**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**TEMEKE SUB - REGISTRY**

**(ONE STOP JUDICIAL CENTRE)**

**AT TEMEKE**

**CIVIL APPEAL NO. 5 OF 2021**

*(Arising from the decision of District Court of Temeke at Temeke in Probate and Administration Cause No. 07 of 2020)*

**MATILDA ROBERT KUFAKUNOGA.....1ST APPELLANT**

**THOMAS KUFAKUNOGA.....2ND APPELLANT**

**STANLEY NYAKUNGA.....3RD APPELLANT**

**GASPER KUFAKUNOGA.....4TH APPELLANT**

**GWIDO MGULUNDE.....5TH APPELLANT**

**VERSUS**

**MWAJABU SUWED ALMASI.....RESPONDENT**

**JUDGMENT**

Date of last order: - 01/04/2022
Date of judgment: -1/8/2022

**OPIYO, J.**

The appellants herein is aggrieved by the decision of the District Court of Temeke at Temeke in Probate and Administration Cause No. 07 of 2020 delivered on 23rd November 2020 before honourable Madili, RM appeal against the whole decision based on the following grounds;

1. That the trial court erred in law and fact to appoint the petitioner/respondent (Mwajuma Suwed Almasi) who is not capable, trustworthy, and knowledgeable of the deceased

properties to administer the estate of the late Gaudence Robert Kufakunoga.

2. That, the trial court erred in law and fact to appoint the petitioner to be the administratrix of the estate of the late Gaudence Robert Kufakunoga despite those who were nominated by the clan in the clan meeting.

3. That, the trial court erred in law and fact in including the properties which do not belong to the deceased.

4. That, the trial court erred in law and fact to entertain the probate case in which there was no consent for heirs.

Wherefore, the appellant prays for the appeal to be allowed, the judgment of the District Court to be quashed and set aside, the appellants to be declared lawful administrators, cost to be borne by the respondent, and any other relief deemed fit to grant.

In this appeal, the appellants enjoyed the services of Batilda Mally, learned counsel while the respondent appeared in person. Submitting on the first ground the learned counsel stated that the trial magistrate erred in law and fact in appointing the respondent who is not trustworthy and does not know the deceased properties. The appellants are close relatives of the deceased. The first appellant shares the same womb and same father with the deceased. They argued that, the respondent is incapable of administering the estate as she has no cooperation with the relatives and she is not trustworthy as she denied the children from burying their own father in Iringa. He argued that, in our African culture such denial alone is enough to impeach her

credibility. They stated that, after the death of Gaudence, the respondent did no go for the burial, she remained behind and took all the households properties to the unknown place without regarding to the fact that, they are living in the same house with the deceased sibling, one Matilda Robert Kufakunoga who also had her belongings therein.

Their further argument is that, some properties are in Iringa where the respondent has never been to. She does not know the deceased properties well; hence it will be difficult for her to administer and identify the properties in question. That, one of the obligations of the administratrix is to collect the deceased properties and pay debts before distributing the same, therefore the deceased properties are in danger of being left unattended as at the same time the respondent's marriage contract was terminated when her husband died, she can decide to get married at any time and there is a feeling that she is already living with another man. She cannot feel anything for the waste of deceased properties.

On the second ground, the counsel submitted that the court erred in appointing the respondent as an administratrix of the estate in disregarding those who were nominated by the family as per paragraphs 2 and 3 of page 11 of the trial court decision. Nomination of the clan member is not a requirement of the law but practice helps the court to reach a fair decision. Family is in a better position to know who is trustworthy, honest, and capable of administering the estate of the deceased. She cited the case of **Elias Madata Lameck v Joseph Makoye Lameck, Probate Cause No. 1/2019, HC**. In this case, the

family nominated someone like in the case above. The court held that clan meeting helps the court to decide judiciously. It is not for the clan meeting nomination to be ignored and leave the court to decide erroneously.

On the third ground, the trial magistrate erred in including the properties that do not belong to the deceased. The issue at hand is the house which is the property of the late Robert Kufakunoga who is the father of the deceased Gaudence and Matilda Robert Kufakunoga. That, at the trial court the caveat was brought and property rent demand note of 2019/2020 was tendered to verify the ownership of the house which was exhibit P3 as per page 4 of the trial court decision. That proved the said house cannot be in the hands of the respondent it must be in the hands of those who were nominated by the clan, as the deceased had a right to inherit part of it from his father's estate, the right which will subsequently pass on to his children. The house and farms at Iringa are wrong listed by the respondent, they are to remain to the deceased father's estate to administer and divide to the heirs thus, the house and farms are to be removed from the estate of Gaudence Robert Kufakunoga.

