IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISRTY

AT MOSHI

DC CIVIL APPEAL NO. 8 OF 2022

(C/F Civil Case No. 10 of 2021 originating from Probate and Administration Cause No. 01 of 2021 of Moshi District Court)

GILIAD SHIJA MIHAMBO..... APPELLANT

VERSUS

FLORA MTUI ..... 1ST RESPONDENT

JANE KIRAMA NGOWI ..... 2ND RESPONDENT

VERONICA GERALD RWEGASARE..... 3RD RESPONDENT

JOYCE JULIUS LESHABAKI ..... 4TH RESPONDENT

JUDGMENT

17/05/2023 & 23/6/2023

SIMFUKWE, J.

The late Edith John Ngowi was blessed with six issues five of them are the parties herein, whereas each has his/her own father. After the demise of their mother, it was alleged that they convened two meetings; the first meeting appointed the appellant herein to be administrator of the deceased's estates. He petitioned for letters of administration before Moshi District court (the trial court). The respondents filed a caveat to object the appointment of the appellant. In their caveat, the respondents

herein resisted the appointment of the appellant on the reason that they had not consented in the clan meeting for him to be administrator. Also, the respondents argued that the deceased left a Will and one house only located at Plot No. 113 Block CCC Section III Moshi Township (Disputed Plot). That, the property at Marangu belonged to their sister called Renatha.

The appellant herein disputed the respondents' allegations. On his side, he alleged that the disputed land belonged to him alone as their deceased mother held it as his Guardian. He asserted that the deceased left the property at Marangu Rauya only.

The trial court after hearing both parties rejected the appellant's petition of letters of administration. It also found that the disputed plot forms part and parcel of the estate of the deceased while the property at Marangu belonged to Renatha. The appellant was aggrieved, he filed the instant appeal on the following grounds of appeal:

1. *That the trial Magistrate erred in law and fact in deciding the ownership of Plot No. 113 Block CCC Section III Moshi Township in full glare of the provision of Law that no Magistrates' Court established by the Magistrate Courts Act have civil jurisdiction in any land matter.*
2. *That that the trial Magistrate erred in law and in fact in deciding in favour of the Respondents without take note that when probate case turn into civil case accordance with section 52 of Probate and Administration of Estates Act, Cap 352 R. E 2019, the mandatory provision of Order VIII 16. Order VIII B, C, D of the Civil Procedures Code, Cap 33*

R.E 2019 should be followed and failure to follow the mandatory provision render the entire proceeding, judgment and decree thereto nullity. (sic)

3. *That the trial Magistrate erred in law and fact in when overrule objection on admissibility of Exhibit D-8 without take note DW-4 lack competence to tender it, the document contravenes provision of section 10 of Oaths and Statutory Declaration Act and section 8 of Notaries and Commissioner for Oaths Act and its authenticity is questionable. (sic)*
4. *That the trial magistrate erred in law and fact in deciding in favour of the Respondent while failing to properly evaluate, analyse and scrutinize the evidence adduced before the Court.*
5. *That the trial Magistrate erred in law and fact in rejecting to appoint the Appellant as administrator of estates of late Edith Ngowi based on the reason that has conflict of interest to the estate, if he could not so erred could have held that the Appellant possesses requisite to be appointed as administrator. (sic)*
6. *That the Trial Magistrate erred in law and fact in declaring the House on Plot No. 113 Block CCC Section III is property of deceased without proof and on balance of probability.*
7. *That the Trial Magistrate erred in law and fact in deciding the farm and House at Marangu to be the property of Renatha Ngowi.*

8. *That the Trial Magistrate erred in law and fact in relying on defective affidavit (Exh.D-8) even after he had agreed it was defective and he went further to error that Edith Kirama Ngowi is also Edith Kirama Giliad Mihambo*.

During the hearing of this appeal, Mr. Charles Mwanganyi learned counsel represented the appellant while the respondents were represented by Mr. Chiduo Zayumba, learned counsel. The court ordered the matter to proceed through filing written submissions, the order which was fully complied by the parties.

