THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MBEYA)

AT MBEYA

PROBATE APPEAL NO. 04 OF 2022

(From the District Court of Mbozi at Vwawa (Hon. N. L. Chami, RM) in Probate Appeal No. 03 of 2021. Originating from Vwawa Urban Primary Court in Probate Cause No. 33 of 2021)

CHRISTINA MWEMBE MSAWILA.....APPELLANT

VERSUS

MUSA LINGISI SWILA.....RESPONDENT

JUDGEMENT

Date of Last Order : 18/08/2022
Date of Judgement: 17/11/2022

MONGELLA, J.

This matter emanates from Vwawa Urban primary court in Probate Cause No. 33 of 2021 in which both parties were appointed to administer the estate of the late Lingisi Mwanguleke Swila. The appellant was aggrieved with the appointment of the respondent thus appealed to the District Court vide Probate Appeal No. 03 of 2021. The District Court found nothing to fault the primary court decision thus dismissed the appeal. This is therefore a second appeal. The appeal has been preferred on three grounds, to wit;

1. That the trial courts (sic) erred in law and facts for appointing the respondent as administrator of estates of the late LINGISI MWANGULEKE SWILA despite being revoked by the appellant. (sic)

2. That the trial courts (sic) erred in law and facts for failure to properly evaluate the evidence of the appellant hence wrongly decided the case.

3. That the trial courts (sic) erred in law and facts for appointing the respondent as administrator of estates of LINGISI MWANGULEKE SWILA despite who (sic) has bad motives against the appellant and her children.

Both parties appeared in person. For interest of justice and following the prayer by both parties, the appeal was argued by written submissions. The written submissions were filed in court as per the scheduled orders.

In her submission, the appellant collectively argued the 1st and the 3rd grounds. She referred first to the **Fifth Schedule paragraph 2 (c) of the Magistrates' Courts Act, Cap 11 R.E. 2019** saying that it gives powers to the primary court to revoke the appointment of administrator upon good and sufficient cause. She said that the appellant applied for revocation of the respondent as an administrator on reasons that: the respondent has bad motives against the appellant and his siblings; he never nursed his sick father; he has included the farms of the appellant and those of his siblings given to them prior to the death of the deceased, in the estate to be administered. She had the stance that the acts of the respondent as an

administrator qualifies under **Rule 9 (1) (e) of the Primary Court (Administration of Estates) Rules G.N. No. 49 of 1971**, hence the trial court ought to revoke the appointment of the respondent as administrator of the late Lingisi Mwanguleke Swila, as he is not fit in administering the estate of Lingisi Mwanguleke Swila.

She argued so saying that the respondent acts negligently against the interests of the beneficiaries of the estate by including farms of the appellant and his siblings in the estate. She added that the respondent as well did not include other beneficiaries who are entitled to inherit from the estate. She further claimed that the respondent's actions began when the deceased was sick whereby he abandoned him and appeared after the deceased died and petitioned for letters of administration. He had the view that if the respondent abandoned his father during his sickness then it is likely that he shall not consider other beneficiaries for his personal benefits. That, the respondent's actions shall continue even in administration of the estate.

Regarding the 2nd ground, she faulted the lower courts for failure to properly evaluate the evidence on record. She specifically referred to her evidence which she said supported her claims to have the respondent revoked. She reiterated her claims that she told the trial court that the respondent has bad motives, he did not consider other beneficiaries, he did not nurse his sick father as he abandoned him during his sickness, and he included the appellant's farms and those of his siblings. She challenged the lower courts for reaching its decision by considering that the appellant ought to have brought the person whom she thought being

fit to be appointed as administrator and that she failed to give reasons as to why the respondent's appointment need to be revoked.

She kept on maintaining that the lower courts failed to evaluate the evidence properly. She contended that if the lower courts had evaluated the evidence properly they would have reached different findings and decision whereby the respondent's role of administration would have been revoked. She argued so on the following reasons:

One, that calling the names of proposed administrator that the appellants proposed is not the proof of revocation of the appellant (sic). That, the failure to call the proposed administrator does not mean that the respondent cannot be revoked. She referred to **Rule 9 (2) (e) of the Primary Court (Administration of Estates) Rules, G.N. No. 49 of 1971**, which empowers the court to appoint administrators amongst the heirs or beneficiaries after revocation of the administrator. In the premises she found it was not necessary to summon the proposed administrator to justify the revocation of the respondent.

