IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISRTY

AT MOSHI

PC PROBATE APPEAL NO. 11 OF 2022

(C/F Probate Appeal Case No. 13 of 2022 of the District Court of Moshi at Moshi, Originally Shauri la Mirathi Na. 61 of 2022 of Moshi Urban Primary Court)

LEONARD ALBERT KIMARIO ..... APPELLANT

VERSUS

JUSTINE ALBERT KIMARIO ..... RESPONDENT

JUDGMENT

17/05/2023 & 20/6/2023

SIMFUKWE, J.

The appellant and the respondent herein are siblings. Following the death of their sibling Casmiri Albert Kimario, the family meeting was convened and they proposed the respondent herein to be administrator of the deceased's estate who did not leave a wife nor a child.

The respondent petitioned for letters of administration before Moshi Urban primary court. However, the appellant herein filed an objection on the ground that the court had no jurisdiction to entertain the matter since the deceased professed Christian religion and the value of the deceased's estate was not within the jurisdiction of the trial court.

The trial court heard both sides together with their witnesses and subsequently, dismissed the objection and continued to appoint the respondent herein to be administrator of the estate of the deceased. The appellant was not happy with the decision of the trial court, he appealed before Moshi District Court (first appellate court) on the grounds that: *first*, the trial court had no jurisdiction; *second*, the respondent was not a fit person to be appointed as administrator and *third,* the application for letters of administration was time barred.

The first appellate court after scrutinizing the grounds of appeal and submissions of the both parties dismissed the appeal. The appellant was irritated by the first appellate court's decision and knocked the doors of this court on the following grounds:

1. *That, the learned Appellate Magistrate erred both in fact and in law when failed to discover that, the Letters of Administration issued in respect of* ***Probate Cause No. 61 of 2022,*** *Moshi Urban Primary Court was tainted with illegalities which are incurably fatal on the eyes of the laws. (sic)*
2. *That, the Learned Appellate Magistrate erred both in fact and in law when failed to ascertain that the whole Trial Court Proceeding and Decision were made contrary to the laws.*
3. *That, the Learned Appellate Magistrate erred both in fact and in law when failed to discover that* ***Probate Cause No. 61/2022,*** *Moshi Urban Primary Court was time barred.*

4. *That the Learned Appellate Magistrate erred both in fact and in law when failed to know that the Trial Court had no jurisdiction to entertain the matter before it.*

The appeal was argued through written submissions, whereas the appellant engaged Mr. Gideon Mushi, learned counsel while the respondent enjoyed the service of Mr. Amani Jackson, learned counsel. I am grateful that both parties filed their submissions timely.

Mr. Gideon Mushi started his submission by narrating the historical background of the matter which has already been narrated briefly herein above.

Submitting on the first ground of appeal that the letters of administration issued by the trial court was tainted with illegalities; Mr. Mushi averred that the clan meeting was conducted without involving the appellant. He opined that the respondent has ill motive. Also, it was stated that time had lapsed since the deceased died about 38 years ago. From the above noted illegalities, it was alleged that the respondent is trying to create endless disputes in the clan and family level. The learned counsel implored the court to revoke the respondent on the reason that his appointment was illegal and unorthodox foundations. That, the respondent's motive is to deprive and mistreat the appellant over the estate of the deceased which he has been developing for quite a while now.

Mr. Gideon opted to argue the second and third grounds jointly. On the second ground of appeal, it was stated that the trial court proceedings and decision were made contrary to **Rue 31 of the Probate Rules** which stipulates that:

1) *In any case where probate and administration are for the first time applied for after expiration of three years from the death of the deceased, the petition shall contain a statement explaining the delay.*
2) *Should the explanation be unsatisfactory, the court may require such further proof of the alleged cause of delay as it may think fit."*

On the basis of the cited provision, Mr. Gideon condemned the respondent for not explaining to the court the reason for his delay. He was of the view that it was improper for the Probate Petition to be filed in 2022, after expiry of 38 years since the deceased's death. The learned counsel referred to the case of **Abasi Kambunga & Two Others vs Mbaraka Abasi Kambunga, Probate and Administration Appeal No. 1 of 2015** (HC) at Sumbawanga, in which it was stated that there ought to be time limit for filing Probate petition and that the time limit for filing those cases is 60 days from the date on which the deceased died. On that basis, it was argued by the learned counsel that 38 years was more than excessive delay.

It was submitted further that this court has power to re-evaluate and analyse critically the evidence presented by both parties in order uphold or otherwise the decisions of the lower courts and advise on the procedures which ought to be followed.

It was insisted by Mr. Gideon that the fact that the respondent had spent 38 years to present his application leaves a lot to be desired. That, the respondent did that behind the appellant's back who has direct interest on the estate of the deceased. He argued that, this issue cannot be left out

as it will lead to endless disputes at family and clan level. He was of the opinion that the foundation of probate procedures is to resolve issues peacefully and once it goes against it, endless feuds are bound to happen.

