THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

PC. CIVIL APPEAL No. 24 OF 2022

(Arising out of Civil Appeal No. 02 of 2021 of Karatu District Court, Originating from Probate and Administration Cause No. 55 of 2019 of Karatu Primary Court)

OLIVA BERNARD... APPELLANT

VERSUS

CORNEL BERNAR...RESPONDENT

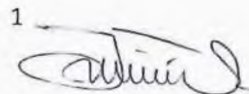
JUDGMENT

04th July & 12th August, 2022

TIGANGA, J.

This is the second appeal to come to the High Court regarding a battle between members of the family of the late Bernard Songay Akonaay, hereinafter, the deceased, over the estate of the said deceased who passed away intestate on 22nd May 2019.

The appellant is a wife of the deceased, the two having contracted Christian marriage in 1992. However, that was the second marital union on the part of the deceased because, he previously had another union which was regarded as the customary marriage contracted on 1988 with

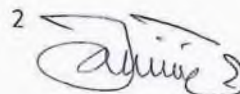


other woman from whom he begotten four children, the respondent being one of them.

At first, the matter relating to the estate of the deceased was filed to the Primary Court, but upon decision the reasons of which will be given later, the appellant appealed to the District Court and later to the High Court. However, on the basis of procedural irregularities the High Court ordered the case file to be remitted to the Primary Court. On arrival of the case file before the Primary Court, the appellant was once again not satisfied, she appealed to the District Court of Karatu where the decision was once again against his favour. The appellant was once again aggrieved by the decision of the District Court of Karatu, she filed this appeal. In this appeal, the appellant filed a total of nine grounds of appeal as follow:

1. That, the District Court grossly erred in law and in fact by not finding that the primary court lacked jurisdiction to entertain and appoint an administrator in Probate and Administration Cause No. 55 of 2019.

2. That, the District Court grossly erred in law and in fact by raising, considering and deciding on new issues which were not raised and



decided upon by the Primary Court in Probate and Administration Cause No. 55 of 2019.

3. That, the District Court grossly erred in law and in fact by finding that the appellant raised jurisdiction issue after the closure of the defence case and at the judgment stage.

4. That, the District Court erred in law and in fact by holding that, the High Court PC. Civil Appeal No. 06 of 2020, limited the Jurisdiction of the Primary Court to an appointment of administrator in Probate and Administration Cause No. 55 of 2019, without a room for raising new issues.

5. That, the District Court grossly erred in law and in fact by finding that the Primary Court framed and answered issues in Probate and Administration Cause No. 55 of 2019.

6. That, the District Court grossly erred in law and in fact by holding that the Primary Court did not deny appointing the appellant as an administrator of the deceased's estate.

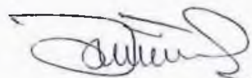
7. That, the District Court grossly erred in law and in fact by not finding that the Probate and Administration Cause No. 55 of 2019,

was incompetently (sic) before the Primary Court for improper filing of form No. 1.

8. That, the District Court grossly erred in law and in fact by not finding that the Primary Court erred by holding that, the deceased professed customary rites.

9. That, the District Magistrate grossly erred in law and in fact and acted disobediently for not complying with the High Court binding decision given in Civil Revision No. 13 of 2020, **Beatrice Briton Kamanga and another versus Ziada William Kamanga** (Unreported).

After serving the respondent, he opposed the appeal. Before venturing into analysis of the case in general, I consider it proper to summarily introduce the historical background of the matter which resulted into rival between parties. It goes as follows: as already pointed out, the appellant was the wife of the deceased Bernard Songay Akonaay. Their marriage was cerebrated way back in 1992 through Christianity rituals. In that union, the appellant and the deceased were blessed with seven children whose names are Godfrey Bernard Songay, Paulo Bernard Songay, Bernadetha Bernard Songay, Anastazia Bernard Songay, Rosemary Barnard Songay, Dominic Bernard Songay and



Gregory Bernard Songay. Before their marriage, the deceased had another customary marriage with another woman, which also was blessed with four children namely; Cornel Bernard Songay, Yuda Bernard Songay, Kornelia Bernard Songay and Happyness Bernard Songay.

