IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(ARUSHA SUB-REGISTRY)
AT ARUSHA

PC CIVIL APPEAL NO. 30 OF 2022

(C/f the District Court of Karatu in Civil Appeal No. 19 of 2021, originating from Karatu Primary Court, Probate and Administration Cause No. 2 of 2021)

FELICIAN NADE TUMBAY ..... APPELLANT

Versus

JOHN NADE TUMBAY ..... RESPONDENT

JUDGMENT

22nd February & 28th April 2023

Masara, J.

The Appellant and the Respondent are sons of the late Maria Dominick Akoonay. On 28/07/2021, the Appellant petitioned for letters of Administration of the Estate of the said Maria Dominick Akoonay at Mang'ola Primary Court (henceforth referred to as "the trial court"), vide Probate and Administration Cause No. 2 of 2021. A Citation was issued to him accordingly; whereas the petition was scheduled for hearing on 25/08/2021. On 16/08/2021, the Respondent entered a formal caveat. The caveat contained four grounds against the appointment of the Appellant as the administrator of the deceased's estate.

The trial court heard the petition and the caveat and, in its decision dated 13/09/2021, found the caveat devoid of merits. Subsequently, the

Appellant was dully appointed to administer the deceased's estate. He was given two months to collect and distribute the estate to the lawful heirs and then file the inventory and the statement of accounts of the same.

The Respondent was aggrieved by the trial court's decision. He challenged it in Karatu District Court ("the district court"), vide Civil Appeal No. 19 of 2021. The appeal was sustained. The district court held that the Appellant was disqualified as the administrator on the ground that he refused to take care of his mother (the deceased) during her sickness to the moment she died. Further, he was found unfaithful to administer the estate. Intriguingly, the district court ordered the deceased's estate to be administered by two joint administrators; the Appellant and the Respondent! Unamused with the said decision, the Appellant has preferred this appeal on the following grounds:

a) *That the district court erred in law and fact to admit and conclude that the Appellant did not take care of his mother while there was no satisfactory evidence on that regard during trial;*
b) *That the district court erred in law and fact to hold that the Appellant lacks some qualification contrary to the evidence available on record;*
c) *That the district court grossly erred in law and fact to appoint second administrator without sufficient reasons as he neither applied for appointment nor proposed by majority members of the family;*

d) *That the district court erred in law and fact to discuss and admit allegations relating to deceased's properties and unfair distribution while the argument was prematurely raised and based on the Respondent's mere suspicion; and*

e) *That the district court erred in law and fact to appoint the Respondent as co-administrator while he lacked qualification for testifying that the deceased left no estate.*

At the hearing of the appeal, both the Appellant and Respondent appeared in Court in person, unrepresented, but had services of advocates for drafting their respective written submissions.

Submitting in support of the 1st ground of appeal, the Appellant contended that the allegation by the Respondent that the he did not take care of his sick mother was a mere statement which was not backed up by evidence. That, there were no documents, such as hospital receipts, proving that it was the Respondent who took care of his mother. He accounted that there was no justification to disqualify the Appellant as the administrator of the deceased's estate as there was no "will" from the deceased denying him as such nor was there any tangible evidence to support the Respondent's version that he neglected his mother.

On the 2nd ground of appeal, the Appellant argued that as there was no evidence supporting the claim that he refused to take care of his mother, there was no ground for the district court to disqualify him. He faulted the

district court's decision for holding that he concealed some of the deceased's properties; stating that such argument was prematurely made as the deceased's estate was yet to be known to the court. He was of the view that such argument would have been raised after filing the inventory showing the deceased's estate; thus, holding him unfaithful was unjustified.

Submitting on the 3rd and 5th grounds of appeal simultaneously, the Appellant fortified that the Respondent did not show any interest to administer the deceased's estate nor was his appointment by the district court supported by any of the witnesses who testified in the trial court. That, it was only the Appellant who petitioned for letters of administration and his appointment was supported by the clan minutes. He added that it was unsafe to appoint the Respondent to co-administer the deceased's estate while he lucidly stated that the deceased left no estate to administer, as reflected at page 6 of the trial court's judgment. It was his further submission that appointing the Respondent will render the administration process impractical because he is not ready to surrender some of the deceased's properties located at Jobaj, as identified by the Appellant.

Regarding the 4th ground of appeal, the Appellant asserted that it was unfair for the district court to determine issues relating to unfair distribution of the estate while the administration process was yet to commence. He urged that such argument would have properly been raised after the Appellant had filed an inventory (Form No. V) and statement of accounts (Form No. VI). He concluded by urging the Court to quash and set aside the decision of the district court, uphold that of the trial court and confirm the Appellant as the sole administrator of the deceased's estate. He also prayed that costs of the appeal be borne by the Respondent.