Mr. Mwanganyi dropped the first ground of appeal and argued the rest grounds of appeal in seriatim.

On the second ground of appeal Mr. Mwanganyi submitted to the effect that the trial magistrate omitted to follow the mandatory requirement of **Order VIII rule 16**, **Order VIIIB** (First PTC and Scheduling Order, **Order VIII C** (Negotiation, conciliation, Mediation and Arbitration Procedures) and **Order VIII D** (Final Pre-Trial-Conference) hence, the whole proceedings and judgment became nullity. He referred to the case of **Monica Nyamakare Jigamba v Mugeta Bwire Bhakome as Administrator of the Estate of Musiba Reni Jigamba and Another, Civil Application No. 1999/01/2019** CAT (www.tanzilii.co.tz) at page 13 and 14 which held that:

> *"Where a Caveator appears and opposes the petition for probate or letter of Administration then subsection 3 of section 59 of the Probate and Administration Act requires the Court to proceeds with the petition in accordance with*

paragraph (b) of section 52 of the Probate and Administration ….

It follows then that where a petition has been opposed, the Probate or administration proceedings change, as nearly as can be, into an ordinary civil suit, where the petitioner becomes the Plaintiff and caveator became the Defendant and parties are requires to file special pleadings. The main purpose of that procedure is to facilitate the investigation of caveator's objection and its effect is to enable the entire proceedings, but not just a part of it, to be dealt with in totality as in a suit and to be concluded as whole."

On the basis of the above authorities, Mr. Mwanganyi asserted that once the caveator enter an appearance and object the petition, the procedures under the **Civil Procedures Code** shall be adhered to and the matter turn to a normal civil suit. That, **Order VIII rule 16 of the Civil Procedure Code** stipulates that as soon as the Written Statement of Defence or, if there is reply to Written Statement of Defence, the case shall be ready for mediation. Thereafter, it follows 1st Pre-Trial Conference, Mediation and finally a final Pre-Trial Conference as per **Order VIIIB, C** and **D**. He condemned the trial magistrate for failure to adhere to all those procedures which renders the Judgment and Decree nullity.

Submitting on the third ground of appeal, Mr. Mwanganyi faulted the trial magistrate for overruling the objection to admissibility of exhibit D-8 without taking note that DW-4 lacked competence to tender the same. He argued that the said document contravened the provision of **section 10 of Oaths and Statutory Declaration Act** and **Section 8 of Notaries**

Public and Commissioner for Oaths Act as it was a defective affidavit. That, the provisions stipulate the contents of affidavit as substitute of oral evidence to contain a proper oath and valid verification clause. That, the Court overruled the raised Objection and relied upon it to establish ownership of the disputed plot. He referred to the case of **D. P. Shapriya & Co. Ltd vs Bish International B.V [2002] EA** which emphasized the mandatory requirement of complying with **section 8 of Notaries Public and Commissioner for Oaths Act**. The learned counsel told this court that he was aware of the current oxygen principle or overriding objective principle. However, he cited the case of **Mondorosi Village Council And 2 Others V. Tanzania Breweries Limited and 4 Others, Civil Appeal No. 66 Of 2017** in which the Court of Appeal stated that:

> *"Regarding Overriding objective principle, we are of the considered view that, the same cannot apply blindly against the mandatory provision of the procedural law which goes to the very foundation of the case."*

He implored this court during its evaluation of evidence to accord the said affidavit less weight or to disregard it since its authenticity is questionable. He continued to challenge the said affidavit by stating that all the signatures in the certificate of title (Exh D-5) Plot No. 113 "CCC" Section III, Moshi Municipality and in the sale agreement (EXH, D-4) and the signature in the affidavit of names differ in its entirety which creates doubt on whether the same was signed by the deceased or it was forged to substantiate respondents' evil motive to prove ownership. He challenged the findings of the trial court by arguing that the disputed Plot was registered in the name of her mother **Edith Kirama** as guardian of **Giliad Mihambo** (appellant herein), although it was mistakenly written Edith

Kirama Giliad Mihambo. That, logically, one person cannot have four different names with two surnames.

