IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

PC **CIVIL APPEAL NO. 35 OF 2022**

(C/F Civil Appeal No. 32 of 2021 in District Court of Arumeru at Arumeru, Original Probate and Administration of Estate Cause No. 27 of 2019 Maji ya Chai Primary Court)

ANDERSON SARIKIAEL AKYOO ..... 1ST APPELLANT

FRIDA SARIKIAEL AKYOO ..... 2ND APPELLANT

VERSUS

JOHN SARIKIAEL ..... 1ST RESPONDENT

NATHAIKA AKYOO ..... 2ND RESPONDENT

JUDGMENT OF THE COURT

20th March & 16th June, 2023

GWAE, J.

The appellants herein are appealing against the decision of Arumeru District Court (the District Court) in Civil Appeal No 32 of 2021 delivered on 30th April, 2021. Primarily, the matter ensued at Maji ya Chai Primary Court (trial court) in Probate and Administration Cause No. 27 of 2019 where the appellants (son and mother) duly petitioned grant of letters of administration in respect of the Estate of the late Sarakiel Efraim Akyoo (deceased) who died on 2nd March, 2018.

The petition being uncontested, on 13th August, 2019 the trial court granted the appellants letters of administration.The appellants discharged

their duties by collecting the deceased's properties, divided them to the legal heirs, filed the inventory and accounts of the estate (Form No. V and VI). The Probate and Administration Cause was marked as closed on 05th September, 2019. However, it vividly clear that on 4th October, 2019 the 2nd respondent filed a complaint letter to the trial court claiming to be the legal 2nd wife of the deceased person. Therefore, she was dissatisfied with the distribution of the deceased's properties.

As at the time of filing the complaint letter the Probate and Administration Cause had already been closed, the respondents herein together with one Elizabeth Sarakiel filed a Civil Revision No. 9 of 2020 at the District Court of Arusha. They sought the District Court to inspect the records of the trial court in order to satisfy itself as to the correctness, legality and propriety of the proceedings. They challenged the appellants' appointment on the grounds that, there was no proper family meeting which proposed them for being granted letters of administration, it was not announced for 90 days; there was no notices of hearing issued; and that, the division of the deceased person properties was not fair. They prayed the appellants' appointment be nullified.

The District Court (Hon. Nguvava, SRM) in revising the proceedings of the trial court made a finding that, there were irregularities in the

proceedings of the trial court from the appointment of the appellants to the administration of the deceased's estate. Consequently, the District Court ordered reopening of the closed Probate and Administration Cause in order that, the trial court could hear and determine the respondents' complainants.

Having heard the parties, the trial court subscribed itself to the findings of the District Court in Civil Revision No. 9 of 2020, revoked the appointment of the appellants and appointed one Abel Kaaya, Kikatiti Village Executive Officer (VEO) to be the administrator of the estate of the deceased.

Aggrieved by the trial court's decision appointing VEO as an administrator, the appellants herein appealed to the District Court (Mushi, SRM) which upheld the trial court's decision hence the current appeal with five grounds as follows;.

1. That, both the trial Primary Court and the Appellate District Court erred in law and in fact when they failed to properly evaluate the evidence so tendered by both parties and thus arrived at a wrong decision.
2. That, the appellate District Court erred in law and in fact in concurring with the decision of the trial court in revoking the letters of administration of the appellants herein without any

proof that the appellants have failed to properly administer the estate of the late Sarikiel Efrahim Akyoo.

3. That, the Appellate District Court erred in law and in fact when it concurred with the trial Primary Court on appointment of the Village Executive Officer without considering the fact that he is not impartial.
4. That, the trial Primary Court erred in law and in fact, when it appointed a stranger to administer the estate of the late Sarikiel Efrahim Akyoo while the family of the deceased has not agreed upon his appointment.
5. That, the trial Primary Court and the District Court erred in law and in fact when it failed to see that the said properties listed by the appellants herein in their inventory were equally distributed to the rightful heirs of the deceased and that the deceased had only one legal wife and 8 children thus no one was left behind.

At the hearing of this appeal, Ms. Beatrice F. Mboya represented the appellants and Ms. Rachel Mwainyekule represented the respondents, both the learned advocates. Hearing proceeded by way of written submissions, which I shall consider while disposing the grounds of appeal serve for ground number four abandoned by the appellants' learned counsel.

