THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MBEYA)

AT MBEYA

PROBATE APPEAL NO. 09 OF 2022

(From the District Court of Momba at Chapwa (Hon. T. Lyon, SRM) in Probate Revision No. 02 of 2022. Originating from Tunduma Urban Primary Court in Probate Cause No. 16 of 2019)

HAFSA ALLY MAKUNDI.....APPELLANT

VERSUS

JOHNSON AMAN.....1ST RESPONDENT

AWALI ALLY MAKUNDI.....2ND RESPONDENT

JUDGEMENT

Date of Last Order : 01/12/2022
Date of Judgement: 24/02/2023

MONGELLA, J.

This matter emanates from Tunduma primary court in Probate Cause No. 16 of 2019. In the said case, the 2nd respondent applied for letters of administration of his late father's estate, one Ally Makundi. He was accordingly granted the letters of administration but was later revoked following an application for revocation by the appellant who was the deceased's wife, on grounds of dishonesty and embezzlement of the deceased's estate. The primary court in its decision appears to have appointed the 1st respondent to administer the deceased's estate in the

place of the 2nd respondent. The 1st respondent completed the task and filed an inventory accordingly leading to the closure of the Probate on 22.10.2021.

The record shows that the appellant was unsatisfied with the appointment of the 1st respondent and thus filed for revision in the District court of Momba vide Probate Revision No. 02 of 2022, challenging the decision of the primary court, particularly the orders dated 22.10.2021, closing the probate, for being tainted with material irregularity. The district court dismissed the application on the ground that there was nothing to examine as the applicant/appellant had failed to move the court on her prayer on that decision.

The decision was reached after the district court observed that the applicant/appellant had made submissions out of what was prayed in the chamber summons. The court observed that the decision complained of and which the applicant/appellant moved the court to revise was that dated 22.10.2021 which was on closure of the probate case after filing of inventory by the appointed administrator. However, in her submissions, the applicant/appellant did not argue on the incorrectness of the said decision, but instead she dwelled into the correctness of the whole appointment of administrator proceedings.

Aggrieved by the decision of the district court, the appellant filed the appeal at hand on the following grounds:

1. *That the 1st appellate court erred in law and facts for failure to grasp the illegality on the proceedings and ruling of the trial primary court on the closure of the probate case which did not follow proper procedure.*

2. *That the 1st appellate court erred in law and facts for failure to discover that the ruling and judgment contain illegality as it is not known as to when the administrator who filed the inventory and closed the deceased estates was appointed for such administratorship (sic).*

3. *That the 1st appellate court erred in law and facts for failure to discover that the ruling and judgment of the trial primary court of 22nd October 2021 has not accorded right to be heard to the beneficiaries of the deceased, the act which amount to miscarriage of justice.* (sic)

4. *That the 1st appellate court erred in law and facts for failure to discover that the deceased's estate's inventory was filed by unqualified person.*

5. *That the 1st appellate court erred in law and facts for failure to determine the issues raised.*

Ms. Neema Saruni, learned advocate, who submitted on behalf of the appellant argued on the 1st ground faulting the district court for failure to grasp the illegality on the proceedings and Ruling of the trial primary court

on closure of the probate cause. She had such stance on the ground that the primary court closed the probate after an inventory being filed by a non-appointed administrator. She had the view that the appointment of an administrator is a prerequisite procedural step before handling the deceased's estate. Referring to the trial court record of 22.10.2021, she contended that that was the official date the deceased's estate started to be entertained after the first administrator was revoked and what is seen on record is the 1st respondent presenting an inventory before the court and thereafter the probate cause was formally closed by the primary court.

Ms. Saruni challenged the primary court record for not showing any appointment of the said administrator or calling of any witnesses to bless the appointment. For ease of reference, she referred the Court to page 14 to 16 of the primary court typed proceedings whereby the administrator appears to explain how he distributed the deceased's estate and the court closing the probate after receiving the report. She contended that the decision entered on 22.10.2021 concerned filing of inventory by the 1st respondent which amounted to closure of the probate case and not only closure of the probate case as ruled by the 1st appellate court. She found the 1st appellate court incorrect in its decision that the appellant failed to express in her affidavit and written submission on how incorrect the trial court decision was, while under paragraph 14 to 17 of the affidavit the appellant had expressed the illegalities committed by the trial court. She added that the illegalities pointed out were further explained in the appellant's written submission. She invited the Court to go through the appellant's written submission to see for itself.