The appellant's counsel urged this court to review the entire proceedings and see that the appellant's grievances are resolved peacefully so that the illegalities on which the letters of administration were obtained, are cured.

Contesting the above submission, the learned counsel for the respondent replied the 1st ground of appeal that the letter of administration was tainted with illegality particularly that the appellant was not summoned in the clan meeting which appointed the respondent. He contended that the appellant was involved in the clan process of appointing the respondent to be administrator of the estate. That, he refused to sign the minutes as he did not agree the respondent to be administrator. He prayed the court to refer to the trial court's evidence which reveals that the appellant attended the meeting.

The respondent submitted further that the law is settled that clan meeting is not a legal requirement that would render petition of administration to be nullified. He referred to the case of **Masubi Jacob vs Rosemary Bega William (PC Probate Appeal No. 17 of 2021 [2022]** TZHC 933 which held that:

> *"From the first complaint of non-existence of the clan meeting, it is now clear that a clan meeting before petitioning for a grant of letters of administration is not a requirement of law but a matter of practice. This has been established by case laws as it was held in the case of* ***Elias Madata Lameck Vs Joseph Makoye Lameck, PC***

Probate and Administration Appeal No. 1 of 2019, *where my Learned Brother, Kahyoza J, stated that:*

> *"I wish to point out that there is no legal requirement that once a person dies intestate the deceased's clan members must convene and appointing a person to administer that person's estate."*

It was stated that in the case at hand, though clan meeting is not the legal requirement, yet the same was conducted in which the respondent was proposed to be administrator of the deceased's estates by family members including his blood relatives. Further reference was made to **Paragraph 2 (a) of the 5th Schedule to the Magistrate Courts Act, Cap 11 R.E 2019** which provides that:

> *"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."*

Also, the respondent cited the case of **Naftary Petro vs Mary Protas, Civil Appeal No. 103 of 2018**, in which the Court of Appeal held that:

"…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 ... Thus, any person, who, according to the rules for the distribution of the estate of an intestate applicable in the case of such deceased person, is entitled to a share of the deceased person's estate qualifies as an interested person. Invariably, this will include any heir, a spouse, a devisee or even a creditor of the deceased."

Basing on the above authorities, the respondent was of the opinion that since the deceased was not married and had no children, the respondent was a fit person to be appointed as administrator. He averred further that Mr. Gideon's argument that the respondent has ill motive in relation to the deceased's estates is not true as he did not tell the court the alleged ill motive.

Responding to the third ground of appeal that the probate matter before the trial court was time barred, the respondent submitted to the effect that as rightly decided by the first appellate court, there is no time limit for filing application for letters of administration in primary courts. That, the deceased's estate would be left unadministered and scattered.

It was the opinion of the respondent that reason for appointing the administrator is for such administrator to administer the deceased's estate

and nothing else. That, the issue of time is not an issue where the deceased's estates are not yet to be administered in accordance with the law. The respondent blamed the appellant for squandering the deceased's estate and leaving it unadministered to date.

Concerning **Rule 31 of the Probate Rules** which was cited by the learned counsel for the appellant, it was elaborated that the Probate Rules are not applicable in primary courts since the laws applicable in primary courts in relation to probate matters are: **the 5th Schedule to the Magistrate Court Act** (supra) and **Primary Courts (Administration of Estates) Rules 1971 GN No. 49 of 1971.**

On the fourth ground of appeal which concerns jurisdiction, the respondent notified this court that the learned advocate for the appellant did not submit on this ground and he did not even pray the court to adopt the grounds of appeal to form part and parcel of his submission. Thus, the fourth ground of appeal is impliedly taken to be abandoned.

However, without prejudice to what he stated above, the respondent answered the issue of jurisdiction to the effect that according to **rule 1(1) of the 5th Schedule to the Magistrate Court Act**, (supra) the primary court is vested with powers to hear and determine administration cases where the law applicable is Customary or Islamic Law. He continued to narrate that in order to determine whether the deceased falls under customary law or not, two tests have to be established as mentioned by the first appellate court to wit: *Mode of life test* and *the intention of the deceased before his death test*. He made reference to **section 9 (1) (b) of the Judicature and Application of Laws Act, Cap 358 R.E** which provides for applicability of customary law.

Having cited the above law, the respondent concluded that in our case, the deceased practiced Chagga customary life. That, the fact that he was Christian is not sufficient to conclude that the deceased abandoned customary life. He said that since the appellant was the one who raised the issue of jurisdiction, he was duty bound to prove that fact since the law is very clear that the one who alleges must prove and the burden never shifts to the adverse party. In support his argument, the respondent referred to the case of **Jasson Samson Rweikiza vs Novatus Rwechungura Nkwama (Civil Appeal 305 of 2020)** [2021] TZCA 699, in which it was held that:

> *"It is again elementary law that the burden of proof never shifts to the adverse party until the party on whom onus lies discharges his burden and that the burden of proof is not diluted on account of the weakness of the opposite party's case."*

On the strength of above argument, the respondent commented that since the appellant failed to prove the fact that the deceased abandoned Chaga customary life, he cannot be blamed for not proving the same. It was insisted that subordinate courts correctly found that the trial court was vested with jurisdiction.