Supporting the appeal, Ms. Mboya submitted on the first ground that, going through the trial court's decision, there was no evaluation of

evidence, which shows how the court reached its decision. She argued that, the said judgment is short and did not cover all the issued raised as it only based its decision on the District Court's findings instead of making its own analysis and findings. She submitted that, had the trial court evaluated the evidence it would have found that, the respondents failed to prove their contentions regarding appellants' appointment at the balance of probability as required in civil cases as underscored in the case of **Zaituni Hassan Mganga vs. Abraham James Mwangake**, Probate Appeal No. 5 of 2020 (HC at Mbeya-unreported).

On the second ground, Ms. Mboya argued that, there was no proof of failure or neglect to properly administer the deceased's estate by the appellants. She argued that, where there is an objection or contention against grant of the letters of the administration that matter becomes a suit where the objector becomes the plaintiff and the other becomes the defendant. She further stated that, the deceased person before his demise had already sold some of the properties listed by the appellants or were parts of the suits in which the appointed administrators lost. Hence, such properties declared properties of other people. She went on arguing that, the remained properties were fairly distributed to the beneficiaries who

are one (1) wife and eight (8) children and none of the respondents contended that they never received their shares.

Regarding the third ground, it was Ms. Mboya's submission that, the trial court had no justification of appointing the Village Executive Officer to administer the deceased's estate. She cemented her argument by citing rule 2 (a) of the 5th Schedule to **Magistrates' Courts Act** (Cap 11, R.E. 2019) which requires that, any person who is appointed by the court to be the administrator of the deceased's estate has to be interested in the estate of the deceased.

Further to that, such interested person has to give regards to the deceased's wishes, if any, which he might have expressed prior to his death. However, the same is not the fact in the current appeal since the said Village Executive Officer is a stranger to the family .Hence; there is likelihood of mismanaging the deceased's estates.

As to the fifth ground, it was Ms. Mboya's contention that, the appellants' neither concealed nor misused part of the deceased's estate thus, the subordinate courts erred in law by revoking their letters of administration while they had already discharged their duties. Bolstering her contention, Ms. Mboya cited the case of **Joseph Shumbusho vs. Mary Grace Tigerwa and 2 Others**, Civil Appeal No. 183 of 2016

(unreported). In the case of **Mary** (supra) the Court of Appeal was of the opinion that, where there is an allegation of maladministration of the deceased's estate, the same should be proved through a civil suit so that such allegations should be proved. Learned counsel prayed that, this court be pleased to allow the appeal with cost.

Opposing the appeal, Ms. Mwainyekule submitted to the first ground of appeal that, the 2nd respondent herein is the legal wife of the deceased whom they contacted customary marriage back in 1990 and were blessed with two children. However, as interested party she was never summoned in court which is contrary to Rule 5 (2) & (3) of the **Primary Court (Administration of Estate) Rules** G.N. No.49 of 1971. Therefore, she argued that, the 2nd respondent was curtailed her constitutional right to be heard rendering the subsequent proceedings a nullity. It was therefore her opinion that, the trial court did not err in revoking the letters of administration granted to the appellants after finding the irregularities and improprieties initially done by the same trial court.

On the 2nd ground, learned advocate submitted that, there was enough proof that rightly warranted the trial court's to revoke letters of administration granted to the appellants. The reasons being that, there was no 90 days' publications; the interested parties were not summoned

to testify; and the appellants breached their oath by leaving behind some of the deceased's properties undistributed. According to her, these were sufficient to warrant their revocation.

As to the 3rd ground regarding the appointment of Village Executive Officer, it was the learned advocate's assertion that, VEO's appointment was proper as a result of failure by the appellants to administer the deceased person's estate properly. She referred the court to the cases of **Mohamed Hassan vs. Mayasa Mzee and Mwanahawa Mzee** [1994] TLR 225 and **Sekunda Mbwambo vs. Rose Ramadhani** [2004] TLR 439. Both decisions emphasizing that, the Primary Courts have power to appoint any other fit person or authority once there are genuine claims against the administrator(s) relating to improper administering the estate of the deceased.

