

**IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA
MOSHI DISTRICT REGISTRY
AT MOSHI**

PC CIVIL APPEAL No. 13 OF 2021

*(C/F Probate Appeal Case No. 4 of 2021 of the District Court of Moshi at Moshi,
Originally Shauri la Mirathi Na. 23 of 2020 of Uru Primary Court)*

DELFINA EMILY NGOWI..... APPELLANT

VERSUS


ANSGAR AFRICANUS MUSHI RESPONDENT

JUDGMENT

21/4/2022 & 17/6/2022

SIMFUKWE, J.

This is a second appeal which emanates from the death of the late Straton Africanus Mushi who died on 18/11/2019. After the death of the deceased, a clan meeting was convened and Mr. Ansgar Africanus Mushi the respondent herein was appointed to be an administrator of the estate of the deceased in Mirathi Na. 23/2020. Then, the respondent successfully applied before Uru Primary Court to be granted letters of administration of the estate of the deceased. The same was granted on 29/12/2020 on condition that he should file an inventory by 14/4/2021. While executing his responsibilities as an administrator, on 08/2/2021, Ms Delfina Emily Ngowi the appellant herein applied before Uru Primary Court for revocation of letters of administration granted to the respondent on a reason of lack of confidence.



Aggrieved by the decision of Uru Primary Court, the appellant appealed before Moshi District Court whereby the first appellate court dismissed her appeal on reasons inter alia that it is clear from the records that the appellant was aware of the appointment of the respondent as she participated in the clan meeting. That, when the matter was fixed for hearing before the trial court the appellant appeared and supported the appointment of the respondent. Another reason advanced by the first appellate court was that the application filed by the appellant herein was filed prematurely as the same was filed two months after the appointment of the Administrator.

Dissatisfied by the decision of the first appellate court, the appellant preferred the instant appeal on the following grounds:

- 1. That, the Resident Magistrate erred in law and in fact by not considering the Appellant's grounds of appeal that the Respondent has shown dishonest and misappropriated of Appellant's husband estate (sic) as he took the money unlawfully in a deceased's Saccos and spend them in his own needs. (sic)*
- 2. That, the Resident Magistrate erred in law and fact by not properly evaluated the evidence before him and consider the facts that the conduct and behavior shown by the Respondent to spend the deceased's money to buy his own motor vehicle and television than paying deceased's children schools fees is misappropriation. (sic)*
- 3. That, the Resident Magistrate erred in law and fact by misdirected himself on the mode of life of deceased than revocation of the Respondent's administration due to misappropriation of the deceased estate.(sic)*



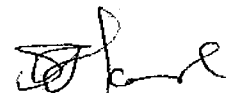
4. That, Resident Magistrate erred in law and fact by not considering the welfare of the deceased children who needs school fees and one child of special needs. (sic).

The appeal was argued orally, whereas the appellant enjoyed the service of Ms Pendo Msuya learned counsel, while the respondent had the service of Mr. Charles Mwanganyi learned counsel who was holding brief for advocate Philemon Shio with instruction to proceed.

On the first ground of appeal, Ms Pendo submitted that the respondent bought a motor vehicle make spacio with registration number T.437 CSD on his name on allegation that the said motor vehicle was bought for the child of the appellant who is disabled. That, the respondent also bought a tv for his own use. The respondent alleged that the motor vehicle and a tv were bought at a cost of Tshs 47,000,000/=. The said amount was withdrawn from the Saccos where the deceased was a member.

It was alleged further by the learned counsel for the appellant that, the respondent did not involve the appellant nor her children in the said transactions. That, the appellant finds the acts of the respondent amounts to misappropriation. The family of the deceased has been living with difficulty while the respondent misuses the estate of the deceased.

It was submitted further that; the respondent did not file an inventory in compliance to the law. Ms Pendo was of the view that if the respondent was honest, he could have filed an inventory within four months as required by the law.

