IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

PC PROBATE APPEAL NO. 14 OF 2021

(C/f Probate Appeal No.01 of 2021 of Hai District Court at Hai originally Probate Cause No.3 of 2020 of Hai Kati Primary Court.)

SEBASTIAN ELIAS MUSHI ..... APPELLANT

VERSUS

BLAKIA ELIAS MUSHI..... RESPONDENT

JUDGMENT

27/7/2022 & 03/10/2022

SIMFUKWE, J.

This is the second appeal which emanates from Probate Appeal No.13 of 2020 of Hai District Court. The historical background of the matter is that the appellant and the respondent are blood relatives in the family of the late Elias Fidetus Urio and the late Maria Elias Urio who left 9 children but 7 of them passed away and left the appellant and the respondent only. It has been alleged that the deceased John Elias Mushi (whose estate is the subject of this matter) had no children and never got married, and he died intestate on January 2017. Thus, the appellant herein was appointed by Hai Kati Primary court to be administrator of his estate. On August 2019, the respondent herein being the only sister of the deceased lodged her complaint before Hai Kati primary court that she never got her share from the estate of the deceased John Elias and that the appellant had never distributed the estate of the deceased to lawful heirs. On the basis of the

fact that the deceased left neither a wife nor children but only the appellant and the respondent who were his brother and sister. The trial court ordered the appellant to collect and distribute the deceased' estate to his heirs (appellant and respondent herein) within two weeks. The appellant was also ordered to file accounts and inventory, thus Form No. V and VI.

Aggrieved by the decision of the trial court, the appellant herein lodged his appeal before the District Court of Hai in which he faulted the trial court for failure to admit his documentary evidence which was to the effect that the deceased had bequeathed to him 3 ½ acres at Shirimatunda Village, 4 and 1 ¼ acres located at Kwa Tito and Relini-Kimashuku respectively. It was also stated by the appellant that the deceased had bequeathed other properties like house wares, cows, goats, crops etc. which were no longer comprising the estate of the deceased. The appellant also faulted the impugned decision of the trial court for failure to grant his oral prayer of calling witnesses who included the former village leaders who composed and stamped the document which was denied to be admitted by the trial court.

In its decision, the first appellate court found that the issue of the will was an afterthought as the same was raised by the appellant in an application for extension of time to file his appeal. It was decided further that despite the fact that the deceased died intestate and had not left a spouse, children nor parents to inherit his estate, his estate can never be neglected, deserted or left deuterating while he left his blood brother and sister who are lawful heirs.

Still dissatisfied, the appellant preferred the instant appeal on the following grounds:

1. *That, the Honourable appellate Magistrate erred both in law and fact as she ignored the fact that the Respondent, unreasonably declined to write and file her replies in response to both the Appellant's petition of Appeal and the Written Submission in chief, but she went on to dismiss the appeal.*
2. *That, the Honourable Magistrate erred in law and fact as she failed to deliver the Court judgment as an ex-parte judgment, while the Respondent didn't appear to be heard neither did she write and file her replies to both the Appellant's Petition of Appeal and the Written Submission in chief although she was properly served and she duly signed the Court Summonses.*
3. *That, the Honourable appellate Magistrate erred both in law and fact as she failed to consider the fact that the stated disputed lands are not the customary lands but went on to wrongly rely on the Customary law and authority.*
4. *That, the Honourable Magistrate erred in law and fact as she failed to consider the fact that the Trial Magistrate ignored to distinguish in between the properties left in the deceased's estate, and those properties the deceased had already bequeathed to the Appellant during his lifetime.*
5. *That, the Honourable Magistrate erred in law and fact as she failed to consider the fact that the Trial Magistrate ignored to distinguish in between the properties left in the deceased's estate, and those properties the deceased had already bequeathed to the Appellant during his lifetime.*

