

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
BUKOBA DISTRICT REGISTRY
AT BUKOBA.**

PROBATE APPEAL NO. 01 OF 2022

(Arising from Probate Appeal No. 07 of 2021 of Karagwe District Court. Originating from Probate Cause No. 22/2019 of Kayanga Primary Court)

EDINA FRANCEAPPELANT

VERSUS

MOMBO YUSUFU KIMANJI (Administrator of estate
of Restuta France Kainunula)**RESPONDENT**

JUDGMENT

*28/08/2022 & 20/10/2022
E.L. NGIGWANA, J.*

This matter emanates from Kayanga primary court which appointed the respondent to administer the estate of the late Restuta France Kainunula instead of the appellant who had applied for the same. The appellant's appeal to the District Court bore no fruits hence, she appealed to this court challenging the decision of Karagwe District Court for upholding the decision of Kayanga Primary Court.

For an understanding of the context in which this appeal emanates, the brief facts of the case are essential. The said late Restuta France Kainunula was the sister of the appellant while the respondent contended to be her husband with whom they were blessed with two issues; Reymo and Sharifu. The deceased was a government employee in the Police force with the rank of Inspector. She died intestate on 07/08/2019. After the funeral, the 'family members' convened a meeting and proposed the appellant to administer the estates of the deceased. She filed a probate cause at Kayanga Primary Court. However, before

she could be appointed, the respondent successfully objected her appointment reasoning that he was the one qualifying to administer the estate of his deceased wife.

When testifying before the trial court, the appellant, who was the applicant, contended that she is the sister of the deceased who was survived by two children she got with the respondent though they were not legally married, therefore, according to her, the respondent is not recognised as the husband of the deceased. She contended that the deceased had no any property apart from the home utensils. Her contentions were supported by PW2 and PW3.

The respondent while objecting the appointment of the appellant, he stated that the deceased was his wife with whom they got married in 2004 and in her lifetime, the deceased acquired one plot in Dar Es Salaam, one house at Bugene and a bank account. He further testified that the appellant is not trustworthy to be appointed because she has illegally possessed the plot at Dar Es Salaam and house at Bugene claiming to be hers. According to him, if the appellant is appointed, the children would not benefit with the properties left by their mother because the appellant is claiming to be the heir of the deceased's properties. Therefore, as the father of children, he is qualified to be appointed in order to safeguard the properties of the deceased for the interest of the children. His contentions were supported by DW2, DW3 and DW4 who told the trial court that the respondent was a fit person to administer the estate.

In its ruling, the trial court, having assessed the evidence of both sides in relation of who is qualified to administer the estates, appointed the respondent reasoning that the appellant has no knowledge of the duties

of the administrator as she had already started squandering and taking possession of the properties of the deceased and also alleging that the deceased left no any property while the respondent stated that the deceased left a plot at Dar Es Salaam and a house at Bugene which the appellant claimed to be her own property.

Being dissatisfied, the appellant appealed to Karagwe District Court seeking the court to revoke the appointment of the respondent, quash the proceedings of trial court and set aside its decision. In her petition of appeal, she contended to be the legal heir to the properties left by the deceased and that the deceased was not legally married to the respondent, thus the respondent is not a legal heir to those properties.

In its appellate jurisdiction, the district court entered the judgment for the respondent by upholding the decision of the trial court.

Still dissatisfied, the appellant is before this court challenging the district court's judgment on six grounds as follows:

- 1. That, the Learned District Court Magistrate grossly erred in law and in facts for failure to recognize that the respondent was a Muslim in nature while the deceased sister of the appellant was a Christian in nature and thus the respondent has no legal right to administer the deceased estate as a Muslim hence wrong decision.*
- 2. That, the Learned Court Magistrate grossly erred in law and facts for failure to know that the late sister of the appellant owned her own separate property as per section 58 of the Law of Marriage Act (Cap 29 R.E 2019) hence wrong decision.*
- 3. That, the Learned District Court Magistrate grossly erred in law and facts for failure know that the deceased sister of the appellant registered her name in the records of employment of which the*

appellant is a legal heirs(sic) to the late sister's properties hence wrong decision.

- 4. That, the Learned District Magistrate grossly erred in law and in facts to decide the matter in favour of the respondent to administer the properties owned by the appellant's late sister who was not married to any person as per letter from Dar Es Salaam Police Academy dated on 16.10.2019 which explains that the deceased was not married to any person hence wrong decision.*
- 5. That, the Learned District Magistrate grossly erred in law and in facts for failure to know that the late sister of the appellant possessed her own estate of which the appellant has all legal qualification to be appointed since the appellant is the legal heirs(sic) to inherit the deceased properties of her late sister RESTUTA FRANCE.*
- 6. That, the Learned District Court Magistrate grossly erred in law and facts for failure to know that the respondent is not recognized by family members and clan members and is not legal heirs to the properties of the deceased hence the respondent has no qualification to be an administrator of another clan members.*

When the appeal was called on for hearing, the parties appeared in person, unrepresented. They prayed and were granted leave to argue the appeal by way of written submissions.

