IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

PC PROBATE AND ADMINISTRATION APPEAL NO. 06 OF 2022

(C/f PC Probate and Administration Appeal No.3 of 2022 of the District Court of Moshi at Moshi, originating from Probate and Administration Cause No. 169 of 2021 of Urban Primary Court at Moshi.)

JULIUS ALBERT MWASE.....APPELLANT

VERSUS

HAMIS OMARY MOSE..... RESPONDENT

JUDGMENT

20/9/2022 & 25/10/2022

SIMFUKWE, J.

Before Urban Primary Court, the appellant herein successfully petitioned to be appointed as administrator of the estate of the deceased Fatuma Suleiman Hamza who died intestate on 07/2/2021. The respondent herein unsuccessfully objected the appointment of the appellant. Instead of revoking the appointment of the appellant, the trial court appointed the respondent as co-administrator. The respondent was not satisfied, he appealed before the district court of Moshi on eight grounds:

1. *That trial primary court magistrate erred in law and facts by failing to ascertain the law applicable before appointing the respondent as co-administrator to the estate of the late FATUMA SELEMAN HAMZA.*
2. *That trial primary court magistrate erred in law and facts by appointing the respondent as a co-administrator to the estate of the late FATUMA SELEMAN HAMZA despite the fact that the appellant is an administrator of the estate of the late ALLY HAMIS MOSE the husband of the late FATUMA SELEMAN HAMZA.*
3. *That trial primary court magistrate erred in law and facts by appointing the respondent and appellant to be joint administrators to the estate of the late FATUMA SELEMAN HAMZA despite apparent conflict of interest between the appellant and the respondent in relation to the estate of the late FATUMA SELEMAN HAMZA.*
4. *That trial primary court magistrate failed to properly analyse the evidence available to the court and as a result reached a wrong conclusion which prejudiced the administration of the estate of the late FATUMA SELEMAN HAMZA.*
5. *That primary court magistrate erred in law and facts by appointing the respondent a non-Muslim to administer Islamic estate despite the apparent conflict of interests.*
6. *That, the magistrate neglected to hear the objection which was lodged by the appellant in respect of the misused and plundered estate by the administrator prior to his appointment.*
7. *That, the trial magistrate ignored the fact by appointing the respondent despite the fact that the respondent had hidden the existence of first line beneficiaries under Islamic law which the*

deceased professed a fact which made the appointment illegal and fraught with malice putting at peril the estate to be administered.

8. *The trial magistrate ignored the fact that the respondent had lied to be the relative of the deceased aiming to deprive lawful beneficiaries a fact which makes him unsuitable as administrator.*

In its decision, the first appellate court found that there were no reasons advanced for the appointment of the appellant (respondent by then) as he had no interest in the estate of the deceased. His appointment was quashed and the respondent herein was affirmed as sole administrator.

Dissatisfied with the decision of the first appellate court, the appellant herein, preferred the instant appeal on the following grounds:

1. *That, the first Appellate Court erred in law by entertaining an appeal which originated from an order of the trial court in which it had no jurisdiction as it was functus officio to issue such order.*
2. *That, the first Appellate Court erred in law and in fact by entertaining the Appeal which originated from objections which were wrongly rised (sic) by the Respondent at the trial Court.*
3. *That, the first Appellate Court erred in law and in fact by entertaining an appeal from the trial court which wrongly appointed the Respondent as a co-administrator.*
4. *That, the first Appellate Court erred in law and in fact by revoking the letter of administration by the Appellant without any legal justification.*
5. *That, the first Appellate Court erred in law and in fact by failure to properly evaluate evidence as the first appellate court hence reaching at erroneous decision.*

6. *That, the first Appellate Court erred in law and in fact by appointing the respondent as a sole administrator contrary to the evidence in record as well as legal requirements.*
7. *That, the first Appellate Court erred in law by failure to understand the true interpretation of Rule 9 (1) of the Primary Courts (Administration of Estates) Rules GN No. 49 of 1971.*
8. *That, the first Appellate Court erred in law and in fact by rising (sic) issues which had never been rised (sic) either at the trial or during the hearing of the appeal.*

The appellant prayed that the judgment and decree of the district court be quashed.