Winding up his submission, the respondent submitted that this appeal is devoid of any merits. He prayed this court to dismiss it with costs and the decision of the trial court as well as of the 1st appellate court to be upheld.

In his rejoinder, the learned counsel for the appellant reiterated what he had submitted in chief. He added that the fact that the appellant was and is still a business partner to the deceased is the reason why he is still in possession of the offer of the only- remaining asset of the deceased of

which the respondent is applying to manage before the courts of law. The appellant complained further that, since the deceased was his business partner and had no wife nor child, it was very important for the appellant to be part and parcel of the meeting which appointed the respondent.

I have keenly gone through the grounds of appeal, submissions of both parties and records of the lower courts; the appellant has raised four grounds of appeal, I will deal with the grounds of appeal as presented and submitted by the parties.

On the first ground of appeal, the appellant's counsel argued that the letter of administration which was granted to the respondent was tainted with illegalities on the reason that the appellant was not involved in the meeting which proposed the respondent to be administrator of the estate of the deceased.

Responding to this issue, the respondent argued that the appellant was involved in the clan meeting but he refused to sign the minutes as he did not agree the respondent to be administrator. In addition, the respondent argued that clan meeting is not a legal requirement before appointing the administrator of the deceased's estates. He cited different authorities to cement his argument.

I have examined the trial court's records; the respondent's evidence is loud that the appellant attended the clan meeting but he refused to sign the minutes as stated by SU1, SU2 and SU3 who attended the said meeting. Thus, the argument that the appellant was not involved in the said meeting is unfounded.

Even if it is assumed that there was no clan meeting, still the person can be appointed as administrator in absence of clan meeting, as it is not mandatory

to conduct the clan meeting before appointing the administrator of the estate. The primary factor to be considered is the interest which a person has in the deceased's estates as stated in the case of **Naftary Petro vs Mary Protas** (supra). Also, under **Paragraph 2 (a) of the Fifth Schedule to the Magistrate Courts Act** (supra), the primary court is vested with powers to appoint the interested person to be administrator of the estate of the deceased. As a matter of reference, the provision reads:

> *"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;"*

On the strength of cited authorities, I am of considered opinion that since the deceased left no child nor wife, then the trial court correctly appointed the respondent to be administrator.

The second noted illegality is in respect of time limitation where the appellant's counsel under the third ground of appeal argued that 38 years has elapsed since the demise of the deceased. Thus, the respondent was time barred to file the probate matter. He cited the case of **Abasi Kambuga and two others** (supra) and **Rule 31 of the Probate Rules** to support his argument.

The respondent argued to the contrary that there is no time limit to file probate matters in primary courts. He went further and explained that **Rule 31 of the Probate Rules** (supra) is not applicable in probate matters instituted in primary courts.

I wish to respond first to **Rule 31 of the Probate Rule;** with due respect to Mr. Gideon, this appeal was instituted before the primary court where the applicable laws are **the 5th Schedule to the Magistrate Court Act** (supra) and **Primary Courts (Administration of Estates) Rules 1971 GN 49 OF 1971** which essentially does not provide for time limit to file probate matters in primary courts.

The first appellate court while discussing this ground at page 15 of its judgment stated that:

> *"In primary court there is no limitation to file probate and administration of estate. However, as stated by counsel for the appellant that where the estate has taken long time from the death of the decease the petitioner may be required by court to give explanation for delay. Despite such requirement, it is discretion of trial primary court either to agree or deny the institution of the proceedings. This was much emphasized in most cited case of Beatrice (supra)…*
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> *The fact that the trial primary court agreed and permitted institution of the matter leading to this appeal, it goes without saying that, it exercised its discretion judiciary (sic). Since there is no limitation of time, the primary court had jurisdiction to deal with the matter."*

From the above findings of the first appellate court, I am of considered view that the learned appellate magistrate said it all. Apart from that, I wish to

state that since in the present matter the deceased left the properties which to date are yet to be administered, time should not run against this matter as it will bar the properties of the deceased to be dealt with in accordance with the law. Thus, the appellant grievances on the second and third grounds of appeal have no merit.

On the fourth ground of appeal, the appellant's counsel raised the issue of jurisdiction. However, he did not discuss it nor adopt it to form part of his submission. However, this being the issue of law, there is no way that it can be left undiscussed. On part of the respondent, he supported the findings of the appellate court that the trial court had jurisdiction to entertain the matter.

On this point, I subscribe to the decision of the first appellate court in which the learned Magistrate discussed this issue thoroughly from page 10 to 14 of the judgment. I do not see any reason to fault that finding.

In the upshot, I find this appeal to have no merit and hence proceed to dismiss it with costs. It is so ordered.

Dated and delivered at Moshi this 20th June 2023.

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOSHI DISTRICT REGISTRY

X

S. H. SIMFUKWE
JUDGE
Signed by: S. H. SIMFUKWE

20/06/2023