The fourth ground is that the trial court erred in law in nominating the respondent without consent from the heirs. Since the clan meeting nomination was disregarded and so was the relative's choice, the court decision should be quashed and appointment revoked.

The respondent replied to all the grounds jointly. In reply to the appeal, the respondent submitted that, the deceased is her husband, hence a member of the family of the late Robert Kufakunoga. That Gaudence

who died on 20th October 2019 was a rightful heir who jointly inherited the house with his sister Matilda Robert Kufakunoga which is situated at Kijichi Kabonyoka and the farms at Iringa were divided among the two in 2014. That, at the time Matilda wanted the house to be sold but, Gaudence refused and the house was divided into two parts; one for her and one for the deceased. So the housed ceased to be that of deceased's father as it was lawfully inherited by the two.

She continued to state that at some point the late Gaudence was converted to Islam and his name changed to Ismail. That, he got sick for 15 years and no any relatives showed up for his treatment until his death when the so called relatives arrived and planned for the funeral without involving her. She said, before he died, he called her and the children and told her that if his relatives want to bury him against Islamic rites I should not attend his burial ceremony including going to Iringa or allowing the children to attend. By not participating in his burial ceremony she was complying to that directive as the relatives decided to bury him against Islamic rites. However, she never left the house as they claim, it is some relatives who evicted her taking some of her properties. Later on, she called my sister-in-law, the first appellant herein and informed her of her intention of leasing their part of the house, but she told her that she had no right after her husband's death.

Therefore, the reason for her approaching the court in the probate cause and listing the house and farms at Iringa and other properties is because they constitute deceased properties after lawful inheritance from his father. That, there are some funds which was brought for the family upon deceased death, but were all appropriated by relatives,

deceased family never benefited from them. As they did not involve her in any burial arrangement, she was not part of the alleged meeting and do not know who was nominated. Therefore, the relative's claim that they love the family is not true as it has been three years and she has never received any help from the said family and even when Gaudence was still alive he went through some difficult challenges, but they never showed up. They showed up after his death. She questioned this kind of love claimed by the deceased relatives. Therefore, as the appellants were never close to the relatives they do not qualify to administer his estate.

She continued to state that, although she has been appointed by the court to administer deceased estate, but she has not been able to get hold of anything belonging to the deceased. The house is occupied by Matilda and the farms are in Iringa. Thus, instead of them cooperating with her to effect the administration process they are obstructing her from it all. She therefore, prayed for the court to dismiss the appeal for lack of merits.

Ms. Mally was quick to rejoin by submitting that, the respondent's claims to have received no help is baseless as she is the one as she is the very one who took the children to the unknown place without informing the relatives. The relatives desire to supervise the house and farms which are not the properties of the deceased as they belongs to her father-in law as there was no administration of his estate. She reiterated prayers she made in chief.

Parties' respective submissions have been dully considered and record thoroughly scruitnised. In disposing the appeal 1st and 3rd grounds will

be dealt with together as they reveal striking similarities. Also the 2nd and 4th grounds for the same reason of close similarity will be disposed jointly. Staring with grounds 1 and 3, which are mainly based on the claim that the trial magistrate erred in law and fact in appointing the respondent who is not trustworthy and knowledgeable of the deceased properties and including as part of deceased estate other properties which does not belonged to the deceased.

From the parties' submissions, it was argued that as the respondent had forbidden the children from burying their father and some properties being in Iringa where the respondent has never visited; also her lack of cooperation with the deceased relatives leading to listing some properties which do not form deceased estate disqualifies her from effective administration of these estates. In appellants eyes, respondent's further disqualification comes from the fact that part of deceased estate is supposed to come from his late father's estate which is yet to be administered. Such claim was supported by property rent demand note of 2019/2020 which was tendered as exhibit 3 showing that the property was still in the name of the late Robert Kufakunoga and not Gaudence Robert Kufakunoga. At this juncture the court was curious whether the late Robert Kufakunoga's estate was ever administered entitling the late Gaudence to any share as claimed by the respondent. The court decided to call the parties to address it on the matter concerning these facts on 15th/7/2022. First, third and fouth appellants managed to appear on that date. On inquiry they came to admit that there was administration of the late Robert's estate by Gaudence, but they argued that it only dealt with his terminal benefits as he was a teacher. It did not go to the extent of distributing the house

that is involved in this issue, so, if at all, it was only partly administered. The respondent insisted that the whole estate was administered including the house in question. She even said the copy of letters of administration sported in the records proves the appellants wrong. The copy of letters of administration of Robert Bruno Kufakunoga's estate was issued on 29/9/2009 by Temeke primary court in probate cause no 428/2009. The conclusion that can logically come from this scenario is that indeed the estate of Robert Kufakunoga was administered contrary to what the trial court was made to believe by the appellants. The argument on the partial administration is not backed with any plausible evidence. The fact that the name of the late Robert Kufakunoga was still retained in the property rent demand note alone cannot prove that the said property was not made part of his estate in probate cause no 428/2009, and that it remained his. The rent demand note is not by itself part proof of ownership.

