

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

(PC) CIVIL APPEAL NO. 40 OF 2022

(C/f Civil Appeal No. 7 of 2022, in the District Court of Karatu at Karatu, Originating from Probate Cause No. 9 of 2022 in the Primary Court of Karatu.)

CORNEL FERDINAND MINANGU.....APPELLANT

Vs

SALUSTIN FERDINAND RESPONDENT

JUDGMENT

Date of last order: 8-3-2023

Date of judgment: 30-3-2023

B.K.PHILLIP,J

This is a second appeal arising from a judgment of the District Court of Karatu at Karatu in Civil Appeal No. 7 of 2022. The grounds of appeal are reproduced verbatim hereunder;

- (i) That, the first appellate court erred in law and in fact by upholding findings of the trial court while trial court lacks the jurisdiction to determine probate and administration cause no.9 of 2022.*
- (ii) That, the first appellate Court erred in law and fact by not nullifying the decision of the trial court after it observed that the respondent did not properly obtain leave of the court to extend time before petitioning for letters of administration out of statutory time.*

- (iii) That, the first appellate court erred in law and in fact as it failed to make a clear interpretation of section 7 (1) of the Magistrate Court Act, and failed to find that the trial court was not properly composed during trial and the decision made was a nullity in absence of two assessors since the matter is customary issue as required by section 52 (a) of the Miscellaneous Laws Amendment Act No. 5 of 2021.*
- (iv) That, the first appellate court erred in law and fact by not finding that the judgment of the trial court is bad in law for determine extraneous matters not argued by either the appellant or the respondent during the proceeding.*
- (v) That, the first appellate court erred in law and in fact by not revoking the appointment of the respondent as an administrator of the deceased's estate after it find prudent that the trial court arrived at erroneous decision as it made wrong reasoning by revoking the appellant's objections and appointing the respondent as administrator of the deceased estate without considering that the respondent did not dispute on objection lodged against him.*
- (vi) That, the first appellate court erred in law and fact by making poor decision guided by wrong reasoning which led to appoint the appellant as a joint administrator with the respondent who has a previous bad record of wasting or alienating and misappropriating deceased' estate for his own personal interest.*
- (vii) That, the first appellate court erred in law and in fact by confirming the respondent appointment without adhering to the*

standard of proof in civil cases which is the balance of probability.

A brief background to this appeal is as follows; that the appellant and respondent are siblings, the sons of the late Ferdinand Minangu Amsi. The appellant was a caveator in Application No. 9 of 2022 before Karatu Primary Court (Hereinafter to be referred to as "the trial court") in which the respondent was the applicant and was appointed as the administrator of the estate of the late Ferdinand Minangu Amsi. The appellant's caveat was dismissed for lack of merit. Aggrieved by the trial court's decision the appellant appealed to the District Court vide Civil Appeal No. 7 of 2022. His appeal was partly successful. The District Court did not revoke the appointment of respondent as the administrator of the deceased estate but appointed the appellant as the co-administrator so that he can work together with his sibling to administer the deceased estate. Undaunted, the appellant lodged this appeal.

Back to the instant appeal, at the hearing of this appeal, appellant was represented by Mr. Nelson Masawe, learned advocate whereas respondent appeared in person, unrepresented. The appeal was heard viva voce.

Submitting for the 1st ground of appeal, Mr. Masawe argued that the trial court had no jurisdiction to entertain the said Probate Cause No.9 of 2022 pursuant to item 1 of the 5th schedule to the Magistrates' Courts Act, Cap 11 Revised Edition, 2019 ("MCA") since paragraph 7 of form no. 1 filed at the trial court by the respondent shows that the deceased was a Christian. He strongly argued that trial court had no

jurisdiction to hear and determine a probate cause in which the deceased professed Christianity in his /her life time.