Addressing the 2nd ground, she faulted the 1st appellate court for failure to discover the illegalities in the Ruling and Order of the trial court to the effect that it was not known as to when the administrator who filed the inventory and closed the deceased's estate was appointed for the administration. She argued that it is the requirement of the law that for the deceased estate to be administered there should be an administrator who shall be appointed by the court either by application of a person who is interested in the deceased's estate or by appointment of such administrator *suo motu* by the court. In support of her argument she referred to **Rule 2 (a) and (b) of the Fifth Schedule to the Magistrates' Courts Act, Cap 11 R.E. 2019**. The provision states:

> *"A primary court upon jurisdiction in the administration 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 the administrator or administrators thereof, and, 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;*
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> (b) *Either of its own motion or on application by any person interested in the administration of the estate and the proper administration thereof, appoint an officer of the court or some reputable and impartial person able and willing to administer the deceased estate to be administrator either together with or in lieu of an administrator appointed under sub paragraph (a)."*

Relating the above provisions and the case and hand, Ms. Saruni had the contention that there is nowhere in the trial court proceedings or judgment shown that the appointment of the 1st respondent was *suo motu* or by application. That the proceedings only show that the 1st respondent appeared before the trial court to file an inventory without being appointed to administer the deceased's estate. She contended further that, even if the 2nd respondent (sic) would have been appointed *suo motu* by the trial court, the same ought to have been reflected in the proceedings of the trial court to show reasons for the appointment by the court. For lack of the appointment in the proceedings she had the view everything performed by the 1st respondent in administering the deceased's estate was done with no capacity to do so, thus should be declared null and void.

Concerning the 3rd ground, she faulted the 1st appellate court for failure to discover that the ruling and judgment of the trial primary court of 22.10.2021 did not accord the right to be heard to the beneficiaries of the deceased. She considered the omission a miscarriage of justice. Specifically, she centred on the inventory filed by the 1st respondent claiming that it lacked clarity as no notice was served to the appellant who is the legal wife of the deceased. She saw the notice crucial for purposes of ascertaining whether the appellant had objection or not on the inventory before closure of the probate.

Addressing further on the right to be heard allegedly denied to the appellant, she contended that the appellant was not heard on the distribution of the properties, especially houses located at Plot no. 10 and

23 Block "K" Tunduma urban, which were included in the deceased's estate while the same were privately owned by her. She added that the said properties were included in the deceased's estate as well by the 2nd respondent something which led to his revocation as administrator of the deceased's estate.

In support of her arguments she referred the case of ***Hadija Saidi Matika & Awesa Saidi Matika***, PC Civil Appeal No. 2 of 2016, which was cited in approval in the case of ***Gabriel Joseph (Administrator of the Deceased Estate of the Late Joseph Chacha Mukohi) vs. Ambrose Gwasi Mukohi***, PC Probate Appeal No. 05 of 2020 (HC at Musoma), which insisted for the court to make it known to the heirs, debtors and creditors, once an inventory has been filed, so that they can file objections if they so wish. Bringing the point home, she argued that the record is clear that the trial court made a mistake of not summoning the appellant on the date the 1st respondent went to file the inventory and the 1st appellate court failed to determine the issue.

Arguing on the 4th ground, she challenged the 1st appellate court for failure to discover that the deceased's estate's inventory was filed by unqualified person. She found the 1st respondent lacking qualifications to do so as he was not the wife, child or close relative of the deceased. In support of her argument she referred the case of ***Sekunda Mbwambo vs. Rose Ramadhan*** [2004] TLR 439. She added that the 1st respondent also did not present any family meeting of the deceased's family as proof that he had blessing from the family members to prove his qualification to be appointed as administrator of the deceased's estate. She referred the

case of ***Philipina Wilfred Malisa & Robert Wilfred Malisa***, Civil Appeal No. 12 of 2020 (HC at DSM, unreported), cited in the case of ***Shabani Mussa Mhando & Ester Msafiri Mhando***, Probate and Administration Case No. 75 of 2020 (HC at DSM, unreported). She prayed for the appeal to be allowed and both lower courts' decisions be quashed, with costs.

