

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

AT TANGA

(TANGA DISTRICT REGISTRY)

PROBATE APPEAL NO. 2 OF 2021

(Appeal from the Judgment of the District Court of Korogwe at Korogwe, Hon. Ngalu M. I, DRM; delivered on 16th December, 2020 in Probate Appeal Cause No. 1 of 2019)

BETWEEN

BEATRICE LAWRENCE SHOGHOLO.....APPELLANT

AND

ZAITUNI SALIMU KASIMU.....RESPONDENT

JUDGMENT

Date of last order: 06/10/2021

Date of judgment: 25/10/2021

AGATHO, J.:

The Appellant being aggrieved by the decision of Korogwe District Court, in Probate Appeal Cause No. 01 of 2019 appealed to this Court on three grounds shown below.

- (1) The trial Magistrate erred in law by blessing illegal conduct of to interfere power and limit powers of the administratrix.
- (2) The trial Magistrate and Appellate Magistrate erred in law by entertaining objection by the Respondent that sneaked in Court through back door and unprocedural.

- (3) The trial Magistrate and Appellate Magistrate erred in law and in fact by failing to evaluate evidence properly fact that propelled them to reach into wrong conclusions.

The Appellant was represented by Advocate Seni and the Respondent had services of Advocate Nkingwa. On the date fixed for hearing the Court ordered the parties to dispose the appeal by way of written submissions to which they complied. Let us now turn the grounds of appeal and their disposition.

The first ground of appeal was that the trial Magistrate as well as Appellate District Court Magistrate erred in law by blessing illegal conduct to interfere power and limit power of administration.

The duties of Administratrix are found Rule 5 of the 5th Schedule of the Magistrates Courts' Act [Cap 11 R.E 2019]. They include to collect, to pay debts and costs of the administration and to distribute assets' none of the roles were interfered by the trial or District Court.

There was neither interfered nor limiting the powers of Administratrix [see page 4 of District Court Judgment]. The trial and District Courts did not bless any illegality. It should be noted that the Administratrix had to discharge her duties within the limits prescribed by the law and when she

exceeds the interested parties or heirs may object. In the present case she distributed the assets and went on directing how the assets are to be managed (that is *ultra vires*). For that reason, the first ground of appeal lacks merit.

The second ground of appeal was that the trial Magistrate and Appellate District Court Magistrate erred in law by entertaining objection by Respondent that sneaked in Court through back door and unprocedural.

Regarding the above ground of appeal, I should point out that the child is under the custody of the Respondent. Moreover, the Respondent is the biological mother of the child (heir of the deceased house at Masuguru, Korogwe). I agree with District Court that the Respondent has the interest to protect, that is the interest of the child. [see page 7 of District Court judgment]. The child's mother is the key factor in this issue. Therefore, the Respondent's *locus standi* stems from her being a biological mother and justifiably protects the interest of the child.

The third ground of appeal is that the trial magistrate and Appellate magistrate erred in law and in fact by failing to evaluate evidence properly fact that propelled them to reach into wrong conclusion.

This is a new issue and was not raised at 1st Appellate Court. I will not examine it [see the case of **Sikujua Model Mwasoni V. Sikudhani Hansi Mwakyoma, Probate Appeal No. 10 of 2020 High Court of Tanzania at Mwanza** (unreported) at page 9].

"It is trite law that the Appellate Court is not required to determine new issue, a new ground cannot be raised by submission at the Appellate level."

I would add that what was not at issue at trial Court and 1st Appellate Court cannot be raised at 2nd Appellate Court.

As for the issue of failure of trial Court and District Court to evaluate evidence, this lacks merit because the question of clan involvement (minutes of clan meeting to distribute property/assets of deceased was refuted by the District Court as seen on its judgment at pages 4 – 6. The clan did not distribute deceased's assets. But even if that was done under Rule 1 (1) of the 4th Schedule of Magistrates Court's Act [Cap 11 R.E 2019], the provisions set under the 4th Schedule of the Local Customary Law Declaration Order G.N No. 279 of 1963 especially Order 5 and Order 6 [see pages 5 – 6 of District Court judgment].

Again, Probate Cause No. 40 of 2017 did not deal with clan meeting it rather dealt with interference of the enjoyment of the estate of the deceased. The Probate 40 of 2017 delivered the extent the Administratrix discharged her local duties. The trial Court and District Court did not deal in division of the deceased estate.

This is clear on page 8 of District Court judgment. That Magistrate cannot distribute the deceased's properties.

The Court merely protected the interest of the child, after being distributed by the Administratrix.

This was important as per record of proceedings at Primary Court, and also the Ruling on objection of Primary Court on the Probate Cause No. 40 of 2017 there is evidence that the Administratrix decided that the mother of deceased to benefit through rents on the house at Masaguru Korogwe that was distributed to the deceased's child (Grace Singano aged 2 years there). See page 2 of the Primary Court Ruling on the objection in Probate Cause No. 40 of 2017.

The Administratrix went beyond her powers. Her duty was to distribute the deceased assets to the heirs and not to manage how the distributed assets should be utilized or exploited. The Primary Court was right to outline the

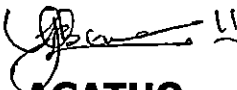
duties of the Administratrix (see page 2 of the Primary Court Ruling on objection on Probate Cause No. 40 of 2017). The Primary Court correctly held [at page 2 – 3 of Primary Court Ruling] that the Administratrix under Rule 5 of 5th Schedule to Magistrates' Courts Act [Cap 11 R.E 2019] does not have power to direct how the distributed assets should be utilized.

I agree with the Primary Court that under Section 10 of the Law of the Child Act No. 21 of 2009 the child of the deceased parent should benefit from deceased parent's estate. The Primary Court did well to safeguard interest of the child.

To conclude, this appeal lacks merit and I dismiss it. The Respondent shall have her costs.

DATED at TANGA this 25th Day of October 2021:




U. J. AGATHO
JUDGE
25/10/2021

Date: 25/10/2021

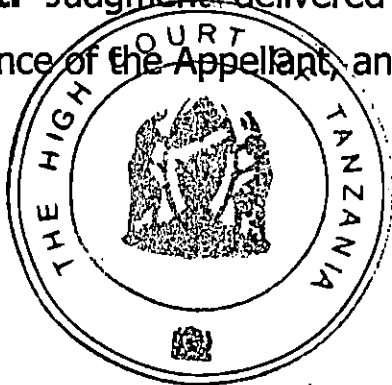
Coram: Hon. Agatho, J


Appellant: Present

Respondent: Present

B/C: Zayumba

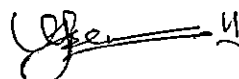
Court: Judgment delivered on this 25th day of October, 2021 in the presence of the Appellant, and the Respondent.




U. J. AGATHO
JUDGE
25/10/2021

Right of Appeal explained.




U. J. AGATHO
JUDGE
25/10/2021