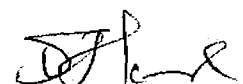


Supporting the 2nd ground of appeal, Ms Pendo submitted that the respondent failed to pay school fees of the children of the deceased and ordered them to be transferred to public schools/government schools while their father left money which could suffice to pay school fees. To the contrary, the respondent used the said money to buy his own motor vehicle and television. Thus, the respondent is unfit to proceed as Administrator of the estate of the deceased, as the appellant has been urging the respondent to pay school fees of the children of the deceased in vain. In turn, the respondent has been insulting the appellant with no help.

The learned counsel for the appellant cemented her arguments by referring to **Probate and Administration Cause No. 48 of 1996 HC DSM, In the Matter of an Application for Revocation of Grant of the Letters of Administration to Daud Mahende Kichonge**; in which the applicants Joseph Mniko and others faced similar circumstances like in the instant matter. That, the court ordered that letter of Administration granted to the Administrator be revoked.

On the 3rd ground of appeal, it was submitted that, the first appellate court based its decision on the life style and marital status of the deceased which was irrelevant to the case. That, the issue before the court is revocation of letter of administration and not mode of life of the deceased. The deceased had one wife only who is the appellant.

On the 4th ground of appeal, it was submitted that the respondent based his expenditure on things which were not a priority to the beneficiaries of the deceased and a child who has special needs. The



said child with special needs has failed to proceed with studies due to the fact that his school is very expensive.

Ms Pendo contended that, it is on the basis of the above grounds that they pray this appeal to be allowed by revoking letters of administration granted to the respondent. Also, the learned counsel prayed that the Administrator General be appointed to administer the estate of the deceased as one child was born out of wedlock and due to the size of the estate of the deceased.

In his reply, Mr. Mwanganyi opposed the appeal vehemently for lack of legal basis. He started his submission by stating briefly the background of this matter which I have already captured herein above.

Mr. Mwanganyi averred that some of the grounds of appeal advanced before this court, are new as the same were not raised before the District Court. He prayed this court to dismiss ground No. 1 and 3 as the said grounds were not raised before the first appellate court. He commented that it is trite law that a second appellate court cannot deal with new ground of appeal which was not raised before the first appellate court. He cited the case of **Abdul Athuman v. Republic [2004] TLR 151** in which the Court insisted that the second appellate court had no jurisdiction to deal with grounds which were not raised before the first appellate court.

In the alternative if the court finds that the above noted grounds are not new, Mr. Mwanganyi submitted that the respondent never misappropriated the deceased's estate, rather he was executing his responsibilities as directed by the court. He alleged that they state so on the basis of evidence tendered before the primary court. The



learned counsel referred to page 3 paragraph 2 of the typed judgment of the primary court where the Hon. Magistrate directed himself well in his decision when he denied the application of the appellant and found that there was no misappropriation done by the respondent.

On the issue that the respondent failed to file an inventory as evidence of misappropriation, Mr. Mwanganyi was of the opinion that the said allegation is misconceived, frivolous and unfounded on the reason that the respondent was appointed on 29/12/2020. The court ordered the respondent to file an inventory before or by 15/4/2021. However, the appellant filed her objection on 08/2/2021 which were two months only after appointment and time to file inventory had not elapsed. Thus, the reason of filing an inventory was premature.

Mr. Mwanganyi argued further that at page 8 of the judgment in Probate Appeal No. 4/2021, the first appellate court's findings were to the same effect that the reason of failure to file inventory was premature. He added that since an inventory had not been filed, they cannot conclude that the respondent misappropriated the estate of the deceased without giving him an opportunity to account. Mr. Mwanganyi was of the view that the appellant based on perception.

Concerning the allegation that the respondent bought a motor vehicle on his name, it was replied that the same was not supported by evidence adduced before the primary court. That, the respondent stated very well before the trial court in respect of misappropriation. The same is found at page 2 of the judgment of the primary court.

