IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

PC. CIVIL APPEAL NO 12 OF 2021

(Originating from Probate Appeal No.1 of 2020 of the District Court of Lindi at Lindi.)

SALMINI ABABI HAMISI ..... APPELLANT

VERSUS

STAWA SANDALI.....RESPONDENT

JUDGEMENT

28/7/2022 &15/12/2022

LALTAIKA, J.

The appellant herein **SALMINI ABABI HAMISI** is dissatisfied with the decision of the District Court of Lindi at Lindi in Probate Appeal No.1 of 2020. The brief facts leading to this appeal are as follows; the appellant is a son to the late Ababi Hamisi Ababi and the respondent is his stepmother. **Through Probate Cause No 7 of 2019 at Mingoyo Primary** Court the appellant was appointed administrator of estate of the late Ababi Hamisi Ababi.

In the course of carrying out his duties, disagreement ensued between him (the appellant) as the administrator and one of the heirs (respondent). The respondent took her complaints on the conduct of the appellant to

Mingoyo Primary Court. The Court ordered removal of the appellant as administrator of estate for failure to carry out his duties as required by law. The appellant was aggrieved. He appealed to the District Court of Lindi where the district court upheld the decision of the trial court. This is a second appeal.

Through legal services of Mr. Hussein Mtembwa, learned Advocate, the appellant has appealed to this court on five grounds as paraphrased bellow.

1. *The District Court erred in law for not offering the right to be heard.*
2. *Trial Court erred in ruling that the administrator of estate had been there for a year.*
3. *The District Court erred in holding that the appellant had used the property of the deceased for his own purposes.*
4. *The District Court erred in removing the administrator of estates without due cause.*
5. *The District Court erred in not finding that the appellant was not in person but administrator of estate.*

When the appeal was called on for hearing on 28/7/2022, the appellant was represented by **Mr. Hussein Mtembwa**, learned Advocate. The respondent, on the other hand, appeared in person, unrepresented. The learned Counsel announced that he was going to submit on the first four grounds only, vacating the fifth. He also undertook to refrain from using English and make use of simple and straightforward Kiswahili expressions bearing in mind that the rival party was appearing unrepresented. The pledge was, by and large, fulfilled. I commend the learned counsel for the same.

Submitting on the first ground, Mr. Mtembwa asserted that it appears that the root cause of the disagreement between the administrator and the respondent who is one of the heirs was **a shamba located at Kiwalala Village.** As per proceedings of Mingoyo Primary Court dated 18/5/2020 at page 6, Mr. Mtembwa asserted further, the trial court had stated that :

> *"Iandikwe barua kwa afisa kilimo wa kata ya Kiwalala ili akafanye tathmini ya shamba na mikorosho ekari mbili la marehemu lililopo Mdabwa Kijiji cha Luo. Na thamani itakayopatikana aielete mahakamani"*

The learned counsel went on to submit that the matter did not proceed before that magistrate as he was transferred. It was Mr. Mtembwa's submission that on 16/6/2020 a month later court records show that another magistrate named MMARI took over the matter whereupon she called the file *suo motto* and issued a summons that the case be called on 29/6/2020. Referring this court to a copy of the proceedings of the lower court in his possession, Mr. Mtembwa averred that although the heirs, more than 8 of them were not there, on page 7 the court is seen interrogating the respondent because she was robbed the farm by the appellant.

The appellant, as recorded on page 8, asserted the learned counsel, replied that he had not grabbed the shamba from the respondent. Based on such interrogation, Mr. Mtembwa stated, the court ended up making an order that since the appellant had failed to administer the estate he was to be removed from the position of the administrator of estate.

Arguing from the above backdrop, Mr. Mtembwa is of a strong opinion that the appellant was not accorded the right to be heard at the Primary

Court and, to add salt into injury, the District Court blessed the decision of the Primary Court holding that the appellant was in court and accorded the right to be heard. Mr. Mtembwa emphasized that there was a difference between what the appellant was asked and the reason the magistrate had given for removing him as an administrator. He was not given the opportunity to address the court on inability to finalize his duty of an administrator of estate for one year and a half, reasoned the learned Advocate.