The respondents opposed the appeal through a joint written submission. Replying to the 1st ground they contended that the appellant filed for revision before Momba District Court on 31.03.2022 praying for the court to examine the record of Probate Case No. 16 of 2019 in order to satisfy itself as to its legality, correctness and propriety of the decision. That the matter was disposed by written submissions and in her submission the applicant failed to show the 1st appellate court how illegal and incorrect the decision of the trial court was. They saw it was the duty of the appellant to prove before the 1st appellate court the illegality committed by the trial court. They argued that the court is moved by the parties in the case and stands as a referee and not as a player in the match by the litigants. On that observation, they argued further that the court had no duty to grasp the illegality that was not grasped by the alleging party.

They supported the 1st appellate court saying that it exercised its duty wisely whereby it observed that the applicant presented on something not asked for in the chamber summons as she did not express how incorrect was the decision she called the court to satisfy itself as to its correctness and instead she dwelt into the correctness of the whole appointment of the administrator proceedings." They had the stance that the appellant had no idea of what she was alleging in court.

Further, they argued that the appellant's contention that the illegality committed by the trial court was the closure of the Probate case without summoning the heirs to come and object the distribution before closure of the case, was a new fact not reflected anywhere in the records of the 1st appellate court. That, the appellant's affidavit and submission bear no paragraph on those assertions. Referring the case of ***Hassan Bundala @ Swaga vs. Republic***, Criminal Appeal No. 416 of 2013 cited in ***Filbert Godson @ Pasco vs. Republic***, Criminal Appeal No. 267 of 2019 (CAT at DSM, found at www.tanzlii.go.tz) they argued that a new matter cannot be entertained at this appeal stage.

As to the filing of the inventory, they argued that the law is clear under **Rule 10 (1) (2) of the Primary Court (Administration of Estates) Rules**, that an administrator of the deceased's estate has to file inventory within 120 days from the date of his appointment and that was done by the 1st respondent. They argued further that the law does not compel the court to summon heirs before the probate cause is closed and that is why the appellant failed to back up her assertion with any law. Generally, the respondents saw that the arguments advanced in the 1st ground are afterthoughts as they were not advanced in the District court.

Replying to the 2nd ground, they challenged the appellant saying that she does not know what illegality entails. They argued so saying that the fact that someone was appointed an administrator on a certain date cannot amount to illegality. They argued that the appointment of the 1st respondent as administrator was known to the appellant as she applied in the trial court to revoke the 2nd respondent. That, she presented two

witnesses to support her case whereby the 1st respondent was one of the witnesses whereby he convinced the trial court to revoke the 2nd respondent from administering the deceased's estate. That, on 03.05.2021 the trial court delivered its judgment before the appellant and the 1st respondent was appointed at the same time. In the end, the 1st respondent filed Form No. III and IV whereby the appellant signed as guarantor of the 1st respondent at the last paragraph of Form No. III. In the premises, they challenged the appellant's contention that the appointment of the 1st respondent was unknown.

They further challenged the appellant's assertion that the illegalities claimed were pleaded under paragraph 14 and 17th of the affidavit in support of the revision application, arguing that from what they presented above and which is on record, the appellant swore lies in her affidavit. That, the appellant knew all that went on and she is the one who proposed the 1st respondent to stand as an administrator. That in the judgment, the trial court remarked that the court unanimously appointed the 1st respondent (SM2), who is the first grandson of the deceased, to administer the deceased's estate considering that the appellant's health was not well.

The respondents also challenged the 3rd ground for presenting a new fact not raised during trial and decided upon by the trial court. Referring the case of **Hassan Bundala @ Swaga vs. Republic**, Criminal Appeal No. 416 of 2013 cited in the case of ***Filbert Godson @ Paso vs. The Republic***, Criminal Appeal No. 267 of 2019, they argued that this Court is prevented under the law from entertaining new facts at this appeal stage.