In her written submission in support of the appeal, the appellant argued that the respondent being a Muslim, does not qualify to administer the estate of the deceased who was a Christian.

On the issue of the respondent claiming to be the husband of the deceased, the appellant contended that the deceased was not married to the respondent because there was no any evidence proving the same. According to the respondent, the respondent took the children so that

he may have right to claim for the properties left by the deceased for his own interests. She went further contending that, the letter from Dar Es Salaam Police Academy where the deceased was working; stated that the employment records showed that the deceased was not married therefore, the respondent cannot be termed as a husband of the deceased.

Submitting on the third ground on who is the legal heir, the appellant contended that she is the legal heir of the deceased's estate because the deceased had registered her (the appellant) as her next of kin, signifying her to be a legal heir of her properties.

In reply, the respondent contended that he is a legal husband of the deceased and they started to live together as husband and wife in 2004 and in 2008 he paid the dowry to the deceased's family. His contention of paying the dowry was supported by three other witnesses including Dotto France, the appellant's brother. Being the husband of the deceased, therefore, he qualified to be appointed the administrator. According to him, the letter written from Dar Es Salaam Police Academy has no legal basis because the said letter cannot be used as a proof of marriage between the respondent and the deceased. He supported his submission with the case of **Sekunda Mbwambo versus Rose Ramadhani** [2004] TLR 439. He further argued that being a Muslim does not bar him from administering the estate of the deceased who was a Christian. That revoking him because of his religion would be a kind of stereotype.

Submitting on the 2nd and 4th grounds on who is the legal heir(s), the respondent contended that the legal heirs are him (the respondent) and

the two children left by the deceased; the appellant is not among the heirs.

In rejoinder, the appellant argued that the issue of religion is one of the most important aspects before appointing the administrator with the aim of knowing the law to be applicable in administration of the estate. She argued further that the court should appoint the person who is capable of handling that task. She reiterated her contention that the deceased was not married to the respondent though they had two children.

She winded up her submission arguing that she is the one who qualifies to be appointed because the deceased trusted her as a near relative that is why she registered her as the next of kin.

I have gone through the proceedings of the two lower courts and considered the grounds of appeal together with the written submissions of the parties. The pertinent two issues discerned from the grounds of appeal are; **One**, who is qualified to be appointed to administer the estate of the deceased between the Appellant and the Respondent. **Two**, whether the deceased left any property eligible for distribution to the heirs.

Ahead of addressing the above issues, it imperative to highlight the legal basis on the power of the court to appoint the administrator and the duties of the administrator of the estates. As the matter commenced in the primary court, the administration of that estate is governed by the Primary Courts (Administration of Estates) Rules G.N No. 49 of 1971. Rule 8 of G.N No. 49 of 1971, provides thus:-

Subject to the provisions of any other law for the time being applicable the court may, in the exercise of the jurisdiction

conferred on it by the provisions of the Fifth Schedule to the Act, but not in derogation thereof, hear and decide any of the following matters, namely-

- a) whether a person died testate or intestate;*
- b) whether any document alleged to be a will was or was not a valid or subsisting will;*
- c) any question as to the identity of persons named as heirs, executors or beneficiaries in the will;*
- d) any question as to the property, assets or liabilities which vested in or lay or on the deceased person at the time of his death;*
- e) any question relating to the payment of debts of the deceased person out of his estate;*
- f) any question relating to the scale, partition, division or other disposal of the property and other assets comprised in the estate of the deceased person for the purpose of paying off the creditors or distributing the property and assets among the heirs or beneficiaries;*
- g) any question relating to investment of money forming part of the estate; or*
- h) any question relating to expenses to be incurred on the administration of the estate.*

Also, in the case of **Sekunda Mbwambo vs Rose Ramadhani** (supra), Rutakangwa, J. (as he then was) which was cited by the respondent, the court stated that the administrator can be a widow or widows, the parent, the child of the deceased or any other close relative of the deceased who can easily identify the properties of the deceased.

From the above cited provisions and the case referred, the appointing court has power to appoint any person who has the capacity to administer the estate faithfully, not necessary to be the heir.

The Administrator of estate, after being appointed, according to **Item 5 of Part II of the Fifth Schedule to Magistrates Courts Act, Cap. 11 RE 2019**, steps into the shoes of the deceased with all rights to identify, collect, pay or demand outstanding debts and costs of administration and thereafter distribute the estate of the deceased to all legal heirs.

According to the evidence of the respondent herein, DW2 Dotto France Kainunula, the brother of the deceased, DW3 Faustine Flugence and DW4 Vitalis Kamafa, the relatives of the deceased, the respondent is the legal husband of the deceased because he paid dowry in 2008 in their presence. Although this is not a matrimonial matter, such the evidence proves the relationship between the respondent and the deceased.