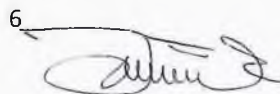
The deceased Bernard Songay Akonaay, died intestate in 22nd May, 2019. As a matter of law, the processes of appointing an administrator/ administratrix was commenced. The clan meeting was conducted with the aim of appointing the appellant together with another person to be administrators of the deceased's estate. However, recommendation of the appellant with other person did not serve well, as the appellant demanded to have been appointed alone on the ground that, she is the only legal wife, despite the fact that, clan members kept emphasizing that, the appellant must be appointed with another co-administrator for the sake of protecting interests of the issues of the first union.

Following that insistence from clan members, the appellant went and called another meeting with the children of her womb only, neighbours and hamlet leaders in which she was recommended alone. After that meeting, she went to the Primary Court of Karatu to petition

for being appointed the administratrix of the deceased's estate. Noticing that, Kornel Bernard Songay filed a caveat against her appointment. Upon hearing of the matter on merit, the trial Primary Court agreed with the reason advanced by the caveator and thus, ordered the matter to be remitted back to clan members who will suggest a person(s) to be appointed administrator(s) of the deceased's estate.

The appellant was aggrieved by that decision she unsuccessfully appealed against it before the District Court of Karatu at Karatu. She did not end up there, she filed another appeal to this court, but upon perusal of record and evaluation of grounds of appeal, this court (Hon. Masara, J.) found that, the decisions of both lower courts were improperly procured. He ordered the file to be remitted back to the primary court with expeditious directive, to appoint the administrator/ administratrix of the deceased's estate. In that judgment the Judge, fairly advised the trial court to have been considered appointing another person distinct from the appellant and Cornel Bernard Songay who were parties in that PC. Civil Appeal No. 6 of 2020.

Also, that, the trial court would have been considered to appoint the appellant with another person. The reason for such advice was due to what His Lordship, the appellate Judge considered to be



misunderstanding among the deceased's family the appointment of another was for purposes of avoiding further commotions.

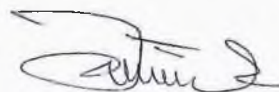
After the case was remitted back to the primary court, the Primary Court acted upon such fair advice and appointed an independent administrator by the name of Sulle, the Ward Executive Officer of Qurus Ward. The appellant again was not dissatisfied with such decision of appointing an independent administrator thus, she appealed to the District Court of Karatu seeking removal of the said Sulle in the office of Administrator and therefore she could be appointed herself. Once again, the matter did not go well on her side, it was dismissed and the decision of the trial court was upheld. Hence, this appeal.

Frankly speaking, this case is one among the many which take long time in courts unnecessarily while being delayed by parties but at the expense of casting the blame to the court without justification. Probably, this is due to lack of knowledge regarding the issues of probate and administration of deceased's estate. I think so because, the general public tend to think that the administrator/administratrix of the estate once appointed, becomes the sole owner of those properties left by the deceased. That brings in the importance of this court to use this platform and say something albeit briefly regarding the role of the

Administrator and doing away with the uncalled existing myth by the general public regarding to the office of the Administrator of the estate. It should be noted that, the office of the administrator/administratrix of the estate has the following roles, one, identifying the properties of the deceased, collecting them, paying debts of the deceased (if any) and distributing the residuals to the legally surviving heirs and beneficiaries of the said estates just to mention a few.

It is the office which run without incentives save for legally costs entered by the administrator/administratrix during follow ups of the deceased's properties and dues for well ending up the office to be ascertained in court. It is the short time lived office according to the law, and thereafter, it must be permanently closed. The status of the administrator/administratrix ceases after closing the office by legally filing inventories and final accounts.