Moving on to the second ground of appeal that the court had erred in ruling that the appellant had been an administrator for a year, Mr. Mtembwa was emphatic that court record did not show that he had been there that long as he was appointed on 25/11/2019 only five months to the date he was removed. In addition, as per the court records dated 18/5/2020 there was an order alluded to earlier where **Hon. Malocho, RM** needed valuation report, stated Mr. Mtembwa with emphasis. It is Mr. Mtembwa's reasoned opinion that the new magistrate was supposed to take cognizance of the order hitherto made by the same court.

It was Mr. Mtembwa's submission further that he was alive to the fact that the law empowers Primary Courts to revoke administration of estate but the same needed to be undertaken judiciously as opposed to haphazardly. To support his contention, the learned counsel referred this court to the case of **Mohamed Hassani v. Mayasa Mzee and Another [1997] TLR 225**

In the instant matter, argued the learned Counsel, no one had requested for revocation. Had it been obvious that the appellant had failed

to execute his functions, the magistrate was supposed to say so, emphasized Mr. Mtembwa adding that in principle, according to law, an administrator of estate is supposed to file an inventory within six months, but the court can enlarge the time. He cited **Rule 10 of the 5th Schedule to the Magistrate's Court Act** reiterating that in his considered view, the appellant was yet to fulfil the order of the court to bring the valuation hence both lower courts failed accord the appellant his right to be heard.

On the third ground of appeal, Mr. Mtembwa stated that the appellant was accused of using the property of the deceased for his own gain particularly the deceased's radio. The learned Counsel was quick to point out that according to the lower court records, the appellant had given an explanation that indeed, he had the radio of the deceased at his home place, but he had not assigned it to himself. Mr. Mtembwa is of a strong view that the District Court, in supporting its position, had misinterpreted the case of **Safieli Cleopa vs. John Kadeghe [1984] TLR 298.**

In the Cleopa's case (supra), argued the Learned Counsel, there was failure to account to the missing property of the deceased while in the instant matter, the situation was different as the appellant had conceded that he had the radio. Taking distinguishability further, Mr. Mtembwa emphasized that in the instant matter the issue was raised *suo motto* by the District Court and that there was no record to show that there was misappropriation. Since the same was not an issue at Primary Court, argued the Learned Counsel, he was certain that the District Court had erred for bringing in a new thing that was not there in the Primary Court.

Arguing for the fourth ground, Mr. Mtembwa asserted that the trial court had revoked the administrator without any record of wrongdoing. The Learned Counsel asserted further that the Primary Court had invented its own reasons that were not in the court records. Submitting rather thoughtfully, Mr. Mtembwa argued that this court has insisted over and over that before revocation of the administrator, courts must have enough evidence of wrongdoing. In case the court does the revocation on its own, argued the Learned Counsel further, records must be clear on inability to distribute the estate within 1 and a half years. To buttress his argument, Mr. Mtembwa referred this court to the case of **Zaituni Hasssan Mganga v. Abraham James Mwangake** Probate Appeal No 5 of 2020 HCT, Mbeya (Unreported).

In concluding his submission, Mr. Mtembwa emphasized that his arguments should not be interpreted as denying the widow of any of her rights to her late husband's property. On the contrary, stated Mr. Mtembwa reflectively while looking at "the widow" he was referring to directly in her eyes, (the respondent) what he was objecting was how the administration of estate position **was revoked from the appellant and given to the respondent even without her praying for the same.** If this Court does not rectify the anomaly, reasoned Mr. Mtembwa, the position of the law would cause more trouble as lower courts could haphazardly revoke administration of estate and end up causing more trouble at family level.

The Learned Counsel emphasized while leaving the floor for the respondent, that he was not objecting revocation, his only wish, as an officer of the court, was that such revocation followed the legal procedure.

Time was ripe for **the respondent to share her part of the story**. As alluded to above, she had appeared in person unrepresented. To this end, the court had to employ some aspects of critical listening skills first to assure her that the court was able to understand her case and secondly ensures she presented her part of the story with confidence and some degrees of precision.