Concerning the findings of the trial magistrate that even if the affidavit is expunged it will not offend the truthiness that the disputed Plot belonged to the deceased, Mr. Mwanganyi submitted that there is no evidence to prove ownership of the suit land to the deceased. That, even the trial court did not stipulate other evidence to substantiate that the same belonged to the deceased.

Moreover, Mr. Mwanganyi submitted that according to the **Registration of Documents Act,** the affidavit of names should be registered before Registrar of Titles or otherwise should have filed a deed pool to show that she abandoned her previous name. It was insisted that the names in the certificate of Title dictate that the late Edith Kirama owned a Plot as guardian of Giliad Mihambo and she was not a real owner of the said Plot.

Also, the learned counsel faulted the trial magistrate for overruling the objection without considering competence of DW-4 to tender certificate of Title. That, DW-4 claimed to be custodian of the documents but during the hearing, DW-1 stipulated that she was the one who handled all the documents of their deceased mother.

Submitting on the 4th ground of appeal which concerns failure to evaluate evidence, Mr. Mwanganyi submitted that the trial Court erroneously found that ownership of the disputed land belonged to the deceased. That, if it could have analysed the evidence properly, it could have decided in favour of the appellant. Nevertheless, the learned counsel said that this reason is premature because the administrator is not yet appointed so that he can collect and distribute the deceased's properties.

It was submitted further that from the adduced evidence the disputed plot was acquired and registered in the name of Edith Kirama as guardian of Giliad Mihambo who is the appellant herein. That, the appellant testified that the late Edith John Ngowi was blessed with six issues, whereas each has his/her own father. That, it was the father of the appellant who bought the said plot and built a house therein. That, since the appellant was a child, it was registered in the name of the mother as guardian of the appellant. He argued that proof lies to the certificate of title which shows that, the said plot has four names to wit, Edith Kirama (mother) and Giliad Mihambo who is the appellant herein. It was also explained that evidence of DW1, DW2 and DW3 tried to establish that the plot belonged to the deceased. That, DW4 tendered a certificate of title and exhibit D-8 the affidavit trying to convince this court that the deceased had two names used interchangeably and that all names belonged to her.

In respect of the fifth ground of appeal, the appellant blamed the trial court for rejecting his petition. Mr. Mwanganyi explained that immediately after a person's death, it follows administration of his estate which is done by the representative of the deceased who is either executor or administrator depending on whether that person died testate or intestate. He submitted that in the instant case, since there is no valid Will tendered, then the deceased died intestate hence her administration should be intestate. Reference was made to **section 33(1) of the Probate and Administration of Estates Act, Cap 352 R.E 2019,** which provides that:

> *"Where the deceased has died intestate, letter of administration of his estate may be granted to any person who according to the rules for distribution of the estate of an intestate applicable in the case of*

such deceased, would be entitled to the whole or part of such deceased's estate."

On the strength of the above authority, Mr. Mwanganyi concluded that if the trial court had looked on that requirement, could have appointed the appellant as administrator since he has no conflict of interest on the reason that from adduced evidence, the disputed Plot belongs to him.

On the 6th ground of appeal, the learned counsel for the appellant condemned the trial magistrate by finding that the disputed plot is the property of the deceased without proof on balance of probability. Mr. Mwanganyi elaborated that the respondents did not advance crucial evidence to prove ownership because all the documents tendered before the trial Court stipulated that the owner was one **Judith Kirama Giliad Mihambo**. That, the appellant testified that the suit land was registered in the name of her mother as his guardian on the reason of him being a child. The appellant testified further that it was mistakenly written in the certificate of title by omitting to stipulate that Edith Kirama was a guardian of Giliad Mihambo.