Two, that lack of cooperation of the respondent in nursing the deceased Lingisi Swila during his sickness was adduced by the appellant as one of the grounds of revocation and was never challenged by the respondent. That the respondent as well never challenged the appellant's testimony to the effect that he never showed any cooperation to the appellant and her children. She cited the case of ***Bomu Mohamedi vs. Hamisi Amiri***, Civil Appeal No. 99 of 2018 (CAT at Tanga, found at Tanzlii), which ruled that failure to cross examine a witness on a certain matter is deemed as

acceptance of the matter and the party is estopped from asking the trial court to disbelieve what the witness said. She thus argued that the respondent is estopped from denying that fact. She prayed for the appeal to be allowed with costs.

The respondent opposed the appeal. In his submission, he argued that the appellant failed to prove her allegations in the District Court and has again failed to provide a good and sufficient cause for this Court to revoke the appointment of respondent to administer the deceased's estate. She challenged the appellant for relying on **Paragraph 2 (c) of the Fifth Schedule to the Magistrates' Courts Act** on the ground that the appellant has failed to prove her allegation that the respondent had bad motive against her and her children. He argued further that the appellant wants his appointment to be revoked without saying who the fit person to be appointed is. In his view, considering the circumstances, the appellant is the one with bad motives. He wondered why the appellant is not satisfied with the appointment of both of them to administer the estate and considered that as a delaying tactic in administration of the estate.

The respondent contended further that every child has a right to inherit from his biological parent. That, when the appellant married the deceased, Lingisis Mwanguleke Swila, she already had two children from other men and thus she is fighting for the said children to inherit from the estate of the deceased who is the biological father of he respondent and 4 other children. In the premises he made a prayer that this Court orders that the respondent alone should be the administrator of the estate of the deceased. He advanced the prayer arguing that the record of the

dispute suggests that if the appellant is appointed the administratrix she will not perform her duty of collecting and dividing the estate of the deceased for the sole purpose of keeping it for herself and her children.

The respondent continued arguing that the lower courts made a correct decision after evaluating the evidence of both parties. He disputed the appellant's claim that he never nursed his sick father and that he never challenged the claim in the trial court. He contended that he testified in trial that he cooperated in nursing his sick father through providing financial support in buying medicines. He further challenged the appellant's allegations arguing that the allegations needed another solid evidence to make it good because people measure cooperation differently. That, others may provide medical assistance, money, religious words and prayer or cooking for the sick, and all that can be termed as cooperation. He added that upon finding that there was no other evidence to support her allegation, the trial court failed to take into account the allegation as being a good reason to revoke the respondent's appointment as administrator.

He as well disputed the appellant's claim that the respondent did not cooperate with her and her children. He referred to page 2 of the District Court's decision whereby it is stated that the appellant and her children are the ones who refused to attend meetings convened by the respondent. In the circumstances, he argued that it is the appellant who did not want to cooperate. He added that the appellant wanted the respondent's uncle to be the administrator but she failed to bring him because he lives in Sumbawanga; then she wanted her daughters, the

respondent's sisters, named one Marietha and one Tumaini, to be appointed administratrix of the estate. He concluded that the appellant's cases are a mere tactic of delaying administration of the deceased's estate for her own selfish goals. He prayed for the appeal to be dismissed.

In her brief rejoinder the appellant had the opinion that the respondent failed to grasp the reasons she advanced at the trial court and in her submission in chief. She said that she claimed that the respondent has bad motives towards her family as he comes from the first wife's family. That he included her privately owned property in the deceased's estate. That he did not include other properties owned by the deceased as the respondent has already sold them and wants to include properties which he intends to sell to deprive other heirs, especially the female children that she gave birth with the deceased.