In all those processes, the administrator/administratrix must be accountable to the court which appointed him/her in order to make sure that the office is duly served for the interests of heirs and beneficiaries. The watchdog duty given to the court should not however, interfere the appointed office from performing its duties including distribution of properties to legal heirs and beneficiaries that being the last task.



Notwithstanding such limitation, the court is not tied up its hands from intervening whenever complaints adduced by the interested person against the appointed office in order to clearly and justly end up the term of that said administrator/administratrix. The watchdog role of the court might be done among other times, during submission of inventories and final accounts by the court summoning interested parties in order for them to say a word or two in regard to the content of the inventory (the propriety listed), and the distribution and the conduct of the administrator/administratrix before the matter is closed up.

To appreciate the reason set forth see the case of **Naftary Petro vs Mary Protas**, Civil Appeal No. 103 of 2018 (unreported)- CAT at Tabora,

Upon receiving such information, the court can, if satisfied that the office for the reasons to be recorded in the proceedings, order the matter to continue for another step including closing it in court or order otherwise for the interests of justice. If the matter is closed up, that marks the end of probate and administration of deceased's estate in the trial court. Save that, such closing up, shall never take away the right of appeal if, unsatisfied party so wishes.

After saying as above though by passing, let me now turn to the matter under scrutiny. In this matter, Mr. Joel Alex Mollel, learned Advocate, represented the appellant. Whereas, Mr. Patrick Maligana, also learned Advocate represented the respondent. with the leave of the Court, the hearing was through written submissions which parties filed the same as scheduled. As said above, the petition of appeal fronted nine grounds which are determined as hereunder;

The first and eight grounds of appeal shall be tacked jointly, as they have similar composition. They are all complaints on jurisdictional issue.

On these grounds, Mr. Mollel contended that, these grounds have merits because, at pages 1 and 2 of the decision of the trial court the appellant intimated to the court the question of jurisdiction by saying that the marriage of the deceased was conducted through Christianity rituals with the appellant. Also, that, the burial ceremony of the deceased was celebrated via Christianism, the issue which was ignored and neglected by the trial court. To fortify his argument, the learned Advocate quoted the percept of his standing from the primary court decision which is couched in Swahili version as;

"Mahakama baada ya kupokea msimamo wa mwombaji wa kwamba hayupo tayari kuteuliwa na mtu mwingine ***akitaja sababu za ndoa ya kikristo na taratibu mazishi ya marehemu"*** *(Emphasize added).*

To him, Christianity marriage and burial ceremony of the deceased are the good factors to consider in determining jurisdiction. Mr. Mollel went on submitting that, because the probate form No. 1 used as a petition in primary court did not specify as to whether the deceased was a Muslim, a Christian or pagan as quoted by the first appellate court, is an indication that, the trial primary court assumed jurisdiction.

To buttress his contention, he cited section 19(a)(c) of the Magistrates Court's Act, [Cap. 11 R.E 2019] and paragraph 1(1) of the 5th schedule to the MCA. That according to those provisions, a Primary Court can only entertain matters in probate and administration of the deceased's estate of customary or Islamic nature only.

On ground eight, Mr. Mollel submitted that, the facts that the impugned judgment referred the deceased to have been professed customary rituals is unfounded. This is because, the trial court judgment does not contain any evidence towards the way of life of the deceased. Mr. Mollel said further that, in the absence of evidence as to the way of

life of the accused in the trial court record, the findings of the first appellate court that the deceased was living customarily remains unjustified.

Mr. Maligana, replying on those grounds submitted that, the deceased's style of life was customary mode of living. That, the deceased in his lifetime had married two wives namely; Sesilia Bernard who was married in the year 1988 through customary marriage with four children and Oliver Bernard (the appellant) who was married through Christian marriage in the year 1992 blessed with seven issues. To cement on his contention, the Advocate referred this Court to the two children of the deceased and Sesilia Bernard whose names are; Yuda Bernard and Happyness Bernard who both were born after the marriage of the appellant and the deceased.