On the 3rd ground of appeal that the first appellate court based its decision on mode of life of the deceased instead of revocation of letters

of administration; Mr. Mwanganyi submitted that one of the grounds which were raised before the first appellate court was jurisdiction of the primary court to determine the said Probate Cause. That, there was no way the trial magistrate could avoid to discuss mode of life of the deceased while the same was at issue. He prayed this court to be guided by the case of **Deemay Daat and 2 Others versus Republic [2005] TLR 132** and more other cases which are to the effect that where there are concurrent findings of the lower courts, the appellate court or 2nd appellate court can interfere the decision of the lower courts only where there is misapprehension of evidence. That, since this is a 2nd appellate court, it should uphold the decision of the two lower courts.

Regarding the prayer to appoint the Administrator General to administer the estate of the deceased, Mr. Mwanganyi submitted that the same is not an automatic right and it was never pleaded in the Memorandum of Appeal. That, those are mere good words. The learned counsel was of the view that there was no reason for appointing the Administrator General as the respondent has not finished his responsibility. He was just pre-empted.

Mr. Mwanganyi concluded by praying this appeal to be dismissed with costs.

In her rejoinder Ms Pendo submitted that from 2021 to 2022 it is a long period; thus, the respondent could have filed the inventory despite the fact that the appellant had objected. That, the appellant and other beneficiaries have a right to object the administrator who is not even a beneficiary and is misappropriating the estate of the deceased.


Moreover, it was alleged that the respondent did not advance reasons of Saccos monies which he misused. On both judgments of the two lower courts, nothing was exhausted in respect of the said misappropriation.

Concerning the issue that the 3rd and 4th grounds are new grounds, it was stated that the same was not true. Ms Pendo referred to the 1st page of the judgment of the district court on the 2nd ground the complaints which are mentioned as ground of appeal, based on the said two grounds herein, especially the 4th ground of the instant appeal which concerns welfare of children.

Regarding the allegation that the respondent fulfilled his responsibilities as directed by the court, Ms Pendo submitted that no court may order misappropriation of the estate of the deceased. That, administrators are guided by the law in executing their duties.

On the prayer of costs, Ms Pendo contended that Probate cases have no costs. She reiterated that the Administrator General be appointed pursuant to the Administrator General Act.

Having these submissions in hand, before scrutinizing this appeal I wish to make it clear that; this being the second Appellate Court, I am refrained from disturbing the concurrent findings of the lower court unless it is found that there is misapprehension of evidence, violation of some principles of law and/or practice, miscarriage of justice, existence of obvious errors on the face of the record or misdirection or non-directions on the evidence. See the case of **Amrathlar Damadar and Another v. A.H.Jariwalla [1980] TLR 31.**



Having established as such, I now turn to the merit or otherwise of this appeal. I have keenly gone through the grounds of appeal, submissions of both parties and records of the lower courts. The issue for determination is whether the administrator can be revoked while administering the deceased's estate.

Rule 2(c) of the 5th Schedule to the Magistrate Court Act, Cap 11 RE 2019 provides that, a primary court upon which jurisdiction in the administration of deceased's estates has been conferred may-

c) revoke any appointment of an administrator for a good and sufficient cause and require the surrender of any document evidencing his appointment;

The reasons for revocation of grant of administration are well stipulated under **Rule 9 of the Primary Courts (Administration of Estates) Rules, GN No.49 Of 1971**. For ease reference it provides that:

"Any creditor of the deceased person's estate or any heir or beneficiary thereof, may apply to court which granted the administration to revoke or annul the grant on any of the following grounds-

- a) That the administration had been obtained fraudulently.*
- b) That the grant had been made in ignorance of facts the existence of which rendered the grant invalid in law.*
- c) That the proceedings to obtain the grant were defective in substance as to have influenced the decision of the court.*
- d) That the grant has become useless or inoperative.*

e) That the administrator has been acting in contravention of the terms of the grant or wilfully or negligently against the interests of creditors, herein or beneficiaries of the estate.

The appellant's claims before the primary court falls under category (e) that the administrator acted in contravention of the terms of the grant and wilfully or negligently goes against the interests of the beneficiaries. This evidence was presented by the appellant herein who is the wife of the deceased. That, the administrator has been harsh to the wife of the deceased whenever she made follow up of the interests of beneficiaries. These allegations were vehemently disputed by the respondent.

