IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF SHINYANGA

AT SHINYANGA

PC. PROBATE APPEAL NO. 7 OF 2020

(Arising from the decision of the District Court of Kahama in Probate appeal No. 3 of 2019 originating from Probate Cause no. 5 of 2019 of Busangi Primary Court)

MARIA MAKELEMO.....APPELLANT

VERSUS

KISUSI ILINDILO.....RESPONDENT

NKENDE ILINDILO.....RESPONDENT

MALWA ILINDILO.....RESPONDENT

JUDGMENT

9th August & 10th September, 2021

MKWIZU, J:

At Busangi primary court, Maria Makelemo filed an application for letters of administration of the estate of her late husband, Ilindilo Kihimbo Nkende who died on 11th October, 2018. Her application however was objected to by her step son Kisusi Ilindilo. One of the five presented points of objection was that deceased children were not involved in the meeting that 5 proposed Maria Makelemo an administrator. The objection was sustained. Parties were advised to go back and convene a clan meeting that would propose an administrator before filing an application for letters of administration.

Parties did comply with the court's directives. A clan meeting was then convened on 4/10/2019. Three respondents above were proposed joint administrators of the deceased estate. The records show that, Appellant, Maria Makelemo and some of the deceased's children did not attend the meeting. After that proposition, Respondents filed Probate Application No. 5 of 2019 for letters of administration. Maria Makelemo objected the instigated appointment. The objection partly succeeded. Trial court acceded to the removal of the 2nd and 3rd respondent. The primary court resorted into appointing the 1st respondent, Kisusi Ilindilo and other two clan members that is Musa Ilindilo and Magete Nkende (who are not party of these proceedings) the Administrator of the deceased estate.

Appellant was not happy with the above appointment. She appealed to the district court through PC Probate Appeal No. 03 of 2019 on four grounds of appeal that (i) 1st respondent misappropriated the deceased estate before the grant of letters of administration, (ii)the trial magistrate was involved in the preparation of the clan meetings minutes prepared on 4/10/ 2019, (iii)trial court failed to evaluate the evidence on the records and (iv) trial court's findings were based on weak evidence by the 1st respondent. The 1st appellate court dismissed the appeal for want of merit hence this 2nd appeal predicated on five grounds of appeal.

At the hearing of this appeal, appellant had the services of Mr. Wilson Magoti Advocate, the 1st and the 3rd respondents appeared in person whilst the 2nd respondent was not in attendance and therefore the appeal proceeded ex - *parte* against him.

Mr. Magoti argued grounds 1, 3 and 4 jointly and 2 ground separately. He abandoned ground 5. Submitting on the combined grounds 1,3 and 4, Mr. Magoti pointed out and argued three separate points ***one,*** that the decisions of the courts below fall short of the procedures for the appointment of the administrators of the deceased estate. Making reference to section 19 of the Magistrate Court Act (Cap 11 R: E 2019) and the fifth schedule to the Act, Mr. Magoti said, no ascertainment was done on whether trial court had jurisdiction to entertain the matter or not. The trial court did not mention the place of abode of the deceased at the time of his death; his religion and the law used to determine the administrator whether customary, Islamic or the laws of the land. Mr. Magoti explained further that, since primary court's jurisdiction on administration of estate issues is limited to Islamic and customary laws, the findings on the law applicable would have automatically solved the issue whether it had jurisdiction or not. It only assumed that customary law was applicable without putting to the test of the matter. To support his position, Mr. Magoti cited the case of **Benson Benjamine Mengi vs Abdiel Reginald Mengi & another**, Probate & Administration Cause No. 39 of 2019 and **Hilda Said Matika vs Awesa Said Matika,** Pc Civil Appeal No. 2 of 2016 (all unreported) at page 12 & 13.

Two, Mr. Magoti blamed the trial court for failure to disclose whether the opinion of assessors was given on the lifestyle of the deceased or not. He on this refereed the court to case of **Hilda Said Matika vs Awesa Said Matika (supra).**

Three, pointing to the provisions of Rule 2 (a) of the 5th schedule read together with the Primary court's administration of estate Rules GN No. 49 of 1971 on the legal requirement of filling in Form No 1 by the administrators, Mr. Magoti said, only two administrators applied for and filled in the required forms.

Regarding the second ground of appeal which was argued separately, Mr. Magoti faulted the trial court's decision for failure to consider *the* participation of the appellant (Widow) and her ten children to the family/clan meeting. Mr. Magoti submitted, though it is just a matter of practice in the administration of estate cases that families are advised to convene a meeting for purpose the proposition of a family member who would be an administrator, in this case, the Ilindilo family had family problems which made it impossible for the family members to meet. His complaint was extended further that, no reason was availed as to why appellant was not appointed administrator. He, in conclusion prayed for nullification of the appointment of the administrators and that the court should order for trial denoval. Alternatively, stated Mr. Magoti, the appellant or the administrator General be appointed the administrator of the estate in issue.

