

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

PC PROBATE APPEAL NO. 13 OF 2022

*(C/F Probate Appeal Case No. 06 of 2022 of the District Court of Moshi at Moshi,
Originally Shauri la Mirathi No. 09 of 2006 of Moshi Urban Primary Court)*

ELIANASA SAMWEL MALISA 1ST APPELLANT

FELIX SAMWEL MALISA 2ND APPELLANT

JACKLINE SAMWEL MALISA 3RD APPELLANT

LEONARD SAMWEL MALISA 4TH APPELLANT

VERSUS

DICKSON GERSON MALISA.....RESPONDENT

(As administrator of the estate of the late Samwel Gerson Malisa)

JUDGMENT

24/05/2023 & 21/6/2023

SIMFUKWE, J.

Moshi Urban Primary Court (the trial court) through Mirathi No. 09 of 2006 appointed the respondent herein to be administrator of the estate of the late Samwel Gerson Malisa. After his appointment, he collected the deceased's estates, distributed the same to the beneficiaries and filed the inventory on 10/07/2020; whereas he distributed all the deceased's properties to the three wives of the deceased and 18 children, including the house at Kiboriloni which the 1st appellant alleged that it was her

homestead before and even after the death of her husband. The second wife of the deceased (1st appellant) together with her children objected the distribution made by the respondent on the reason that they were not involved in the process of distribution of the deceased's estates and that the administrator distributed some of the properties which the deceased gave the appellants before his death. The trial court entertained the said objection by hearing both sides and decided that the administrator has no obligation to obtain consent from beneficiaries during distribution of the estates. Thereafter, the trial court found that the distribution made by the respondent was just and fair save for the house of the 1st appellant which was to be distributed to the 2nd wife (1st appellate) as it was her homestead.

The respondent herein was aggrieved, he filed the appeal before Moshi District Court (First appellate court) which quashed the decision of the trial tribunal and sustained the distribution made by the respondent. The appellants were aggrieved and filed the instant appeal on the following grounds:

- 1. That the first appellate court grossly erred both in law and fact in holding that there was no sufficient evidence that the Respondent erroneously distributed the deceased estate hence faulting the trial court's findings of fact.*
- 2. That the first appellate court grossly erred both in law and fact in holding that he respondent dully discharged his duties as administrator of the deceased estate.*
- 3. That the first appellate court grossly erred both in law and fact in glossing over the evidence on record and fail to*

properly evaluate the same hence reaching into erroneous decision of faulting the trial court's decision.

The appeal was ordered to be argued by way of written submissions. The appellants were represented by Mr. Martin Kilasara, the learned counsel while the respondent had the service of Ms. Elizabeth Minde, learned counsel.

Supporting the first ground of appeal *that the first appellate court grossly erred both in law and fact in holding that there was no sufficient evidence that the Respondent erroneously distributed the deceased estate hence faulting the trial court's findings of fact*, on the outset, Mr. Kilasara submitted that the administrator correctly distributed the deceased's properties. He said among other things that, it is not disputed that Elianasa Samwel Malisa is a second wife of the deceased Samwel Malisa since 1965. Also, it is undisputed fact that both the first Appellant and Eliaichi Malisa (first wife) each has her homestead whereas the first appellant's homestead is at Kiboriloni while the first wife's homestead is at Mowo Village Old Moshi. That, even the respondent's witness SU2 one Gladness Malisa testified to that effect.

The learned counsel continued to explain that, during the trial it was testified that the house in dispute was jointly acquired and developed by the deceased and the first appellant since 1969. That, the said house is part and parcel of the first Appellant's homestead whose description was adequately given in the objection to the inventory filed. It was stated that the dispute arose upon perusing the presented inventory and accounts of deceased's estate, in that the house in dispute was erroneously included in the deceased's estate and distributed to unqualified beneficiary. The

learned counsel referred to the case of **Beatrice Brighton Kamanga and Another vs Ziada William Kamanga, Civil Revision No. 13 of 2020**, which he condemned the first appellate court for failure to consider it. That, in the said case, at page 22 it was held that:

*"Heirs, creditors and debtors may seek to peruse the statements of accounts and inventories. If they do so the court must allow them. In practice, in a good system of administration of justice, once they are filled, the court must cause the same to be known to heirs, debtors and creditors and ask them to file objections against them, if they so wish. If there is an objection, the court will be at liberty to return them to the administrator for rectification as was said by this court in **Nuru Salum and Husna Ali Msudi Juma PC Probate Appeal No.10 of 2019** (Rumanyika, J.) or proceed to hear the parties and make a ruling on the matter as was said by this court in **Hadija Saidi Matika** (supra). On good reasons being established and in the great interest of justice, the court can change what was done by the administrator and substitute thereof with what it considers to be the best division or make a directive accordingly. It is however important to hear the administrator and all interested parties fully before making the decision."*