6. *That, the Honourable Magistrate erred in law and fact as she failed to consider the fact that the Trial Magistrate erred in law and fact as he declined to consider the Appellant's submission during the trial, that the deceased had already bequeathed his landed properties to the appellant during his lifetime, namely, the plots of land measuring; 3 ½ acres at Shirimatunda village, 4 acres and 1 ¼ acres at Kwa Tito and Relini – Kimashuku, Hai respectively, and that, all of the mentioned landed properties were no longer comprising the estate of the deceased.*
7. *That, the Honourable Magistrate erred in law and fact as she failed to consider the fact that the Trial Magistrate erred in law and fact as he unreasonably declined to admit the documentary evidence tendered by the Appellant, to say, the document written and signed by the deceased himself as was witnessed and properly signed and officially stamped by the Local Government leaders and other six living witnesses, a document through which the deceased bequeathed his landed properties hereinabove mentioned to the Appellant.*
8. *That, the Honourable Magistrate erred in law and fact as she failed to consider the fact that the Trial Magistrate erred in law and fact as he unreasonably delivered an illegally secured judgment in a sense that it included the properties that were lawfully no longer belonging to the estate of the deceased, regardless to the Appellant's efforts to rectify the mistake during the trial.*
9. *That, the Honourable Magistrate erred in law and fact as she regarded the Appellant's appeal and reference of the documentary herein above mentioned as 'the afterthought.'*

10. That, the Honourable Magistrate erred in law and fact as she improperly directed the Court hence a bad judgment.

Hearing of the appeal was ordered to proceed by way of written submissions. Both parties were unrepresented.

On the first ground of appeal, the appellant submitted that the first appellate court erred in law and fact by ignoring the fact that the respondent had declined to file her submission in response to the appellant's petition of appeal and written submission in chief and went on to decide in favour of the respondent. He contended that as a general rule each and every allegation of a party have to be opposed by the adverse party. That, in this matter it was the duty of the respondent to deny or admit the facts in the grounds of appeal and submission in chief of the appellant. The appellant made reference to the High Court decision in the case of **Ayubu Salehe Chamshama and Another versus Diamond Trust Tanzania Limited and 3 Others, Misc. Land Case Application No. 514 of 2020,** High Court, Land Division at Dar es Salaam (unreported) in which consequences of failure to file submission according to the court order were discussed.

The appellant went on to submit that the respondent in this case did not appear before the court nor did she bother to utilise her right of filing the ordered submissions without any good reason despite being insisted by the Hon. Magistrate. He quoted part of judgment of the first appellate court where it was stated that the respondent had ignored her right to be heard by not filing her reply to Petition of Appeal as well as reply to the written submission in chief by the Appellant.

On the second ground of appeal the appellant faulted the first appellate court for failure to deliver her judgment as an ex parte judgment as the respondent had not opposed the appeal and that her appearances were almost equal to non-appearance.

On the third ground of appeal, it was submitted that the disputed land was not customary land thus, the Hon. appellate Magistrate erred by wrongly relying on Customary Law and authorities. The appellant elaborated that the deceased did not inherit the disputed land from his parents but he laboured to clear the bush far away from his village.

On the fourth ground of appeal, the appellant averred that the first appellate court erred by not distinguishing between the properties left in the deceased's estate and properties which the deceased had already bequeathed to the appellant during his lifetime. In support of this ground, the appellant alleged that together with his wife were living with the deceased and took care of him throughout his old age and illness until the day he passed away and thereafter buried him. He alleged further that that fact makes the appellant among the clan members and neighbours who know well the deceased's properties. He said that there was a written documentary evidence which was ignored by the two courts below; hence, the same resulted into a bad and unjustifiable judgment against the appellant.

The fifth and sixth grounds of appeal were a repetition of the fourth ground of appeal.

On the issue of the will, the appellant asserted that the Hon. first appellate Magistrate had misunderstood him as he meant that the

deceased had bequeathed the said lands through a written document and not a will as the deceased died intestate.

On the seventh ground of appeal which concerns denial to admit documentary evidence of the appellant, the appellant reiterated his submission on the 4th ground of appeal.

On the eighth and tenth grounds of appeal, the appellant reiterated his submissions in respect of the landed properties which he alleged that had already been bequeathed to him by the deceased. In addition, he averred that the first appellate court's judgment does not state the good reasons for dismissing the appeal. That, judgments of both the trial court and first appellate court were clouded with false facts against the appellant while some statements by the appellant were not recorded.

The appellant prayed that judgment of the first appellate court be quashed and set aside and this appeal be allowed.

In his brief reply, the respondent submitted among other things that the deceased died intestate and they were the only relatives left. So, both of them have same rights to inherit the properties of the deceased. That, the district court did not favour her but did the best according to the law and procedures. She stated further that the appellant knew the truth that the deceased died intestate and he did not leave a wife, children or parents, but he was just disturbing the court.

Responding to the issue on non-appearance, the respondent stated that she never missed any session in court because she knew that failure to appear, judgment would be entered ex parte.