Counsels of both parties prayed that the appeal be argued by way of written submissions, whereas Mr. Muhalila learned counsel argued the appeal for the appellant and Mr. Kipoko learned counsel opposed the appeal for the respondent.

Supporting the first ground of appeal, Mr. Muhalila on the outset cited the case of **School Trustees of Washington City Administrative Unit versus Benner, 222 N.C 566, 24 S.E 2d 259, 263** in which the phrase *functus officio* was defined as follows:

> *"**Having fulfilled the function, discharged the office, or accomplished the purpose, and therefore of no further force or authority.** Applied to an officer whose term has expired, and who has consequently no further officio authority; and also, to instrument, power, agency etc which has fulfilled the purpose of its creation, and is therefore of no further virtue of effect."* Emphasis supplied

Mr. Muhalila submitted that it is on record that the appellant through Probate Cause No. 169/2021 at Moshi Urban primary Court was appointed unopposed on 20/9/2021 to be the Administrator of the estate of the late Fatuma Suleiman Hamza. He successfully filled all necessary forms and was ready to start administration of the estate of the deceased by collecting and distributing to heirs the available properties. That, strangely, the respondent raised objection challenging the appointment of the appellant as administrator of the estate of the late Fatuma Suleiman Hamza while he was already appointed. The learned counsel for the appellant was of the opinion that after appointment of the appellant as administrator, Moshi Urban primary court became *functus officio* to entertain the matter it had already given an order. That, the only way out to the respondent was for him to apply for revision before the district court to challenge the administration of estate of the deceased by the appellant, or to apply for revocation of appointment of the appellant under **rule 9 (1) of the Primary Court (Administration of Estates) Rules, GN. 49 of 1971.**

It was submitted further that the nature of objection by the respondent before the trial court directly wanted to challenge the appointment of the appellant while they were time barred. Mr. Muhalila cemented his argument by referring to the case of **Kamundu v. Republic [1973] EA 540** in which the defunct East African Court of Appeal held that:

> *"A court becomes functus officio when it disposes of a case by a verdict of passing guilty or passing sentence or making some orders finally disposing of the case."*

That, the above position was also held in the case of **Bibi Kisoko Medard vs Minister for Lands Housing and Urban Developments and Another [1983] TLR 250** in which the late Mwakibete J, held that:

> *"In a matter of judicial proceedings once a decision has been reached and made known to the parties, the adjudicating tribunal thereby becomes functus officio."*

The learned counsel for the appellants was of the view that it was wrong for the trial court to entertain such objections challenging the appointment of the appellant as Administrator of the estate of the deceased which were raised after the appointment was already done by the same court and then appointed the respondent as co-administrator. Hence, the appeal to the district court which appointed the respondent as sole administrator which emanated from such objections was misconceived and that even the decision of the first appellate court is a nullity.

On the second ground of appeal, Mr. Muhalila submitted that it is a well-established principle that all objections relating to the appointment of the administrator of any estate, must be presented to court before the appointment is done. And once the appointment is done, the trial court hands are tied to some aspects. That, in this case the appellant was appointed unopposed on 20/9/2021 before the trial Magistrate. Strangely, on 27/01/2022, the respondent instead of challenging the appointment to the higher court, went back to the trial court and before the same magistrate and raised objections regarding the appointment of the appellant. The trial magistrate instead of advising the respondent to take proper procedure to challenge the appointment of the appellant, he illegally entertained the objections and then appointed the respondent as

co-administrator. Mr. Muhalila was of the opinion that the trial court could have interfered if the appellant had failed to administer the estate properly or if the respondent had applied before the trial court for revocation of appellant's letters of administration under **rule 9 (1) of the Primary Court (Administration of Estates) Rules, GN 49 of 1971.** That, the respondent could have advanced reasons for annulment of the appellant as administrator of the estate of the late Fatuma Suleiman Hamza. In this case, it was alleged that the respondent raised the objections before the appellant had started the administration. Mr. Muhalila concluded that the first appellate court erred by entertaining the appeal which was a result of the objections which were wrongly raised before the trial court.

On the third ground of appeal, the learned counsel for the appellant contended that the respondent was wrongly appointed as co-administrator by the trial court because the objections which enabled him to be appointed were wrongly raised. That, the trial court was *functus officio* to entertain such kind of objections after it had appointed the appellant as sole administrator. In that regard, it was the opinion of Mr. Muhalila that the appeal which emanated from such wrong appointment was illegal.

