IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY OF DODOMA

AT DODOMA

DC. CIVIL APPEAL NO. 27 OF 2022

KHALIFA SHABAN.....APPELLANT

VERSUS

ZENA MOHAMEDI.....RESPONDENT

(Arising from the judgment of the District Court of Singida-Kisoka,RM)
Dated 21st day of September, 2020
In
Misc. Civil Application No. 12 of 2020

JUDGMENT

14th February& 28th April, 2023

MDEMU, J:.

The Appellant being aggrieved by the decision of the District Court of Singida, in Misc. Civil Application No. 12 of 2020, lodged this appeal on the following grounds: -

1. *That, the Trial Court erred in law and facts to enter decision in favour of the Respondent without legal justification of its decision. However, the Appellant states further that, the only beneficiary of the deceased estates has a mental health challenge.*
2. *That, the trial Court erred in law and fact to enter decision in favour of the Respondent based on*

contradictory evidence adduced by Respondent and her witnesses.

3. *That, the trial Tribunal erred in law and fact to enter decision in favour of the Respondent without considering the evidence adduced by the Appellant and his witnesses as Respondent using it for his own benefits.*
4. *That, the trial Tribunal erred in law and fact to enter decision in favour of the Respondent based on weak evidence.*

Briefly, in 2008, the Appellant was appointed by Utemini Primary Court to be administrator of estate of the late Sudi Mohamed Mattary. Later his appointment was revoked and the Respondent was appointed instead. The Appellant was dissatisfied hence appealed to the District Court which quashed the appointment for want of jurisdiction and advised the parties to file a fresh application. The Appellant then filed Probate Cause No. 1 of 2009 praying to be appointed administrator of the estate of late Sudi Mohamed Mattary. He was not appointed but rather the Respondent. The Appellant then preferred Civil Application No. 12 of 2020 moving the District Court of Singida for revocation of appointment of the Respondent in administration of the estate. The District Court declined, hence the instant appeal.

On 14th February, 2023, I heard the parties. The Appellant appeared in person while the Respondent was represented by Mr. Kesanta, learned Advocate. Supporting the appeal, the Appellant adopted his grounds of appeal and in addition, he submitted that, the Respondent is not a relative in his clan, and she has her own clan and she never resided in their premises but rather used to stay at Iramba.

It was his submissions further that, the Respondent did not have clan minutes nominating her to be appointed the administratrix of the estate of Sudi Mohamed. But rather he had such minutes which he presented to the trial Court. He argued that, after his appointment, the Respondent lied to Court to have distributed the estate to one Abdallah Sudi, a fact which is incorrect because the said Sudi Abdallah is insane. He cited GN No. 149/1971 which, to his view, require the Respondent to file an inventory after one year. He also said that, it was not possible for the Respondent to deal with an insane person, the reason why he is pursuing the matter.

He contended further that, the Respondent is misusing the estate as she is collecting rent for his own gain without assisting the said Abdallah Sudi. He thus, prayed the Respondent be revoked from administering the estate and should reimburse all the rent she collected in the estate.

In reply, Mr. Kesanta resisted all the grounds of appeal and argued them as one. He submitted that, in submissions and evidence at the trial Court, the beneficiary is only one person who is insane. It was his argument that, not any person can bring an action save for and on behalf of the said insane person. He added that, the Appellant didn't file probate cause as a next friend but on his own capacity. He cited Order XXXI, Rules 1-15 of the Civil Procedure Code, Cap. 33 to support his argument.

On the issue of misappropriation of the estate, he submitted to be a new fact not stated in the trial Court. Likewise, the issue of renting the premises which is not backed by evidence, that is, who was rented and what was the rent price? As to clan minutes, he argued not to be a legal requirement. In his view, Rule 39 of the Probate Rules lists items to be annexed. Clan minutes is not among them. It is a rule of practice. He cited the case of **Elias Madaba Lameck vs. Joseph Makoye Lameck PC. Probate and Administration Appeal No. 1 of 2019** (unreported) to bolster his assertion.

On the issue as to whether the Respondent is proper administrator, he said that fact has been concluded. He referred at page 6 of the trial Court proceedings which is to the effect that, in Probate Cause No. 16 of 2008, the

Respondent was appointed the administratrix of the estate of the late Sudi. He said that, the Appellant didn't object or provide explanation on it. He said therefore, the decision subject to this appeal is res judicata.

On the issue of distribution of estate, he submitted that, there is no dispute that Abadalla Sudi Mohamed is the only heir and has been given his share and that, the Appellant didn't object. He therefore said that, he doesn't see the reason as to why he want to administer the estate while the beneficiary Abdalla Sudi Mohamed is present. He further submitted that, as the Appellant stated to have been evicted in 1978, he was not residing at the suit premises when Probate cause was filed in 2009.

In rejoinder, the Appellant stated also to be the beneficiary since 1958 according to letters of administration of the District Office Singida. He said also that, there is evidence from Village Authorities such that, the Respondent never distributed the estate and there is no inventory as to how she can distribute the estate to an insane person.

