakaria Magunguli** violated Rule 9(1) of the Primary Courts (Administration of Estates) Rules, GN No. 49 of 1971 as alleged. It was the contention of the Counsel that the Respondent managed to collect all assets and liabilities within the four months period provided by Rule 10 of the Primary Courts (Administration of Estates) Rules, GN No. 49 of 1971. He filed in court the inventory and each heir accepted it as correct one, save for the children of the Appellant who were still minors, whereas the Appellant accepted the same on their behalf. The Counsel argued further that there were no strangers in the list of heirs but three wives and their issues whom the Appellant knew them well. Lastly, the Counsel argued that the distribution was done in accordance with an "oral will" of the deceased. The Appellant re-joined reiterating to their submissions in chief.

Let me also determine the controversy in this ground number four. It is not in dispute that the Respondent was dully appointed as administrator of the estate of **Late Magunguli Zakaria Magunguli** in Probate Cause No. 07 of 2020 on 23/04/2020. It is also not in dispute that after his appointment, the Respondent filed in the trial court an inventory for

distribution of the estate to heirs. There are documents in the court file in Probate Cause No. 07 of 2020 which contain the inventory headed as "*Orodha ya Mali Alizoacha Marehemu Magunguli Zacharia Magunguli*, Mirathi Na. 07 of 2020" and another document headed *"Mgawanyo wa Mali alizoacha Marehemu Magunguli Zakaria Magunguli"*. The latter document lists names of heirs, the names of the children of the Appellant, namely, Merianna Magunguli and Brightness Magunguli, are seen in numbers 6, 9 and 10. Number 6 concern a motor vehicle, Toyota Canter Reg. No. T598 DET, numbers 9 and 10 concern money in the bank account. While the name of her child *"Merianna"* was wrongly written as *"Anna"* was corrected to read "*Merianna*". Therefore, the complaint that her children were deprived of inheritance is unfounded, the concurrent findings by the lower courts are correct in law and facts.

It is true, however, that the name of the Appellant as a widow is missing in the list. Instead, it is the name of the first wife **Modesta Misri Mgema**, who is the Respondent's mother and the second wife, **Saada Said Salula** appear on the list. Each one was allocated with a house and two bank accounts. The Counsel for the Respondent argued that the Appellant was deprived of inheritance by the lower courts so she could not be included in the said list of heirs.

This Court has stated above that those decisions were a wrong as far as divorce is concerned. A question is whether, in absence of a divorce dissolving the marriage between the Appellant and deceased until the death of her husband entitled the trial court to deprive her to inheritance. The answer to this question is in negative. I say so because, the marriage between the Appellant and **Late Magunguli Zakaria Magunguli** was still in the register of marriage. Legally it can safely be said that they were only separated, but their marriage was still subsisting. In the circumstance, therefore, it was wrong to deprive her from inheritance to the estate of her late husband. I must say that the deprivation was not a mere invent of the Administrator but the same was blessed by the trial court in the objection proceedings raised by the Appellant in Probate Cause No. 07 of 2017.

On top of that, it was contended for the Appellant that the trial court ought to ascertain and exclude the shares of the widows, the Appellant inclusive, in matrimonial properties before distributing the remaining estate properties to heirs whom include the widows. The Counsel for the Appellant cited the cases of **Benson Benjamini Mengi and 3 Others vs. Abdiel Reginald Mengi and Another**, Probate

Cause No. 39 of 2019 (unreported) and the case of **Elizabeth Mohamed vs. Adolf John Magesa** [2006] TLS LR 114. In the latter case Hon. Mruma, J. held that: -

> *"If there are properties jointly acquired by the deceased person and his wife or her husband, the share of the surviving spouse must be ascertained first and excluded from the deceased's estate which is liable for administration and consequently distribution to heirs is the estate of the deceased spouse and not estate of the surviving spouse.*

As to the formular to be used in ascertainment, Hon. Mruma, J. stated at page 27 and 28 of the judgement as follows: -

