IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[ARUSHA DISTRICT REGISTRY]

AT ARUSHA

CIVIL APPEAL No. 59 OF 2021

(C/F Civil Appeal No. 16/2021, Babati District Court, Originally from Probate and Administration Cause No.58/2021 Babati Primary Court)

SALIMU ISSA MSANGI.....APPELLANT

VERSUS

ISMAIL ISSA MSANGI.....RESPONDENT

JUDGMENT

Date of last order 08th November 2022

Date of judgment 02nd December 2022

BADE, J

The Appellant herein appealed against the decision of Babati District Court in Civil Appeal number 16 of 2021 which originated from the Probate and Administration Cause number 58 of 2021 before Babati Primary Court hereinafter referred to as the Trial Court. The District Court of Babati had decided in favour of the Respondent previously. As the matter progresses, the first Appellate Court upheld the Trial Court's decision and dismissed the appeal with costs. The Appellant dissatisfied approached this Court in second appeal.

The Petition of Appeal consists of five grounds thus:

1. That, the first Appellate Court erred in law and fact by moving suo motu in its findings by not considering all grounds of appeal raised and presented before the court and reached into the wrong and biased decision.
2. That, the trial Primary Court Magistrate and first Appellate Court erred in law and fact by rejecting the Objections raised by the Appellant during the trial while knowing that the Respondent was rejected and disqualified by the same Court on probate Cause No. 26 of 2020 on the same grounds of objections by the Appellant (by then the Objector hence reached into biased decision to appoint the Respondent to be the Administrator of the Estate of the deceased who is not trustworthy who sold the deceased properties even before applying to be appointed to be Administrator of the deceased.
3. That, the trial Primary Magistrate and first Appellate Court erred in law and fact by regarding and entertaining the fabricated Minutes of the deceased family meeting held at Usangi while the deceased domicile is Babati Town and not Usangi and other family members were not involved.

4. That, the trial and first Appellate Court erred in law and fact by accepting hearsay evidence from the Respondent that, the Appellant is not the deceased son without any critical proof.
5. That, the trial Primary Court Magistrate and first Appellate Court erred in law and fact by holding that, the Appellate (Objector) does not know the duties and responsibilities of the Administrator of the Estate without ascertaining that the Respondent (the Applicant) knows the duties and responsibilities of the Administrator of the estate.

The facts of this case can be briefly stated that, the Respondent Ismail Issa Msangi filed a Probate and Administration Cause no 58 of 2021 before Babati Primary Court, following the issuing of general citation. The Appellant filed objection proceedings challenging the legality of the family meeting basing on the ground that he was not involved in that meeting while he is a member of the Deceased family. After the hearing of the objection the Court ruled that the family meeting was legally conducted since majority of the family members were present in the meeting, hence the objection was found illogical.

After the ruling the court proceeded with the determination of the application for administration of estate of the late Issa Msangi and on the 19th August 2021 the Respondent by then an Applicant was appointed as an Administrator of the Deceased's estate. The Appellant being aggrieved with the ruling by the trial court appealed before the District Court of Babati, which upheld the Trial Court's decision that resulted into this appeal before the High Court.

Parties argued this appeal by way of written submissions, with scheduling order to the effect that Appellant's submissions were filed on 12th July 2022, Respondent's submissions were filed on 26th July 2022; and rejoinder submissions filed on 02nd August 2022.

The Learned Counsel for the Appellant sought the Court's leave to argue the 1st and 4th grounds of appeal jointly and abandoning the 2nd, 3rd, and the 5th grounds of appeal. He reasoned that, the first appellate court erred in law and fact by moving suo motu in its findings by not considering all grounds of appeal raised and presented before the court and reached into the wrong and biased decision, due to the fact that, the issues for determination by the first Appellate court were basically on the grounds of appeal raised by the Appellant which were also the grounds of objections that the trial court

rejected; and thus the aggrieved party went on by way of appeal to seek his remedies and sought reliefs by way of an appeal.

He submitted that, there is nowhere on the court records of the 1st Appellate court's decision that provides the reasoning as to why the 1st appellate court desist from dealing with any of the grounds of appeal from those presented to it by the Appellant; and instead decided to invoke the provisions of section 20 (1) (b) of the Magistrates Courts Act, (Cap 11 RE 2019) which he argues, is not applicable to give such powers to the 1st appellate court to demonstrate the power to make evaluation of evidence on record and come with its own findings. Section 20 (1)(b) of the MCA Cap 11 RE 2019 provides for the right to appeal for the aggrieved party following decision or order of the Primary Court to have right to appeal to the District Court and not otherwise.

He also submitted that; the 1st Appellate Court went astray by leaving the Appellant's appeal unattended by not dealing fully with the grounds of appeal presented by the Appellant.