On the issue that the disputed land was not customary, it was submitted by the respondent that that was not an issue as the issue is who is the right person to inherit the estate of the deceased who left only two immediate relatives.

Regarding evaluation of evidence, the respondent replied that the trial Magistrate considered every evidence adduced in court to reach at his decision. That evidence of the appellant was so weak and his aim was to make sure that he benefits himself all the properties left by the deceased.

The respondent concluded that this appeal is hopeless and she prayed that it should be dismissed with costs for lack of any merit.

In rejoinder, the appellant alleged that the respondent had departed from common practice of stating one ground after another and that she chose to submit generally. He reiterated that the issue was failure of the respondent to file her submission and to properly appear before the first appellate court. Also, the appellant reiterated that the disputed land had been bequeathed to him by the deceased and that there was a document in the court file to that effect.

On the issue of non-appearance of the respondent, the appellant alleged that even before this court the respondent maintained her behaviour of omission to appear. He insisted that the respondent has no colour of right over the disputed land though she had been clinging on the unfound allegations of being of an old age and close relative of the deceased.

Having considered submissions of both the appellant and the respondent as well as the raised grounds of appeal; it seems that the

main grievance of the appellant is decline to admit the so called his documentary evidence which he alleged that shows that the disputed land had already been bequeathed to him by the deceased. According to the submission of the appellant, one may suggest that the respondent has no share in the estate of the deceased. Therefore, the issue for determination is ***whether the disputed landed properties were bequeathed to the appellant as alleged?***

This being the second appellate court I found it justifiable to peruse the trial court's records in order to satisfy myself of what is instore in the records. With due respect to the appellant, I could not trace any document which he tendered or prayed to tender before the trial court. Likewise, there was no prayer to call witnesses which was denied to the appellant. Even in his oral testimony he did not inform the court that the landed properties of the deceased had already been bequeathed.

In short, what I gathered from the proceedings of the trial court and the first appellate court is that after being appointed as administrator of the estate of the deceased on 7/3/2018, the appellant did not distribute the estate of the deceased nor file accounts and inventory as ordered by the trial court. The respondent lodged her complaint which prompted the trial court to summon the appellant. It is on record that the appellant refused to sign the summons as a result he was arrested and remanded for 14 days for contempt of court. When releasing him on 22/4/2020, the trial court observed among other things that while being cross examined by the court it was discovered that the appellant had already sold one farm of the deceased at Tshs 7,000,000/= before distributing the estate of the deceased. Then, the

trial court ordered the appellant to distribute the estate to himself and his sister (respondent herein) within two weeks. Thereafter, the appellant appealed against the decision of the trial court his main complaint being failure to consider his document which he had prayed to tender as already noted herein above. The first appellate court found that the said document was attached to an application for extension of time which was considered as an afterthought. I examined the proceedings of Misc. Application No. 4/2020 and found that the said document was impleaded at paragraph 4 of the supporting affidavit of the applicant. At the same time in Probate Cause No. 4/2018 the appellant had informed the court that the deceased died intestate and never testified about the properties which had been bequeathed to him. Worse enough the appellant had filed in Probate Cause No. 4/2018, hand written minutes of the meeting dated 12/8/2019 showing distribution of the estate of the deceased, most of the beneficiaries being his children.

At this juncture, I am strongly convinced that the stories of the appellant are purely a contradiction which is for his own peril. How comes that on 12/8/2019 he distributed all the landed properties which he alleges that had been bequeathed to him?

In the case of **Sekunda Mbwambo v. Rose Ramadhani [2004] TLR 439** it was held that:

> *"In view of all this, it is evident that* ***the administrator is not supposed to collect and monopolise the deceased's properties and use them as his own and/or dissipate them as he wishes,*** *but he has the inevitable heavy responsibility which*

he has to discharge on behalf of the deceased. ***The administrator might come from amongst the beneficiaries of the estate, but he has to be very careful and impartial in the way he distributes the estate.*** *"*Emphasis added

It is trite law that concurrent findings of fact of the two courts below must be upheld by the second appellate court unless there is a principle of law which has been violated. In this case, I could not detect any principle of law which was violated by the two courts below; nor any injustice occasioned to the appellant. In the circumstances, I uphold the findings of the two courts below and find this appeal lacks merit.

Appeal dismissed with no order as to costs.

It is so ordered.

Dated at Moshi this 3rd day of October 2022.

S.H. Simfukwe

Judge