Mr. Maligana further argued that, the respondent did not submit on the legality of marriage of the first wife but the mode of life of the deceased. That, the fact that, Yuda Bernard was born in 1992 and Happyness Bernard in 1994 who are biological children of the deceased which is not disputed by the appellant, is the signification that the deceased lived customarily and therefore, the trial court had jurisdiction.

Lastly, the learned advocate asked this court to dismiss these grounds with costs.

In determining these grounds as of meritorious or otherwise, I would at the outset, agree with Mr. Mollel that, the jurisdiction of the primary court on matters of probate and administration of the deceased's estate is limited to customary and Islamic only. This is in accordance with sections 18(1)(a)(i) and 19(1)(c) of the MCA which read:

> *"18.- (1) A primary court shall have and exercise jurisdiction*
>
> *(a) in all proceedings of a civil nature-*
>
> *(i)* ***where the law applicable is customary law or Islamic law****: Provided that no primary court shall have jurisdiction in any proceedings of a civil nature relating to land". (Emphasis Added)*
>
> *19 (1) The practice and procedure of primary courts shall be regulated and, subject to the provisions of any law for the time being in force, their powers limited-*
>
> *(c)* ***in the exercise of their jurisdiction in the administration of estates by the provisions of the Fifth Schedule to this Act****, and, in matters of practice and procedure, by rules of court for primary courts which are not*

inconsistent therewith; and the said Code and Schedules shall apply thereto and for the regulation of such other matters as are provided for therein". (Emphasis Added)

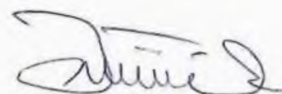
That being the case, whenever the matters of probate and administration of deceased's estate are lodged in primary courts, must be of customary and Islamic nature only. Short of that, the primary court ceases to have jurisdiction.

The ground which Mr. Mollel is relying upon to convince this court that, the primary court had no jurisdiction to entertain the matter, is Christianity marriage between the deceased and the appellant. This is substantiated by the burial ceremony of the deceased which was done according to the rituals of Christianity. On opposition Mr. Maligana is saying that, the determinant factor of jurisdiction is the mode of life of the deceased. That despite the fact that, the deceased had Christianity marriage, but he used to maintain his first wife who was customarily married and cohabiting with him to the extent of causing another two issues of marriage after being married to the appellant. These children are, Yuda Bernard who was born in 1992 and Happyness Bernard born in 1994.

While I agree with Mr. Mollel that, Christian marriage is one of the forms of marriages which prima facie intimate to the life style of the deceased, I, at the same time depart with him to some extent. It is obvious that a Christian person within its meaning, who follows the attributes and deeds of Christianity does not fall within the ambit of customary law. But a Christian person who, to some extent follows Christianity rituals and turns to customary way of life in my view, he is not accommodated in Christianity engagements. I would have been understood the mode of life of the deceased to be Christianity only if, at the time when he decided to profess Christianity by marring the appellant would not had been returned to the former marriage while Christianity marriage was subsisting.

The fact that, the deceased sired other to children with the previous woman married in accordance with customary rites is asignboard to him of being professing customary mode of life.

As much as I know under Christianity rules, the known and binding principle is that marriage is a sacrament whereby one man, one woman to the exclusion of all others principle is cherished. The principle goes further by prohibiting and curtailing Christian believers from conjugating



outside the solemnized marriage. It makes it a sign going contrary to God's Order (sixth commandment).

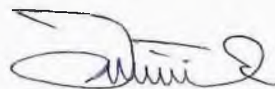
The conduct of the deceased returning to the previous customary married wife, which I became the habit because he went back more than once as evidenced by the two last issues of the first marriage is an indication that, he professed customary rituals than Christianity.

In the event therefore, it is my finding that, the primary court was seized with jurisdiction to entertain the matter. Thus, these two grounds lack merits and they are dismissed.