On the fourth ground of appeal, the learned counsel reiterated his submission on the second ground of appeal and added that in nullifying the appointment of the appellant the first appellate court reasoned that the appellant failed to show that he had interest in the estate of the deceased and that he failed to produce the death certificate. Mr. Muhalila asserted that it was totally wrong because the family of the deceased proposed as the administrator of the estate of the deceased which was sufficient to prove that the appellant had interests in the estate of the

deceased as the appellant stated before the court that the deceased was his aunt. It was contended that the raised reasons were insufficient to revoke the appellant's letters of administration. The learned counsel subscribed to the decision in the case of **Ibrahim Hassan Hanzuruni versus Ashura Selemani Faraja, PC Civil Appeal No. 164 of 2020,** HC at DSM (unreported) at page 8 of the judgment where it was stated that for revocation to take place, the administrator must breach the conditions of grant under **Rule 9 (1) of GN 49 of 1971** (supra). It was held that:

> *"It is common knowledge that the Primary Court has been conferred with jurisdiction to entertain administration cases where the law applicable is customary law or Islamic law as provided under paragraph 9 (1) of the Fifth Schedule. Likewise, it has power to appoint one or more persons interested in the estate of the deceased, an officer of the court or some reputable and impartial person to be administrator of the estate of the deceased pursuant to Paragraph 2 (a) and (b) of the Fifth Schedule. Equally, just like the power to appoint, pursuant to Paragraph 2 (c) of the Fifth Schedule, it has the power to revoke any appointment of the administrator for good and sufficient cause. However, according to rule 9 (1) of the Primary Courts (Administration of Estates) Rules (supra) such revocation can be made on the ground that the administrator has been acting in contravention of the terms of the grant or wilfully or negligently against the interests of creditors or beneficiaries of the estate."*

On the sixth ground of appeal, it was submitted that the respondent was appointed by the trial court illegally. That, the first appellate court erred by believing that the respondent was the only relative of the deceased.

On the seventh ground of appeal, it was alleged that **Rule 9 (1) of GN 49 of 1971** provides the circumstances under which the letters of administration can be revoked. Thus, the two courts below were bound by this rule before the appointment of the respondent as co-administrator and before revocation of letters of administration by the first appellate court. That, the judgment of the first appellate court does not contain any ground/reason enshrined under Rule 9 (1), since if during evaluation of evidence the court had interpreted well such provision, it could have not revoked the administration by the appellant.

The learned counsel for the appellants prayed that this appeal be allowed and the appellant be reinstated as sole administrator.

Opposing the appeal on the first, second and third grounds of appeal, from the outset Mr. Kipoko submitted that the first appellate court had jurisdiction to determine the appeal. That, the decision of the trial primary court in Probate Cause No. 169/2021 was final decision of which an appeal lies to the district court as a matter of right stipulated under **section 20 (3) of the Magistrates Courts Act, Cap 11 R.E 2019**. That, the position was evaluated and analysed at length by the appellate district court as seen on page 12 to 18 of the typed judgment.

On the fourth, fifth and sixth grounds of appeal, it was replied that the first appellate court was justified to remove the appellant as co-administrator on sound reasons after properly evaluating the evidence on the record. It was contended that at page 20 to 25 of the typed judgment,

the first appellate court found that the appellant had no interest whatsoever in the estate of the late Fatuma Suleiman Hamza, and had lied to that extent. That, the appellant had not been appointed by the family of the deceased and did not present death certificate of the deceased. As such, the appellant was appointed based on misrepresentation of facts.

On the seventh and eighth grounds of appeal, it was averred that the trial primary court made appointment of the current respondent as he had in his possession the death certificate, he was appointed by the family of the deceased and was thus qualified to be so appointed as administrator. That, the trial primary court ought to have annulled the appointment of the current appellant rather that retain him as a co-administrator and that is why the current respondent appealed to the district court.

It was further submitted that; the current appellant is intending to delay administration of the estate in question and lacks any credibility. Mr. Kipoko was of the opinion that in any event, the appellant had failed to show how the appointment of the respondent as administrator is prejudicial to the estate of the late Fatuma Suleiman Hamza.