With regard to the 2nd of ground of appeal, Mr. Masawe submitted that the District Court was supposed to nullify the decision of the trial court because the respondent did not obtain leave to file the application for administration of the deceased estate out of time. He argued that the respondent did not adduce any reasons for delay in the filing the application for appointment of the deceased estate. He further elaborated that when the word "shall" is used in the law it means that what is stated in the law is mandatory. He invited this Court to be guided by the provision of section 53 (1) of Cap 1 of the Interpretation of Laws Act.

With regard to the 3rd ground of appeal, Mr. Masawe argued that the proceedings of trial court are null and void because the trial court magistrate did not sit with two assessors as provided in section 7 (1) of the MCA as amended by Act No. 5 of 2021. He insisted that trial court did not give reasons for not sitting with assessors.

Submitting on the 4th ground of appeal, it was Mr. Masawe's contention that the decision of the trial court was a nullity because the court dealt with issues/matters not raised by any party in the case. The trial court's decision is based on the finding that minutes of the clan meeting was not properly signed but there was no concern raised by parties about the signatures found in the minutes of the clan meeting, contended Mr. Masawe. Further, he argued that the trial court did not give opportunity to the parties to be heard on that issue.

Submitting for the 5th ground of appeal, Mr. Masawe argued that the 1st appellate court erred to appoint the respondent to be administrator of the deceased estate since he did not refute the appellant's assertion that he is not faithful and has been misusing the deceased's properties. He was of the view that under the circumstances the trial court's decision was not justifiable.

With regard to the 6th and 7th ground of appeal, it was Mr. Masawe's contention that the 1st appellate court erred for failure to properly analyze the arguments raised by the appellate in particular on the respondent's misuse of the deceased properties and being unfaithful as a result it did not set aside the decision of the trial court. He insisted that there is clear evidence that the respondent is not faithful. He contended that the respondent did not present in court any evidence to prove that he is faithful and has been administering the deceased estate faithfully even before he was appointed by the court to be administrator of the deceased estate. In addition, Mr. Masawe was of the view that the 1st appellate court was supposed to appoint the appellant as the sole administrator of the deceased estate since his evidence was heavier than the respondent's evidence. He invited this court to nullify the decision of the lower courts and appoint the appellant as the sole administrator of the deceased estate.

In rebuttal, the respondent submitted he is faithful. He contended that currently, the deceased's properties are under his custody and despite appellant's allegations that he is not faithful the appellant has not stated which properties of the deceased have been squandered or misused. He beseeched this court to uphold the decision of the 1st

appellate court so that he can participate in administration of the deceased's estate and distribute deceased's properties to the heirs.

On the issue of assessors, the respondent argued that now days the Primary Courts do not sit with assessors and matters in Primary Courts are heard by Magistrate only. To his understanding that is the position of law nowadays.

With regard to the issue concerning the minutes of the clan meeting, the respondent submitted that the minutes of the clan meeting were presented in court by the appellant's witnesses. The trial Magistrate is the one who asked the appellant's witness why those minutes were signed by thumb print as if all members who attended the meeting did not know how to write. Moreover, he pointed out that he did not attend the allegedly clan meeting and he does not know anything about that meeting.

The respondent conceded that the deceased professed Christianity, thus he was a Christian and was buried in accordance with Christian rituals.

Furthermore, the respondent submitted that he lodged his application at Primary Court for being appointed as the administrator of the deceased estate contains the reasons for delay in filing the application and the same was admitted. The trial court granted leave for the application to be heard because the reason he adduced for the delay were satisfactory. He refuted Mr.Masawe's contention that the application was filed out of time without the leave of the court. He maintained that if at all the trial court had no jurisdiction to entertain the application the trial magistrate would have told him.

In addition, he contended that he has been taking care of deceased properties for quite a long time and he knows all of the deceased properties since he stayed with the deceased for seventeen years. He urged this court to dismiss appeal for lack of merit . He was emphatic that the judgment of the 1st appellate court is correct and appropriate under the circumstances of the case.

Advocate for the appellant did not make any rejoinder.