With regards to the 4th ground, they challenged the appellant's complaint that the inventory was filed by an unqualified person. In reply, they contended that the 1st respondent was a qualified person to file the inventory on the distribution of the deceased's estate. In support of their contention they referred the case of ***Sekunda Mbwambo vs. Rose Ramadhani*** (supra), which held that the court is empowered to appoint any person who is eligible to do the administration task.

Banking on the above decision they found the appellant's argument lacking legal base arguing that the 1st respondent performed the administration task under the umbrella of "*any person*" thus fit to file the inventory. They added that the appellant is not the only legal heir to the deceased's estate. There are other heirs who have no problems with the appointment of the 1st respondent to administer the deceased's estate. In the circumstances they had the view that the non-submission of family meeting minutes to the court has no base as it is as well not a legal requirement. In that respect, they referred the case of ***Almas Moshi Ramadhani vs. Madua Ramadhani Baruti***, Probate Appeal No. 66 of 2020 (HC at Mwanza, unreported).

Concerning the appellant's complaint that the distribution of the deceased's estate included her personal properties, they had the argument that the same is a mere assertion and not a justification of ownership. They had the view that the appellant ought to have provided evidence on her allegations.

They argued further that before distributing the deceased's estate the 1st respondent visited the land office for Momba whereby he discovered that the claimed plots no. 10 and 23 at Block "K" came into possession of the deceased in 1970 and 1972 which was before the appellant got married to the deceased. They further argued that in her application in the district court of Momba, the appellant deponed to have married the deceased in 1976 which was 6 years after the claimed properties were acquired by the deceased. They thus called for the dismissal of the 4th ground of appeal.

On the last ground, they disputed the appellant's claim on the contention that she never raised any issue before the trial court that the court failed to determine. They further argued that the appellant failed to pin point the kind of illegality committed by the trial court, which proves that the trial court decided the probate in accordance with the laid down procedures. They had the view that the appointment of the 1st respondent to administer the deceased's estate is not in itself an illegality. In the premises, they prayed for the appeal to be dismissed, with costs.

The appellant had a rejoinder. With regard to the 1st ground, her counsel, Ms. Saruni, had the stance that the district court was properly moved through an affidavit sworn by the appellant. She reiterated her point that the appellant's grievances were well explained under paragraph 14 to 17 and in her submissions before the district court. She found the respondents' arguments geared at misleading the Court.

On the 2nd ground, Ms. Saruni found erroneous and misleading the respondents' reply to the effect that the 1st respondent was appointed *suo moto* by the trial court after revocation of the 2nd respondent and after the appellant had informed the trial court that she was not able to stand as administrator of the deceased's estate thereby praying for the 1st respondent to be appointed. He contended further that the assertion is false as nowhere in the trial court's proceedings it is shown that the trial court stated about being unable to administer the deceased's estate and that the 1st respondent should be appointed. She added that nowhere in the proceedings it is shown that the trial court appointed the 1st respondent *suo motu*. She had the view that whatever testified by the parties or decided by the court has to be reflected in the proceedings. She concluded that since the appointment of the 1st respondent does not feature on record, the 1st respondent had no capacity to administer the deceased's estate.

As to the 3rd ground, she challenged the respondents' argument that the averments in this ground present new facts. She found the same misleading to the court as the issue was raised and argued in the 1st appellate court. To substantiate her point she referred to page 4 paragraph 4 of the district court's Ruling under which the court touched on the argument by the appellant, which is also advanced in this ground of appeal.

Rejoining on the 4th ground, she had the contention that the respondents have failed to grasp the holding in the case of ***Sekunda Mbwambo vs. Rose Ramadhani*** (supra). Explaining the holding in the said case, she said

that the Court ruled that an administrator may be a widow/widows, parent or child of the deceased, or any other close relative and if such persons are not available or if they are found to be unfit in one way or another, the court can appoint any other fit person or authority to discharge the duty. She distinguished the decision for the case at hand on the argument that in the case at hand, the deceased's wife is still alive and fit to administer the deceased's estate. In the premises she had the stance that the 1st respondent, who is not even an heir, could in no way be appointed to administer the deceased's estate.