Challenging further exhibit D-8 (affidavit regarding names of the deceased) which was tendered by the respondents, Mr. Mwanganyi submitted that if the said Exhibit D-8 could have been expunged from the record as suggested by the trial court, there will be no other evidence to proved that the ownership of the suit land belonged to the deceased.

On the 7th ground of appeal, the learned counsel for the appellant submitted that the trial court erroneously held that the property situated at Marangu does not belong to the deceased. He argued that the said Renatha Ngowi is not party to the suit and she has not objected to the

appointment of the appellant. It was the opinion of Mr. Mwanganyi that the court should not dwell on that issue. It was insisted that the duty of the administrator is to collect and distribute the estate to the legal heirs.

Lastly, on the eighth ground of appeal the learned counsel faulted the trial magistrate for relying on defective affidavit (Exh.D-8) even after he had agreed that it was defective.That, having found that the affidavit was defective, the trial Magistrate should have not continued to hold that Edith Kirama Ngowi was also Edith Kirama Giliad Mihambo but he should have expunged it and relied on the remaining evidence which Mr. Mwanganyi was of the view that the same does not prove ownership of the disputed property.

In his conclusion, Mr. Mwanganyi urged the court to allow the appeal with costs and set aside the judgment and decree of the trial court.

In reply, Mr. Zayumba noted that under **Rule 39(f) of the Probate Rules**, the petitioner must obtain written consent in a prescribed form from the heirs of the deceased, and in case of absence of such consent he must file an affidavit in lieu of the consent. He argued that the appellant herein had done none of the two requirements. It was further submitted that **Rule 71 (4) of the Probate Rules** provides the format of the Consent, that it shall be in the form prescribed in **Form 56** set out in the First Schedule and shall be signed by the person or persons giving the same and attested by any person before whom an affidavit may be sworn. That, **Rule 72 (1)** provides the procedure where consent is not available or refused.

Mr. Zayumba notified this court that the appellant had not challenged the decision of the trial court in respect of consent. He opined that the trial

court rightly rejected the petition, basing on the stated basic reason, which was sufficient to dispose the matter. He insisted that the provisions of the law are mandatory, and none of them were complied by the appellant/Petitioner. He cited the case of **Rashidi Hassan vs Mrisho Juma [1988] TLR 134 (HC)** in which it was held that:

> *"Since the Respondent did not comply with the provisions of section 22 of the Civil Procedure Code and rules 39, 73 and 75 of the Probate Rules, there was no petition of probate and administration lodged with the District Court."*

Responding to the second ground of appeal Mr. Zayumba submitted that there is no law providing that **Order VII rule 16 of the CPC** must be followed in Probate cases and that failure to follow it is not fatal. He made reference to the case of **In the Matter of the Estate of the Late Ramadhani Mohamed Kalingonji (Deceased) and In the Matter of Application for Letters of Administration by Kalingoni Ramadhani Kalingonji, Administration Cause No. 1 of 2020**, (unreported) HCT at Tabora, where at page 3 it was held that:

> " *The import of the cited provision of the law **is not to turn the whole matter into a suit** which commences with the filing of pleadings, plaint, the written statement of defence counter claim/ set off reply to the written statement of defence and attendant mandatory procedures of pre-trial conferences and **mediation sessions.***
>
> *Thus, a contentious matter like the present one is not a suit per se. In my view, only proceedings subsequent to*

filing the caveat are the ones that need to be conducted as if the matter was a normal suit.

Consequently, parties ***will have to pick it from the stage of hearing by procurement of witnesses,*** *adducing evidence through to final submissions, where necessary, before the court makes its decision."*

From the above case, Mr. Zayumba stated that, the parties will have to pick at the stage of hearing by procuring witnesses. He predicted that the appellant's side might argue that this decision is not binding upon this court. He said that the position of the law was stated by the Court of Appeal of Tanzania in the case of **JS MTUNGI vs THE UNIVERSITY OF DAR-ES-SALAAM AND OTHERS [2001] TLR 26**; that Judges of the same Court should not give conflicting decisions over similar issues.

