IN THE HIGH COURT OF TANZANIA

(IN THE DISTRICT REGISTRY)

AT MWANZA

PC PROBATE APPEAL NO. 10 OF 2021

(Arising from Probate Appeal No. 1/2021 at Magu District Court)

NASSOR AMOUR---------- **APPELANT**

VERSUS

FATUMA SAID SEIF---------- RESPONDENT

JUDGEMENT

Last Order: 08.03.2022

Judgement Date: 16.3.2022

M. MNYUKWA, J.

The Appellant herein has appealed against the decision of Magu District Court in Probate Appeal No. 1/2021 before Hon. E. P. Kente (RM) which originated from Probate Cause No. 6/2016 in Nyanguge Primary Court. The background of this appeal in brief goes as; sometimes in October 2016 the Appellant herein petitioned for the grant of letters of administration for his late father one Amor Nassor Rashidi in Nyanguge

primary court through Probate Cause No. 6/2016. The court appointed the appellant as the administrator for his late father estate. The court record reveals that there was nothing done by the appellant after his appointment.

Later on in 2019, the respondent herein who is the widow of the late AMOUR NASSORO RASHID petitioned for the grant of letters of administration through Probate cause No. 121/2019 at Mwanza Urban Primary Court and she was appointed on 12/11/2019. Being aware of the respondent's appointment, the appellant challenged her appointment through Revision Application No. 2/2020 in the District Court of Nyamagana. The district court after satisfying itself of the existence of probate Cause No. 6/2016 nullified the proceedings and ruling on Probate Cause No. 121/2019.

The respondent did not see justice on her part, she went back to Nyanguge Primary Court and made an application to be included in probate Cause No. 6/2016 as she is the widow of the deceased. The court heard and determined her application in which the court revoked the appellant's appointment for the reason that he has lost the qualities of being an administrator for failure to fulfil his duties to finalize the probate matter.

Dissatisfied, the Appellant appealed to Magu District Court, raising five grounds of appeal which are reproduced hereunder as they appear on his petition of appeal:

i. *The honourable trial court erred in law and fact for misdirecting itself on the application and remedies prayed for by the applicant (Respondent herein).*
ii. *The trial court erred in law and fact for granting prayers which were not prayed for by the applicant (respondent herein).*
iii. *That the trial court erred in law and fact for entertaining the matter of properties of estate of the deceased while was not an issue in the application before the court.*
iv. *That, the court erred in law and fact for raising, entertaining and determining issues raised suo motu without affording opportunity to be addressed by the parties during trial.*
v. *That the court erred in law and fact for availing remedies never prayed for in the application to applicant (Respondent herein).*

The Appellant lost the appeal in the district court and he now appeals from the decision of Magu District Court before Hon. Kente (RM) raising three grounds of appeal as reproduced hereunder:

1. *That, the Honourable 1st appellate court erred in law for failure to determine the raised grounds of appeal in the petition of appeal by the appellant.*
2. *The Honourable 1st Appellate Court erred in law and fact for holding that there was no need for the trial magistrate to invite the appellant to adduce fact why delayed to close probate.*
3. *That, the Honourable 1st appellate court erred in law and fact for holding that the respondent could not apply to be co-administrator as there was no existing administrator while the appellant as administrator never revokes by any court order before the respondent application to the trial court.*

Whereas the appellant prays this court to allow the appeal with costs and set aside the judgement of both the 1st appellate court and trial court.

During the hearing of this appeal, the appellant was represented by Mr. Akram Adam learned advocate, while the respondent enjoyed the services of Mr. Chuma Matata learned counsel. Through parties' prayer and court's approval, the appeal was argued by way of written submission. I thank both parties for adhering to the court's schedule of filling their submissions.

In his submission in chief, the appellant's counsel started by submitting on the first ground of appeal in which he averred that, the 1st appellate court erred in law by failure to determine the specifically pleaded three grounds of appeal as raised by the appellant as indicated in the petition of appeal filed and argued by the parties. That, as a matter of principle the 1st appellate court is treated in form of re-hearing court, hence it was supposed to determine issues raised as grounds of appeal. He went on to reproduce the five grounds of appeal raised in Magu District Court.