The second ground is about the District Court raising and deciding on the issue which was not decided upon by the trial court. The new issue considered to have been raised by the District Court is the statement at page 1 of the impugned judgment where the Magistrate is quoted to have saying;

> *"He later fall (sic) into love with one Sesilia Bernard in 1988 contracted a marriage which (sic) celebrated customarily a customary marriage".*

And other words considered by Mr. Mollel to be new issue not feature in the primary court record is at page 6 of the impugned judgment where the Magistrate wrote;



"Bad enough he kept having and enjoying a conjugal right from the first wife to an (sic) extent the two last born, Yuda Bernard born in 1992 and Happiness born in 1994, were born after the deceased contracted a Christian marriage with Oliver Bernard".

Responding on this allegation, Mr. Maligana submitted that, the first appellate court did not raise new issues. He went further quoting the trial court's judgment at page 3 which says;

"Ushahidi wa SM1 uliungwa mkono na SM2 aitwaye Antony John, Mkristo, kwamba SM1 alikuwa mke wa marehemu kwa ndoa kikristo tangu mwaka 1992 ila alinidokezwa na marehemu kwamba alikuwa amezaa Watoto nje ya ndoa".

Also, that when cross examined by the appellant, the respondent at page 9 of the primary court proceeding said;

"Mimi ninakupinga kama mtoto wa marehemu wa nyumba kubwa"

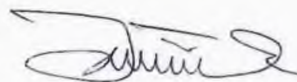
Mr. Maligana also quoted the percept at page 2 when the trial court said;

"Kuhusu ndoa, SUI alieleza mahakama Kwamba marehemu alikuwa na ndoa mbili; ya kwanza ya kimila na ya pili ya kikristo (RC) ambazo zimebarikiwa Watoto

wanne nyumba kubwa na Watoto saba nyumba ndogo".

I am alive of the law that, the first appellate court cannot raise new issues which where not raised and determined by the trial court unless parties have been given a right to be heard. Authorities on this area are legion. It is no longer grey. Some of them are, coupled with those cited by Mr. Mollel in his submission, **The Registered Trustees of Arusha Moslem Union versus The Registered Trustees of National Muslim Council of Tanzania alias BAKWATA**, Civil Appeal No. 300 of 2017, **Kubwandumi Ndefoo Ndossi vs Mtei Bus Service**, Civil Appeal No. 257 of 2018 and **Margwe Erro and Two others versus Moshi Bahalulu**, Civil Appeal No. 111 of 2014 (All unreported and of CAT) just to mention a few.

However, I am quite opposite with the submission by Mr. Mollel that the said issue of the deceased having married in customary rituals and having two children who were born during subsisting of Christianity marriage was raised by the court of first appeal at first without being feature in the primary court records. Apart from the quoted percept by Mr. Maligana still, the record of the trial court and of course, which is the essence of the commotion of this case is due to the fact that the

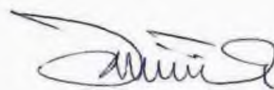


deceased had a former wife alleged to have been married customarily. The appellant herself does not dispute the fact that the deceased had other children out of hers though, she seems not to recognise that former marriage.

In fact, recognizing presence of other children apart from those born by the appellant and the deceased is as good as recognizing that the deceased had sexual relationship out of the subsisting one. This is due to the fact that, children are born by the women and not fall like manna from the heaven. Ordinarily, they are born by women after contracting sexual intercourse with men, in this case, the deceased and one Sesilia Bernard who, the appellant does not want to recognize.

Looking at all those facts included in the trial court record, it cannot be said that the magistrate of the first appellate court raised new issues. The facts show that it was discussed basing on the available record form the trial court. In the event therefore, this ground also lacks merit. It is hereby dismissed.