Mr. Zayumba distinguished the case of **Monica Nyamakare Jigamba** (supra) by arguing that the said case involved the 2nd respondent who did not file any caveat nor object, but prayed to be included in a list of beneficiaries. That, in that case nowhere it was stated how the Appellant's rights were prejudiced or failure of justice was occasioned in that situation.

On the third ground of appeal, it was stated that the trial court did not err to admit Exhibit D-4. Mr. Zayumba argued that the appellant did not state why DW4 was incompetent to tender Exhibit D4 since Jane Kirama Ngowi was a daughter of the deceased who was in possession of the document, she had knowledge of it, and the deceased left the document in her possession. Also, it was stated that the learned counsel did not state any legal reason.

Elaborating the above document, Mr. Zayumba submitted that the document relates to different names used by the parties' deceased mother to wit **Edith John Ngowi, Edith John Kirama Ngowi, Edith Kiram Giliad Mihambo,** all names begin with the name **EDITH** which suggests that the person is the same. That, sometimes she decided to add the name of her father and clan name, sometimes she added the name of the appellant's father since at the time she acquired the plot she cohabitated with him and it is common for women to use surnames of men they cohabit with even if they are not married. He argued that the Appellant did not offer any explanation who else is the said Edith. It was stated that the appellant objected Exhibit D.8 by relying on legal technicalities while there was evidence of witnesses from the Respondents' side that the deceased used different names but all begin with Edith at various times. He referred to the case of **Ally Omary Maseni vs Republic, Criminal Appeal No. 17/2021**, (unreported) which held that:

> *"It is my considered view that the appellant ought to have stated that prejudiced his right and this ground is without merit.* "

It was further stated that in the present matter the main issue in controversy was whether the disputed plot belonged to the deceased or the appellant. He argued that the title deed bears the name of Edith which is a female name and the plot was acquired in 1960's when the appellant was an infant. He argued that the trial court correctly admitted the exhibit and even if the same was not admitted still there is sufficient evidence to prove that the disputed plot belonged to the deceased.

On the 4th ground of appeal which concerns evaluation of evidence, it was contended by Mr. Zayumba that there was no way except for the trial court to find out whether the allegations of concealing deceased's properties were true or false. That's why the trial court made a finding that the disputed house belonged to the deceased, the appellant had no evidence whatsoever except mere arguments that the deceased was holding the house as his guardian. Thus, the arguments by Mr. Mwanganyi has no legal basis since the title deed which was tendered showed that the registered owner's first name is EDITH and there is nowhere it was written as a guardian of the appellant. That, there was also exhibits Exhibit D 7 which showed that the deceased used the title deed as a collateral to acquire a loan at NBC Bank in her name. Also, the deceased was paying rent.

On the 5th ground of appeal, Mr. Zayumba replied that the appellant does not deserve to be administrator of the deceased's estate since he claims to be the owner of the disputed plot. He was of the view that the appellant cannot represent the deceased's interest. Thus, he was supposed to let another person to do so.

Mr. Zayumba prayed the court to dismiss the fourth and sixth grounds as they are related since the basis of the objection by the Respondents was that the appellant concealed the deceased's properties, he cannot be administrator while he claims the deceased was not the owner of the property, instead he should sue the administrator to establish ownership in a land court.

On the sixth ground of appeal which concerns the property at Marangu, Mr. Zayumba submitted that the basis of the respondents' objection was

that the appellant had included in the list of properties left by the deceased, properties which do not form part of the deceased's estates, the house and farm at Marangu being one of their protests. That, the respondents proved their claims that the appellant is not faithful by including a property which does not belong to the deceased but to his sister RENATHA. That, they tendered sale agreement and also brought a witness the vendor/seller **DW3 SAFARI MAMIRO** who testified that he sold the land to Renatha and not the deceased, while the appellant had no evidence whatsoever. He emphasized that it was necessary for the court to decide whether the appellant was faithful or had reputation, by determining on ownership whether the property he had listed really belonged to the deceased or not. He cemented his argument with the case of **Mgeni Seif v Mohamed Yahaya Khalfani, Civil Application No.01/2009**, CAT in which the Court of appeal held that:

> "*Where there is a dispute over the estate of the deceased only the probate and administration court seized of the matter can be decided on the ownership."*

Regarding ground number 8 Mr. Zayumba submitted that the same had been covered in his foregoing submission regarding the names of the deceased.