With regard to the 5th ground, she contended that there is an illegality committed by the trial court by illegally appointing the 1st respondent as administrator of the deceased's estate. That, the same was argued clearly in the first appellate court and in this Court. She concluded by reiterating her prayer for the appeal to be allowed with costs.

I have accorded the grounds of appeal, the submissions by both parties, and the lower courts' record due consideration. In my deliberation I shall address three main issues being: one, whether the 1st appellate court was correct in its decision to the effect that the appellant had not addressed the prayers in the chamber summons, thus had nothing to deliberate on; two, the appointment of the 1st respondent was illegal and needs to be revoked; and three, whether the appellant was denied her right to be heard upon filing of inventory, thus vitiating the closure of the probate by the trial primary court.

With regard to the first issue, I find that the district court abrogated its duties to deliberate on the real issues raised by the appellant in the application to have the probate proceedings and orders revised. In my considered view, the chamber summons includes general prayers, to wit in the case at hand, the appellant wished for the record to be called and examined and the decision made thereon be checked as to its legality, correctness and propriety. This means that what was to be revised were the proceedings and the decisions made in the whole probate case. The order of 22nd October 2021 was a further Order entered after the other decisions had been made. The complaints had to be checked as a whole. The affidavit under paragraph 14 to 17 clearly explains the basis of the appellant's complaints and the same contents were explained further in the submissions by the appellant's counsel. For ease of reference the paragraphs read:

> *"14. That after perusal my advocate informed me that she has realised that the administration of the said estate has been closed as all inventory has been filed. (Sic)*
>
> *15. That, further my advocate informed me that she realised that the 1st respondent was the one who closed the said administration without being appointed as administrator of the deceased estate and he included my above mentioned properties to the deceased estate and he distributed them to the 2nd respondent.*
>
> *16. That, the above mentioned properties which were included in the estate of the deceased are my own properties and they do not belong to the estate of the deceased.*

> *17. That, I was neither a part (sic) to the case which appointed the 1st respondent as an administrator of the deceased estate and in considering that the administration of the said estate has been closed hence this is the only remedy I have." (sic)*

Considering the above extract from the appellant's supporting affidavit in the application in the district court, I find that the complaints regarding orders dated 22nd October 2021 were clearly raised and argued. I therefore find the district court's decision erroneous and an abrogation of the duty to deliberate on the matter before it. I further find the claim by the respondents that the appellant has advanced new matters of fact at this appellate stage unfounded.

With regard to the appointment of the 1st respondent to administer the deceased's estate, the law is clear as to who may administer the deceased's estate. In the case of ***Mariam Elias Assery vs. Emma Ally Bakari***, Civil Appeal No. 1 of 2011 (HC at Tanga, found at www.tanzlii.go.tz) Teemba, J. as she then was, while referring to the decision in the case of ***Sekunda Mbwambo*** (supra) held that:

> *"An administrator/administratix is a person who is supposed to diligently and faithfully administer the estate of the deceased. This person can be* ***a widow, parent or child of the deceased or any other close relative. If such people are not available or if they are found to be unfit in one way or another, the Court has the power to appoint any other fit person or authority to discharge his duty.***"

See also: ***Cecilia Theophil Gumlo vs. Andrea Stanley***, (PC) Civil Appeal No. 33 of 2019 (HC at Arusha, found at www.tanzlii.go.tz). Further, in accordance with the provision of **sub paragraph (a) of paragraph (2) of the Fifth Schedule to the Magistrates' Courts Act**, for one to be appointed an administrator of the deceased's estate by the primary court, he/she has to have an interest in the deceased's estate. Elaborating on this provision, the Court of Appeal in the case of ***Naftary Petro vs. Mary Protas***, Civil Appeal No. 103 of 2018 (CAT at Tabora, found at www.tanzlii.go.tz) explained on what entails "*a person interested in the deceased's estate*." The Court held that it should be considered in terms of "*beneficial interest*" which can include an heir, a spouse, a devisee (one bequeathed the property by Will), or even a creditor of the deceased.