Having considered the submissions of both parties, it is trite law that appellate courts may rarely interfere with trial court's findings of facts. It may do so in circumstances where trial court had omitted to consider or had misconstrued some material evidence, or had acted on wrong principle or had erred in its approach to evaluating evidence. In the case of **Helmina Nyoni vs Yeremia Magoti, Civil Appeal No. 61 of 2020,** CAT at Tabora it was held that:

"The second appellate courts should be reluctant to interfere with concurrent findings of the two courts below except in cases where it is obvious that the findings are based on misdirection or misapprehension of evidence or violation of some principle of law or procedure, or have occasioned a miscarriage of justice."

According to the grounds of appeal advanced by the appellant herein and the submission in support thereof, the appellant has raised the issue of the trial court being *functus officio* to determine the objections raised by the respondent herein. That, the first appellate court erred to revoke the letters of administration of the appellant and confirming the respondent herein as sole administrator in an appeal which emanated from objections which were wrongly raised by the respondent. On the face of it, the first issue for determination is *whether the trial court had jurisdiction to entertain the objections raised by the respondent herein after the appointment of the appellant herein*. **Paragraph 2 (c) of the Fifth Schedule of the Magistrates Courts Act, Cap 11 R.E 2022** confers powers on a primary court *to revoke any appointment of an administrator for good and sufficient cause and require the surrender of any document evidencing his appointment*. **Paragraph 2 (b) of the Fifth Schedule** (supra) provides that:

"2. A primary court upon which jurisdiction in the administration of deceased's estate has been conferred may-

(b) either of its own motion or an application by any person interested in the administration of the estate, where it considers that it is desirable to do for the protection of the estate and the proper administration thereof, appoint an officer of the court or

some other reputable and impartial person able and willing to administer the estate to be administrator either together with or in lieu of an administrator appointed under subparagraph (a);"

From the wording of the above quoted provisions, it clear that the primary court is conferred with jurisdiction to entertain applications (including objections) after appointment of the administrator. That jurisdiction includes appointing an additional administrator either of its own motion or upon an application by any person interested in the administration of the estate; and revocation of the appointed administrator. In simple words a primary court does not become *functus officio* after appointing the administrator of the estate. When does the court become *functus officio* in probate and administration matters? It is after an inventory and accounts have been filed in court. The cases of **Ahmed Mohamed Al-Laamar v. Fatuma Bakari and Another, Civil Appeal No. 71 of 2012,** CAT (unreported) and **Hadija Masudi (as the legal representative of the late Halima Masudi) v. Rashidi Masudi, Civil Appeal No. 26 of 1992,** CAT (unreported) are relevant. Furthermore, the respondent herein objected the appointment of the appellant within 42 days from the date of petition. That being the case, I am of settled opinion that the first, second and third grounds of appeal have no merit.

Concerning the fourth to eighth grounds of appeal which are based on issues of fact, with due respect to the learned counsel of the appellant, the decision of the first appellate court based on its evaluation of evidence on the record. As rightly submitted by the learned counsel for the respondent, the respondent was confirmed as administrator due to the fact that he had in his possession the death certificate, he was appointed by the family of the deceased and was thus qualified to be so appointed

as administrator, replacing the late Fatuma who was the administratrix of the estate of her late husband, the uncle of the respondent herein. In the case of **Sekunda Mbwambo v. Rose Ramadhani [2004] TLR 439** it was held inter alia that:

> *"Furthermore, it must by now be very obvious to all, that* ***such an administrator*** *must be a person who is very close to the deceased and can therefore, easily identify the properties of the deceased.* ***He must also have the confidence of all the beneficiaries or dependants of the deceased."*** Emphasis added

In the instant appeal, the learned Magistrate of the first appellate court evaluated thoroughly the background of this matter. It is evident from the record among other things that the petition filed by the appellant herein was not citated for a prescribed time. The appellant was appointed within 25 days and he had no death certificate under his possession. Justice hurried is justice buried. This being the second appellate court, I do not see any justification to disturb the findings of fact of the first appellate court as no material evidence has been omitted or misconstrued nor did the first appellate court act on a wrong principle or erred in its approach to evaluating evidence.

In the event, I dismiss this appeal for lack of merit. No order as to costs.

It is so ordered.

Dated at Moshi this 25th day of October, 2022.

S.H. SIMFUKWE

JUDGE