1st respondent opposed the appeal. He said, they followed the court's instructions by convening the clan meeting to propose for the administrator. He said, their father was a traditional healer and therefore no procedure was contravened. 1st respondent added that, after the funeral of their deceased father, appellant convened a meeting where she customarily divided the deceased properties to the heirs. Some of the heir had to sale their

properties because they were residing far from the village but nothing was sold after the court's direction. He prayed the court to dismiss the appeal.

On his part, third respondent had nothing to say apart from asking the court to dismiss the appeal.

The rejoinder submissions were in essence reiterations of the appellant's counsel submissions in chief.

I have critically considered the grounds of appeal, parties' submissions and the two lower court's records. The issue for determination is whether the appeal is meritorious or not. But before going into the merit of the appeal, I should point out here that, my perusal of the records have revealed that the four grounds of appeal filed by the appellant at the district court, and on which the impugned decision was made, are different from what has been presented here by the same appellant. The said grounds are replicated here for easy of reference.

1. *That, the trial magistrate erred in law and fact by not taking into consideration of the strong evidence adduced by the Appellant instead decided to base on cooked, baseless and misdirecting evidence adduced by the 1st respondent is the one who was giving directions and insisting the 2nd and 3rd respondent to sale the estates early for the interest the 1st respondent without being appointed as the Administrator of Estate of ILINDILO KIHIMBO NKENDE the deceased without any consent from the clan members, 1st respondent new that*

if the court will decide on favour of the appellant then the 1st respondent shall be subjected to return the estate which was sold by the 2nd and 3rd respondent without consent of other family member and without being appointed as an administrator of the estate.

2. *That, the trial magistrate erred in law and in fact as was involved in the minutes of the deceased family dated 04/10/2019 where the magistrate was involved by the 1st respondent in preparing the minutes of the family thus why the magistrate have been referred in the family minutes showing there were directions which came from the trial magistrate and in that case the appellant believes that the trial magistrate was bias and the minutes was just prepared by the 1st respondent together with 2nd and 3rd respondent for their interest.*

3. *That, the trial magistrate grossly erred in law and fact for failure to record, evaluate and scrutinize the evidence adduced by both parties of which the evidence adduced by appellant was strong that the evidence of the respondents and there is no doubt that the 1st respondent is a problem in our family and he was not legally chosen by the deceased family to be Administrator of Estates the deceased ILINDILO KIHIMBO*

NKENDE and 1st respondent was denied by other family members to be administrator of the deceased estate.

4. *That, the trial magistrate erred in law and fact by basing on the mere say and weak evidence adduced by 1st respondent while departing the strong evidence adduced by the Appellant.*

In this court, the appellant has brought new grounds of appeal. The amended petition of appeal dated 30/11/2020 reads:

1. *That the trial court erred both in law and in facts as the judgment of Busangi Primary Court does not show the opinion of the assessors being recorded for the appointment of administrator of Estate of the Late Ilindilo Kihimbo Nkende.*

2. *That, the trial court erred both in law and facts for not considering the participation of the appellant (Widow) and her ten children to the family/clan meeting for the appointment of the administrator of Estate of her late was illegal.*

3. *That, the trial magistrate erred in law and facts hence procedure for appointment of administrator of Estate was illegal.*

4. *That, the trial magistrate erred in law to entertain a Probate Cause without determine whether Islamic law or Customary law where applicable for appointment of administrator of Estate of Late Ilindilo Kihimbo Nkende.*

5. *That, administrator of estate one Kisusi Ilindilo sell some of the property and also use the property of the deceased for his own benefit without the consent of the heirs (administrator on his own wrong.*

It is settled that the second appellate court will only look into matters which came up in the lower court and decided; not on matters which were not raised nor decided by the 1st appellate court unless it is a point of law. There is a long list of Court of Appeal decisions on this principle. See for instance the decision in **Athumani Rashid v. Republic**, Criminal Appeal No. 26 of 2016 (unreported). **In Samweli Sawe Vs Republic,** Criminal Appeal No. 135 of 2004, the Court held that:-