The third ground is that, the Magistrate erred in founding that the appellant raised jurisdictional issue after the closure of the defence case and at the judgment stage. On this ground in both, submission in chief and the reiterated rejoinder, Mr. Mollel was of the view that, the court

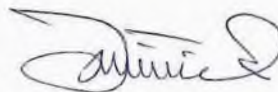


findings at page 10 of the challenged judgment that, withdrawal of the petition at the trial court was impossible due to the High Court decision because there was no room for new issues was improper. He then asked this Court to allow this ground with costs.

Counterarguing, Mr. Maligana said, the moment the decision of the Court is given is binding to the lower courts. That, the High Court remitted back the matter for appointing the administrator and the appellant was also heard on that whereby she said, she could not be appointed with another person as a Co-administrator. After that, she prayed for withdrawal of the matter. To buttress on bindingness of the High Court Order, Mr Maligana cited the case of **Olam Tanzania Limited vs Halawa Kwilabya,** DC. Civil Appeal No. 17 of 1999 (unreported).

On this issue I think, so long as I have already determined that, the primary court had jurisdiction to entertain the matter it therefore remains redundant. Discussing it bears no fruits at all.

The fourth issue is on the complaint of the High Court limiting jurisdiction of primary court from raising a new issue. Mr. Mollel Submitted that, it was wrong for the District Court to hold that, the Primary Court was limited by the High Court via PC. Civil Appeal No. 06



of 2020 for appointment of the administrator and that the primary court could not decide on new issues. Mr. Mollel further submitted that, reading the Judgment of the said PC. Civil Appeal No. 06 of 2020 nowhere the High Court limited the jurisdiction of the primary court on how to appoint the administratrix but only gave directives to the trial court to expeditiously appoint the administrator of the deceased's estate.

In reply, Mr. Maligana argued that, the decision of the District Court was correct by finding that, the judgment of the High Court in Civil Appeal No. 6 of 2020 was binding to the Primary Court as it was directing the trial court to appoint the administrator of the deceased's estate and not to hear the case denovo.

This ground took me to the judgment of the High Court in PC. Civil Appeal No. 06 of 2020 delivered by my learned brother, Masara, J. at page 13 of the typed judgment. The following was said:

> *"Consequently, I order that the file be remitted back to the trial court in order for it to expeditiously appoint the administrator/ administratrix of the deceased's estate".*

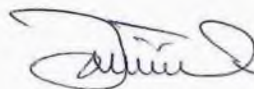
In my settled opinion, these were binding directives to the Primary Court under the principle of *stare decisis*. Also, according to that judgment what was set aside are the judgments of both lower courts. However, the proceedings of the trial court remained intact. Are those proceedings which the trial court was required to compose out its decision limited on appointment only. As lightly argued by Mr. Maligana, the case was not remitted back in the trial court for retrial. Therefore, the trial court appointing the administrator was justified as it was acting upon the directives of the High Court.

With this finding the fifth ground of appeal also remain with no effect. I am saying so because the only issue which was available for determination was appointment of the administrator/ administratrix according to the directives of the High Court. The fact which was acted upon besides raising the issue. Even if it could have been raised, it would have brought the same consequences. Basing on such directives the trial court under the power conferred upon it by rule 2(a) of the fifth schedule to the Magistrates Courts Act, [Cap. 11 R.E 2019] appointed the independent administrator to administer the deceased estate. In my view, I do not see how the appellant was prejudiced for not raising the issue which was constructively answered.

With regard to sixth ground, Mr. Mollel contended that, the trial court denied the appellant from being appointed the administratrix of the deceased's estate. Mr. Mollel further argued that, there is no evidence on record supporting on the ground that the appellant waived herself the right of being appointed after rejecting the advice of the High Court and elders.

On reply, Mr. Maligana argued that, the appellant was given a chance of being appointed alongside with another person as a co-administrator but she rejected. And that, that was the directive of the High Court *via* Pc. Civil Appeal No. 06 of 2020. In the event, the court appointed an impartial administrator pursuant to the directives of the High Court. On the issue of the trial court being bound by the decision of the high court, Mr. Maligana cited the case of **Olam Tanzania Limited versus Halawa Kwilabya**, DC. Civil Appeal No. 17 of 1999.

