IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE SUB-REGISTRY OF MWANZA)

AT MWANZA

PC. PROBATE APPEAL NO. 01 OF 2022

(Arising from Prob. Appeal No. 3 of 2021 of the D/Court of Kwimba and Originating from Ngudu Urban P/Court in Probate Cause No. 18 of 2021)

CONSTANTINE MAYEKA .... APPELLANT

VERSUS

JUMA MAYEKA SOLLO...RESPONDENT

JUDGMENT

28th July & 4th August, 2022

DYANSOBERA, J.:

The appellant herein is challenging the decision given by the District Court of Kwimba District at Ngudu in Probate Appeal No. 3 of 2021 delivered on 18th day of November, 2021 on the following two grounds of appeal: -

1. That the learned trial Magistrate erred both in law and facts to appoint the respondent as co-administrator suo motto
2. That the learned Magistrate erred both in law and facts for leaving behind 35 acres of land which was allocated to Kaya Ndogo without evidence thereto.

With these grounds, the appellant is praying that this appeal be allowed and the judgment and decree in PC Probate Appeal No. 3 of 2021 be quashed and set aside and any other reliefs.

The historical background is briefly the following. Mayeka Sollo Mtemi, the deceased, met his demise on 4th March, 2001 and was interred on 5th March, 2011. He was survived of ten children, namely, Hollo Mayeka, Sollo Mayeka, Enock Mayeka, Salu Mayeka, Kamba Mayeka, Muhuli Mayeka, Nyiligwa Mayeka, Juma Mayeka, Ndanga Mayeka and Shinje Mayeka. It would appear the deceased was married to two wives. From the senior wife he begot five children, only one is alive. He is Enock Mayeka. The deceased and his junior wife were also blessed with five children, four are alive but one is dead. The deceased left behind a landed property measuring 120 acres situated at Mwadubina.

Following the death of the deceased, the appellant successfully petitioned the Primary Court of Kwimba District at Ngudu Urban for letters of administration and on 9th August, 2021 he was appointed administrator of the deceased's estate. The respondent was not amused with this appointment and decided to go to the Primary Court on objection. According to the respondent, the grounds for the objection were the following: -

1. *Sikubaliani na msimamizi wa mirathi kujumuisha eneo la familia ndogo ya marehemu Mayeka Solo kwa kuwa alikuwa na miji miwili tofautii mji mkubwa ulikuwa*

Manguluma, Mji mdogo ulikuwa Kijiji cha Mwadubi kitongoji cha Mwasweya.

2. *Marehemu Mayeka Solo alifariki mwaka 2005 mpaka sasa ni miaka kumi na sita (16) eneo hilo tunalitumia.*
3. *Mhe: Hakimu baba yetu alipofariki eneo hilo lilibaki chini ya uangalizi wa mama yetu mzazi baada ya mama yetu mzazi kufariki mwaka 2010 eneo hilo lilibaki chini ya uangalizi wa wtoto. Mwaka 2018 tuliamua kugawana maeneo hayo kila mmoja akapata haki yake mbele ya viongozi wa Kata, Kijiji na kitongoji naambatanisha barua ya mgawanyo huo.*

The primary court, after hearing the objection proceedings, did on 12th October, 2021, make an order overruling it on account that it lacked substance as there was no evidence that the listed property was not a probate matter.

The respondent was aggrieved and appealed to the District Court vide Probate Appeal No. 3 of 2021 complaining that the trial court grossly erred both in law and facts as he refused his objection against the respondent and that it created its own evidence and failed to analyse the evidence testified before the trial court in the original proceedings. In its judgment dated 18th day of November, 2021, allowed the appeal and mde the following orders:

i. The respondent should address and devide the only property to the deceased.

ii. To avoid dispute, the court is hereby appointing joint administrator to the deceased properties, one Constatine Mayeka and Juma Mayeka Sollo sit together and devide the disputed land leaving behind the 35 acres that was allocated to the Kaya Ndogo

iii. A report on the division of the deceased's estates should be filed before the trial court within a month if no appeal to any part to the High Court.

iv. No costs of this appeal, each part shoulder its own costs reason is that the matter involves related parties.

