

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(MWANZA SUB-REGISTRY)**

AT MWANZA

PC PROBATE APPEAL NO. 20 OF 2021

(Arising from Probate and Admin. Appeal No. 8 of 2021 of the Nyamagana District Court. Original Probate and Admin. Cause No. 89 of 2018)

IRENE PHESTO.....APPELLANT

VERSUS

HALIMA GEORGE PASTO.....RESPONDENT

JUDGMENT

23rd March & 10th May, 2022

DYANSOBERA, J.:

This is an appeal against the decision of the District Court of Nyamagana in DC Probate Appeal No. 08 of 2021 delivered on 24th day of September, 2021 in which the appellant's appeal was dismissed.

The brief background of the matter is as follows. The parties are siblings born of the same father one George Pastory Maduhu, the deceased. The deceased died intestate in September 2003 leaving behind some survivors including the appellant and respondent. The same deceased was survived also by a widow, one Jackline Francis George. At the time of his death, the deceased left behind some property including a house at Mabatini area in Mwanza City.

Following the demise of the parties' father, the respondent Halima George successfully petitioned for letters of administration before the Primary Court of Nyamagana District at Urban vide Probate and Administration Cause No. 89 of 2018. The efforts by Jackline Francis George to have the appointment revoked was unsuccessful after her objection was dismissed on 18th September, 2019 by the trial Primary Court. The respondent then embarked on her duty of administering the deceased's estate as per law required. In that exercise, she sold the house in question so that the proceeds of the sale were distributed to the legal heirs. This disposition aggrieved the appellant who, on 4th day of June, 2021 filed objection proceedings before the trial court challenging the sale of the house in question. The trial court heard the objection but in the end, dismissed it for want of merit. Dissatisfied with the said dismissal, the same appellant appealed to the District Court vide DC Probate Appeal No. 8 of 2021. She lost her appeal. Unflinchingly, the appellant has come to this court appealing on the following grounds:-

1. That the District Court erred in law and fact by dismissing the appellant's appeal for the reason that it lacked merit while the

grounds of appeal by the applicant (sic) were of substance to assist the court to reach fair and just decision.

2. That, both the first appellate court and the trial court erred both in law and fact for failure to observe that the sale of the estate of the late George Pastory was in prejudice and unfair to the appellant and other beneficiaries of the late George Pastory.
3. That both the trial court and first appellate court erred in law and fact for not considering the fact that the allegation by the respondent that the appellant's mother sold the house at Kiloleli was a lie as she failed to bring the buyer of the said property to prove the same.

At the hearing of this appeal, the appellant was represented by Mr. Steven J. Mhoja, learned Advocate of Happy & Associates Law Chambers, Mwanza while the respondent's written submission was drawn by Mr. Mathew Patrick Kija, learned Advocate of One Line Attorney, Mwanza. The appeal was argued by way of written submissions.

In arguing the appeal, the appellant's counsel dropped grounds no. 1 and 3 and argued the 2nd ground only. He contended that after the sale of the house in question, the distribution to the heirs was unfair for no reasons in that the appellant and other two legal heirs were given lower

percentage on the estate of his father, while the respondent and her young sister acquired 25% each while others were given 12.5% of the proceed of sale of the said house and that the appellant did not consent to the sale of the said house. Learned Counsel for the appellant was of the view that there was fundamental error leading to miscarriage of justice on part of the appellant.

Opposing the appeal, Mr. Mathew Patrick Kija, learned Advocate for the respondent submitted that the sale of the house and subsequent distribution was fair and according to law. He explained that the deceased had left behind two landed properties, one at Kiloleli and the other located at Mabatini areas. Further that the same deceased left behind a car make Toyota Hilux and a shop at Pamba Road area in Nyamagana District in the City of Mwanza. The widow sold not only the house at Kiloleli but also the car and the shop. Counsel for the respondent elaborated that apart from the fact that the widow had no capacity to sell the said properties, she did not even bother to give a share to other heirs that is Minza George and Halima George, the present respondent. It was prayed on part of the respondent that this appeal being devoid of merit should be dismissed with costs.