For satisfactory, I endeavoured to the proceedings of the trial court. As said above, the judgment of the High Court did not quash the proceedings of the trial court. Therefore, remained with legal force to warrant siring of legal decision. At page 11 of the typed trial court proceeding, it is written:



"Mahakama imepokea jalada la mirathi hii ya marehemu Benard Songay toka Mahakama Kuu-Arusha; Mahakama Kuu ilielekeza mambo mawili katika hukumu yake ya tarehe 18/09/2020 ambayo ni Pamoja na kwamba mahakama hii inaweza kumteua mwombaji na mtu mwingine au mtu mwingine huru kuepuka ucheleweshwaji wa haki za warithi wa marehemu. Mhusika/mwombaji amepewa nafasi hiyo na anaileza mahakama kwamba mimi sipo tayari kuteuliwa na msimamizi mwingine kwa sababu mimi nilifunga ndoa na marehemu ya kikristo. Pili taratibu zote za mazishi ya marehemu zilifanyika kikristo

Washauri: R. Paresso

E. Abdi

N. S. Massaba-Hakimu

11/01/2021

<u>Amri</u>

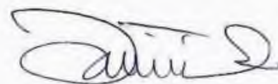
- *Shauri hadi saa saba na nusu mchana kwa ajili ya uamuzi wa uteuzi wa msimamizi wa mirathi huru.*

Washauri: R. Paresso

E. Abdi

N.S. Massaba-hakimu

11/01/2021



And the high court in Pc. Appeal No. 6 of 2020 said at page 12 of the typed judgment said:

> *"Considering that there were misunderstanding among the deceased's family, and for the purpose of avoiding further fracases, the trial Court could have appointed the appellant with some other person or appoint another person distinct from the parties herein in order to have the deceased's estate distributed to the to the lawful heirs".*

According to such guideline given by the High Court, it was apparent that, either the trial court appoints the appellant with some other person or appoint another person distinct from both parties. The trial court's obedience is reflected in the proceeding as quoted above.

The appellant was given a right to be appointed with another person but she rejected. Therefore, the remained option to the trial court was to follow the second alternative that is to appoint another person distinct from the parties and thus, it appointed Anni Tlatlaa Sulle the administrator. In the circumstances, the appellant cannot be heard complaining on the right she was given according to the fair advice of the High Court and rejected. Therefore, this ground also is dismissed for lack of merit.

The seventh ground is on the incompetency of the Probate and Administration Cause No. 55 of 2019 due to improper filing of Form No. 1.

Arguing this point Mr. Mollel said, in the impugned judgment at page 4, the magistrate said that the Form No. 1 did not contain material facts conferring jurisdiction. Therefore, Mr. Mollel contended that, the letters of administration issued by the trial court are void. To buttress his position, he cited the case of **M/S Swift Motors Limited vs Paschal Exavery & Others,** Revision No. 157 of 2008, HC Labour Division (Unreported).

Counteracting, Mr. Maligana said, this ground should not be decided upon, because it is new. That, it was not raised in the first appellate court and therefore it cannot be raised at this second appeal. That the court is bound to determine on the grounds submitted prior in the first appellate court.

Alternatively, Mr. Maligana contended that, according to rule 2(a) or 2(b) of the 5th schedule to the Magistrates Courts' Act (supra) the Form No. 1 requires the applicant to describe status of the deceased as per 7th paragraph stipulated in the Schedule to the Primary Court (Administration of Estates Rules) G.N 49 of 1971. That the appellant

being the applicant in the trial court was duty bound to sufficiently fill the said Form No. 1. That, failure to comply with such requirement cannot give her an opportunity to benefit from her own mistakes. Mr. Mollel reiterated his position in submission in chief during rejoinder part.