Mr. Zayumba prayed the appeal to be dismissed with costs.

In his rejoinder, the appellant's advocate reiterated what he had submitted in chief. In addition, he stated that the issue of consent from other beneficiaries was not among the grounds of appeal.

I have thoroughly examined the grounds of appeal, submissions by the learned counsels of both parties and trial court's records. I will consider all

the grounds of appeal having in mind the fact that this court being the first appellate court, I am duty bound to re-evaluate and analyse the entire evidence and come up with my own findings in case the trial court erred in its findings.

On the second ground of appeal, the learned counsel for the appellant faulted the trial magistrate for failure to comply with **Order VIII rule 16, VIIIB, C and D of the Civil Procedure Code** (supra) which prescribes among other things mediation as a mandatory procedure in civil suits. He opined that since the matter turned into a civil suit, the trial magistrate should have followed the procedures stipulated under those provisions. He supported his argument with the case of **Monica Nyamakera Jigamba.** (supra)

Mr. Zayumba had different opinion, he argued that there is no law which provides that **Order VIII rule 16 of the CPC** must be followed in Probate cases and that failure to follow it is not fatal.

I wish to state that as rightly submitted by the learned counsels, when a caveat is filed, the probate matter turns to be a civil suit as per **section 52(b) of Probate and Administration of Estates Act** which provides that:

> *b) in any case in which there is contention, the proceedings shall take, **as nearly as may be** the form of a suit in which the petitioner for the grant shall be plaintiff and any person who appears to oppose the proceedings shall be defendant."* Emphasis added

Basing on the above provision of the law, the requirement is that the probate matter turn to be a civil suit **as nearly as it may be**. My emphasis

here is the underlined words. I have thoroughly studied the case of **Monica Nyamakera Jigamba** (supra) which was cited by Mr. Mwanganyi for the appellant. However, I failed to note where the honourable court stated that where a probate matter turn into a civil suit should pass all the procedures provided for under the **Civil Procedure Code** including mediation stage. **In the Matter of the Estate of the Late Ramadhani Mohamed Kalingonji** (supra) it was categorically stated that the purpose of the law is not to turn the whole matter into a suit. Thus, Parties should proceed from the stage of hearing followed by other steps. The above provisions explicitly provide that the matter turn to be civil suit as nearly as it may be. I subscribe to the case of the late **Ramadhani Mohamed Kalingonji** (supra).

On the third ground of appeal, it has been alleged that DW-4 was not a competent witness to tender exhibit D-8 (affidavit regarding to the names of the deceased). On the other side, the respondents' counsel was of the view that DW4 was competent witness to tender the said document.

The law is very clear on who may tender exhibit. In the case of **Jaffary Saidi Mwalimu vs Republic, Criminal Appeal No. 497 of 2019, [2021] TZCA 230** (Tanzlii) at page 12 the Court quoted the case of **The DPP vs. Mirzai Pirbakhsh @ Hadji and Three Others, Criminal Appeal No. 493 of 2016** (unreported), in which the Court listed the categories of people who can tender exhibits in court. It stated that:

> *"A person who at one point in time possesses anything, a subject matter of trial, as we said in Kristina Case is not only a competent witness to testify but he could also tender the same. It is our view that*

it is not the law that it must always be tendered by a custodian as initially contended by Mr. Johnson. The test for tendering the exhibit therefore is whether the witness has the knowledge and he possessed the thing in question at some point in time, albeit shortly…"

In the instant matter, DW4 stated that she was the custodian of the said affidavit of her deceased mother. Therefore, in line of the above cited case, DW4 was a competent witness to tender the same since the said affidavit was under her custody.