Mr. Kilasara submitted further that the trial court was availed with sufficient evidence to prove that the inventory and accounts filed were indeed tainted with gross anomalies. That, the trial court was further

impartial, and it properly directed its mind on the law and facts of the case in determining the objections raised by the appellants hence reaching fair and just decision. The learned counsel was of the view that, it was very unfortunate that the first appellate court failed to grasp the essence of the trial court's decision hence misdirected itself in its findings.

On the second ground of appeal, Mr. Kilasara faulted the first appellate court for holding that the respondent dully discharged his duties as administrator contrary to the available evidence on record. The learned counsel elaborated that it is apparent from the record that the respondent either by default or maliciously misallocated the deceased's estate and included other assets which were not part of the deceased's estate. He stated that it is settled position of the law that, beneficiaries of the deceased's estate and or creditors thereto have the right to access, question and or challenge the filed accounts and inventory of the deceased's estate. That, the trial court has an obligation to allow the beneficiaries to inspect those accounts and inventory; more so to hear and determine the merits of any objection raised thereto.

Mr. Kilasara notified this court that in the decision now subject of this appeal, the appellants were not disputing the respondent's appointment. However, they were challenging the inventory and accounts filed by the respondent whereby their objection was duly heard and determined by the trial court.

The learned counsel recited the case of **Beatrice Brighton Kamanga** (supra) at page 23 where it was held that:

"Inventories and statement of accounts must be filled within the period stipulated under the law so that the matter may come to an end. ... And if the matter remains pending for a longer period, let's say 3 years, without such a report or extension from the court, the appointment ceases to exist by operation of the law for as I have pointed above, there is no 'life administrators' in our schemes."

It was insisted that the respondent herein duly discharged his duties as administrator by presenting true and correct inventory and accounts of the deceased's estate hence the appellants' objection. That, the trial court properly directed the respondent to amend and refile the inventory and accounts. The learned counsel contended that the first appellate court grossly erred in law and fact in holding that the Respondent had duly discharged his duties as administrator of the deceased's estate contrary to the evidence available on record. He invited this court to revise the first appellate court's decision and reinstate the decision of the trial court.

In respect of the third ground of appeal, the learned counsel for the appellants faulted the first appellate court for glossing over the evidence on record and failed to evaluate it properly. It was stated that the house in dispute is and has always been part and parcel of the 1st Appellant's homestead where her residence is also situated. That, the said house has been leased to tenants long before and after the deceased's death and the proceeds obtained thereof were used by the deceased and his second wife (1st appellant) and not by the first wife as contended. That, during the trial the Respondent admitted that he erroneously included the disputed house thinking that it was separate from the 1st appellant's

homestead. Mr. Kilasara averred that, such piece of evidence was never considered by the first appellate court; instead, the magistrate glossed over it to justify the erroneous decision reached.

Elaborating further evidence adduced before the trial court, Mr. Kilasara submitted that SU2 Gladness Malisa, first wife's daughter testified that her mother has three houses at her homestead which remain untouched. From such evidence he believed the purported assertion of equitable redistribution for just second wife's asset, is indeed frivolous, unfounded and grossly misconceived. It was insisted that since both wives have their respective homesteads and due shares of the deceased's estate; it will be absurd and indeed unjust and thereby gross miscarriage of justice to let any of them interfere either side. That, the trial court's findings and directives in respect of the disputed house was indeed impartial and legally justified.

In the final analysis, Mr. Kilasara concluded that this appeal has merits he prayed the court to allow it and be pleased to quash and set aside the decision of the first appellate Court.

In her reply, on the outset, Ms. Minde submitted that, the appeal is devoid of merits and ought to be dismissed with costs. In her introduction, she notified this court inter alia that the case is now 18 years since the struggles begun. Thus, the longer the case remains pending in court, the more the 2nd wife Elianasa Samwel Malisa and her children continue to enjoy the fruits from the estate of Samwel Gervas Malisa at the expense of other beneficiaries.