Referring the case of ***Bomu Mohamed vs. Hamisi Amiri*** (supra) she insisted that all what she said was not contested by the respondent in cross examination. She maintained her stance that the respondent's actions contravene **Rule 9 (1) (e) of the Primary Court (Administration of Estates) Rules, G.N. No. 49 of 1971**. She as well disputed the respondent's assertion that the appellant is the one with bad motive with intent to delay administration of the deceased's estate; and that the appellant had the two daughters with another man. She contended that she has interest in the deceased's property and her two daughters are fathered by the deceased. She further maintained her submission in chief and prayed for the appeal to be allowed.

Having considered the grounds of appeal, the arguments by the parties and gone through the lower courts record, I am of the view that the appeal can be disposed under one main issue as to whether the trial court erred in its decision appointing both parties to administer the late Lingisi Mwanguleke Swila's estate. In the course of deliberating on this issue, I shall consider the issues raised in the grounds of appeal.

First of all I wish to point out that the appellant appears to confuse between revocation of an administrator and objection to the grant of letters of administration. She claims to have revoked the respondent in the trial primary while in essence, considering the record; she filed a complaint objecting the appointment of the respondent as the administrator. Revocation occurs after the administrator is already appointed. The provision relied upon by the appellant, that is, **Rule 9 (1) (e) of the Primary Courts (Administration of Estates) Rules, G.N. No. 49 of 1971** is irrelevant to her claims of objecting the appointment of the respondent to administer the deceased's estate. The provision, for ease of reference states:

> *"9 (1) Any creditor of the deceased person's estate or any heir or beneficiary thereof,* ***may apply to court which granted the administration to revoke or annul the grant*** *on any of the following grounds-*
>
> *(e) that the administrator has been acting in contravention of the terms of the grant or willfully or negligently against the interests of creditors, herein or beneficiaries of the estate."*

As the words go in the above quoted provision, revocation occurs where the letters of administration have already granted, which was not the case in the matter at hand. Faced with a similar situation, this Court (Utamwa, J.) in the case of ***Zaituni Hassan Mganga vs. Abraham James Mwangake***, Probate Appeal No. 5 of 2020 (HC at Mbeya, found at Tanzlii) held:

> *"... in law, an objection against the appointment of an administrator of estate is distinct from a move for his revocation. The former is applied for and made before the actual appointment is done. On the other hand, the latter is applied for and made when the appointment has already been done."*

However, just like in revocation, the objection on appointment of an administrator can only succeed upon proof of good and sufficient cause See: ***Zaituni Hassan Mganga vs. Abraham James Mwangake*** (supra). In that respect, the record shows that in objecting the respondent to be appointed administrator of the late Lingisi Mwanguleke Swila's estate she advanced reasons to the effect that: the respondent was stubborn and she never wanted her to administer the deceased's estate; the respondent had included her properties in the estate to be administered; the respondent had not included his own farms in the estate; the respondent threatens her and had sent people to beat her; and that the respondent never cared for the deceased during his sickness.

Both lower courts never heeded to the appellant's claims on the main ground that she failed to furnish proof of her allegations and that she even failed to furnish the persons she preferred to be appointed to administer the deceased's estate. I have gone through the trial court proceedings

and find the lower courts' observation justified. In all her claims, the appellant averred mere allegations. The trial court gave her the chance to furnish witnesses to prove her allegations and even adjourned the matter twice to accord her the chance, but she failed to do that. The law is trite that the one who alleges must prove existence of the alleged facts and that the burden of proof lies on the complainant albeit in balance of probabilities. See: **Section 110 of the Evidence Act, Cap 6 R.E. 2019**. See also the case of ***Berelia Karangirangi vs. Asteria Nyalwambwa***, Civil Appeal No. 237 of 2017 (CAT, unreported) in which the Court of Appeal, while referring to its previous decision in the case of ***Godfrey Sayi vs. Anna Siame Mary Mndolwa***, Civil Appeal No. 114 of 2012 (unreported) stated:

> *"... we think it is pertinent to state the principle governing proof of cases in civil suits. The general rule is that, he who alleges must prove... It is similarly that in civil proceedings, the party with legal burden also bears the evidential burden and the standard in each case is on the balance of probabilities."*