The trial primary court after hearing the parties, decided to appoint the respondent, husband of the deceased and dismissed the application by the appellant because she was seen untrustworthy as she had started squandering the properties of the deceased as stated above. The first appellate court upheld the decision of the trial court considering that the respondent is the father of the children left by the deceased and they are under his custody.

Guided by the above position, I now determine the issues I have formulated herein above that is; who is qualified to be appointed to administer the estate of the deceased between the appellant and the respondent, and whether the deceased left any property eligible for distribution to the heirs.

Before determining the issue on who, between the appellant qualifies to be appointed to administer the estate, it would be pertinent to point out qualifications to be taken into consideration by the court before appointing the administrator as it was elaborated in the case of **Sekunda Mbwambo vs Rose Ramadhani** (supra) thus:

"The objective of appointing an administrator of the estate is the need to have a faithful person who will, with reasonable diligence, collect all the properties of the deceased. He will do so with the sole aim of distributing the same to all those who were dependants of the deceased during his life time... it is evident that the administrator is not supposed to collect and monopolize the deceased's properties and use them as his own and/or dissipate them as he wishes, but he has the unenviable heavy responsibility which he has to discharge on behalf of the deceased"

In the instant case, looking at the 3rd and 5th grounds, the appellant is seeking to be appointed the administrator claiming to be the legal heir of the deceased's estate. She has not clearly stated if the deceased's children will have any share in the estate she intends to administer. In my view, if she is appointed, she will administer the estates for her own interests not for the benefit of the heirs and therefore, the interests of the deceased's children will be in jeopardy. On that instance, I agree with the two lower courts that the appellant is not trustworthy to administer the estates. Considering that the respondent is taking care of the children, he is in a better position to administer the estate and distribute the proceeds to the heirs.

With regard to the properties left by the deceased; the appellant herein and her witnesses; PW2 and PW3 testifying before the trial court, stated that the deceased left no any property. The appellant went further contending that the house at Bugene is her own property; does not belong to the deceased. However, the respondent told the trial court that the deceased left a plot in Dar Es Salaam and a house at Bugene which the appellant claims to be hers. Perusing the records of the trial court, I came across Form No. I, the Probate Application Form in the primary court. Under Item 5 of the said form, the Appellant listed one house and employment benefits to be the properties left by the deceased. For easy reference I quote:

5. Naamini kuwa mali yote itakayo kuwa katika mirathi hii itakuwa na thamani ya.....(Eleza aina ya mali na thamani yake)

Nyumba 1, Haki kazini.

From the above, I am satisfied that, among the properties left by the deceased, there is one house. As the appellant concealed to state where the house is, I am of the considered view that unless stated otherwise, the said house is the one situated at Bugene in Karagwe District.

With regard to the contention by the appellant to be the legal heir of the deceased's properties, the record shows that the deceased died intestate, thus no Will containing the names of the heirs and how the properties should be distributed to them was tendered before the trial court. However, it should be noted that the court has no duty to determine who are the legal heirs of the deceased's estate. I sought guidance from the Court of Appeal decision in the case of **Marim Juma versus Tabea Robert Makange**, Civil Appeal No. 38 of 2009 (Unreported) where it was held that the court has no mandate to

determine who should be the beneficiary of the deceased's estate because such a role has to be played by the Administrator of the estate. The Court further in the case of **Monica Nyamakare Jigamba versus Mugeta Bwire Bhakome as Administrator of the Estate of Musiba Reni Jigamba and Another**, Civil Application No.199/01 of 2019(Unreported) had this to say;

"It follows that it is the duty of the administrator to collect the properties of the deceased and the debts, pay the debts and identify the rightful heirs of the deceased"

In the final analysis, the respondent being the father of the children left by the deceased, and being taking care of those children, there is no doubt that he is capable of administering the estate according to law.

Consequently, I am settled that the appeal lacks merit. I uphold the decision of the trial court and that of the first appellate court. I hereby confirm the appointment of the respondent, Mombo Yusuf Kimanji, as the administrator of the estate of the late Restuta France Kainunula. The appeal is thus dismissed. Under the circumstances, I make no order as to costs.

It is so ordered.

Dated at Bukoba this 20th day of October, 2022.

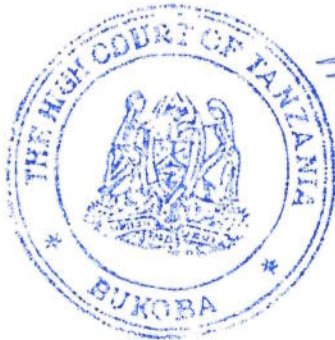


E. L. NGIGWANA

JUDGE

20/10/2022

Court: Judgment delivered this 20th day of October, in the presence of both parties in person, Audax Kaizilege Vedasto, Judge's Law Assistant and Ms. Tumaini Hamidu, B/C.



E. L. NGIGWANA

JUDGE

20/10/2022