In reply submissions, the Counsel for the Respondent submitted that it is a common practice that grounds of appeal can be consolidated to form one issue for determination, and that the 1st appellate court needed not to deal

with grounds of appeal in seriatim but rather deal with the decisive ground of appeal which sufficiently disposed the entire appeal. The Counsel also submitted that, the Appellant has no interest in the deceased's estate, he neither had the capacity to object the appointment of the administrator nor appeal against his appointment. He stated further that, the 1st Appellate court was right to determine the appeal in the way it did hence the Appellant's allegation that the appeal was left unattended is unjustifiable.

He maintains that, the Appellant was duty bound to bring the necessary proof to show that the Deceased is his biological father, but the Appellant has failed to do the same against the law that tritely provides under section 111 of the Law of Evidence Act, cap 6 [RE 2019] that he who alleges must prove.

On the other hand, the learned Counsel for the Appellant submitted further that, the 1st Appellate court went astray by coming into the wrong findings in law by relying on the hearsay evidence of the Respondent and the Relatives saying that, the Appellant is not the deceased's son without any critical biological proof. The Counsel also argued that, the matter before the trial court was not the determination as to who has interests or right to inherit the deceased properties or estate but the subject matter was only the appointment of the administrator of the deceased estate of which the

Appellant be it disputed or undisputed; to be the deceased son was not subject to the qualification or disqualification of the Respondent to be appointed the Administrator of the estate of the deceased.

In rejoinder submissions the Appellant reiterated what he stated in the submissions in chief, insisting that the 1st Appellate court did not deal with the raised grounds of appeal but rather formulated its own points of determination while the source of the dispute is the family meeting which the Appellant did not attend as among the rightful heirs of the Deceased.

As argued earlier on by the Appellant's Counsel that his submissions in chief will support only the 1st and the 4th grounds of appeal. The Appellant abandoned the other three grounds of appeal.

Basing on these two grounds of Appeal, this court's issues for determination are whether the 1st Appellate Court had moved suo motu to address an unraised issue abandoning all other grounds of appeal, and whether it unjustifiably accepted hearsay evidence from the Respondent that the Appellant is not the deceased son without any critical proof.

As alleged by the Appellant, the records of the trial court are clear that the Appellant filed objection proceedings before Babati primary court basing on the fact that, he was not involved in the family meeting held at Usangi hence

that renders that meeting to be illegal, his objection was found lacking by the trial court, he was aggrieved by the appointment of an Administrator without his presence as one of the members of the Deceased family, the Appellant decided to appeal before the District court of Babati.

In the course of deliberation of the appeal, having gone through both Parties' submissions, I dug through the lower court's records, and found that this was the contention at the primary court objections proceedings no 58 of 2021. The fact that the appellant herein was not called to attend that meeting of the family of the deceased at Usangi; necessitating his objection of the Respondent to be appointed administrator of the deceased estate. The trial court recorded the Respondent herein then Applicant as saying the reason that the appellant was not called upon to take part in the deceased estate family meeting was that they did not recognize him as neither their sibling (the son of the deceased) nor their relative. See page 2 – 3 of the trial court's judgment. The record further reveals the Applicant then; Respondent herein stating that they know the objector has been known by the names Aron Jackson Teti, and these statements were shown to be corroborated by all the other witnesses that have testified at the objection proceedings that they do not recognize the objector as one of the deceased son and their sibling.

On the other hand, the trial court applied its mind to two issues – why the objector was omitted and not involved in the family meeting, and why the meeting had to happen in Usangi instead of Babati. See page 3-4. It answered these issues according to the evidence presented to it, that while they adhered to the requirement that was instructed by the Court in Babati to have the family meeting, they had not involved the objector in this meeting because they did not recognize him as his presence came about during the death and funeral of the deceased. It is not on record that the deceased rebutted these allegations by providing any proof that he was in fact a son of the deceased, and thus entitled to not only take part in the family meeting or and later inherit on the estate of the deceased.

On that account the objections were rejected and the trial court proceeded to appoint the present respondent to be the administrator of the estate of the late Issa Shabani Msangi. Now let's see the issues on the 1st appellate court and what informed the decision of that particular Court. The grounds of appeal presented at the district court are paraphrased that the court erred in rejecting the objections raised by the appellant; that the court erred in entertaining some fabricated minutes of the deceased family meeting as held in Usangi while the deceased was domiciled in Babati, that the court erred in accepting hearsay evidence from the respondent that the appellant is not

the deceased son without any proof; and lastly that court erred by holding that the appellant does not know the duties and responsibilities of the administrator of the estate.

