

**IN THE UNITED REPUBLIC OF TANZANIA
THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM**

PC CIVIL APPEAL NO. 01 OF 2020

*(Arising from the Judgment of District Court of Ilala at Kinyerezi, in Civil Appeal No.
55 of 2020)*

IMELDA YAKOBO MLEKWA.....APPELLANT

VERSUS

ANDREW PETER.....RESPONDENT

JUDGMENT

12th December, 2021 – 13th January, 2022

N.R. MWASEBA, J.

Aggrieved by the decision of the District Court of Ilala at Kinyerezi vide Civil Case No. 55 of 2020, the appellant raised four grounds of appeal stating that:

- 1. That, the appellate district court erred both in law and fact for dismissing the appellant's appeal based on weight evidence from the respondent side and in not considering the weight of evidence*

on record from the appellant's side which was not sufficiently contradicted and controverted/rebutted by the respondent in the district appellate court.

- 2. That, the presiding appellate Resident Magistrate erred both in law and fact in annulling/revoking the appointment of the appellant as an administratrix of the late Peter Mlekwa's estate and appointing the respondent to replace the appellant in disregarding the evidence on record which has been proved on the balance of probability that the respondent is an unfit person to be the administrator and is not supported by any evidence from clan members.*
- 3. That, the appellant has proved on the balance of probability that she is a fit and trusted person by clan members as well as the beneficiaries of the deceased's estate to be an administratrix of the same.*
- 4. That, the appellant filed the appeal at the district appellate court on 17th May, 2019, and immediately the calling for the record was made by the first appellate court to the trial Primary Court, but to the surprise and disappointment of the appellant, the court file (i.e. Probate and Administration Cause No. 220 of 2014 was not submitted to the District Appellate Court until after the parties had*

argued the appeal by the way of written submission in mid-February, 2020. The court record was received on or before 27th August, 2020 and the judgment was delivered on 18th September 2020. Therefore, the possibility of the same to be edited cannot be ruled out.

As a result, the appellant prays for the appeal to be allowed, the judgment of both lower courts be quashed, and order/decreed be set aside and the appellant be reinstated to be a lawful administratrix of the deceased's estates.

On **9th November, 2021** when the matter was before this court, the parties agreed in consensus to dispose of the case by way of written submission whereas the parties complied with the court schedule. The appellant retained the services of Stevens Kosi Madulu-learned counsel while the respondent was in person.

Submitting in chief, the counsel for the appellant prayed for the court to adopt the submission submitted at the District Court of Ilala in PC Civil Appeal No. 55 of 2019 filed on 25th February, 2020. Arguing on the first ground the counsel submitted that, the appellate court erred

both in law and fact for dismissing the appellant's appeal based on weak evidence. It is not disputed that the appellant was nominated by clan members and then legally appointed to be administratrix of the estate of the late Peter Walelo Mlekwa who is her brother by the Primary Court of Ukonga. However, her appointment was annulled following a successful objection raised by the respondent. In the objection proceeding, the respondent alleged that the appellant included four other children as beneficiaries, and their birth certificates were forged, some of the properties forming the deceased estate have been sold illegally but those allegations were not collaborated by the clan members or the village leader.

From the date the appellant was nominated to be the administratrix, she assumed the responsibilities of the deceased including taking care and maintenance of the deceased's children/beneficiaries. Hence, she had the power of using/selling the deceased's estate for the better upkeep of the deceased's beneficiaries such as paying school fees, food, shelter, and clothing as evidenced by DW2.

The appellant further submitted that, the allegation that the respondent was not consulted during the family meeting the issue is

that, by that time, he was at school but his name was listed. Then, he was then given the minutes, read, and signed the same. The appointment of the respondent to be the administrator was not graced by the majority of clan members.

Resisting the appeal, the respondent in his brief submission stated that, the primary court determined two issues as to whether the objection(s) raised by the respondent was/were valid in the eyes of the law and who should be the administrator of the deceased's estate. And the trial court referred to the case of **Sekunda Mbwambo v Rose Ramadhani (2004) T.L.R 439** and the powers of the court to annul/ revoke the grant are governed by **rule 9(1) of the Primary Courts (administration of estates) Rules G.N No. 49 of 1971** where the element to be proved should be that the grant was obtained fraudulently by untrustworthy procedure.

Lastly, the respondent submitted that this is the second appeal and the court can only interfere the findings of the two lower courts if there has been a misapprehension of evidence, miscarriage of justice, or violation of principles of law or practice and cited the case of **Amratlal D.M t/a Zanzibar Silk Store v A.H Jariwale t/a**

Zanzibar Hotel (1980) T.L.R 31 of which in the case at hand there is no miscarriage of justice or violation of principles of law. The respondent further insisted that the appellant is using this court process to benefit from the estate of the late Peter Walelo Mlekwa and left the beneficiary of the deceased's estate surviving in the hardship of life while his father left properties.

After going through the entire lower court's files and submissions of both parties, I find all the grounds of appeal can be combined into one issue as to whether the appellate court erred in law and fact for dismissing the appellant's appeal based on weak evidence and disregarding the evidence on record that the respondent is unfit to be the administrator of the estate.

From the submission, the appellant claimed that her evidence was not contradicted or rebutted by the respondent, and furthermore, the respondent has not been supported by any clan member, she also admitted that from the date she was nominated to be the administratrix and finally appointed she assumed the responsibilities of the deceased including taking care and maintenance of the deceased's children/beneficiaries. Hence, she had the power of

using/selling the deceased's estate for the better upkeep of the deceased's beneficiaries such as paying school fees, food, shelter (page 3 of the appellant's submission).