Having gained sufficient confidence to the extent of adjusting her seat, the respondent asserted that when she left her home place in Tunduru for matrimonial union, she found her late husband with nothing. According to the **culture of the YAO people to whom she belonged**, asserted the respondent further, [newly married] women were simply shown the forest [uncleared farm] and expected to produce wealth. Since her husband had admitted that there was nothing that belonged to anyone else, argued the respondent, she started working hard and moved from sleeping in a traditional bed made of trees to owning property. As if sending a message to the appellant through his lawyer, the respondent looked at the Learned Counsel in the eyes and stated that by that time Salimini (the appellant) was a young boy, going to school while their mother was living separately.

Responding to the issue of **the farm** raised by the Learned Counsel in the first ground, the respondent stated that she used to go to the cashewnuts farm and many times she would find the farm in a bad shape. So, recalled the respondent, she started looking for a customer to sell it to. She finally found one and sold it to **one Mzee Chiiko** for 2 million. Thereafter, recalled the respondent thoughtfully, trouble started.

The appellant told the person she had sold to [Mzee Chiiko] that he (the appellant) did not recognize the transaction and he went to Mingoyo primary court, but the court decided in her favour, asserted the respondent. It was ordered that the estate be distributed under supervision of the Village Executive Officer [VEO]. The respondent left for Tunduru and in her absence, the appellant started misusing the deceased property. He started owning all the property, complained the respondent, including two houses of the deceased.

It was the respondent's story that the appellants asked **her to accept compensation of four million** and leave them with all the property to which she refused. She took her complaints to the Ward Executive Officer WEO whereupon the appellant was summoned and asked who had allowed him to administer the estate "kugawa minazi". Upon being pressed the respondent averred, the appellant mentioned the Village Executive Officer [VEO] and the Village Chairman. The two also appeared before the WEO and apologized. Thereafter, stated the respondent, she was advised by the WEO to go to Lindi District Court.

At the Lindi District Court, the respondent narrated, she was told to go back to Mingoyo PC and if she failed to get the rights sought, she would then go back to the District Court. It was the respondent's submission further that the Primary Court issued a summons to the appellant, VEO and WEO and all but the appellant appeared as summoned. The magistrate ordered that the appellant "be given" her rights. As the order was not complied with, asserted the respondent, she decided to go back to the District Court which also ordered in her favour to the dismay of the appellant hence this appeal.

It was the respondent's submission that it was her conviction that the appellant was not the proper person to administer the estate because, he has been using the property for his own benefits, asserted the respondent. For example, the respondent averred further [the deceased's] motorbike, radio, palm trees farm and a house in which the appellant was staying there.

The respondent prayed that the lower courts' decisions be upheld because the appellant was not the proper person for the task. She asserted that she had been unable to work and make money because she has been on the road too often for cases. The respondent concluded by calling the attention of this court that it had been 5 years since the matter started at Mingoyo Primary Court.

In rejoinder, Mr. Mtembwa prayed to make the records clear that he was not in any way interfering with the respondent's rights to her deceased husband's property. The learned Advocate insisted that if the error occasioned by the courts below are left unattended, it would create more trouble and misinterpretation of the law related to probate and administration of estate.

I have dispassionately considered arguments by both parties. I must admit that this appeal raises a few issues I find very interesting. However, in trying to ensure I do not move too far away from the nature of the cause namely Probate and Administration of Estate Law, I will only touch upon those issues as briefly as possible.

On the first ground of appeal, the learned counsel for the appellant argued that his client was denied **the right to be heard**. Having gone

through the court records, I am totally perplexed. Denial of the right to be heard, as I know it, applies where someone has been condemned unheard. A court of law or tribunal has proceeded without giving that person the chance to tell his part of the story. Surprisingly, the appellant was in court. He knew what transpired and as a matter of fact had struggled a big deal to invoke his rights throughout the proceedings leading to his grant of letters of administration of the estate. The learned counsel might have invented another novel interpretation of the right to be heard. Since I am aware of such elongation of our jurisprudence, the first ground of appeal is hereby dismissed.