In her submission in this appeal, the appellant considered herself to have proved her allegations on the ground that the respondent never cross examined her on the alleged facts. She supported her stance with the case of ***Bomu Mohamed vs. Hamisi Amiri*** (supra) which ruled that failure to cross examine entails acceptance of the alleged facts. I am very much alive at that settled legal position. However, I am also aware that the said rule is not absolute, especially where the credibility of the witness is in question. The Court has to consider all other relevant facts in the case. This position was settled by the Court of Appeal in the case of ***Zakaria***

Jackson Magayo vs. The Republic, Criminal Appeal No. 411 of 2018 (CAT at Dar es Salaam), in which the Court held, at page 13 that:

> *"It appears to us to be clear that the rule is not absolute. Our understanding of it is that it focuses on the material evidence adverse to the other party excluding incredible evidence."*

The Court took inspiration from a High Court decision (Samatta, J. as he then was) in the case of ***Kwiga Masa vs. Samwel Mtubatwa*** [1989] T.L.R. 103, in which it was held:

> "A failure to cross-examine is merely a consideration to be weighed up with all other factors in the case in deciding the issue or truthfulness or otherwise of the unchallenged evidence. The failure does not necessarily prevent the court from accepting the version of the omitting party on the point. The witness' story may be so improbable, vague or contradictory that the court would be justified to reject it, notwithstanding the opposite party's failure to challenge it during cross-examination. In any case, it may be apparent on the record of the case, as it is in the instant case, that the opposite party, in omitting to cross-examine the witness, was not making a concession that the evidence of the witness was true."

Marrying the observation of the Courts in the above cited cases with the circumstance in the case at hand, I find that the failure of the respondent to cross examine the appellant on the alleged facts does not in any way render him conceding to the facts alleged by the appellant. I am of this observation in consideration of two main factors. **First**, in his defence, the

respondent rejected the appellant's claims and the appellant as well never cross examined. **Second**, the trial court specifically needed proof of the allegations and ordered the appellant to furnish the proof and gave her time to furnish the proof, but she failed to do that.

With respect to the farms which she claimed to be her own private property but listed in the estate by the respondent, I find she as well failed to prove that as she could not describe the property. She did not even say where the properties were located. Had she proven her allegations the trial court would have dealt with the matter in terms of **Rule 8 (d) of the Primary Courts (Administration of Estates) Rules, G.N. No. 49 of 1971**. See also: ***Japhet Gonilima Mbuta vs. Edgar Mbuta***, Probate Appeal No. 08 of 2021 ((HC at Mbeya, (Ebrahim, J.) found at Tanzlii)

I as well find the claim that the respondent never cared for his sick father, apart from the fact that it was not proved, not automatically disqualifying him from administering the estate. In my view, the same would have an effect if the deceased had denounced him in a Will in consideration of that reason. This was however not the case and the record reveals that the respondent was chosen at a family meeting to administer the deceased's estate and one of his siblings testified in his favour.

The record reveals that the appellant was the second wife of the deceased and the respondent is the deceased's son from the first wife. In that respect, and as correctly observed by the trial court, both of them have an interest in the deceased's estate. Both of them are entitled to protect their interests in the deceased's estate. In consideration of this

factor as well, I find no reason at all to interfere with both lower courts' decision in appointing both parties to administer the deceased's estate.

The appeal is therefore found to lack merit and is dismissed accordingly. Considering the circumstances of the case and the relationship between the parties, I make no orders as to costs.

Dated at Mbeya on this 17th day of November 2022.

L. M. MONGELLA

JUDGE

Date: 17/11/2022

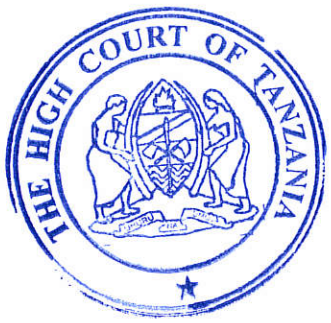
Coram: Hon. A.E. Temu, - DR.

Appellant:

Respondent: } Both present

B/C: Mapunda

Court: This appeal is coming for judgment today. The same delivered in the presence of both parties.



A.E. Temu

DEPUTY REGISTRAR

17/11/2022