He, further submitted that, as it is reflected on page 7 and 8 of the 1st appellate court judgement, the court's findings were not on any specifically pleaded grounds of appeal, rather its findings focused on the trial court's proceeding and raised the issue of death certificate, lack of clan minutes without affording the parties opportunity to address the same. That the court reached its verdict without considering the submission of parties on the raised ground of appeal. He cemented his argument by citing a case of ***Kapapa Kumpindi v The Plant Manager, Tanzania Breweries Ltd,*** Civil Appeal No. 32 of 2010, CAT Mwanza (Unreported) that the 1st appellate court occasion mistrial by failure to determine and resolve the issues raised at appeal stage.

Submitting on the second ground, the appellant's counsel avers that the 1st appellate court erred by holding that it was not necessary for the

trial court to adduce reasons for his delay to close the probate. That, the 1st appellate court on page 8 of its judgement while answering the issue of revocation on the reason for failure to close probate within 4 months, the trial court failed to afford parties an opportunity to be heard considering that the issue was raised by the trial court at judgement stage. That it was wrong for the first appellate court to upheld the said decision while the parties were not heard.

The appellant's counsel submitted further that, the trial court's assertion that there is an automatic revocation of the administrator who was already appointed by the court was a total misdirection and misconception. That, that was wrong as the rule requires a party to make an application for revocation of an administrator who was already appointed and that the appointment of respondent was right without being application for revocation before the trial court. The appellant's counsel cited the case of **Joseph Shumbusho v Marry Grace Tigerwa and 2 others**, Civil Appeal No. 183 of 2016 CAT.

The appellant's counsel conveys the holding in the above case to mean that the court cannot appoint the administrator in the absence of a petition but can appoint the administrator when there is an application for revocation. He concluded that, the 1st appellate court could have been right to hold so if there was an application for revocation before the trial court.

Submitting on the 3rd ground, the appellant's counsel avers that the 1st appellate court misdirected itself on holding that the respondent was not required to apply for co-administration for the reasons that the appellant was automatically revoked. He avers that at the time the trial court was hearing respondent's application to be joined in the administration, the appellant was still an administrator as he was never revoked. He goes on that, it is the requirement of law that, the court can appoint an administrator without petition of letters of administration. He distinguishes the position that, once the court appoints an administrator then there must be an application for revocation so as the court to appoint another administrator after granting the prayer of revocation and removal of an administrator. The appellant's counsel refers to the case of **Joseph Shumbusho** as cited above.

He went on to submit that, in our case at hand there was neither application for being appointed as administrator nor application for revocation of the appellant but an application to be part on the probate and estate of the late Amour Nassor Rashid and therefore the 1st appellate court erred to uphold the decision of the trial court of appointing the respondent as the administrator while there was no any application ever brought to court to apply for appellant revocation rather, the issue was *suo moto* raised by the court when hearing an issue to extend time to hear application to be joined in the probate by the respondent.

The appellant's counsel retires his submission in chief praying for this appeal to be allowed and the proceedings and decision of the 1st appellate court be quashed and set aside.

Responding to appellant's submission, the respondent counsel geared his submission by firstly submitting that, the first ground of appeal raised by the appellant is not a ground of appeal. He cited Rule 3 of the Civil Procedure (Appeal in proceedings originating in primary Court) Rule GN 312 of 1964. He went on that, in our case at hand, there is no adjudication of fact or law (decree) to be reviewed. That the appellant's remedy was to apply for review or revision of the said decision. He therefore, prayed the ground to be rejected.