I take the liberty to argue the 2nd, 3rd, and 4th grounds of appeal collectively. In essence, the appellant through his counsel is of the view that revocation of letters of administration of estate of the appellant by the trial and first appellate courts was erroneous and if left unattended would impact on administration of justice and affect family stability. This is massive. I am inclined to unpack this massive claim and address it piecemeal in the next paragraphs.

I must point out at this earliest stage that, with due respect to the learned counsel, it is not true that the trial court acted *suo motto* to deal with the matter leading to this appeal. Records are clear and the respondent had clearly narrated how she went "through the ranks" from the Ward Executive Officer to the District Court in pursuit of her rights. Courts of law in our country do not conduct investigations out there and take actions on their own. This is articulated by Lord Denning in **Jones v. National Coal**

Board [1957] 2 QB 55 albeit referring the UK with whom we share legal ancestry:

> *"In the system of trial that we evolved in this country, the Judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of the society at large, as happens, we believe, in some foreign countries."*

The learned counsel agrees that in our jurisdiction, Primary Courts are empowered to revoke administration of estate but emphasizes that such power needed to be exercised judiciously as opposed to haphazardly. He referred this court to the case **Mohamed Hassani v. Mayasa Mzee and Another (supra).** The fact that the District Court confirmed the decision of the Primary Court is a huge concern to the learned Counsel who thinks this court should not allow this opportunity to pass without rectifying the situation.

It is a settled position of the law in our jurisdiction that this court would normally not interfere with concurrent findings of lower courts on a second appeal. In **Waruku Mwita v. Republic, Crim. App. No 219 of 2012** the Court of Appeal held that;

> *"The law is well-settled that on second appeal, the Court will not readily disturb concurrent findings of facts by the trial court and the first appellate court unless it can be shown that they are perverse, demonstrably wrong or clearly unreasonable are a result of a complete misapprehension of the substance, nature and quality of the evidence, misdirection or non-direction on the evidence, a violation of the principle of law or have occasioned a miscarriage of justice."*

In the instant matter, both the learned trial and first appellate court magistrates have gone beyond the maze of technicalities to that justice is done. In the just cited case of **Jones v. National Coal Board** case (supra) Lord Denning went on to state that:

> *"It is all very well to paint justice blind, but she does better without a bandage round her eyes. She should be blind indeed to favour or prejudice, but clear to see which way lies the truth."*

During hearing of this appeal, the respondent left no stone unturned in explaining how, as a hard-working **Yao** woman, she contributed to acquisition of the property in dispute through among other ways, "clearing the forest" as per dictates of the Yao culture. It would be nothing short of acting blind to injustice to allow such a hard-working woman to be turned into a "beneficiary" instead of a co-owner of the property that she arguably contributed more than her deceased spouse in their acquisition.

The respondent had clearly brought to the attention of this court unscrupulous attempts that were on going to force her to accept a compensation of four million for the entire estate she had laboured in producing. **Hon. M.A. Batulaine, RM** having referred to leading authorities in the emerging jurisprudence impressively states:

> *"That being the case, the widow's interests are double facet. There are rights to her share as a wife to the deceased; specifically, her contribution to the matrimonial property which is in a way bond with the estate of the deceased. By this premise the rights of the spouse of a deceased over the estate is relatively higher than other heirs."*

I wholesomely endorse that position and hereby uphold the decision of the District Court. I see no merit to the appeal. The same is hereby dismissed in its entirety. I make no orders as to costs.

It is so ordered.

E.I. LALTAIKA

JUDGE
15.12.2022

Court

This appeal is delivered by my hand and the seal of this court on this 15th day of December 2022 in the presence of Adv. Rose Ndemereje for the appellant and the respondent who has appeared in person, unrepresented.

E.I. LALTAIKA

JUDGE
15.12.2022

Court

The right to appeal to the Court of Appeal of Tanzania fully explained.

E.I. LALTAIKA

JUDGE
15.12.2022