IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY)

AT MWANZA

PC PROBATE APPEAL NO. 17 OF 2021

(Arising from Probate Appeal No. 3 of 2021 in Ukerewe District Court at Nansio)

MASUBI JACOB---------- APPELANT

VERSUS

ROSEMARY BEGA WILLIAM---------- RESPONDENT

JUDGEMENT

Last Order: 23.03.2022
Judgement Date: 14.4.2022

M. MNYUKWA, J.

This is the second appeal emanating from the judgement of the District Court of Ukerewe at Nansio in Probate Appeal No. 3 of 2021 before Hon. Nyahenga, RM, which also originated from Probate Cause No. 8/2021 in Ukerewe Primary Court at Nansio before Hon. Mrisho A, RM.

The Respondent herein instituted Probate Cause No. 8/2021 before Ukerewe Primary Court seeking grant of Letters of Administration of his late husband Jacob Biyengo Munyaga. The petition was objected to by his

step-son herein the appellant for the reason that there was no clan meeting that was held to nominate the respondent to petition so as to be appointed as administrator of the deceased estate. The trial court heard the objection and at the end, the trial court dismissed the objection and appointed the respondent, the appellant together with the Ward Executive Officer to be the administrators of the deceased estate.

Dissatisfied with the trial court's decision, the appellant appealed to the District Court raising only one ground of appeal;

1. THAT, the Trial Court's decision and proceedings sought by the trial Magistrate were biased and tainted with illegalities.

The first appellate court dismissed the appeal on grounds that, the trial court had jurisdiction to hear the matter as the deceased estate was to be governed by Kerewe customary law, something that was not in controversial. That there was no dispute that the deceased was dead and so the absence of a death certificate could not be a fatal error to order a retrial and that the absence of the minutes of the family meeting was not the requirement of the law in the probate application before the primary court.

Aggrieved by the first appellate court decision the appellant has now appealed to this court with two grounds of appeal that;

1. THAT, the district magistrate erred in law not to consider the appellant's ground of appeal which are founded purely on point of law.
2. THAT, the first appellate court magistrate erred in law and fact for failure to consider the proceedings and judgement of the primary court is tainted with illegalities.

During the hearing of this appeal, both parties appeared in person, unrepresented. The hearing was done orally.

Appellant was the first to address the court and being a layperson, he had nothing more to add and he prayed to adopt his grounds of appeal as presented in the petition of appeal to form part of his submission. He further prayed for time to settle the matter.

Responding to the appellant's submission, the respondent submitted that, the appeal is misplaced and she prayed for this court to uphold the decision of the District Court and this appeal to be dismissed. She further submitted that both lower courts decided the matter in accordance with the law and practice of the court.

She went on that, in the first ground of appeal, both the appellant and respondent were appointed as the administrators of the deceased estate, if the appellant is the administrator of the deceased then why he is appealing.

On the second ground, she prayed for it to be dismissed as the appellant is required to prove before this court, as there is no any illegality on the decision of the trial court. She also submitted that, this was not a ground in the first appellate court and so it was not decided. That, the appeal should come from the decision of the court, since this was not the ground on the first appellate court, she prayed for the same to be dismissed. She ended by praying this appeal to be dismissed with cost and adopting her reply to the petition to be part of her submission.

Re-joining, the appellant reiterates his submission in chief. I appreciate both parties for their brief submission.

Before I embark on the determination of this appeal, I find it necessary to remind myself of the well-established principle that, the second appellate court is bound not to interfere with the concurrent findings of the facts made by the lower courts. This can be seen in a number of case laws such as; the case of **Herode Lucas and Another VS. Republic**, Criminal Appeal No. 407 of 2016, CAT Mbeya (unreported) and **Machemba Paulo V Republic,** Criminal Appeal No. 538 of 2015 CAT Tabora (unreported). The exception being that, the second appellate court can only interfere with the concurrent findings of the lower courts if in evaluating the evidence, there is a misapprehension of evidence that has caused a miscarriage of justice. This was also held in the case of **Joel**

Ngailo V Republic, Criminal Appeal No. 344 of 2017 CAT Iringa Where it was held that;

> *"...On second appeal the court can only interfere with findings of facts by the courts below if in evaluating the evidence the courts below misdirected themselves and in so doing occasioned miscarriage of justice to the appellants."*

Going back to the determination of this appeal, I will have one issue as to whether this appeal has merit. And in determining that issue I will determine the raised grounds as one ground as the first ground complains of the disregarding of the second ground in the 1st appellate court. Looking at the two grounds raised, they are widely constructed as they did not outline the tainted illegalities referred to in the proceedings and judgement of the trial court. Unfortunately, the parties being laypersons, (especially the appellant) could not submit anything of value to elaborate on the raised grounds. Thus, I will evaluate the first appellate court's decision and the trial court's decision together with the adduced evidence in the trial court in reaching my decision.

From the first appellate court decision, the court raised one ground of determination as to whether the objection against the respondent was properly decided by the trial court. The first appellate court addressed the main grounds of objection in the trial court which are; non-existence

of the clan meeting to appoint the respondent, jurisdiction of the court to hear and determine the matter, failure by the respondent to state deceased beneficiaries, issue of general citation and failure of the respondent to attach death certificate.