This finding aggrieved the appellant hence this appeal. During the hearing of this appeal, the appellant was represented by Joseph Madukwa, learned Counsel who submitted in support of the appeal. The appeal was heard ex parte after the respondent defaulted appearance without notice and despite his having been duly served.

In his submission in support of the appeal, Mr. Joseph Madukwa, starting with ground no. 2, that the district court erred in law and facts when leaving 35 acres of land to the junior homestead without evidence. He pointed out that in the ruling arising out of objection

proceedings on which the district court based its decision the third witness of the objector David Bumali who is said to be village leader testified that the land was distributed to the junior homestead in writing and their mother is already dead and he witnessed the distribution. Counsel for the appellant was of the view that in law, he as the leader, had to prove those writings. According to him, any estate must undergo the process of administration and that the law is clear and it is a cardinal principle that an administrator must collect the deceased' s property, it is a cardinal principle that administrator must collect the deceased's property, recognize the heirs and pay any debts and then close the administration. He made reference to section 19 (1) of the Magistrates Courts Act [Cap. 11 R.E.2019] read together with Fifth Schedule to this Act.

Counsel for the appellant faulted the District Court for appointing suo motto the co-administrator and the appointment being made under Section 33 (1) to (4) of the Probate and Administration of the Estates Act [Cap. 352 R.E.2019], the provision which applies only to the High Court. Further that the appointing of the co-administrator was uncalled for and both sides were not given opportunity of being heard which is also in contravention of the Constitutional principles.

The decision of the District Court was also challenged on another front. According to learned Counsel for the appellant, the case before the District Court was a probate matter and not on who was the owner of the said acres and if there was any dispute as to who the lawful owner was, the matter had to be referred to the land courts and not to the probate court.

Having considered the records of the lower courts and after taking into account the submission by Counsel for the appellant, I am satisfied that the appeal has merit.

With respect to the 1st ground of appeal, I agree that the learned Resident Magistrate at the District Court misdirected himself in appointing the respondent as a co-administrator. According to the record, the reason by the respondent to file objection proceedings before the trial court was that the listed property was not a probate property and the trial court was right to dismiss the respondent's objection on the ground that it was not proved that the listed property of 35 acres were not probate property subject to be administered. Besides, as rightly submitted by learned Counsel for the appellant, the question as to who was the lawful owner of the said property could not be determined by the probate court, rather, it had to be determined by the properly constituted forum as the question as to

whether or not the said 35 acres were a probate property was not the function of the probate court to decide but of the administrator the court had appointed. Likewise, appointing the respondent as a co-administrator was uncalled for as it was not indicated how the estate had been managed or rather mismanaged to the extent which necessitated intervention by the District Court. After all, the Primary Court had already discharged its obligation of appointing the administrator of the estate and the complaints leveled against it by the respondent at the District Court had no any legal justification.

Moreover, the appellant was yet to file a true and complete statement under rule 10 (1) of the of the Primary Courts (Administration of Estates) Rules, GN No. 49 of 1971. Rule 10 (1) of the Rules is very clear, and is mandatory. It requires the administrator of the deceased estate, within four (4) months of the grant of administration or within such further time as the court may allow, to submit to the court a true and complete statement in the appropriate form (Form IV), of all the assets and the liabilities of the deceased person's estate, and at such intervals thereafter, as the court may fix. Likewise, the administrator is required to show to the court all the monies received, payments made, and property or other assets or otherwise transferred by him. The respondent rushed to the

court before the accomplishment of the said legal requirements. The intervention by the District Court was, in the circumstances of the case, improper.

Besides, the provisions of Section 33 (1) to (4) of the Probate and Administration of the Estates Act [Cap. 352 R.E.2019] were improperly invoked as the do not apply to matters originating from Primary Courts.

Incidentally, this appeal has not been resisted as the respondent neither filed answer to the petition nor appeared in court.

For the stated reasons, I find this appeal meritorious and allow it. I quash and set aside the judgment and decree in PC Probate Appeal No. 03 of 2021.

No order as to costs is made.

Order accordingly.

W. P. Dyansobera
Judge
4.8.2022

This judgment is delivered under my hand and the seal of this Court on this 4th day of August, 2022 in the presence of Mr. Joseph Madukwa, learned Counsel for the appellant but in the absence of the respondent.

W. P. Dyansobera
Judge