" As a second appellate court we cannot adjudicate on a matter which was not raised as a ground of appeal in the first appellate court. The record of appeal at page 21 to 23 shows that this ground of appeal by the appellant was not among the appellant's ten grounds of appeal which he filed in the High Court. In the case of ***Abdul Athumani v. R.*** *[2004) TLR 151 the issue on whether the Court of Appeal may decide on a*

matter not raised in and decided by the High Court on the first appeal was raised. The Court held that the Court of Appeal has no such jurisdiction. "

Again, in **Galus Kitaya v. Republic**, Criminal Appeal No 196 of 2015(unreported) the Court of Appeal when confronted with the issue whether it can decide on a matter not raised in and decided by the High Court on first appeal. It observed:

"on comparing grounds of appeal filed by the appellant in the High Court and in this Court, we agree with the learned State Attorney that, ground one to five are new grounds. As the court said in the case of ***Nurdin Mussa Wailu v. Republic*** *(supra), the Court does not consider new grounds raised in a second appeal which were not raised in the subordinate courts. For this reason, we will not consider grounds number one to number five of the appellant's grounds of appeal."*

See also a decision in a civil matter between **Simon Godson Macha (Administrator of the Estate of the Late GODSON MACHA) V. Mary Kimambo (Administrator of Estate of the Late KESIA ZEBEDAYO TENGA),** Civil appeal No. 393 of 2019 (Unreported).

As stated above, the appellants grounds appeal brought in this court are new. They were not raised in the first appellate court. They are being raised here for the first time. Guided by the above decisions, I find myself without

jurisdiction to entertain them on this second appeal save for the point of law raised in the 1st 3rd and 4th grounds of appeal argued collectively.

I will begin with the point raised in ground 4 of the appeal. Though not clearly so stated in the petition of appeal, Appellant's counsel submissions tend to fault the trial court for not having prerequisite jurisdiction to entertain the matter that was before it. Specifically, the blames were directed to the trial court's failure to ascertain the place of abode of the deceased at his death, religion as well as the determination of the law applicable. The administration of deceased's estate power of the primary court is regulated by the Fifth schedule to the MCA. Rule 1 (1) of the said schedule provides for the jurisdiction as follows;

> *"1.-(l) The jurisdiction of a primary court in the administration of deceased's estates, where the law applicable to the administration or distribution or the succession to, the estate is customary law or Islamic law, may be exercised in cases where the deceased at the time of his death, had a fixed place of abode within the local limits of the court's jurisdiction:"*

In **Hilda Said Matika vs Awesa Said Matika (supra),** this court, Mlacha J gave three conditions to be considered by the primary court in ascertaining its powers and the applicable law in an application for letters of administration of one's estate namely, the tribe and religion of the deceased,

whether the deceased have a fixed place of abode within the local limit of the court's jurisdiction and lastly is the applicable law.

I have revisited the trial court's records. As pointed out earlier, three respondents were the applicants. Paragraph 6 and 7 of Form No 1 filed by the applicants by then, now respondents at the trial court on 8/10/2019 state:

> *"6. Marehemu alipofariki alikuwa mkaaji wa **NGAYA KITONGOJI** cha **BULAGAJA** na /au alikuwa na mali katika eneo la mamlaka ya mahakama hii.*
> *7. Marehemu alikuwa (eleza kabila lake) **MSUKUMA** na alikuwa mfuasi wa dini ya **MPAGANI**."*

Though, appellant had objected to the application by the respondent, the facts in the two paragraphs quoted above was not part of her grounds of objections. In a form of confirming the information in FORM NO 1, at page 33 of the trial court's proceedings, 1st respondent Kisusi Ilindilo was recorded thus;

> *"Marehemu alikuwa baba yangu mzazi, alifariki mnamo tarehe 11/10/2018. Marehemu baba yangu alikuwa anaishi katika Kijiji na kata ya Ngaya, Wilaya Kahama na alikuwa anajishughulisha na kilimo Pamoja na uganga wa tiba asilia"*

The above indicates clearly that deceased lived a normal traditional life, and had a fixed abode at the locality of the Busangi primary court. Since the

above facts were not controverted, there was no need to go into discovering/ determining the already confirmed information.

I have also read the decision of Benson **Benjamin & 3 others vs Abdiel Reginald Mengi & another** (Supra) cited by the applicant counsel. The facts of that case are different from the facts of the case at hand, in the cited case, the deceased had lived two modes of life, traditional mode and modern ways of life. The court therefore was under such a circumstances obliged to test the deceased life style so as to come into an affirmation as to the correct mode of life applied for proper determination of the law applicable. This is not the case, here. In our case, deceased lived only customary life. Nothing more was brought in the records which would have necessitated putting to test the deceased's mode of life as suggested.