From the first complaint of non-existence of the clan meeting, it is now clear that a clan meeting before petitioning for a grant of letters of administration is not a requirement of law but a matter of practice. This has been established by case laws as it was held in the case of **Elias Madata Lameck Vs Joseph Makoye Lameck**, PC Probate and Administration Appeal No. 1 of 2019, where my Learned Brother, Kahyoza J, stated that;

> *"I wish to point out that there is no legal requirement that once a person dies interstate the deceased's clan member must convene and appointing a person to administer that person's estate"*

I also agree with my learned brother in the above-cited case that, a clan meeting is a good practice that is to be cherished as it reduces conflicts among the deceased's heirs and saves court's time in prosecuting unnecessary objections that may arise if the clan meeting was not convened. However, it is not always the case as each case has its own facts and circumstances. From the trial court's proceedings, the

respondent instituted the petition seeking court intervention as she alleged the deceased relatives to be wasting deceased properties. Looking at that proceeding it is my considered view that it was wise and proper for the trial magistrate to admit the institution of the respondent's petition as the court was the proper forum for the dispute to be resolved, as there was an allegation that the respondent was chased away from the deceased house by the deceased relatives. Looking at that, it is clear that the atmosphere around the respondent and deceased relatives was not cool at all for the clan meeting to be convened peacefully. This also can be seen in the matter of the **Estate of Late Shabani Mussa Mhando and in the Matter of Petition for Letters of Administration by Esther, Msafiri Mhando** Probate and Administration Cause No. 75 of 2020.

Therefore, it is my finding that both the trial court and the first appellate court was right to hold that clan meeting was not a legal requirement that would render the respondent's petition to be a nullity.

Turning on the issue of jurisdiction, the primary court is vested with powers to hear and determine Administration cases when the law applicable is either Customary or Islamic Law. This is in accordance with the provisions of the 5th Schedule to the MCA under section 1(1). From the first appellate court proceedings, the appellant's counsel raised the

issue of jurisdiction that the trial magistrate failed to ascertain the way of life of the deceased in order to know if the trial court was vested with jurisdiction. It is my firm view that, the court will be obliged to enquire the way of life of the deceased when there is a dispute at what law to be used to administer the deceased estate. Looking at the trial courts proceedings I have failed to see anywhere where the issue of law applicable was raised and contested by parties. From the court records, the respondent at the very early stage (page 1 of the typed proceedings) stated that the deceased was kerewe and so the law applicable was customary law, particularly kerewe customary laws. Therefore, I also concur with the trial court and the first appellate court's decision that the trial court was seized with jurisdiction to hear and determine the matter.

On the complaint that the respondent failed to state deceased beneficiaries, I concur with the first appellate court that, beneficiaries were well listed on Form No. 1 which is used to institute the matter. Form No. 1 that exists in the trial court consists of 5 beneficiaries including the appellant and respondent together with the other 3 children. And from trial court's proceedings, deceased beneficiaries that were listed by both the appellant and the respondent were the ones appearing from Form No. 1. Thus, this complaint is also baseless.

On the issue of failure to issue citation, the court records reveal that citation was issued as evidenced on the trial court proceeding on page 3 of the typed proceedings. It is worth to note that the purpose of issuing citation is to inform the public and if there are interested parties on the deceased estate, to be able to appear and defend their interest against the deceased properties. Although the law requires for the citation to be done in 90 days, it is now the matter of practice and supported with case laws that a magistrate is in a good position to determine the time for citation. From the trial court's proceedings (page 2 of the typed proceedings), citation was issued within 14 days, and I will understand the wisdom of the trial magistrate, taking into consideration of the fact that, the petitioner stated the danger of the deceased estate to be wasted as she stated the relatives were planning to distribute the estate in bad faith, and that the deceased relatives and heirs were all around and that is why the trial magistrate issued summons to the deceased heirs to appear before commencing of hearing. Therefore, from this finding, I find it just that citation was issued and from the circumstances of the case, the days issued sufficed to inform interested parties of the petition filed.

On the last issue of the absence of a death certificate, the law that governs the grant of letters of Administration of Estate in Primary courts does not state if a death certificate is a mandatory requirement. Although,

its existence is important in order to ascertain the death of the said deceased. This was also stated in the case of **Beatrice Brighton Kimanga and Amanda Brighton Kamanga V Ziada William Kimanga,** Civil Revision No. 13 of 2020 where the High Court stated that;

> *"Equally there is no rule requiring the existence of death certificate in the primary court but it is encouraged to prove that the person named therein is really dead."*

Therefore, there was no any irregularity on the part of the trial court and the first appellate court to dismiss the ground that there was no death certificate when the petition was instituted. Besides, as the first appellate court observed that there was no any dispute that the deceased is dead. Thus, I find this complaint has no merit.

Consequently, I proceed to dismiss the entire appeal and uphold the trial court and the first appellate court decision. Taking into consideration the relationship between the appellant and the respondent I make no order as to costs.

It is so ordered.

Right of appeal explained to the parties.

THE HIGH COURT TANZANIA MWANZA UHURU NA UMOJA

M.MNYUKWA
JUDGE
14/4/2022

Court: Judgement pronounced today on 14th April 2022 in presence of both parties.

M.MNYUKWA
JUDGE
14/4/2022