> *"The law therefore requires that when a person applies for probate and or letters of administration, he/she must include only the properties of the deceased person otherwise there is a danger of administering the estate of a person who is alive. It is my opinion that if there are properties jointly acquired by the deceased and his/her wife/husband (as the case may be), the share of the surviving partner must be carefully ascertained and excluded from the list of the deceased's estate. The estate which is liable for administration and consequently distribution to heirs is that of the deceased person and not otherwise."*

In **Elizabeth Mohamed (supra)** Hon. Mruma, J. was discussing the provisions of sections 56, 58 and 60 of the Law of Marriage Act, [Cap. 29 R. E. 2002]. These provisions recognize ownership of properties wholly acquired by a spouse separate from jointly acquired properties during subsistence of their marriage.

In the former case of **Benson Benjamini Mengi and 3 Others** (supra) Hon. Mlyambina J. extended the ratio decidendi in the case of **Elizabeth Mohamed** (supra) to cover the provisions of section 114 of the **Law of Marriage Act** which provides for division of jointly acquired properties by the spouses during the subsistence of their marriage, properties which are referred to as matrimonial properties. Hon. Mlyambina, J. stated at page 45 of the judgement as follows: -

> *"The legal basis of this ratio decidendi according to my Brethren Mruma, J. in the case of **Elizabeth Mohamed** (supra) are the provisions of sections 56, 58 and 60 of the **Law of Marriage Act, 1971** which entitle a wife right to acquire, own, hold and dispose both immovable and movable property during the subsistence of marriage separately (alone) or jointly with husband. However, I'm of opinion that the provisions of section 114(1) of the **Law of***

***Marriage Act**, entitles a wife a share in matrimonial property acquired by joint efforts with her husband upon death of her husband."*

Basically, I agree with the statements of the law in the above cited cases. However, the question is on the procedure and forum on exclusion of the said properties. The decisions above did not say how, at what stage and in which forum the said joint matrimonial properties are to be excluded.

My considered opinion is that, this been a probate court, is not a proper forum for ascertainment of matrimonial issues, I say so because, if it is allowed to do so there is a danger of turning a probate court into matrimonial court and hence mix up the issues. I am not alone on this position, Hon. Tiganga, J. when he was confronted with the issue whether a probate court could deal with matrimonial issues in the case of **Sara Samson Kiyuga vs. Silas Lucas (Administrator of Estate of the Deceased Philipo Manyumba Mapinda)** PC. Probate Appeal No. 11 of 2020 (unreported), stated as follows: -

The other issue which needs to be made clear is that, this is not a matrimonial dispute in which the division of matrimonial properties obtained or acquired by the spouses is divided after their marriage has been resolved.

It is the probate, in which the deceased who was a husband of seemingly two wives, and father of about 12 children has passed away leaving that number of persons surviving him. All his properties form his estate and should be divided to all heirs including his wives and children."

Another case on point is the case of **Nuru Salum (Administratrix of the Estate of the Late Ally Masoud) vs. Husna Ally Masoud Juma (Administratrix of the Estate of the Late Ally Masoud)** Pc Probate Appeal No. 10 of 2019 (unreported) where Hon. Rumanyika, J. was confronted with issues of matrimonial property division in a probate cause stated as follows: -

"With regard to the alleged matrimonial house, again rightly so like the 1 appeal court ruled and Mr. A. Daniel argued, indeed the probate court assumed ordinary civil jurisdiction of a family court because there had been no matrimonial proceedings before her. Leave alone as said, one getting the 50% unusually and unlawfully apportioned by the magistrate suffice the 3 points to dispose of the appeal."

Yet in another case decided by Hon. Dr. Levira, J. as she then was, the case of **Ester Safari vs. Steven Almas,** PC. Probate Appeal No. 1 of 2016 (unreported) in which sitting in a probate court was

confronted with issue of a claim of share by a spouse from jointly acquired matrimonial property in the estate of deceased husband, she stated as follows: -

> *"In the upshot the appeal is allowed. The judgment of the first appellate court is hereby vacated and the respondent being the administrator of the deceased estate is duty bound to consider the appellant as one among the beneficiaries. If the appellant so wishes may claim the share arising from her contribution to the acquisition of the matrimonial house.* ***However, she must channel it to a proper mode and forum."*** (emphasis mine).

