IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CIVL APPEAL NO. 10 OF 2020

(Originating from Civil Appeal No. 13 of 2019 at Karatu District Court, Probate and Administration Cause No. 23 of 2019 at Karatu Primary Court)

DAMIAN MADAY MASSAY ..... APPELLANT

VERSUS

KARATO ELIAS MASSAY ..... RESPONDENT

JUDGMENT

15/3/2022 & 20/5/2022

ROBERT, J:-

This is the second appeal whereby the Appellant, Damian Maday Massay, challenges the decision of the first appellate Court, the District Court of Karatu in PC Civil Appeal No. 10 of 2020 which dismissed his appeal against the decision of Karatu Primary Court in Probate and Administration Cause No. 23 of 2019.

The Appellant was proposed by the family of the late Elias Massay Slegaray, who died intestate, to apply for a grant of letters of administration

of his estate in a family meeting held on 30th August, 2018. However, he failed to act on the proposal until 24th February, 2019 when the family members decided to propose another person, the Respondent herein. The Appellant and Respondent are brothers. When the Respondent applied for appointment as administrator of the estate at Karatu Primary Court the Appellant filed an objection on grounds that it was the wishes of the late Elias Massay Slegaray for him to take leadership of his siblings in the family and the family meeting held on 30/8/2018 had proposed him to be appointed as administrator of the estate but failed to apply for appointment due to sickness. After the hearing, the Primary Court overruled the objections and appointed the Respondent herein to be the administrator of the estate. Aggrieved, the Appellant appealed unsuccessfully to the District Court of Karatu. Still aggrieved, he preferred this appeal on two grounds:-

1. *That the trial Court misdirected itself for determining appeal on issues based only in delay for filing petition for probate and administration cause and not the qualifications for appointment of the administrator for the good interest of justice.*
2. *That, the judgment of the Court is bad in law for being bias (sic) on Appellants, since the trial Magistrate did not consider the evidence of the appellant in his decision contrary to the requirement of the law.*

When this matter came up for hearing, the Appellant was represented by Mr. Arnold A. Tarimo, learned counsel whereas the Respondent appeared

in person without representation. At the request of parties, the appeal was argued by filing written submissions.

Submitting in support of this appeal, the learned counsel for the Appellant opted to argue the appeal generally. He argued that, it is a settled principle of law that in petition for appointment of an administrator of estate, the Court must have regard to any wishes of the deceased. He maintained that this position is well provided for under paragraph 2(a) of the 5th Schedule to the Magistrates Act, Cap. 11 R.E. 2019. The cited provision reads:-

> *"A Primary Court upon which jurisdiction in the administration of the estate of the deceased's estate has been conferred may (a) either of its own motion or on an application by any person interested in the administration of the estate appoint one or more persons interested in the estate of the deceased to be administrator or administrators thereof, in selecting any such administrator, shall, unless for any reason it considers inexpedient so to do, have regard to any wishes which may have been expressed by the deceased."*

He argued that, the cited provision is couched in mandatory terms which means before appointing the administrator of the estate the Court must have regard to the wishes expressed by the deceased. He maintained that it was the wishes of the deceased for the Appellant herein to petition for letters of administration in order to administer his estate. However, the

trial Court and first appellate Court ignored the said fact for unjustifiable reasons.

He argued further that, the trial Court and first appellate Court were wrong for having considered that the Appellant failed to file petition for letters of administration within time because the period of limitation for filing probate and administration cases in Primary Courts is six years in terms of paragraph 24 of Part 1 of the Schedule to the Law of Limitation Act, Cap. 89 (R.E.2019). He emphasized that the Appellant was still in time within which to petition for letters of administration.

He referred this Court to the Court of Appeal decision in the case of **Mohamed Hassan versus Mayasa Mzee and Mwanahawa Mzee (1994) TLR 225** where it was held, inter alia, that, "(ii) it is up to the person challenging the validity of appointment of an administrator by the Court to show that the person so appointed does not have the required qualifications to administer the estate".