In the matter at hand, the record reveals that the 1st respondent was presented in court by the appellant to testify in her favour in the proceedings to have the 2nd respondent revoked from administering the deceased's estate. He testified saying that he is the 1st grandson of the deceased, thus a close relative. Perhaps being a grandchild, he is not an heir and the record reveals that he was not in the list of heirs who benefited from the deceased's estate. In the premises, he cannot be said to be a person with interest in the deceased's estate in accordance with the decision in ***Naftary Petro*** (supra).

However, I find the circumstances in the case at hand different and distinguishable. It is clear in the judgment that the trial court appointed the 1st respondent on the ground that the health of the appellant was not fit enough to manage the duties of administration. In my considered view,

this observation by the trial court and subsequent appointment of the 1st respondent was blessed by the appellant and the rest of the beneficiaries who appear to have no issues with the distribution of the deceased's estate. The appointment was made through the decision delivered on 03.05.2021 whereby the record shows that the appellant was present. I as well believe that the appellant obtained a copy of the decision.

In the premises, I do not subscribe to her assertion that she had no knowledge of the said appointment to render the same illegal. The fact that she kept quiet and took no action entails her acceptance into the appointment of the 1st respondent. In my considered view, if the appellant had issues with the said appointment she should have made appropriate application before the trial court to have the appointment revoked. Bringing the point at this stage is an afterthought. Probate matters need to be dispensed with expeditiously to avoid wastage of the deceased's estate. The claim is therefore dismissed.

With regard to the issue concerning the right to be heard to the appellant upon filing of the inventory, I agree with the appellant on her claim that the inventory was filed without her being informed so that she could register her objections, if any. The record clearly shows that she was not present during filing of inventory and account and closure of the probate. It as well does not show if the court issued summons to the appellant as a beneficiary and whether she never appeared despite being served. In the premises, I agree that her right to be heard was infringed and her property rights deprived. She ought to have been notified so that if dissatisfied with the distribution, she should have lodged a complaint to the court and

appropriate orders in accordance with the law entered upon investigation. See: ***Mariam Elias Assery*** (supra) and ***Cecilia Theophil Gumlo*** (supra).

The right to be heard is fundamental and can vitiate the proceedings of the court if infringed and where the rights of the parties or any affected person have been prejudiced. See: ***Mbeya-Rukwa Auto Parts and Transport Limited vs. Jestina George Mwakyoma*** [2003] T.L.R. 251

It is true on record that the inventory was filed and the Probate case closed. The rules are silent as to whether in the circumstances, the Probate can be re-opened. However, for interest of justice and especially in consideration of the appellant's claims that her own privately owned properties, to wit, two houses located at plot no. 10 and 23 Block "K" Tunduma Urban, whereby one of them was acquired after the demise of the deceased, have been included in the deceased's estate and distributed to the 2nd respondent, I find it necessary for the Probate Case to be re-opened from the stage of filing inventory so that an inquiry/investigation is made into the assertions and orders entered accordingly. The claim by the respondents that a search was made at the land office and discovered that the properties were acquired in 1972 before the appellant got married to the deceased cannot, in my view, be entertained by this Court at this appeal stage. The same has to be deliberated upon by the trial court in the course of its investigation.

In the premises, the district court's decision is hereby quashed. The primary court order rendered on 22nd October 2021 endorsing the inventory and

closing the Probate Case is quashed. The case file is remitted back to the trial primary court for the case to be re-opened, summons be issued to all the beneficiaries including the appellant, for an inquiry into the appellant's claims to be conducted and decision entered thereof accordingly by the trial primary court. Considering the relation between the parties, I make no orders as to costs.

Appeal partly allowed.

Dated at Mbeya on this 24th day of February 2023.

L. M. MONGELLA

JUDGE

Court: Judgement delivered in Mbeya in Chambers on this 24th day of February 2023 in the presence of the 2nd respondent.

L. M. MONGELLA

JUDGE