In this matter, particularly this issue, the contention is about entitlement of shares by the Appellant from matrimonial properties in the estate of her late husband claiming that it ought to have been excluded from the estate of her deceased husband.

It is my considered views, from the line of authorities above, that the Appellant being among the beneficiary, if she wishes to maintain her claim on her shares in matrimonial properties, may pursue her rights in a proper mode and forum. Save as elaborated above, there is merit in ground four of appeal.

This brings me to grounds three and five of appeal in which the complaint are on the issue that whether it was wrong for the first appellate court to hold that the Appellant had taken her share without any evidence and that whether the first appellate court erred in law and facts to base its decision on nullified proceedings and judgement of the Mwanza Urban Primary Court in Matrimonial Cause No. 66 of 2017.

Supporting these grounds, the Counsel for the Appellant submitted that since the marriage between the Appellant and the deceased subsisted, then there existed common interest between them under section 144 of the Law of Marriage Act, which creates a presumption of common ownership matrimonial assets under section 114 of the same law. He was of the views that based on such presumption, then it fits for the Appellant to be appointed as administratrix of the estate of the deceased.

On their side, the Counsel for the Respondent argued the third and fifth grounds seriatim. In respect of ground three, the Counsel submitted conceding that the proceedings and the judgement in Matrimonial Cause No. 66 of 2017 were nullified by the District Court in Matrimonial Appeal No. 23 of 2017 but quickly pointed out that the

Appellant had received her share in jointly earned matrimonial properties, therefore she cannot come back and claim inheritance, she is estopped by her acceptance of TShs. 4000,000/= which she was offered.

In respect of ground five, the Counsel argued that the first appellate court did not rely on the nullified proceedings and judgement of the primary court in Matrimonial Cause No. 66 of 2017 but relied on the proceedings and judgement of trial court in Probate Cause No. 07 of 2020. He added also that the Appellant did no cohabit with the deceased until his death.

This Court has already ruled and the Counsel of both sides agree that the proceedings and the judgement of the primary court in Matrimonial Cause No. 66 of 2017 were nullified by the District Court in Matrimonial Appeal No. 23 of 2017. Also the controversy on payment of TShs. 4000,000/= made by the deceased to the Appellant alleging that it was her share in matrimonial properties was unresolved in that the Appellant disputed contending that the same was payment of a debt which the deceased owned her. The parties were advised to refer their dispute to proper authorities been the reconciliatory board. This Court is

of strong views that the primary court being constituted as a probate court could not resolve the matrimonial dispute.

Moreover, in their oral submissions, in support to their back bone written submissions, the Counsel for the Respondent asked whether it is proper for a divorced woman who received her share in their jointly acquired matrimonial properties to come back and claim inheritance to the estate of her deceased husband. The answer to that question, in law, it is in negative.

However, as far as this matter is concerned, such a question does not arise. As seen above; this Court has already found above that the divorce was nullified for want of proper procedure as the matrimonial cause was filed in the primary court prematurely. Further, it is on record that the controversy on payment of the TShs. 4,000,000/= is unresolved.

Before I pen off, there is one issue which this Court has been asked to determine, that is, whether the Respondent's appointment as administrator of the estate of **Late Magunguli Zakaria Magunguli** deserve to be revoked. The Counsel for the Appellant contends that the

Respondent has failed to discharge his duties, hence they request his appointment as administrator of the estate be revoked and lieu thereof an independent administrator be appointed, in particular the Administrator General. The Counsel for the Respondent says he discharged his duties as administrator because he administered the estate in accordance with the wishes of the deceased, which in the proceedings is referred to as "*usia*".