On the 2nd ground, the respondent's counsel submitted by quoting the trial court's decision in Probate Cause No. 6 of 2016 when the court made the following remarks;

"pamoja na hayo mjibu maombi aliteuliwa kusimamia mirathi hii tangu tarehe 15/12/2016. Alipaswa akamilishe majukumu yake ndani ya miezi minne tangu ateuliwe kuwa msimamizi wa mirathi ili iweze kufungwa. Hii ni takwa la kisheria kama ilivyo chini ya kanuni ya 10(1) kanuni za mirathi Mahakama ya Mwanzo, Tangazo la Serikali GN No. 149 ya 1971(Sura ya 11 toleo la 2019 ***"kama kuna jambo lilikuwa limemkwamisha kutekeleza majukumu yake ndani ya miezi hiyo***

minne alipaswa aifahamaishe mahakama na aombe kuongezewa muda....")

He further quoted the 1st appellate court's findings when the court referred the failure to exercise the duties of the administrator within four months as a violation of mandatory requirement of law. The respondent's counsel also quoted the 1st appellate court's findings when the magistrate contested the appellant's view that the appellant should have been invited to tell the court the reasons for delay. He insisted that, there was no application for extension of time to file account/inventory at the trial court by the appellant. He winded up by submitting that, this ground was misconceived as it was not the decision of court and therefore prayed this ground also to be rejected.

On the 3rd ground, he averred that, the appellant's contention that the appellant's appointment was never revoked by any court is misconceived. And that the trial court revoked the appellant's appointment and appointed the respondent as the administrator thereof at page 11 paragraph 4 of the trial court's judgement by virtue of rule 2 of the fifth schedule to the Magistrate's Court Act Cap 11 R.E. 2019. He went further to cite the case of **Beatrice Brighton Kimanga and Amanda Brighton Kamanga V Ziada William Kimanga,** Civil Revision No. 13 of 2020 and submitted that the court found that if the administrator fails to render account/inventory to the court within four

months, the appointment of the administrator becomes null and void and cease to exist by operation of the law. He also cited the case of **Mohamed Hassan Vs Mayasa Mzee and Mwanahawa Mzee** (1994) TLR 225.

He went further and submit that, the provision in the Magistrate Court Act 1984 is similar to the 5th schedule of Magistrate Court Act Cap 11 R.E 2019 rule 2(a) and (b) which provide the power of the Primary Court Magistrate either on its own motion or upon application to appoint any interested person in the estate of the deceased. He went on to make reference to the power of High Court under section 49(2) on the Probate and Administration Act as was discussed in the case of **Joseph Shumbusho** (supra). He went on that the court can remove administrator and also appoint a successor without there being an application or petition. That the logical behind the provision is that the estate should not be left unattended. The respondent's counsel prayed for dismissal of the ground. He finally rested his submission by praying the entire appeal to be dismissed with cost.

Re-joining, the appellant's counsel asserted that, the respondent has not denied that the 1st appellate court did not resolve the grounds of appeal as presented and argued by the parties during the hearing which renders there being a mistrial of the appeal. He went on to submit on the meaning of ground of objection as submitted by respondent's counsel, and avers that it's a total misdirection as the cited provision only caters

for the requirement to seek leave to appeal out of time as provided for under rule 3 of GN No. 312/1964.

He further succumbed that, the respondent's counsel interpretation of rule 3 is completely different from what appears in the wording of the rules in GN No. 312/1964. He pleaded the court to disregard the submitted argument and this court to find that the appeal has merit as the 1st appellate court did not exercise its duties for resolving the grounds of appeal before it.

In respect to the 2nd ground, the appellant's counsel stated that, Rule 3 of GN No. 312/1964 is not applicable as the statement of the court was not an obiter and rather a part of the decision made by the court.

Regarding the 3rd ground, the appellant's counsel retaliates his submission that there is no automatic revocation and parties were never given opportunity to address the court on failure to submit inventory. He further retaliates on rule 2 of the MCA that the court cannot on its own motion revoke and appoints another administrator unless there is an application of revocation by a party. He ended his submission by retaliates the prayer to allow this appeal, quash and set aside the judgement of both subordinate courts.