In his rejoinder, Counsel for the appellant emphasised that the respondent failed to prove that the deceased left behind another house at Kiloleli, the car and the shop. He said that the deceased left behind only the disputed house situated at Mabatini. He reiterated that the distribution was unfair.

In essence, as the petition of appeal indicates in the second ground of appeal indicates, the issue is whether the sale of the house by the respondent who is the administratrix of the estate of the late George Pastory Maduhu was unfair and prejudicial to the appellant and other heirs.

As the records clearly show, the deceased left behind two landed properties, one at Mabatini and the other at Kiloleli. He also left behind the car and a shop. This is clear from Form No. 1 in which it is indicated thus:

"Mirathi ya nyumba mbili, moja iko Mabatini, nyumba nyingine iko Kiloleni-Ilemela pamoja na gari aina ya Toyota Hilux (Pick Up) na duka la jumla Pamba Road, Nyamagana".

As to the proof that the deceased left behind those properties, the respondent stated at p. 6 of the proceedings of the trial Primary Court that:

"Mali alizoacha marehemu ni nyumba moja iliyopo Mabatini, nyingine Kiloleli, na gari aina ya Toyota (namba haijui), Duka la nguo Pamba Road na kipindi baba hajafa alisema hiyo nyumba ya Mabatini ni yetu sisi na hiyo ya Kiloleli ndiyo amemjengea mama mdogo, naomba tusaidiwe kuipata hiyo nyumba aliyojenga marehemu mama yetu pamoja na mama".

The respondent was supported in this by the deceased's brother one Deogratius Pastory Maduhu (PW 2) who, at p.7 of the proceedings, is recorded to have told the trial court that,

"ushahidi wangu ni kuwa marehemu kaka yangu baada ya kufariki aliacha nyumba mbili, gari aina ya Toyota Hilux Pick Up na duka la jumla Pamba Road. Huo ndio ushahidi wangu".

As to how the widow sold those other properties, the respondent stated at p. 7 of the proceedings that,

"Mali zote alikuwa nazo mama mdogo lakini sasa ameshaziua. Hatukushirikishwa, alipouza alienda kujenga kwao. Nyumba ya Mabatini anakaa yeye mwenyewe na ameifanya guest".

Although the widow one Jackline Francis denied the existence of another house and a motor vehicle as among the deceased's estates, she admitted that the deceased left behind the shop. This is reflected at p.

20 of the proceedings of the trial court. In the circumstances of the case, I have no doubt as was the trial court and the first appellate court, the deceased left behind the estates as listed in the Form No. 1 and proved by the respondent and Deogratius Pastory Maduhu , the deceased's brother.

The argument by the learned Counsel for the appellant that the respondent did not prove the existence of other properties is, therefore, a lie and the respondent managed to prove how the widow disposed of those other properties.

The appellant also complained before the District Court and this Court that the sale of the house by the respondent was unfair and prejudicial to her and other heirs because they were not involved and/or consulted.

In answering this complaint, the learned Resident Magistrate observed at p. 5 of the typed judgment thus:

"Coming to the 2nd and 3^d grounds of appeal, this court is of the view that disposition of property by the administrator for the interests of the beneficiaries do not require consent of all beneficiaries".

With respect, I agree that that is the legal position. The Court of Appeal in the case of **Joseph Shumbusho v. Mary Grace Tigerwa**

and 82 others, Civil Appeal No. 183 of 2018 (unreported) had this to say:

"...We entirely with the trial Judge that the obligation to consult is derived from the fiduciary duty whereby it requires an administrator to make consultation for smooth administration leading to a peaceful conclusion of administration but it is not statutory requirement. It is a matter of prudence rather than legal obligation. There is no law which demands the administration to seek for the consultation from other beneficiaries on deciding the deceased's estate".

This same position was also sounded by the same Court of Appeal in **Mohamed Hassani v. Mayasa Mzee and another** [1994] TLR 225 where it was stated that:

The administrator is not legally required to obtain consent of all the heirs before disposing of the property or sale of a house.