Based on this score line, the trial court (Primary Court) at page **9 and 10 of the judgment**, listed grounds that made the appellant be revoked as administratrix. One ground is selling of the deceased's properties without notifying the beneficiaries and not include the sale in the minutes so that it could be discussed in the clan meeting as one of the agenda. The same position was upheld by the District Court on the appeal **at page 7 of the judgment**.

In the case of **Hadija Said Matika v Awesa Saidi Matika, PC. Civil Appeal No. 2 of 2016, High Court of Tanzania, at Mtwara, L.M Mlacha, J.** referred the case of **Naftal Joseph Kalalu v Angela Mashirima, PC Civil Appeal No. 145 of 2001 (HC, Dar es Salaam)** **at 243** where he explained the duty of the administrator as I quote:

"...the duty of the administrator is to make a collection of the deceased's property and distribute it to heirs..."

In page 14 of **Hadija Said Matika's** case, *Mlacha J.*, insisted that,

"...he must file a report to court containing what he did, filling the report is mandatory and none filing has some legal consequences."

The position is settled, that administrators are not owners of the properties. Similarly, in the case of **Naftary Protas v Mary Petro, Civil Appeal No. 103 of 2018, Court of Appeal of Tanzania at Bukoba, (unreported) Ndika, J.** with approval extracted the decision of **Rutakangwa, J. (as he then was)** in **Sekunda Bwambo v. Rose Ramadhani [2004] TLR 439. at pp. 443-444** on qualifications of a fit person for appointment as an administrator as well as the duties and responsibilities of such a person and I quote:

"The objective of appointing an administrator of the estate is the need to have a faithful person who will, with reasonable diligence, collect all the properties of the deceased. He will do so with the sole aim of distributing the same to all those who were dependants of the deceased during his lifetime. The administrator, in addition, has the duty of collecting all the debts due to

the deceased and pay all the debts owed by the deceased. If the deceased left children behind, it is the responsibility of the administrator to ensure that they are properly taken care of and well brought up using the properties left behind by their deceased parent. After the administrator has so faithfully administered and distributed the properties forming the estate, he has a legal duty to file an inventory in the Court which made the appointment giving a proper account of the administration of the estate. This action is intended to help any one of the beneficiaries who feels aggrieved at the way the property was distributed and thus dissatisfied to lodge his/her complaints to the Court which would, in turn, investigate the same and decide the matter in accordance with the dictates of the law. In view of all this, it is evident that the administrator is not supposed to collect and monopolize the deceased 's properties and use them as his own and /or dissipate them as he wishes, but he has the unenviable heavy responsibility which he has to discharge on behalf of the deceased."

It is clear from the evidence and admission of the appellant on her submission that, the act of stepping into the deceased's shoes and acting as the deceased in administering the estate is wrong and hence a sufficient ground to annul her appointment. Hence, I find the ground of appeal lacking merit.

Another issue that evolved in this case is that the respondent was not approved by the clan. This matter is also settled as stated in the case of **Hadija Said Matika v Awesa Saidi Matika, PC. Civil Appeal No. 2 of 2016, High Court of Tanzania**, at Mtwara, *L.M Mlacha, J. held that:*

"...the clan or family will usually sit to discuss the matter and propose someone to be the administrator. He will be sent to court with some minutes. This practice is encouraged because it makes the work of court easy..."

Having reflected on the above position, I also join hands with my fellow Judges that, family meetings are important to be convened but it is not

necessary. As such, in the case at hand I find no merit in the objection that the respondent was not approved by the clan.

Also, the appellant stated that the respondent is not fit to be the administrator. In this regard, I find this argument to be void as no evidence to the contrary was adduced in support of that. The case of **Benson Benjamini Mengi and 3 Others v Abdiel Reginald Mengi and Another (supra)** referred to the case of **Saleli Doto v. Maganga Maige and Others, PC Probate Appeal No. 6 of 2018 (Shinyarga Registry), (Unreported)**. Where the High Court of Tanzania had the following to say in deliberation as to who should be an administrator of the deceased's estate in the circumstances:

"In appointing the administrator of the deceased's estate, the main consideration is the reputation and capability of such person to act faithfully, diligently and impartially in administering the estate to the rightful owners. Therefore, Court can appoint any reputable person who is not even a member of the family or officer of the Court for that matter to be an administrator of the estate of the deceased."

The main test above is for an administrator to have a **reputation and capability to act faithfully, diligently, and impartially in**

has it all as no evidence on the contrary was adduced.

Lastly, the appellant stated that the court's record was received on 27th August, 2020 and the judgment was delivered on 18th September, 2020 and therefore there was a possibility of the same to be edited. I find this to be a mere assumption of which this court of law cannot act on possibilities contrary to the law of evidence. And unfortunately, the appellant has not stated how injustice has occurred on his part as the judgment was delivered on 18th **September**, 2020 after reception of lower court's records on 27th August, 2020. This takes us to the burden of proof initiated by the **Law of Evidence Act, Cap. 6, R.E. 2019** in **Section 110 (1) and (2)** which provides that:

"110. (1) whoever desires any Court to give Judgment as to any legal rights or liability defendant on the existence of facts which he asserts must prove those facts exist
(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person"

With being said, I find this appeal lacking merit and I hereby dismiss it entirely. No order as to costs.

It is so ordered.



A handwritten signature in blue ink, appearing to read "N. R. Mwaseba".

N. R. MWASEBA

JUDGE

13th January, 2022