Responding to the first ground of appeal in respect of the argument that the house in dispute was jointly acquired and developed by the 1st Appellant and her late husband, Ms. Minde submitted that issues of joint ownership are better determined in a Matrimonial Cause where the degree of contribution can be determined from evidence. Thus, this is a Probate matter where one needs to confirm her relationship with the deceased and the fact that she was performing her wifely duties until he died. That, the trial court and the 1st appellate court found that both Eliaichi Malisa and Elianasa Samwel Malisa were wives of the deceased, and they are entitled to benefit from the estate of their late husband.

It was further submitted that the complaints of Elianasa Samwel Malisa at the trial court, at the first appellate court and now at this court differ due to lack of consistency and valid reasons for her complaint. That, at the trial the complaint was non-involvement of the 1st appellant and her children, in the first appellate court the objection was centred on demand to exclude some properties from the estate alleging that the deceased had distributed his properties before his death. In the High Court, the complaint is about lack of evidence to support distribution.

Ms Minde went on to submit that there is no evidence from the clan level and from the record to support the complaints by the appellants. That, at the first appellate court, the appellants introduced new ideas about some properties having been distributed by the deceased before his death the fact which was never brought in the clan meetings or at the trial. Thus, such fact is a new fact which came as an afterthought with no legal effect. Ms. Minde believed that such inconsistency reflects someone attempting delaying tactics.

Responding to the issue as to whether the 1st Appellate Court grossly erred in law and fact for holding that the Respondent had duly discharged his duties as administrator, Ms. Minde contended that an Administrator is held to have discharged his/her duties as per the law, if upon being appointed, he is able to collect the estate, pay debts if any and distribute reserve according to the law to all beneficiaries. It was stated that the present Administrator convened a meeting of all beneficiaries to confirm the distribution. Even when objections were raised, he followed orders of the court, by calling the clan meetings (not once) at Ward level and family friends. The respondent's counsel continued to submit that, despite the resistance from the Appellant and her children, form No. V and VI were duly filled and filed. Thereafter, the trial court allowed all interested parties to raise their objections, and all were heard. The learned counsel observed that the appellants have not shown what step was violated.

On the third ground of appeal on whether the 1st appellate Court glossed over the evidence on record, it was replied by Ms. Minde that the 1st appellate court duly analysed the evidence before it to arrive at the conclusion it did. That, the issue of house being near the homestead of Elianasa is a non-issue as the boundaries were never identified. That, it was the 1st appellant in her attempt to control the entire estate who came up with a survey sketch made after death of Samwel Gervas Malisa. That, the 1st appellant was intending to prove that she was the sole owner.

Ms. Minde explained further that the appellant's allegation as reflected at page 3 last paragraph of Appellant's submission, is a misrepresentation since the house is not on the Appellant's homestead and even the

proceeds are now solely used by the Appellant by force despite complaints.

Concerning evidence of SU2 Gladness, Ms. Minde submitted that the same was misconstrued by Mr. Kilasara since the issue at hand was distribution of houses at Kiboriloni, a business centre and not houses in a village where the mother of Gladness lives. That, the said three houses do not generate any income and they were not an issue from the start.

The learned counsel for the respondent prayed the appeal to be dismissed with costs.

In rejoinder, Mr. Kilasara noted that the annexures accompanying the written submissions are not and cannot be regarded as evidence; thus, the first appellate court misguided itself into entertaining them.

Responding to the allegation that the issue of joint ownership should be determined in matrimonial cause, Mr. Kilasara reiterated that it is undisputed fact that the 1st appellant is a second wife and Eliaichi Malisa is a first wife of the deceased, and each has her respective homestead.

It was also noted that the respondent did not dispute the evidence which was adduced before the trial court to prove that the house in dispute was jointly acquired and developed by the deceased and the first appellant. He insisted that the cited case of **Beatrice Brighton Kamanga and Another** (supra) is relevant to the case at hand.

On the second and third grounds of appeal, Mr. Kilasara reiterated what he had submitted in chief.

Having considered the lower courts' records, grounds of appeal as well as the rival submissions of the parties, I am of the view that issues for consideration in this appeal which will cut across all grounds of appeal are:

- 1. Whether the impugned distribution was fair to the beneficiaries.*
- 2. Whether the administrator had duly discharged his duties.*

The first issue will resolve the 1st and 3rd grounds of appeal while the second issue will accommodate the 2nd ground of appeal.

On the first and third grounds of appeal, I have noted that the main grievance is on the distribution of the deceased's estates particularly the house which is located at Kiboriloni where the 1st appellant claimed to be her homestead before and even after the death of her deceased husband. The appellants' counsel argued that the said house was jointly acquired by the deceased and the first appellant since 1969. The learned counsel formed an opinion that the said house was erroneously included in the deceased's estate and distributed to unqualified beneficiaries.