Opposing the appeal, the Respondent argued, with respect to the 1st ground, that it was testified in the trial court by the Respondent that the Appellant had neglected his mother, making reference to page 24 of the typed proceedings. Regarding the 2nd and 4th grounds of appeal, the Respondent relied on Rule 10 of G.N No. 149 of 1971, which require an appointed administrator to accomplish the administration task within four months. He faulted the Appellant's appointment stating that he was appointed on 13/09/2021 but he failed to finalize administration of the deceased's estate for approximately 16 months, reckoning from the day he filed his reply submission. In his view, that reflected unfaithfulness on

the part of the Appellant and disqualifies him as the administrator of the deceased's estate. To reinforce his argument, the Respondent relied on the decision of this Court in the case of **Beatrice Briton Kamanga and Another vs Ziada William Kamanga, Civil Appeal No. 13 of 2020** (unreported).

Submitting against the 3rd and 5th grounds of appeal jointly, the Respondent contended that it was appropriate for the district court to appoint him as co-administrator relying on the case of **Olivier Bernard vs Cornel Bernard, PC Civil Appeal No. 6 of 2020** (unreported). He concluded his submission by urging the Court to dismiss the appeal by upholding the decision of the district court.

In a rejoinder submission, the Appellant reiterated his submission in chief adding that it was the Respondent who delayed the administration process by appealing in the district court. That the Appellant could not proceed with the administration process amidst pendency of the appeal challenging his appointment. He added that unfaithfulness cannot be gauged on failure by the administrator to accomplish the administration process on time. According to the Appellant, joint administration in the circumstances of this case is impracticable due to misunderstandings among the co-administrators.

I have carefully considered the grounds of appeal, the lower courts' records as well as the submissions for and against the appeal. Two issues for determination arise; namely, whether the district court was justified to disqualify the Appellant as the administrator of the deceased's estate and, whether the appointment of the Respondent as a co-administrator was necessary.

The first issue covers the 1st, 2nd and 4th grounds of appeal in which the Appellant argues that the district court solely relied on the Respondent's statement that the Appellant refused to take care of his sick mother before she died. He further contends that the district court had no basis for holding him unfaithful. Upon close perusal of the judgment of the district court, it is apparent that one of the grounds that the Respondent relied on to challenge the Appellant's appointment is that he failed to take care of his mother when she bed ridden. In his judgment, the learned magistrate relied on that argument while holding the Appellant unfaithful. Grammatical errors at page 3 and 4 of the typed judgment notwithstanding, the learned magistrate had the following to say:

> *"Here I ask myself, although I am not the iraqw tribe, is it fair for child to desert his/her parent to fail (sic) to contribute anything in order to save the life of the parent then to wait after his/her parent*

passed away to come to administer his/her estate? This is not correct and is unacceptable behaviour."

At page 4 he went on:

"... because the respondent lacks some qualification like to be faithful and his habit to failed (sic) to care for his parent to wait to be administrate to divide (sic) the estate of the mother."

The record also shows that such concern was raised in the trial court by both the Respondent and his witnesses. However, the complaint was disregarded by the trial magistrate because it does not form the basis for appointing a person the administrator of the deceased's estate. The above prescript entails that it formed the basis of the decision of the district court. As pointed out by the Appellant, there was no sufficient evidence that the Appellant refused to take care of his sick mother until she died. The Appellant is noted to have admitted that his mother was living at the Respondent's house. PW2 (Paulina Nade), the sister of the parties herein, when cross examined by the Respondent, admitted that the Appellant was living far from where the deceased lived but he used to assist through giving financial support. The same applies to PW3. During cross examination by the Respondent, she admitted that the Appellant used to visit his mother at the hospital. The Respondent's evidence was that the Appellant was summoned by his mother but he did not heed. His basis

was that he cannot at this time claim the deceased's properties after lapse of a year.

From the above, it cannot be said that it was sufficiently proven that the Appellant refused to take care of his sick mother. I hold this view because there was no concrete evidence to support that allegation. Further, even if that was to be the case, that could not form the basis of denying him the opportunity to administer the deceased's estate. My conclusion is supported by the fact that factors to be considered in appointing a person as administrator of the deceased's estate are provided for by law. The procedure for appointing administrators in Primary Courts is provided under Paragraph 2(a) of the Fifth Schedule to the Magistrate Courts Act, Cap 11 [R.E 2019]. For easy of reference, the provision provides:

> *"2. A primary court upon which jurisdiction in the administration of deceased's estates 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 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."*
>
> (Emphasis added)

From the above, the primary factor to be considered in appointing the administrator of the deceased's estate is the interest that a person has on the deceased's estate. This was also affirmed by the Court of Appeal in **Naftary Petro vs Mary Protas, Civil Appeal No. 103 of 2018** (unreported), where it was observed:

> *"In our view, sub-paragraph (a) above is unambiguous and thus it should be construed in its plain and ordinary meaning. In essence, it empowers a primary court, either of its own motion or upon an application, to appoint one or more persons "interested in the estate of the deceased" to be the administrator or administrators thereof.* ***The primary consideration, therefore, is holding of an interest in the estate of the deceased****. The term interest in a deceased's estate has not been given any statutory definition. But we think it should be looked at as "beneficial interest" which is defined in Black's Law Dictionary."* (Emphasis added).

