

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(TEMEKE HIGH COURT SUB-REGISTRY)
(ONE STOP JUDICIAL CENTRE)
AT TEMEKE**

P.C. CIVIL APPEAL NO 11 OF 2022

(Arising from Probate Appeal No 49 of 2021 of District Court of Kinondoni before Hon. L. Silayo – RM, originating from Probate Cause No 159 of 2000 of the Primary Court of Kinondoni District at Magomeni before Hon. V. Manega – PCM)

BARKE ABBAS MAX..... APPELLANT

VERSUS

SULEIMANI MOHAMED SULEIMAN (Suing under the power of attorney of Maryam Abbas Max and Thani A. Max)**RESPONDENT**

JUDGMENT

04/07/2022 & 21/07/2022

I.C. MUGETA, J

The late Msungu Abbas Max died intestate on 9th July, 1992. On 20/08/2001 the Primary court of Kinondoni at Magomeni appointed the appellant to administer his estate. She is one of the ten (10) children who survived him. The others are Maryam, Ayshe, Zeynab, Ahmed, Farida, Ally, Hussein, Theni, and Khadija. The properties listed are a house at Magomeni, a house at Makorongoni, Iringa and a farm at Mbezi Luis.

Up to 13/04/2021 the appellant had neither filed inventory nor accounted for her administration. The respondent, under the powers of attorney



granted to him by Maryam and Thani, moved the appointing court vide a letter of complaint dated 12/04/2021 to revoke the grant of her letters of administration on account of her above stated failure and misuse of funds. When required to show caused why her letters of administration should not be revoked, she testified that she had done her best to administer the estate.

Regarding management of the listed properties, she testified that she could not do anything with the house at Magomeni because it was used by their mother up to 2008 when she passed on. That, thereafter, she worked to settle the mortgage with CRDB as the deceased had mortgaged it. She disputed to have misused funds from the estate and that is why some heirs still supported her. Regarding the house at Iringa, she said that it was a subject of litigation in a case she did not disclose. Apparently, her explanation in respect of the farm the record is not clear. She is recorded saying.

'Mirathi tulifungulia ili sababu ya kukomboa shamba ili kubadili jina'

The appellant tendered a letter from CRDB to prove that the mortgage was discharged on 10/12/2019. She also submitted to the court letters from Hussein, Ally and Zeyanab who are among the beneficiaries to establish that they still support her as administratrix of the estate. In his evidence the

complainant produced no proof on the appellant's alleged misuse of funds. His evidence was limited to failure to account for her administration and that the heirs are not benefiting from the estate.

On the strength of the above evidence from the parties, the probate primary court reject the prayer to revoke the letters of administration. It held that since the appellant had already performed better part of the administration like distribution of the farm, discharging the mortgage and had proved by evidence that other beneficiaries supported her, it was imprudent to grant the prayer for revocation of the letters of administration. Consequently, it extended the time for three months for her to account for the administration.

Aggrieved, the respondent appealed to the district court which held that failure to timely account for the administration is a good reason to revoke the letters of administration. As a result, it revoked the letters of administration and in lieu thereof, it appointed Maryam Abas Max to administer the estate. The appellant has appealed to this court armed with five grounds of appeal:

- i. That the district court did not dispose the preliminary objection she raised.
- ii. That Maryam was appointed without obtaining consent of the other heirs.

Ageta

- iii. That Maryam lives in the USA, therefore, she cannot administer the estate from there.
- iv. That the court erred to hold that the appellant had not filed inventory within the time extended.
- v. That the district court erred to ignore the reasoning of the Primary court for rejecting to revoke the letters of administration.

The appellant is represented by Abdallah Shaibu, learned advocate. Her combined arguments on the four grounds of appeal, the fifth ground was abandoned, is that the district court ought to have consider the preliminary objection raised by the appellant in her submission and it ought not to have appointed an administrator who lives abroad and without consent of all the beneficiaries. Finally, he argued that the appellant had filed inventory within the time extended, therefore, the district court erred to hold that the same had not been filed.