On the same ground, the learned counsel questioned authenticity of the said affidavit by arguing that it contravenes **section 10 of Oaths and Statutory Declaration Act** and **section 8 of the Notaries Public and Commissioner for Oaths Act** (supra).

Section 8 of the Notaries Public and Commissioner for Oaths Act provides that:

"Every notary public and commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall insert his name and state truly in the jurat of attestation at what place and on what date the oath or affidavit is taken or made."

Section 10 of the Oaths and Statutory Declaration Act requires that:

"*Where under any law for the time being in force any person is required or is entitled to make a statutory*

declaration, the declaration shall be in the form prescribed in the Schedule to this Act..."

Looking at the impugned affidavit, I hasten to conclude that the same is wanting as it contravenes the above provisions, because it is not in a prescribed form provided for under the schedule to the **Oaths and Statutory Declaration Act,** as it does not contain jurat of attestation. Therefore, it goes without saying that as claimed under the 8th ground of appeal, the trial magistrate having found that the said affidavit was defective, he should not have relied on it but rather expunged it. Having noted the above defects, I hereby continue to expunge the said affidavit from the record.

Following such expungement, the next issue for determination which is the main grievance of the appellant is in respect of the disputed plot whereby the learned counsel for the respondents argued that the same forms part of the estate as it contains the first name of the deceased, 'Edith', while the appellant argued that the same is his property which her mother held as his guardian and that's why it contains his names. Also, the appellant faulted the trial magistrate for deciding that the property at Marangu belonged to Renatha who did not object the appellant. He faulted the trial magistrate for failure to properly evaluate the evidence. The above arguments cover the 4th, 5th, 6th and 7th grounds of appeal.

Before resolving this issue, I find it prudent to state that the issue as to whether a particular property forms part and parcel of the estate of the deceased should not be determined at the stage of appointment of administrator. The same should be determined after the appointment of the administrator by the court and when the said administrator has started

to discharge his duties of collecting the properties of the deceased and filing of the inventory. It is until the said administrator has collected the properties of the deceased that someone who thinks that he has a rightful claim against it will then bring his complaint to the court that appointed such administrator. Otherwise, to make a decision of whether the property forms part of the deceased's estate at the appointment stage before the administrator has been appointed becomes premature. However, the circumstances of this case suggest otherwise because, the only property which the parties alleged to be left by the deceased is the disputed Plot and the property at Marangu. Thus, the trial court could not escape discussing it at the stage of appointment. Otherwise, there will be no need of appointing the administrator as he/she will have no duty to discharge.

I am aware that this is not a land court to discuss ownership of immovable properties. I am grateful that the trial magistrate from page 10 to 15 of his judgment made it clear that normal courts are vested with jurisdiction to determine whether any property belongs to the deceased or not. The case of **Mgeni Seif v Mohamed Yahaya Khalfani** (supra) is relevant.

Having established as such, I now turn to the grievance of the appellant. The evidence presented by the respondents to substantiate that the said property belonged to their late mother is a certificate of title which contains the names of **Edith Kiram Giliadi Mihambo** which the appellant argued that his name **Giliad Mihambo** appeared in the said certificate because her mother held the said title as his guardian. Mr. Mwanganyi was of the view that logically there is no any person with two surnames.

Mr. Zayumba had different views that since the first name of the deceased **"Edith"** appears on the said title, then the said title belonged to the deceased as the appellant has no such a name. He averred that the deceased sometimes decided to add the name of her father and clan name.