I am flattered for both parties' submissions on the raised grounds of appeal and I thank both counsels for their submissions. I will go on to determine this appeal by raising one ground of appeal that, whether this

appeal has merit. In answering this raised issue, I will determine each ground as submitted by both parties.

Starting with the first ground of appeal, the appellant faults the 1st appellate court for its failure to determine the grounds raised by the appellant. From the records of the 1st appellate court, the appellant had raised five grounds of appeal. But it is revealed in the 1st appellate court judgement that there were 6 grounds of appeal that were argued on by the parties after the appellant counsel added one more ground of appeal. It is the appellant's assertion that the court reached its verdict without considering the submission of the parties on the raised ground.

I entirely agree with the appellant's counsel that, it is a legal principle that, an appellate court must address the raised grounds of appeal as it was discussed in the case of **Malmo Montage konsult AB Tanzania Branch Vs Margaret Gama,** Civil Appeal No. 86 of 2001 CAT at Dar es salaam(unreported) where the court had this to say;

> *"...an appellate court is not expected to answer the issues as framed at the trial court. 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 as listed in the memorandum of appeal. It may, if convenient, address the grounds generally or address each ground separately."*

From the above decision, it is not necessary for the court to determine each ground separately. The court can choose the best way to address the raised grounds. But the important point is to determine all raised grounds or to determine the important ground that dispose of the appeal without necessarily discussed the rest. However, when doing so the court must clearly point it out.

Going back to the judgement of the 1st appellate court, I find that the magistrate started by scrutinizing at the trial court's proceedings and he pointed out what seemed to him to be the irregularities on the way the deceased estate was filed and administered. He further discussed what the respondent had applied for and went on to decide the fate of the appellant linking the findings of the trial court.

From the observation of the first appellate court's findings, together with the six raised grounds of appeal, it is my considered view that the first appellate court had discussed ground 1, 2 and 5 which are intertwined and he also discussed ground 4 of the appeal. However, I must make a confession that it is quite hard to understand which ground started and which one ended due to the style used by the 1st appellate court magistrate as he did not declare that he discusses the raised grounds together. I am further of the view that, the 3rd and 6th grounds of appeal were not discussed in the 1st appellate court's findings.

Going through his findings, the 1st appellate magistrate discussed ground 1, 2 and 5 from the 2nd paragraph as it is reflected on page 7 of the judgement when he discussed what was the respondent's application before the trial court as observed from her letter. He went on to discuss why the trial court had reached the findings on revoking the appellant's administration and finally appointing the respondent. And lastly on page 8 of the same judgement the 1st appellate court reached its findings on the 4th ground of appeal as to why the trial court had revoked the appellant appointment without giving chance to parties to address the *suo moto* raised issue. From this finding, it is my firm view that the 1st appellate court did not address the 3rd and 6th raised grounds of appeal and did not state why the same were never addressed.

Guided by the decision of the Court of Appeal in the case of **Malmo Montage konsult AB Tanzania Branch** (supra), this ground is merited and it is hereby allowed.

I will now go on to determine the 2nd ground of appeal. The core subject of the appellant's submission was that, the 1st appellate court erred to hold that it was not necessary for the appellant to adduce reason for his delay to close the probate while the issue was raised by trial court *suo moto* without giving parties right to be heard.

It is a cardinal legal principle that, right to be heard is very crucial in the whole process of administration of justice and in making sure that

justice has not only be done but seems to be done for both parties. It is a settled position of law that a person should not be condemned unheard as it was held in the case of **Transport Equipment vs Devram Valambhia** [1998] TLR 89 and the case of **Mbeya-Rukwa Autoparts and Transport Ltd vs Jestina George Mwakyoma** (2003) TLR 251.

Going through the trial court's proceedings and the trial court's judgement, it is clear that the issue of appellant failure to close probate within time was raised by the trial court's magistrate during composing judgement. The trial court's records on hearing of the respondent application does not feature anywhere were parties addressed the issue of time barred for closing probate cause no. 6/2016. So, it is obvious that the trial court's magistrate raised the point *suo motu* and gave his decision without giving an opportunity to parties to address the court.