The tests for this Court been a second appellate court to interfere with distribution and or appointment of administrators were clearly stated by Hon. Rumanyika, J. in the case of **Nuru Salum (Administratrix of the Estate of the Late Ally Masoud) vs. Husna Ally Masoud Juma (Administratrix of the Estate of the Late Ally Masoud)** (supra) that court officers should not assume the role of an administrators but rather to endorse the inventory of the properties and list for distribution, unless there are outstanding unresolved controversies in which case, with reasons to be recorded, the court may direct rectification of the list or in case rectification becomes impossible, order revocation of appointment of the letters of administration. I may add that the court may also appoint an additional administrator or a

quite new independent one. His Lordship Rumanyika, J. stated as follows: -

> *"It is settled law that judicial officers do not, at their own distribute, order, sale, apportion or divide estates. Unless on the face of it the proposed list was unrealistic and unfair courts are obliged to bless and or whole sale endorse proposals presented by administrators. If anything, with reasons also to be recorded, a probate magistrate may reject or return the proposed division to administrators with the direction that they revisit it with a view to reaching at a fair and just distribution of the estate at issue. Should the administrators reach no consensus like it was the case here, and the probate court did not do the needful, the probate court is hereby directed to revoke the letters of administration and in lieu thereof appoint any other independent administrator of the estate to do the needful.*

In the matter at hand, when discussing the complaints in grounds one and two above, this Court made it clear that the distribution of the estate properties to the heirs was in accordance with the law. The administrator presented a list of distribution of the assets, only the Appellant was unamused, all of the other heirs took no issue. In such circumstances is revocation of the appointment of the Respondent's

letters of administration tenable. The answer to this question is in negative.

Further the Counsel for the Appellant suggested this Court to use its discretion to appoint the Administrator General under section 5 of the Administrator-General (Powers and Functions) Act, [Cap. 27 R. E. 2002]. Under that provision, this Court is empowered to appoint the Administrator General *suo mottu* to administer estates where, for reasons stated, the court finds it expedient. However, in this matter the Counsel did not state any reason which would justify Administrator General's interference in the administration of the estate in this matter. Section 5 reads: -

> *"5. (1) Where a person dies in Mainland Tanzania or where a person dies believed to be possessed of property in Mainland Tanzania, ... and if it appears that the deceased left property and: -*
>
> *(a) That any such person died intestate; or*
> *(b) NA*
> *(c) NA*
> *(d) NA*
> *(e) NA*

Provided that ***where it appears to the court that circumstances of the case require, for reasons recorded in its proceedings, the court may, of its own motion or otherwise, grant letters of administration to the Administrator-General*** *or to any other person notwithstanding that there are persons who in the ordinary course, would be legally entitled to administration."* (Emphasis added).

As it can be gleaned from the provision that, in order for the Administrator General to be appointed administrator of estate, reasons are require to be given. It follows therefore, that in absence of any reason, and the fact that the circumstances of this matter where there is only a desire for a party to be included in the administration in the of estate, this Court does not see need of invoking the provisions of section 5 of the Administrator-General (Powers and Functions) Act.

However, in order to calm the lingering issues on the administration of the estate, this Court finds it expedient to appoint both the Appellant, **Stella Ernest Nyanda** and the Respondent, **Anthony Magunguli Zakaria** as co-administrator of the estate of Late **Late Magunguli Zakaria Magunguli.** Hence, there is merit in grounds three and five to the extent elaborated above.

In the result, the appeal is partly allowed to the extent and reasons given above. Consequently, I do hereby make the following orders that:-

1. the appeal is partly allowed to the extent explained above.

2. I do hereby appoint both the Appellant, **Stella Ernest Nyanda** and the Respondent, **Anthony Magunguli Zakaria** as co-administrator of the estate of Late **Late Magunguli Zakaria Magunguli.**

3. Considering the nature of this matter, a probate involving relatives and closely related persons all of the same family, this Court declines to grant costs, each party to bear their own costs.

It is so ordered.

F. K. MANYANDA
JUDGE
30/09/2021