It is undisputed fact that the appellant herein is named **Giliad Shija Mihambo** which suggest that his father's name is **'Shija Mihambo'**. That, the fact that the deceased sometimes used the name of the appellant's father is logically unfounded as she should have used the name '**Shija**' and not the appellant's name **'Giliad'.** Also, the respondents did not explain to the trial court why the name of the appellant **"Giliad"** appeared in the said certificate of title. In my considered opinion, since the certificate of Title contains the names of the deceased and the names of the appellant herein, on balance of probabilities, the same was owned by the appellant. As rightly submitted for the appellant, the disputed property was acquired when he was a child, thus his mother who was his guardian continued to be custodian of the property.

In respect of the property at Marangu, the respondents stated that the same belonged to Renatha Ngowi who bought it from one Safari Michael Mamilo in 2009. The appellant testified that the house was built by their deceased mother. Mr. Mwanganyi argued that the said Renatha did not object the appointment of the appellant and she is not party to the instant matter.

I agree with Mr. Mwanganyi on the point that the said Renatha is not party to the instant suit. It is until the administrator is appointed when the said Renatha will object if she desires to do so. The respondents cannot claim

on her behalf as they have no such capacity whatsoever to claim the rights of Renatha.

The last issue for consideration is who is entitled to be appointed as administrator of the deceased's estates. The appellant's advocate has suggested that the appellant is a fit person to be administrator. During the hearing, at page 22 of the typed proceedings of the trial court, the appellant testified that he was appointed in the clan meeting where all the respondents signed the minutes of the said meeting as seen in Exhibit P3.

On the other hand, the respondents stated that they did not appoint the appellant to be administrator. Mr. Zayumba for the respondents was of the view that the appellant's petition was defective since he did not obtain heirs' consent as required under **Rules 39(f), 71 and 72 of the Probate Rules.**

I am very aware with the requirement of obtaining consent from the heirs before appointment of administrator of the deceased's estates. **Rule 71(1) of the Probate Rules** provides that:

> *"(1) Where an application for the grant of letters of administration is made on an intestacy the petition shall, except where the court otherwise orders, be supported by* ***written consent*** *of all those persons who, according to the rules for the distribution of the estate of an intestate applicable in the case of the deceased, would be entitled to the whole or part of his estate."*

The term consent simply means voluntarily giving permission to someone to perform a certain action. The issue is whether the appellant obtained a written consent from other heirs of the deceased. My perusal of the trial

court's records revealed that the appellant accompanied his petition with the minutes of the meeting and the list of the people who attended the said meeting including the respondents. In the said meeting dated 13/03/2021, in agenda No. 7, the appellant herein was appointed to be administrator without any objection from the respondents. The minutes of the said meeting together with the names of people who attended it, was admitted before the trial court as **Exhibit P3**. Basing on such facts, I am of considered opinion that the written consent was attached to the petition and the respondents conceded for the appellant to petition for letters of administration. Thus, the written consent was obtained from the heirs.

Therefore, the respondents herein could not at the later stage impeach the appellant from being administrator.

The next issue for determination is whether the appellant was a fit person to be appointed. The trial magistrate at page 21 of the judgment rejected the petition of the appellant on the reason that he had conflicting interest to the estate.

With due respect to the learned trial Magistrate, it has been stated in numerous decisions that the duty of the court is to appoint a person with an interest in the deceased estate particularly any heir, a spouse, a devisee or even a creditor of the deceased. See the case of **Naftary Petro vs Mary Protas, Civil Appeal No. 103 of 2018.**

In the instant matter, the petitioner/appellant is the only son of the deceased; thus, he is interested person to the estates. Disqualifying him just because he has shown his interest to the estate of the deceased was not just, since even the respondents have also showed interest in the said estates.

On the basis of the above findings, I hereby quash and set aside the judgment of the trial court serve for the 2nd ground of appeal which I dismissed. My scrutiny of evidence as the first appellate court find that the appellant is a fit person to be appointed as administrator and I proceed to appoint him to be administrator of the estates of the deceased Edith John Ngowi. No order as to costs.

It is so ordered.

Dated and delivered at Moshi this 23rd day of June, 2023.

X

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

23/06/2023