Thus, it is crystal clear that whether the Appellant took care of his sick mother or not, in so far as he managed to establish his interest in the deceased's estate, the court could appoint him the administrator of the deceased's estate. There being no cogent evidence to the contrary, it was erroneous for the learned district court magistrate to hold that the Appellant was disqualified in that he did not take care of his mother during her sickness.

Another reason put forth by the learned magistrate, while disqualifying the Appellant, is that he is not faithful as he concealed some of the deceased's properties, especially those which are located where he lives. This complaint was raised in the trial court and was deliberated in extenso by the trial magistrate. At page 16 of the trial court's judgment, the trial magistrate had this to say regarding the complaint:

> *"Baada ya kuelezea kwa kuhusu mapingamizi na aina zake Mahakama hii imerejea mapingamizi yaliyoletwa Mahakamani kama yalivyonukuliwa hapo juu katika hukumu hii,* ***pingamizi linalohusu orodha ya mali ya marehemu kuwa mleta maombi hakutaja mali zote za marehemu ni kwamba muda wake haujafika limeletwa mapema kwani mleta maombi hajapewa fomu ya orodha ya mali za marehemu.*** *"*(Emphasis added)

The above holding is, in my view, the position of the law. As pointed out correctly by both the Appellant and the trial magistrate, the complaint that the Appellant is dishonest for not disclosing some of the deceased's properties was prematurely raised. He ought to have waited until the administrator filed the inventory and, if some properties were omitted, raise the objection and the court would be in a better place to investigate and decide on the objection. In sum, the district court magistrate misdirected himself by holding the Appellant unfaithful. That said, the first issue is resolved in the negative.

I now turn to the second issue which covers the 3rd and 5th grounds of appeal. The Appellant's complaint in these grounds is that the district court was not justified to appoint the Respondent as co-administrator because he did not petition for it. Further, that the Respondent testified that the deceased had already distributed all his properties; therefore, there was nothing to administer.

It is undisputed that the trial magistrate, at page 10 of the typed judgment, confirmed that the Respondent had testified that the deceased had distributed all her properties, therefore there was nothing to administer. However, I have revisited the trial court proceedings, especially the entire evidence by the Respondent who testified as SU1; incidentally, such words did not feature in his evidence. Therefore, the fact that there was no estate to administer remains to be the trial magistrate's own concoction.

That notwithstanding, I do not see good grounds to entitle the appointment of the Respondent as a co-administrator, bearing in mind that the Appellant, who was dully appointed by the trial court, had met the conditions precedent to be appointed as the administrator of the deceased's estate. The Appellant proved his interest in the deceased's estate as he is the deceased's son and there were properties left behind

by the deceased, yet to be distributed to the lawful heirs. Further, the Appellant participated in the clan meeting and was nominated to petition for letters of administration, as per exhibit P2. Although minutes of the family or clan meeting are not a requirement of the law, their presence connote that the person nominated is trusted by those who participated in the meeting.

Appointment of the Respondent as a co-administrator was uncalled for, since the Appellant and their uncle (SU4), who the Respondent had proposed for appointment, clearly stated that there is a misunderstanding between the Appellant and the Respondent. Appointing antagonistic persons to administer the deceased's estate will obviously render the administration process impracticable. Deducing from the above, I agree with the Appellant's submission that the district court erroneously appointed the Respondent as the co-administrator as he neither prayed to be appointed nor was he proposed by any of the witnesses who testified in the trial court. Further, there was no indication that the estate needed to be administered by two administrators, bearing in mind that the Appellant was yet to undertake his responsibilities as the administrator. Furthermore, being appointed an administrator is not akin to being the inheritor of the estate to be administered. An administrator is merely an

agent entrusted with the administration of the estate of a deceased person. His primary duty is to ensure that properties left by a departed person are collected, managed and distributed to the lawful heirs. If the Respondent qualifies as an heir, he will invariably receive what is due to him at the end of the day. That said, the second issue is resolved in the negative as well.

From the above, the appeal is merited. It is allowed in its entirety. The decision of the district court appointing the Respondent as a co-administrator is hereby rescinded, quashed and set aside. The decision of the trial court appointing the Appellant as the sole administrator of the estate of the late Maria Dominick Akoonay is restored. The Appellant being dully appointed, shall administer the deceased's estate immediately and file inventory and statement of accounts in the trial court within the period of four months. Taking into account the nature of the case and relationship of the parties, I direct that each party bears their own costs.

Y. B. Masara

JUDGE

28th April 2023