I have carefully considered the competing arguments made by Mr. Masawe and the respondent. Starting with the 1st ground of appeal on the jurisdiction of the trial court, upon perusing the court's records, I have noted that the issue on the trial court's jurisdiction was never raised by any of the parties before the trial court. As correctly argued by the respondent the trial court admitted the application and proceeded to determine it. However, the position of the law is that issues on jurisdiction can be raised at any stage. [See the case of **Mwanaisha Rashid Vs Meri Dede and Otero Dede, PC Civil Appeal No.14 of 2021** (unreported).].Therefore, notwithstanding that the parties did not raise the issue of jurisdiction at the trial court and the 1st appellate court, I will entertain it in this appeal

The jurisdiction of Primary Courts in Probate and Administration matters is provided in section 18 of the Magistrate Court's Act ("MCA") and Rule 1 of the fifth schedule to the MCA. For clarity let me reproduce the same hereunder;

Section 18.-(1) A primary court shall have and exercise jurisdiction

(a) in all proceedings of a civil nature-

(i) where the law applicable is customary law or Islamic law: Provided that no primary court shall have jurisdiction in any proceedings of a civil nature relating to land;

(ii) for the recovery of civil debts, rent or interests due to the Republic, any district, city, municipal or town council or township authority under any judgment, written law (unless jurisdiction therein is expressly conferred on a court or courts other than a primary court), right of occupancy, lease, sublease or contract, if the value of the subject matter of the suit does not exceed fifty million shillings, and in any proceedings by way of counter-claim and set-off therein of the same nature and not exceeding such value;

(iii) for the recovery of any civil debt arising out of contract, if the value of the subject matter of the suit does not exceed thirty million shillings, and in any proceeding by way of counterclaim and set-off therein of the same nature not exceeding such value; and

(b) in all matrimonial proceedings in the manner prescribed under the Law of Marriage Act.

(c) in all proceedings in respect of which jurisdiction is conferred on a primary court by the First Schedule to this Act;

(d) in all proceedings in respect of which jurisdiction is conferred on a primary court by any other law; and

(e) in all proceedings in which the Attorney General's right of audience is excluded.

*(2) The Chief Justice may, by order published in the Gazette, confer upon a primary court jurisdiction in the administration of deceased's estates **where the law applicable to the administration or distribution of, or the succession to, the estate is customary law or, save as provided in subsection (1) of this section, Islamic law.***"

(Emphasis is added)

Rule 1 of the fifth schedule to the MCA;

"1.-(1) The jurisdiction of a primary court in the administration of deceased's estates, where the law applicable to the administration or distribution or the succession to, the estate is customary law or Islamic law, may be exercised in cases where the deceased at the time of his death, had a fixed place of abode within the local limits of the court's jurisdiction:

Provided that, nothing in this paragraph shall derogate from the jurisdiction of a primary court in any proceedings transferred to such court under Part V of this Act".

(Emphasis is added)

From the above quoted provisions of the law, it is obvious that Primary Courts can entertain matters involving administration of the deceased estates if the law applicable is either customary law or Islamic law. (Also see the case of **Scolastica Benedict Vs Martin Benedict, Civil Appeal No.26 of 1988, (1993) T.L.R.1**

In this appeal, it is a common ground that the deceased was a Christian and was buried in accordance with Christian rituals . That is evidenced by the particulars filled in form no. 1 (the application form for appointment of an administrator of the estate of the deceased) at paragraph 7 where it is clearly stated that deceased professed Christianity.

From the going it is the finding of this court that the trial court had no jurisdiction to entertain the matter, thus the proceedings of the trial court are null and void. The same are hereby so declared and quashed. The judgment of both lower courts are set aside. Under the circumstances I do not see any plausible reasons to determine the remaining grounds. The parties herein are at liberty to file afresh application for appointment of the administrator of the deceased's estate at the court vested with jurisdiction to entertain it. For avoidance of

perpetuation of endless litigation among family members, each party will bear his own costs.

Dated this 30th day of March 2023


B.K.PHILLIP

JUDGE.