On the last ground Ms. Mwainyekule submitted that, there are other legal heirs apart from the 2nd appellant and her eight children and other properties which the appellants neglected to account and distribute. More so, the appellants divided to themselves more valuable properties while other properties were distributed to more than one heirs hence may cause chaos. She prayed that this appeal be dismissed and this court uphold the concurrent decisions of the both subordinate courts.

In her brief rejoinder, Ms. Mboya reiterated her earlier submission and maintained that this appeal be allowed.

Having gone through subordinate courts' records, grounds of appeal as well as parties' rival submissions, I am now tasked to determine this appeal while being aware of the principle that, this being a second appeal, I am restricted to interfere with the concurrent findings of facts of the courts below. Interference will only entertained in a situation where there is misapprehension of evidence by misdirection or non-directions which has occasioned a miscarriage of justice or where there is violation of some principles of law or procedures. In fact, the Court of Appeal of Tanzania in the case of **Neli Manase Foya vs Damian Mlinga** [2005] T.L.R 167 had the following to say;

> *".... It has often been stated that a second appellate court should be reluctant to interfere with a finding of fact by a trial court, more so where a first appellate court has concurred with such a finding of fact. The district court, which was the first appellate court, concurred with the findings of fact by the primary court. So did the High Court itself, which considered and evaluated the evidence before it and was satisfied that there was evidence upon which both the lower courts could make concurrent findings of fact."*

With the above principle in mind, this court proceeds to examine the merit of the appellants' complaints to see whether there is necessity of

this court to re-examine evidence to see whether it can come up with different findings from that of the courts below. That said, in this appeal the gist of contention between the parties is mostly in two limbs. **Firstly;** whether the trial court was justified to revoke the letters of administration issued to the appellants and **secondly;** whether the trial court properly appoint the Village Executive Officer as an administrator of the deceased's estate.

In the first limb, the appellants are challenging the decision of the trial court in revoking the letters of administration, which were issued to the appellant without considering the evidence on record especially, that the appellants had distributed all the deceased person's properties to the his heirs and that, the properties claimed by the respondents do not exist. The respondents on their part strongly insisted that the appointment of the appellants was covered by some irregularities such as non-publication of the notice of hearing and failure to serve the summons to the interested parties.

It should be noted that, the decision of the trial court revoking the letters of administration issued to the appellant was founded from the decision of the District Court after filing of the application for revision registered as Civil Revision No. 9 of 2020 by the respondents. In the said

revision, the learned Senior Resident Magistrate revised the proceedings of the trial court after his findings that, both the appointment of the appellants and administration of the deceased's estate were covered with irregularities and directed the probate to be re-opened for any aggrieved party to lodge his or her complaints. Much as the District Court had found out that the appointment of the appellants was covered with irregularities, the trial court proceeded to revoke the letters of administration issued to them.

From the above narratives, this court wishes to address to the validity of the order issued by the District Court to re-open the closed Probate and Administration Cause so that, the respondents herein could lodge their complaints. It is my considered opinion, that the directive issued by the District Court is the root of the contention in the instant matter. The records are clear that, at the time the respondents filed the civil revision before the District Court challenging both the appointment of the administrators and the distribution of the deceased's properties were already done. Similarly, both accounts and inventory in respect of the deceased person's estate had already been filed in the trial court and proceedings to that effect were effectively closed on 5th September, 2019. This implies that, notwithstanding of the manner the Probate and

Administration was closed, at the time of filing the application for revision since the appellants had already discharged their duties and the office of the administrators had already been closed. Hence was nothing left to be revoked or annulled.

Moreover, even the proceedings show that, the appellants were sued in their own capacities and not as administrators of the deceased person's estate. The above scrutiny suggests that, the District Court misdirected itself to issue an order of re-opening of the Probate and Administration Cause while in fact there was nothing left in the office of administrators to administer. If at all there were complaints relating to the deceased's properties then, it was proper to direct the parties to either sue the administrators in their own capacities or the beneficiaries and or persons in possession of the deceased's estate be it actual or constructive possession.