The 1st appellate court's judgement as it is evidenced on page 8, together with the trial court's verdict, went on to discuss the administrator's conduct regarding his failure to close probate within 4 months as it is required by the law. He also cited the case of **Beatrice Brighton Kamanga(supra).** The 1st appellate magistrate also joined hands with the trial court magistrate that there was no need for the appellant to give reasons for his delay as the delay has exceeded six to eight months which would have made the explanation impracticable.

I agree with both lower courts that administrator's failure to file inventory and accounts of the estate within four months is a fatal irregularity that render the said administrator to become unqualified and cease to exist as it was rightly held in the case of **Beatrice Brighton Kamanga(supra).** However, as I have pointed out above that, it was still crucial for the parties to be heard first before the appellant's fate was decided. This right must be exercised even when the outcome of the case would be the same when the parties were given right to be heard as it was held in the case of of ***Abbas Sherally and another V Abdul Fazalboy,*** Civil Application No. 133 of 2002 (unreported) where the Court of Appeal held that;

> *"the right of a party to be heard before adverse action or decision is taken against such party has been stated and emphasized by the courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice"*

Additionally, the Court of Appeal in the case of **Kumbwandumi Ndemfoo Ndossi vs Mtei Bus Services Limited,** Civil Appeal No 257 of 2018 CAT at Arusha, it was observed that:

"Basically, cases must be decided on the issues or grounds on record and if it is desired by the court to raise other new issues either founded on the pleadings or arising from the evidence adduced by witnesses or arguments during the hearing of the appeal, those new issues should be placed on record and parties must be given opportunity to be heard by the court."

The available record suggests that, the 1st appellate court magistrate did not take into consideration the raised concern that, the parties were not given right to be heard as the issue was raised *suo moto* by the trial court. The trial court was obliged to allow the parties to have an address on why the appellant failed to close the probate within four months after his appointment, keeping in mind that parties said nothing on the matters while submitting their cases on respondent's application before it. This also was highlighted by the Court of Appeal in the case of **Pili Ernest V Moshi Musani**, Civil Appeal No. 39 of 2019, CAT at Mwanza where the court of appeal nullified the judgement of the 1st appellate court for failure to afford parties right to be heard after raising an issue *suo moto* during composition of his decision. The same stance was also taken in the case of **Kumbwandumi Ndemfoo Ndossi** (supra). Based on the above decisions, I find this ground of appeal has merit and it is hereby allowed.

In determining the 3rd ground of appeal, it is my findings that, the respondent application through her letter dated 19/10/2020 did not say anything warranting the court to appoint her as an administrator, as she prayed to be included in deceased estate in probate cause No. 6/2016.

However, going through trial court's proceedings in hearing of the respondent's application, under page 8 of the trial court's proceedings, the respondent pleaded the court to revoke the appellant and appoint her as an administrator. For me that was also a proper remedy to plead as the court was in a good position to rule out whether the appellant was still qualified to be an administrator. Unfortunately, the court took another turn in giving its verdict that renders the trial court's proceeding to be a nullity.

Therefore, I do not agree with the trial court and the 1st appellate court's assertion that the respondent could not apply for revocation as the appellant did not exist as an administrator by the time as he had ceased by the operation of the law. I would like to end here by also allowing this ground as it is my view that this ground has already been properly addressed on the 2 ground of appeal as indicated above.

In the upshot I hereby allow this appeal in its entirety, and I nullify the 1st appellate court's proceedings and judgement, together with the trial court's decision dated 5/1/2021 save for the trial court's proceedings, and I proceeded to order the remit of the case file to the trial court and

direct parties to be heard specifically on the point of failure of the appellant to close probate within time before judgement is composed.

Being a probate cause I make no orders as to costs.

Right of appeal fully explained.

It is so ordered.

M.MNYUKWA
JUDGE
16/3/2022

Judgement delivered on 16/3/2022 all parties advocates were present

M.MNYUKWA
JUDGE
16/3/2022