I have considered the parties' submissions, records of the trial Court as well as applicable laws. To begin with, I will address the issue of res judicata first as pointed out by the Respondent's Counsel. In law, the

doctrine of res judicata is provided for under the provisions of section 9 of the Civil Procedure Code, Cap. 33 which reads as follows:-

> *No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in the former suit between the same parties or between parties under whom they or any of them claim litigating under the same title in a court competent to try such subsequently raised and has been heard and finally decided by such court.*

From the wording of the foregoing quoted provisions, the spirit behind this provision is to put to an end a litigation or bar multiplicity of suits on a cause of action that has been finally determined between parties by a Court of competent jurisdiction. In the case of **Peniel Lotta vs. Gabriel Tanaki and Two Others,** Civil Appeal No. 61 of 1999 (unreported) which is cited with approval in the case of **Ester Ignas Luambano vs. Adriano Gedam Kipalile,** Civil Appeal No. 91 of 2014 (unreported), is stated as follows: -

> *"The scheme of section 9 therefore contemplates five conditions which when co-exist will bar a subsequent suit. The conditions are:-*
>
> *1) The matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit.*

2) *The former suit must have been between the same parties or privies claiming under them.*
3) *The parties must have litigated under the same title in the former suit.*
4) *The court which decided the former suit must have been competent to try the subsequent suit.*
5) *The matter in issue must have been heard and finally decided in the former suit.*

Having revisited the records of trial Court, it is apparent that, in Probate cause No. 1/2009, the Appellant petitioned to be appointed the administrator of the estate of Sudi Mohamed Mattary but he was not appointed, rather the Respondent was appointed. In Misc. Civil Application No. 12/2020 subject of this appeal, the application was for the trial Court to revoke or nullify the administratrix appointed and appointment of the Appellant instead or any other person as the Court may determine. What the trial Court did was to determine whether there were good reasons for revocation of the administratrix. At the end, it found no reasons for revocation. Therefore, though parties were the same, issues were different and therefore, the doctrine of res judicata cannot apply in the circumstance.

In essence, the impugned decision was delivered following application made by the Appellant under the provisions of section 49(1) (a),(b), (c) and

(d) of the Probate and Administration of Estates Act, Cap. 253 and Rule 27 of the Probate Rules on the following orders:-

a) The Court be pleased to revoke and nullify the administratrix appointed by Singida District Court and appoint the Applicant and, or to provide a suggestion of another person to be appointed as administrator of estate of deceased.

b) costs be provided for

c) any other order(s) the Court may deem fit and just to grant.

Upon hearing the parties, the trial Court didn't grant the application. The grounds for revoking the grant are listed under section 49(1) of Probate and Administration of Estates Act, Cap. 352 which stipulates that, the grant of probate and letters of administration may be revoked or annulled for any of the following reasons: -

a) That, the proceedings to obtain the grant were defective in substance.

b) That, the grant was obtained fraudulently by making a false suggestion, or by concealing from the Court something material to the case.

c) That, the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify

the grant, though such allegation was made in ignorance or inadvertently.

d) That, the grant has become useless and inoperative.

e) That, the person to whom the grant was made has willfully and without reasonable cause omitted to exhibit an inventory or account in accordance with the provisions of part XI or has exhibited under that part an inventory or account which is untrue in a material respect.

In the instant appeal, the Appellant filed his application under section 49(1) (a), (b) (c) and (d) of the Probate and Administration of Estate Act which applies only when the appointment was obtained fraudulently by making false allegation and that, the grant has become useless and inoperative. It should be noted that, revocation is a remedy the Applicant can be granted when the Court is satisfied that, any of the condition set under the above provisions have been met. Additionally, for revocation to be granted as prayed, there must be evidence that it was obtained by means of fraud or fallacious information. In it therefore, it was the Applicant's duty to prove the allegation he made against the Respondents towards the administration of late Sudi Mohamed's estate.

Looking at the trial Court's records, all the above allegations were not proved rather, he complained that, the Respondent didn't have clan meeting

minutes nominating the him to be appointed and that, she has not filed an inventory. As said by Mr. Kesanta, clan meeting minutes is not a legal requirement. It is a matter of practice. The primary factor to be considered is the interest which a person has in the deceased's estates. See the case of **Naftary Petro vs. Mary Protas**, Civil Appeal No. 103 of 2018 (unreported). The position was correctly observed by the trial Court.

Furthermore, I have noted that, it was not the Respondent who applied for letters of administration but rather the Appellant. What the Respondent did, was to file a caveat resisting the appointment of the Appellant. Therefore, the issue of clan minutes cannot apply to her. It was the Appellant who filed a consent form with the following beneficiaries; Abdalla Sudi Mohamed Mattery, Moze Mohamed Mattery and Merry Shotan who are son, sister and wife of the deceased respectively. However, upon hearing, none of the abovenamed person indicated interest on the deceased estate and never testified in support of the Appellant's application. Prudency dictates that, they could have come to Court supporting the appointment, short of it, raises doubt as to whether they real consented or that, they are not beneficiaries. Therefore, since the Respondent is the who is taking care of

the beneficiary one Sudi, I find her to have interest on the deceased's property and was rightly appointed by the trial Court.

Furthermore, on the issue of not filing inventory, I am aware that, for the probate matter to be closed, the inventory and final statements of accounts have to be filed to the granting Court in terms of section 107 (1) of the Probate and Administration of Estate Act. Equally, the Court shall make an order for the beneficiaries to inspect and confirm on the inventory and final statements and if not contested, the Court then shall cause the beneficiary to sign and mark the probate case closed. From the records and as observed by all parties, the beneficiary is insane and is living with the Respondent since 1978 when the Appellant was evicted from the suit premises. The fact that the Appellant was raised by the deceased does not in itself, make him the beneficiary. Since the Respondent didn't file the inventory, and taking into account that the only beneficiary is an insane and has been in the care of the Respondent since 1978 and that, no any action or complaint has been filed by the Appellant that the said beneficiary is facing problems while in the hands of Respondent, I find that revocation cannot be granted on the fact that the Respondent has failed to file an inventory.

That said and done, this appeal lacks merits. It is hereby dismissed with costs.

It is so ordered.

Gerson J. Mdemu
JUDGE
28/04/2023

DATED at **DODOMA** this 28th day of April, 2023

Gerson J. Mdemu
JUDGE
28/04/2023