Therefore, re-opening of the Probate and Administration Cause, which has already been closed for purposes of revoking the letters of administration to persons who have already discharged themselves, is a misconception of the administration process. Facing similar scenario, the Court of Appeal in the case of **Andrew C. Mfuko (suing in person) vs.**

George C. Mfuko, Civil Appeal No. 320 of 2021 (CAT at Dsm-unreported) had this to say;

> *"On our part, having heard the advocates' submissions to the questions we posed, there is no dispute that the order of the High Court in Probate Cause closed the matter with the result that, the respondent ceased to be an administrator. Having vacated office as an administrator, he could not sue or be sued in that capacity. Apparently, both learned advocates agree that it was wrong for the appellant to have sued the respondent in his capacity as an administrator. That means the suit was instituted against a person who had no capacity to act as an administrator regardless of the fact that the order closing the Probate Cause may have been erroneous."*

The same stance also stressed by the Court of Appeal of Tanzania in the case of **Ahmed Mohamed Al Laamar vs. Fatuma Bakari & another,** Civil Appeal No. 71 of 2012 (unreported) where it was stated that;

> *"... Furthermore, we have discovered from the High Court record, that as consistently claimed by the appellant, he did exhibit the requisite inventory and account in the High Court on 25th February, 1987. This fact is proved beyond any reasonable doubt by Exchequer Receipts Nos. 643059 and 643058 respectively both dated 2th February 1987. In law the probate proceedings were effectively closed from that day.*

> *Given the fact that the appellant had already discharged his duties of executing the will, whether honestly or otherwise, and had already exhibited the inventory and accounts in the High Court, there was no granted probate which could have been revoked or annulled in terms of section 49(1) of the Act. As the appellant was already* ***functus officio,*** *as correctly argued by Mr. Akaro, the revocation or annulment order, in our respectful opinion, was superfluous. It had no purpose to serve [see* ***HADIJA MASUDI v. RASHID MAKUSUDI*** *(supra)]..."*

In light of the above authorities, the law is clear that, after the close of Probate and Administration Cause the same cannot be re-opened. In the event of complaints vis-à-vis misappropriation of the deceased person's estate against the administrator/executor, the best approach is to sue the administrator/executor in his or her capacity for recovery of any property misappropriated or wrongly distributed and or those persons in possession of the property alleged being the estate of the deceased person. Rule 8 of the **5th** Schedule to the Magistrates Courts Act, Cap 89, Revised Edition, 2019 provides that an administrator who misapplies or occasions loss to the estate by neglecting it or any part of the property of the deceased or subjects it to loss or damage shall be liable to make good of the same. (See the case of **Safiniel Cleopa vs. John Kadeghe**, 1984 TLR 198).

In the similar disposition, in my view, even if the 2nd respondent was intentionally or inadvertently excluded in the estate as a legal wife of the deceased yet the remedy available in her favour was to institute a civil suit against the then administrators in their personal and any person in possession for recovery of her share of the estate. This legal position was also stated by the Court of Appeal in the case of **Hadija Makusudi as the Legal Representative of the late Halima Makusudi vs. Rashid Makusudi,** Civil Appeal No. 26 of 1992 where thr Court of Appeal had the following to say;

> *"This state of affairs does not however mean that a person who claims to be a heir of Salima Makusudi and who has not got his or her rightful share of the deceased's estate, has no remedy at law. Far from it. The remedy for such person, like the respondent, is to sue for the recovery of his or her share of the estate of the deceased, Salima Makusudi from any person who is in possession of it."*

In the strength of the above judicial authorities, it follows that, it was improper for the trial court to revoke the letters of administration granted to the appellants. Reason being that, at the institution of the respondents' complaints it is evidently clear that, the appellants had already discharged themselves as administrators of the estate of the late

Sarikiel Efrahim Akyoo. Allowing such practice will visibly open a pandora box of infinite litigations before courts of law.

Having demonstrated as herein above, the second limb is overtaken by the finding in the 1st limb as the subsequent order issued by the trial court in appointing the Village Executive Officer of Kikatiti village is found to be a nullity. In addition, even if, the trial court's order revoking the letters of administration granted to the appellants was proper yet, it was not proper to appoint VEO without his exhibition of his readiness to perform the duty as an administrator of the deceased's estate and trial court's ascertainment of VEO's suitability or his impartiality in the administration of the estate.

Consequently, the Appellants' appeal has merit; the subordinate courts' concurrent decisions are quashed and set aside. This being the Probate and Administration Cause and given the parties' relationship, this court shall refrain from issuing an order as to costs of this appeal and those of the lower courts.

It is so ordered.

HIGH COURT OF TANZANIA

M. R. GWAE
JUDGE
16/06/2023