First ground of appeal is a complaint over the trial court's decision for not indicating the opinion of the assessor for the appointment of the administrator of the estate. I should state here that, it was difficult for this court to understand the center of the contest on this ground. This is because, while the ground presented read "***the judgment of Busangi Primary Court does not show the opinion of the assessors being recorded for the appointment of administrator of Estate of the Late Ilindilo Kihimbo Nkende",*** appellant's counsel submissions queried on whether the opinion of assessors was given on the ***lifestyle of the deceased*** or not. The participation of assessors in the decision making at the primary courts

is a statutory requirement. It is guided by Section 7 (1) of the MCA (Cap 11 R.E 2019) which provides:

> *"7 - (1) In every proceeding in the Primary Court, including a finding, the court shall sit with not less than two assessors".*

And **Rule 3 (1) and (2) of the Magistrate's Courts (Primary Courts) (Judgment of Court) Rules,** 1987 GN No. 2 of 1988 provides categorically that the magistrate and assessors are both members of the primary court and the decision of the primary court is a majority decision. The rule states as follows: –

> *"(3)(1) Where in any proceedings the court has heard all the evidence or matters pertaining to the issue to be determined by the court, the magistrate shall proceed to consult with the assessors present, with the view of reaching a decision of the court.*
>
> *(2) If all the members of the court agree on one decision, the magistrate shall proceed to record the decision or judgment of the court which shall be signed by all the members.*

The above rule read together with section 7 (2) of the MCA, Cap 11 RE 2019 presupposes that before a decision is made, primary court magistrate must consult with the assessors requiring them to subscribe their opinion which would determine the decision of the court. After such a consultation, the magistrate composes a decision of the court which must be signed by the Magistrate and the assessors. In case of a dissenting

opinion by one of the assessors, that opinion is recorded and signed by the dissenting assessor and the opinion of the rest two members form a decision of the court. The above provision has been interpreted in the case of **Neli Manase Foya vs Damiani Mlinga**, Civil Appeal No. 25 of 2002 CAT (Unreported) the court clarified the principle that;

> *"..... It is evident from sub rule (2) above that all members of the court are required to participate in the decision making process of the court. Assessors are members of the court, co – equal with the magistrate. After they have completed hearing the evidence from the parties, the stage is then set for the magistrate to consult with them in order to reach a decision of the court. This presupposes that before the court reaches a decision, there will be a conference of the members of the court to deliberate on the issues before them and reach a decision. In such a case, the magistrate will write down the decision, which will then be signed by all members of the court. It will be recalled that Mchome, J. said that –*
>
> ***"they (assessors) sign the judgment of the court to certify that they agree with it.*** *(emphasis added).*

The trial court records reveal that, assessors participated on the proceedings and they did give their opinion and both assessors and the Magistrate signed the judgment. The appellant's ground was faulting the decision of the trial court for not reflecting the opinion of the assessors. I

doubt if the law so requires. My perusal of section 7 of the MCA, fifth schedule as well as the Magistrates Courts (Primary Courts) (Judgment of Court) Rules GN No 2 of 1988, finds no such requirement. Faced with a similar complaint, Mgeta J, in **Buruno Sospeter & Another V Salvatory Beyanga,** PC Civil Appeal No 32 of 2020 (unreported)at page 11 and 12 of the typed decision said;

> *"One could not detect that there was consultation of the trial court members, magistrate and assessors, because there is no law requiring the outcome of their consultation to be recorded. Their consultation is reflected by their signatures put at the bottom of the judgment that was delivered on 3/13/2018. I therefore find that the trial court judgment was signed by all the three members of the court, namely the magistrate and the two assessors who sat with him. Thus, the second ground of appeal has no merit. I accordingly dismiss it"*

I subscribe to the above decision. The first ground of appeal is as well dismissed for lacking in merit.

There is yet another point of law brought by the applicant. He complained that only two among the three applicants at the trial court signed FORM No 1 as required by the law. I think this point should not detain the court. The trial courts records are clearly that all respondents did fill in and signed Form No 1 as required by rule 3 of the Primary Courts (Administration of Estates) Rules G. N. 49/1971. FORM No 1 filed at the

trial court on 8/10/2019 was signed by all the three candidates of letters of administration that is Kisusi Ilindilo, Nkemde Ilindilo and Malwa Ilindilo. This complaint is a misconception.

That said, the entire appeal is dismissed for lacking in merit. Given the nature of the dispute and parties relationship, I order each party to bear owns costs.

It is so ordered.

DATED at **SHINYANGA** this 10th **September**, 2021.

E.Y.MKWIZU
JUDGE
10/9/2021

Court: Right of Appeal explained.

E.Y.MKWIZU
JUDGE
10/9/2021