Ms. Minde for the respondent submitted that issues of joint ownership are determined in matrimonial cause where the degree of contribution can be determined from evidence. She argued further that, in this case there is no evidence to substantiate the appellants' allegations. On the third ground of appeal, Ms. Minde continued to resist that there were no issues of boundaries. She supported the findings of the first appellate court.

At this juncture, I wish to make it clear that the issue of distribution of the deceased's estate is done by the administrator who is appointed by the court. In the due course of exercising the powers bestowed on him,

the administrator so appointed shall give effect to the directions of the trial court as provided under **Paragraph 5 of the 5th Schedule to the Magistrate Court Act, Cap 11 R.E 2019** which reads as follows:

"An administrator appointed by a primary court shall, with reasonable diligence, collect the property of the deceased and the debts that were due to him, pay the debts of the deceased and the debts and costs of the administration and shall thereafter distribute the estate of the deceased to the persons or for the purposes entitled thereto and, in carrying out his duties, shall give effect to the directions of the primary court."

The administrator so appointed by the primary court in the due course of distributing the deceased's estate will be guided by the customary law as the case herein and Islamic law if the deceased was Muslim. Therefore, since in this case the deceased was Chaga, Chaga customary law should be applicable in distributing the deceased's estates. This is provided for under **Paragraph 1(1) of the 5th Schedule to the Magistrate Court Act** (supra) which reads:

*"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..."* [Emphasis added]

From the above provisions it may be noted that, the deceased's properties should have been distributed according to the **Local Customary Law Declaration Order**. At page 8 of its ruling the trial court observed that:

"Kwa kuwa msimamizi alikiri kuwa na maelekezo kuwa kila mke wa marehemu abaki kwenye boma lake na yeye hakujua kama nyumba hiyo ilikuwa kwenye boma la mleta maombi Na.I, **basi mahakama inaamua kuwa mgawanyo wa nyumba moja ya wapangaji iliyoko kwenye boma la mke wa pili wa marehemu haukufanyika kihalali. Kwa kuwa mke wa kwanza alibaki kwenye boma lake lenye nyumba tatu, mke wa tatu akabaki kwenye boma lake lenye nyumba mbili basi mke wa pili na yeye abaki kwenye boma lake lenye nyumba mbili.**" Emphasis added

The trial court while affirming the distribution made by the respondent, at page 11 and 12 of its ruling had this to say:

*"Kutokana na sababu zote zilizotolewa hapo juu mahakama hii kwa pamoja imeridhika na mgawanyo alioufanya msimamizi wa Mirathi hii kuwa ulikuwa wa haki na usawa na watoto wote 18 pamoja na wake watatu wa marehemu walipata haki za marehemu kwa usawa **isipokuwa mgawanyo wa boma la mleta maombi Na.1 ambapo alisitahili kurithi boma lake kama ilivyoelezwa hapo.**"*Emphasis mine

Thus, the distribution made by the respondent was affirmed by the trial court with exception of the house in dispute which is alleged to be within the homestead (boma) of the first appellant.

The first appellate court did not support the above findings of the trial court instead, it found that the disputed house should be distributed as it was done by the administrator before the objection.

This court is of considered opinion that since the deceased had three wives and each wife has her homestead, then as rightly decided by the trial court the 1st appellant's homestead should not have been distributed to other beneficiaries other than the 1st appellant. In the circumstances, I hereby uphold the findings of the trial court.

Turning to the second issue on whether the administrator had dully discharged his duties; under the third ground of appeal, the appellants' advocate challenged the findings of the first appellate court which held that the administrator had dully discharged his duties of administration of the deceased's estates. On the other hand, the learned counsel for the respondent argued that the administrator had already discharged his duties.

It is trite law that a probate matter come to an end when the court mark it closed. The administrator is said to have fully discharged his duties of administration after he has filed the inventory and accounts and there is no further claim from the beneficiaries and the court has already marked the matter closed.

In the instant matter, perusal of the records revealed that there is no order suggesting that the probate matter had been closed. Moreover, Form No. V and V1 was not yet signed by the trial magistrate. Therefore, the first appellate Magistrate erred by concluding that the administrator had discharged his duties.

Basing on the above findings, the appeal is hereby allowed with no order as to costs. I hereby quash and set aside the first appellate court's decision and uphold the trial court's findings.

It is so ordered.

Dated and delivered at Moshi this 21st June 2023.



X

S. H. SIMFUKWE
JUDGE

Signed by: S. H. SIMFUKWE

21/06/2023