On part of the respondent, Fredrick Saba Marwa, learned advocate, replied that the district court was right not to attend the objections which were improperly raised in submissions. In his views, the administrators appointed on appeal need not to have consent and that the district court found Maryam suitable to administer the estate and it is the court not the appellant who can assess that suitability. In that connection he argued that so far, the respondent has not violated rule 10 (1) and (2) of the Primary Courts

(Administration of Estates) Rules G.N 49 of 1971 which requires inventory to be filed within four months while the appellant has not filed one since 2001.

In rejoinder, counsel for the appellant reiterated that the appellant filed inventory within the extended time. However, he failed to show a copy of the same from his records when requested by the court to do so.

I shall start with the question of filing inventory. The district court at page 10 of the judgment held: -

'...The trial court ordered the respondent to finish administering the deceased estate within three months from the decision, to distribute and file inventory ... which up to now has not been done'

I have gone through the primary court file and found that a copy of the inventory is therein. Therefore, the above finding of the district court is erroneous.

Regarding the appointment of Maryam as administratrix, the district court took a wrong course. While I have no problem with her staying abroad, it is a fact that she never applied to be so appointed nor appealed to the district court. The appellant and the respondent (holding Maryam and Thani's power of attorney) are the parties to these proceedings. Besides my doubt about the legality of a person holding power of attorney to be appointed to administer the deceased estate, Maryam could not have been appointed as she was not

a party to the proceeding and the district court did not state why it considered her to be suitable than the holder of her to be powers of attorney.

On consent of the heirs, I do agree with counsel for the respondent that in appointment resulting from raising objections or appeals, the objector or the appellant comes with reasons for the objection or grounds of appeal and consent of the beneficiaries is not a prerequisite. Nevertheless, upon such appointment, the court can order him/her to execute the administration bond. At that stage the issue of consent is irrelevant.

I move to the question the preliminary objections. Indeed, the appellant being a respondent at the district court raised preliminary objections in her reply submissions. The district court never considered them for being improperly raised. I understand there is a detestable practice of raising objections in submissions. In my view, objections, except for those relating to jurisdiction and time limitation, ought to be raised before the commencement of the hearing. When the court orders to dispose of the appeal by way of filing written submissions, hearing is deemed to have commenced, therefore, the doors for objections is closed. That order is specific relating to the grounds of appeal not a chance to raise objections. In this case the

objections raised do not relate to either time limitation or jurisdiction of the court, therefore, the district court correctly ignored them.

On revocation of the letters of administration my general assessment of the fact of this case leads to the conclusion that the probate court was right to refuse to revoke the letters of administration and instead ordered the appellant to account for her administration. I am settled in my mind that if the house at Magomeni was on undischarged mortgage which was discharge in 2019 and the one in Iringa was involved in litigation, the learned magistrate was right to be lenient with the appellant unless she failed to discharged her obligations within the extended period of time which is not the case here.

In the event, I hold that the district court erred to appoint a person not a party to the proceedings without assigning reasons and to hold that the appellant had not filed inventory within the extend time while the same had been filed. What was not filed is the accounts and she could not have done so while there is an appeal. The district court also failed to appreciate the reasons advanced by the appellant as to why the appellant had not accounted for her administration for 20 years. The learned magistrate did discuss them in relation to the time required to file inventory and accounts.

He did not take into account the understanding of the process by the appellant and the inaction of court to require her to do her job. After twenty years of inaction what matters is to have the estate accounted for not to have a new administrator except if it is proved that upon being required to account the appellant failed to do so. Unlike the learned magistrate, I find such reasons constituting a sufficient cause for the delay. By any standard, she could not have bequeathed a mortgaged house or that which is involved in litigation. Further, in any case, revoking her letters of administration ought to have been preceded by direction to account for her administration first in order to determine where the new administrator shall start from. Not doing so can cause chaos.

Consequently, I hereby set aside the proceedings and quash the judgment of the district court for being erroneous. I restore the decision of the primary court. I order it to ensure that the appellant, subject to extension by that court as necessary, finalizes the administration from where she ended within two months from when the probate court file is returned and received by the primary court.




I.C. MUGETA

JUDGE

21/07/2022

Court: - Judgment delivered by video conference to Michael Minja holding brief for Abdalah Shaibu for the appellant who is absent and Fredrick Seba Marwa for the respondent who is absent.

Sgd: I.C. MUGETA

JUDGE

21/07/2022.