In my view, this point which was not raised in the first appellate court cannot be agued at this stage of second appellate court and be determined. In the case of **Godfrey Wilson vs The Republic,** Criminal Appeal No. 168 of 2018 the Court of Appeal of Tanzania observed that:

> *"On our part, we subscribe to the above decisions. After having looked at the record critically we find that, as the learned State Attorney submitted, grounds Nos 1, 2, 3, 5, 6, 7 and 8 are new. With an exception of the 6th ground of appeal which raises a point of law, as was stated in **Galus Kitaya and Hassan Bundala's cases** (supra), we think that those grounds being new grounds for having not been raised and decided by the first appellate Court, we cannot look at them".*

Moreover, the Court of Appeal of Tanzania in the case of **Makende Simon vs The Republic**, Criminal Appeal No. 412 of 2017 said:

> *"Basically, we agree with the learned State Attorney that those grounds are new as they were not raised*

and determined by the 1st appellate court (the High Court). Times without number, this Court has refrained from dealing with such new grounds of appeal because it does not have the jurisdiction to entertain them on the second appeal".

I have gone through the grounds of appeal presented before the first appellate court, ground 7 did not feature thereto. Thus, this takes me to the conclusion in line with Mr. Maligana that, this ground is new and it cannot be determined at this stage of second appellate court. It also fails as such. It is dismissed.

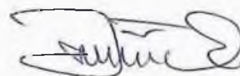
The last ground is ground 9. Mr. Mollel argued that, the first appellate court acted disobediently by not complying with the binding decision of the High Court of Tanzania in the case of **Beatrice Briton Kamanga and Another versus Ziada William Kamanga**, Civil Revision No. 13 of 2020 (Unreported). The counsel said, the cited case observed that, appointing an administrator outside the family to be legally accepted, it must be preceded with good reasons to be recorded. That, such requirement was not observed by the trial court before appointing Mr, Sulle, the Ward Executive Officer of Qurus Ward in Karatu District.

Mr. Maligana accepted the principle enunciated by the court in the above cited case of **Beatrice Briton Kamanga and Another versus Ziada William Kamanga** (supra). However, he distinguished it, by arguing that, the trial court gave the reason for appointing an independent person outside the family members. He quoted page 2 of the trial court decision which appointed the independent administrator. The quoted percept says:

> *"Kutokana na sababu hafifu za mwombaji; na maelekezo ya mahakama kuu Arusha katika hukumu yake ya tarehe 18/09/2020 Pc. Civil Appeal 06 of 2020, mahakama hii kwa kauli moja inaamua kumteua mtu huru ambaye ni afisa mtendaje wa kata ya Qurus Bw. Sulle".*

Mr. Maligana also referred this Court to page 12 of the judgment of the High Court. The part reads:

> *"Considering that there were misunderstanding among the deceased's family, and for the purpose of avoiding further fracases, the trial Court could have appointed the Appellant with some other person or appoint another person distinct from the parties herein in order to have the deceased's estate distributed to the to the lawful heirs".*



It is very surprising to hear Mr. Mollel saying that the reasons for appointing the independent administrator outside the family members were not given. I consider it so because, the judgment of the High Court under which the trial court drove its powers for appointment is crystal clear. That, it is due to misunderstanding and fracases within the deceased's family. Also, that, the appellant rejected being appointed alongside with another co-administrator as it was suggested by the High Court. The sounding reason is very conspicuous and clear to be seen by whoever wants to see it. However, once given a chance to hear about it, he might be also in the likelihood of appreciating the reality. In the event also this ground lacks merit too. I dismiss it.

Thus, that being the last ground to determine, it is my holding that this appeal is entirely dismissed for lack of merits. Given the nature of the appeal being of family companionship, I order no costs.

It is accordingly ordered.

DATED at **ARUSHA** on this 12th day of August 2022

J.C. TIGANGA

JUDGE.