It follows therefore that, provided both sides agree that the lawful heirs of the late Gaudence have a right of inheritance from their grandfather via their father's shares and as the said heirs include the respondent and her children, not any of the appellants, none than the respondent stand a better chance of administration of these estates. This is one of the circumstances where the clan meeting proposal stands a chance of being disregarded. It seems there was misunderstandings that lead to respondents failure to fully participate in the final journey of her late husband, but that alone does not disqualify her from administering her husband's estate as a beneficiary. In case the petitioner has the blessings of all the beneficiaries (herself and her children in this case), she cannot be disqualified merely for not being favoured by other

deceased relatives. This is because his accountability is to the beneficiaries of the particular estate not relatives in their generality.

In the instant appeal, the property, that form central part of the estate, the house originated from Robert Kufakunoga's estate. I am alive to the fact that it could only be claimed through the administration of his estate. It is not disputed that Robert kufakunoga's estate was administered by Gaudence, but the argument is that the same was not administered in relation to the house and the farms at Iringa. This is unlikely. But even if it is true, this does not give appellants a heavier hand in the estate of Gaudence than one of his lawful heirs, his legal wife. Having said so, after discovery that the estate of Robert kufakunoga was actually administered by Gaudence Robert Kufakunoga as both agreed in appeal, the inheritance in regard to the estate of Robert had already in law gone to Gaudence and his sister Matilda who were separately living in their portions in the said house on the same understanding. What was remaining is the transfer of title to the respective heirs of the late Robert Kufakunoga. So, what is to be administered is his rightful shares (portion of the house) from his father's estate.

If in the cause of administration, it is found that there is part of the estate of Robert that was indeed not administered, the appellants are advised to direct their mind to that based on good faith they claim to have, to administer the un administered properties and pass the late Gaudence's share to his legal heirs through his estate administered by the respondent rather than furthering their desire to obstruct the administration of Gaudence's estate by one of his lawful heirs. For the

reason, I find no justification allowing these grounds of appeal having the effect of revoking respondent's appointment. The two grounds are dismissed.

On grounds 2 and 3 that the trial magistrate disregarded the nomination of the clan meeting in the appointment of the administratrix and without heirs' consent, it is my opinion that the same lacks merits. In the case of **Abdul Aziz Hussein Ntumiligwa v Yunus Hussein Ntumiligwa, (PC) Probate Appeal No. 2 of 2019, High Court of Tanzania at Kigoma,** it was held that it is not necessary to convene a family meeting to appoint the administrator though it is a good practice. In **Hadija Said Matika v Awesa Saidi Matika, PC. Civil Appeal No. 2 of 2016, High Court of Tanzania**, at Mtwara, *L.M Mlacha,J held that;*

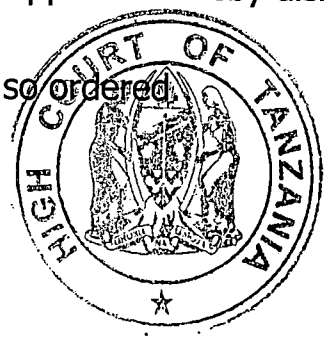
> *"...the clan or family will usually sit to discuss the matter and propose someone to be the administrator. He will be sent to court with some minutes. This practice is encouraged because it makes the work of court easy..."*

Having reflected on the above position, which I am strongly convinced of especially in special circumstances like in this case, family meeting proposals shall not be used to deprive the lawful heirs the right to administer the estates in which their interest supersede other interests that may arise from the none legal heirs. Importantly so, when the lawful heirs are not made part of those family meetings for whatever reason like what transpired in this case in which the appellants and the respondent seemed not to get along as it can be evidenced by the family dramas like not allowing children to bury their father making the

siting impossible. These two grounds also lack merits. Having found all the grounds lacking merits, the entire appeal remains with no leg to stand on. It is therefore dismissed in its entirety with no order as to costs given the nature of this matter.

This appeal is hereby dismissed

It is so ordered.




**M. P. OPIYO,**

**JUDGE**

**1/8/2022**