It is undisputed fact that the administrator in his administration has bought a car from the Saccos' money Tsh 9,100,000/ and bought the TV for the children. I have keenly examined the records of the primary court; the administrator has never accounted for such money either by filing Form No. 5 and 6 to that effect. **Paragraph 5 of the 5th Schedule to the Magistrate Courts Act** (supra) provides for the powers of the administrators. That;

*"An administrator appointed by a primary court shall, with reasonable diligence, collect the property of the deceased and the debts that were due to him, pay the debts of the deceased and the debts and costs of the administration and shall **thereafter distribute the estate of the deceased to the persons or for the purposes entitled thereto and, in carrying out his duties, shall give effect to the directions of the primary court.**"*Emphasis added.



The law is clear that after collection of deceased's properties, the next stage is to pay debts and costs if any and distribute the remaining properties to the beneficiaries. Also, the law stipulates that in the due course of doing that, the administrator shall give effect to the directions of the primary court. Considering the deceased's wife allegation that it is difficult to get information from the administrator Paragraph 2 (a) of the Fifth Schedule to the Magistrate Courts Act(supra) provides 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 on 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 be the administrator or administrators thereof and in selecting such administrator, shall, unless for any reason it considers inexpedient so to do, have regard to any wishes which may have been expressed by the deceased;"*

The Court of Appeal in the case of **Naftary Petro vs Mary Protas, Civil Appeal No. 103 of 2018**, when approving the decision of the High Court which revoked the appointment of administrator had this to say: -

*"...In essence, it empowers a primary court, either of its own motion or upon an application, to appoint one or more persons "interested in the estate of the deceased" to be the administrator or administrators thereof. **The primary consideration, therefore, is holding of an interest in the estate of the deceased.** The term interest in a deceased's estate has not been given any statutory*

*definition. But we think it should be looked at as "beneficial interest" which is defined in Black's Law Dictionary, Eighth Edition, at page 828, to mean "a right or expectancy in something (such as a trust or an estate) as opposed to legal title to that thing." Thus, any person, who, according to the rules for the distribution of the estate of an intestate applicable in the case of such deceased person, is entitled to a share of the deceased person's estate qualifies as an interested person. **Invariably, this will include any heir, a spouse, a devisee or even a creditor of the deceased**"*
Emphasis added.

In the instant matter as established above, the respondent's administration is wanting. There is miscommunication between some of the deceased's heirs with the administrator. In the circumstances, it will be difficult to communicate the beneficiaries' needs. I am of considered view that waiting for the administrator to finish his duration of administration will be more worse considering that there are beneficiaries who are residing with the appellant herein who should benefit from the deceased's properties. Therefore, revocation of the appointment of administrator is inevitable under the above circumstances. I therefore fault the decision of lower courts. I hereby revoke the appointment of the respondent the administrator of the estate of the deceased Straton Africanus Mushi.

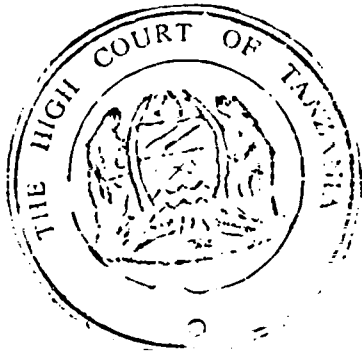
In the upshot, it is the finding of this Court that this appeal has merit. I accordingly allow it to the extent explained herein above. Thus, I order that the file be remitted back to the trial Court in order for it to expeditiously appoint another administrator/administratrix of the deceased's estate.



Considering the nature of the case, I direct that each party shall bear their own costs before this Court and the courts below.

It is so ordered.

Dated and delivered at Moshi this 17th day of June, 2022.



A handwritten signature in black ink, appearing to read "S. H. Simfukwe".

S. H. SIMFUKWE

JUDGE

17/6/2022