And further at p. 229,

"... we think and we are satisfied that in the circumstances of this case, selling the house and distributing the proceedings among the various contending heirs was the only sensible option open to the administrator....We are therefore satisfied that the decision to sell the

suit house was not arbitrary, in fact it was in the best interests of the estate and all the heirs”

In the instant case, I am satisfied as were the two lower courts that the sale of the house of Mabatini and the distribution of the proceeds thereof to the heirs was in the best interests of the estate and all heirs.

The trial Primary Court and the first appellate District Court were, in the circumstances of the case, justified to decide the way they did.

The second question I ask is whether this court as a second appellate court can interfere with findings of fact of the lower Courts. I think I cannot. I am guided in this by the fact that said that the courts have, in times without numbers, addressed themselves on their roles when determining second appeals particularly with regard to the factual issues and conclusions of the trial courts. For instance, in the case of **Alfeo Valentino versus The Republic**, Criminal Appeal No. 97 of 2006 (unreported), the Court of Appeal through His Lordship, Rutakangwa JA, had the following to say on the role of the second appellate courts:

*On a second appeal this court will not interfere unless it is shown that there has been a miscarriage of justice or a violation of a principle of law or practice. See **Amratlal D.M. t/a Zanzibar Hotel** [19980] TLR 31, CAT, D.P.P. versus J. M. Kawawa [1981] TLR*

143, Musa Mwaikunda versus the Republic, Criminal Appeal No. 174 of 2006 (unreported)“.

Further, the same Court of Appeal of Tanzania put emphasis on this where her Ladyship, Mjasiri J.A. had the following to say in the case of **Abdalah Manyamba versus Republic**, Criminal Appeal No. 126 of 2005, (unreported):

*"This is a second appeal, the principles to be followed in dealing with the finding of facts and conclusion reached by the lower courts is clearly set out in various decisions of the Court of Appeal for East Africa. In **Republic versus Hassan bin Said** (1962) 9 E.A.C.A. 62 it was held that the Court of Appeal is precluded from questioning the finding of fact of the trial Court, provided that there was evidence to support those findings, though it may think possible or even probable, that it would not have itself come to the same conclusion.*

Further the same Court of Appeal of Tanzania speaking also through Hon. Mjasiri JA. in the case of **Omar Said @Habibu and Another versus the Republic**, Criminal Appeal NO. 302 of 2014 (unreported) had the following to say:

"It is settled law that very rarely does a higher appellate Court interfere with concurrent findings of facts by the Courts below unless there are misdirections or non – directions on the evidence, a miscarriage of justice or a violation of some principle of law or practice".

In the case under consideration, there is nothing showing that there was miscarriage of justice or a violation of a principle of law or practice. Indeed, the evidence was clear that the respondent who was the legally appointed administratrix of the deceased's estate had legal justification to sell the house as had consented by the widow and observed by the trial court. According to the record at p. 54 of the proceedings of the trial court that, the widow consented in the following terms:

"Mawazo au maoni ya msimamizi wa mirathi hii nami nakubaliana nayo kwa sababu hii itasaidia kuondoa kukaa tunazozana kwa ajili ya nyumba. Hivyo nami nakubaliana ikathaminiwe namui niwape fungo lao kama mgao wao ili tuachane".

With this consent of the widow, the trial court observed at p. 54 that:

"Makubaliano ya msimamizi wa mirathi hii pamoja na mjane ambao wanazozana mgawanyo wa nyumba Na. 010/058

(squatter) iliyoko mtaa wa Mabatini Kaskazini wa Serikali taarifa iletwe ili mjane awape mgao wao hawa watoto wawili Minza George Pastory na Halima George Pastory ambao ni watoto wa mumewe ili kuondoa malumbano ya kila mara yasiyoisha juu ya mgawanyio wa mali. Barua itolewe kwenda kwa mthamini wa serikali, mjane na watoto hawa wote wachangie gharama za uthaminishaji zitakazokuwepo”

The sale and distribution was, in the circumstances of the case, unassailable.

The upshot of this is that the appeal fails and is dismissed with costs to the respondent.

Order accordingly.



W.P. Dyansobera
Judge
10.5.2022

This judgment is delivered at Mwanza under my hand and the seal of this Court on this 10th day of May, 2022 in the presence of the appellant and the respondent.



W.P. Dyansobera
Judge