He submitted that, in the instant case it was the wish of the late Elias Massay Slagaray for the Appellant to be appointed as the administrator of

his estate and not the Respondent. Hence it is the Appellant who qualifies to be appointed as administrator.

He prayed for the appeal to be allowed, the decisions of the lower courts to be set aside and the Appellant be appointed as administrator of estate.

In response, the Respondent submitted on the first ground that, the late Elias Massay Slagaray died intestate on 24/8/2018. He did not leave any will directing the appointment of the Appellant as an administrator. Thereafter, the clan meeting was conducted on 30/8/2018 and proposed the Appellant to apply for appointment as the administrator of the estate. The appellant remained silent without taking action for him to be appointed and reasonable efforts were made by the family members to remind him without success. On 24/2/2019 the family members conducted another meeting and revoked the Appellant's proposal and replaced him with a proposal of the Respondent, another family member who they though could manage the duties of administration.

He made reference to the case of **Sekunda Mbwambo vs Rose Ramadhan (2004) TLR 439** where it was held that, "The objective of appointing an administrator is 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 dependents during his lifetime"

He maintained that, in the present case the appellant appeared not to be faithful to the family members as he intends to take over all the properties left by the deceased on the grounds that he was given by the deceased.

He maintained that the revocation of proposal for appointment of the appellant as administrator by the clan meeting was due to lack of family trust, faithfulness and being unfit for the duties of administrator of the deceased estate.

Coming to the second ground, he argued that since the Appellant is challenging the appointment of the Respondent on the grounds that he is not the wishes of the deceased, based on the case of **Mohamed Hassan** (Supra) cited by the Appellant, it is up to the person challenging the validity of appointment of an administrator by the Court to show that the person so appointed does not have the required qualification to administer the estate. He maintained that, the Appellant did not tender any exhibit or a valid will from the deceased to prove his allegations. He argued that the argument

that the Court should consider the wishes of the deceased is baseless because there is no proof of the wishes of the deceased and or any valid will. He therefore prayed for the appeal to be dismissed.

In his rejoinder, the learned counsel for the Appellant submitted that, the trial Court was supposed to consider any wishes of the deceased not WILL of the deceased. He maintained that, the evidence of Appellant at the trial Court indicated that the deceased wished the Appellant, his elder child to be appointed as an administrator of his estate. He explained further that the Appellant was proposed by the family meeting of about 68 members to be appointed as administrator of estate. Based on the arguments raised he prayed for this appeal to be allowed with costs.

Having heard submissions of both parties and examined the records of this matter, the main question for determination is whether the appointment of the Respondent by the trial Court and the first appellate Court as the Administrator of the estate of the late Elias Massay Slegaray is valid.

The Appellant faulted the appointment of the Respondent as administrator of estate on two grounds. First, he alleged that, it was the wish of the late Elias Massay Slegaray for him (the Appellant) to be appointed as

the administrator of the Estate and not the Respondent. Secondly, he was proposed by the family meeting to be appointed as the administrator but he got sick and therefore he couldn't proceed with the application for appointment.

Both the trial Court and the first appellate Court gave a well-deserved consideration to the grounds stated by the Appellant. When deciding on the objection raised by the Appellant herein, the trial Court in a Ruling delivered on 19/6/2019 at page 4 stated that the appellant's assertion that it was the wish of the deceased for him to be appointed as the administrator of the estate was not only unproven but also couldn't prohibit the deceased's family from revoking his proposal for appointment as the administrator which they did through a meeting held on 30/8/2018 and propose another person they considered effective. The trial Court observed further that, there was no evidence to establish that the Appellant failed to take up his role due to sickness. When appointing the Respondent herein to be the administrator of the estate, the trial Court considered that, the Respondent could not have petitioned for appointment as administrator if the family was satisfied that the Appellant had discharged his obligations. The District Court was equally quick to point out that, the family of the late Elias Massay Slegaray is the

Considering the relationship of parties in this case and the nature of this case, I give no order for costs.

It is so ordered.

K.N.ROBERT
JUDGE
20/5/2022