I would agree with the respondent's counsel that the court can consolidate the grounds of appeal. More importantly, its good and common practice to frame issue(s) while considering an appeal despite the grounds of appeal presented. This is because it helps the court to apply its mind to the dispute at hand. The Court of Appeal has pronounced itself in **Malmo Montage Konsult AB Tanzania Branch vs Margret Gama, Civil Appeal no 86 of 2001,** which was also quoted on emphasis on **Cheyonga Samson @Nyambare vs Republic, Criminal Appeal No 510 of 2019** (both unreported ; that the first appellate court is not expected to answer the issues as framed at the trial. That is the role of the trial court. It is however, expected to address the grounds of appeal before it. **Even then, it does not have to deal seriatim with the grounds of appeal as listed in the memorandum of appeal. It may if convenient, address the grounds generally or address the decisive ground of appeal only or discuss each ground separately.**

So, what the first appellate court did is to consolidate the grounds of appeal and address them generally, while framing an issue to assist in directing its

mind to apply to the grounds of appeal and the issue because the scrutiny of the record is clear that the issue cannot be isolated to only the appointment of the administrator, since during the trial court objection proceedings these issues came up and were decided upon by the court which heard the evidence. So, in my view the district appellate court was correct to direct its mind as it did especially because the appellate court can and is entitled to confine its judgment to only one issue or ground of appeal out of several grounds which were raised and filed or the issue as shall be framed as the case may be as well as consider all evidence as provided at trial, and came to its own finding.

In doing so, the 1st appellate court framed the issue whether the appellant had any legal interest over the estate of the late Issa Shabani Msangi. In the case of **Malmo Montage Konsult** cited earlier supra, the court discussed the stance taken by **Kimaro, J** as she then was, who thought that all five grounds of appeal raised by the appellant therein could be consolidated into one ground of appeal, and asked herself a separate issue on which the court applied its mind to resolve the matter before it. Suffices to say that the appellant on further appeal to the Court of Appeal was aggrieved by this stance by the trial judge. At the end of the day, the Court of Appeal **also disposed the case on grounds other those raised and advanced by**

the appellant and affirmed the liberty that can be taken by the trial court regarding grounds of appeal or framing of issues. (*emphasis mine*)

In any case, this is what the law requires while determining whether or not to grant letters of administration of an estate to an applicant. As rightly argued by the counsel for the appellant, the issue that featured throughout the two courts below was the appointment of the administrator of the deceased estate, to which the appellant was objecting to. The truth of the matter is that there were questions on the issue of whether the objector /appellant herein is in fact a son of the deceased. And to this I would agree with the respondent's counsel herein that it was not for the respondents then to prove and present the needed proof. In any case it was the Objector/Appellant herein who came in to say that he is the son of the deceased, without providing any proof. The burden of proof was actually on him as he was the one who alleges existence of a particular fact who must prove the said existence as per section 111 of the Evidence Act, Cap 6 RE 2019.

This brings us to the second issue hinging on the 4th ground of appeal that the appellate court accepted the holding of the trial court that the appellant

is not the son of the deceased. I am of the view that while this was contended upon during the objection proceedings, there was no holding one way or the other as argued by the counsel for the appellant, because the holding of that court was to reject the objections by the appellant as it found no merits to his objections basing on the fact that the person who is being appointed to the office of the administrator of the estate of the deceased is fit for such appointment as there were no any proof that he will misappropriate the deceased properties or is not trustworthy. In any case these allegations were brought prematurely. Any discussion of who would be the rightful heirs could not have come during the appointment of the administrator stage, and thus the fact disputed or otherwise of the status of the appellant in regard to him being a son or not of the deceased could not have been exhaustively determined, despite being contended upon at the trial. It definitely was not the determining factor of whether or not the appointment of the administrator of the estate be granted or not. More importantly, the complaint that the appellant was excluded from the family meeting that proposed the administrator of the estate while he is purportedly "a son" of the deceased cannot hold the day because as it is established; the holding of a family meeting is not a pre requisite for proposing and eventually appointing by the court of the administrator of the estate of a deceased

person. I am fortified by the holding of my brother learned judge Masara, J in **Oliver Bernard and Kornel Bernard in PC Civil Appeal No 6 of 2020** (unreported) where he held "…. While it has been customary for a person interested in petitioning for letters of administration to be appointed by the clan to attach in the application the clan meeting minutes signifying such appointment…… the presence or absence of the clan/family meeting minutes is not a requirement in appointing an administratrix of the deceased's estate as thought by the trial court. The primary factor to be taken into account when appointing the administrator / administratrix of the deceased 's estate is the interest that person has in the deceased 's estate.

The practice of having family meeting and attaching thereto minutes when applying for the grant of the letter of administration is more a matter of practice and never a matter of law, and thus cannot be said to be the reason to vitiate an appointment of an administrator or revoke the letters hitherto, and thus it naturally follows thus on where those meeting are held is equally an unimportant factor.

Having deliberated on both the 1st and 4th ground of appeals, I have come to the conclusion that this appeal has no merit and thus it must fail basing on what I have endevoured to establish coupled with the authorities as guided by the Court of Appeal. The administrator should proceed to execute

the duties of the office of the administrator of the estate of the late Issa Shabani Msangi as granted by the trial court as it is left unadministered since 2018.

Consequently, I am inclined to order the respondents to have their costs. It is so ordered accordingly.

DATED at **ARUSHA** on the 02nd December, 2022.

A.Z. BADE

JUDGE