IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF BUKOBA

AT BUKOBA

(PC) PROBATE APPEAL NO. 8 OF 2023

(Arising from Bukoba District Court in Probate Appeal No. 8 of 2022. Originating from Probate and Administration Cause No. 21 of 2022 of Bukoba Urban Primary Court)

TIGDES EMILY KATUNZI.....APPELLANT

VERSUS

BI AURELIA SEBASUKU.....1ST RESPONDENT
DAVID EMMANUEL MWOMBEKI.....2ND RESPONDENT
ERNESTINA EMMANUEL MWOMBEKI.....3RD RESPONDENT
EDMUND EMMANUEL MWOMBEKI.....4TH RESPONDENT

JUDGMENT

20th June & 19th July, 2023

BANZI, J.:

In this appeal the appellant is faulting the decision of Bukoba District Court which quashed and set aside the decision of Bukoba Urban Primary Court where the appellant was appointed to administer the estate of Emmanuel Kabulemu Mwombeki (the deceased).

Briefly, the facts reveal that, the deceased died on 09/02/was survived with two wives, the first respondent and Alistidia Emmanuel and seven children; the second respondent, third respondent, fourth respondent, Laetus, Johanes, Nobert and Dagobert. After his death, on 16/02/2021 the family meeting was convened and the appellant was proposed to be administrator of his estates. However, by that time, he was not in Bukoba,

therefore, he filed the Probate Cause at Bukoba Urban Court (the trial court) on 11/05/2022. After filing the cause, everything turned sour because after he was ordered to bring the witness to confirm his appointment, he took Wilfred Mwombeki Bigirwa (SM1), Tresphory Rweyemamu Kijuka (SM2), Edwin Rutachunzibwa (SM3) and Pastory Rwekaza (SM4) who testified before the trial court that, the deceased left an oral will in which he explained how his properties would be distributed among the heirs.

After their testimonies, the respondents arose and objected the oral will stating that, the deceased never left any will. They contended that, since the deceased knew how to read and write, he would be able to write his will. With that regard, they contended that the oral will was concocted by the appellant aiming at favouring one side of the second wife, Alistidia Emmanuel. Their objections bore no fruits, because the trial court overruled them and blessed the oral will left by the deceased. It appointed the appellant to administer the estate of the deceased according to the oral will.

The respondents were aggrieved by the decision of the trial court. They appealed to Bukoba District Court (the first appellate court) complaining against the trial court for dismissing their objection and appointing the appellant who was bias and one sided. They still objected the oral will and contended that, the appellant was not faithful for failure to disclose some of the properties in Form No. 1. The first appellate court decided in their favour

and it was satisfied that the deceased did not leave oral will. Also, the appellant was declared unfaithful for failure to disclose all properties left by the deceased in Form No. 1. At the end, it quashed and set aside the decision of the trial court and all orders emanating from that decision. The matter was left to any interested party to file a fresh application for appointment before the trial court.

The findings of the first appellate court did not please the appellant and now he came before this court with three grounds of appeal thus:

1. *THAT, the District Court of Bukoba erred in law and fact in revoking the appointment of the appellant as an administrator of the estate of the late Emmanuel Kabulemu Mwombeki on the ground that the appellant was not a faithful person without tangible evidence to support the allegations, and without taking into account that the said allegations were prematurely raised against the appellant.*
2. *THAT, the District Court of Bukoba erred in law and fact and misdirected itself in holding that the late Emmanuel Kabulemu Mweombeki left no oral will on baseless grounds, and after the respondents had failed to prove the allegations on non-existence of the oral will of the deceased person.*
3. *THAT the District Court of Bukoba erred in law and fact in basing its decision on extraneous matters and*

arguments which were not supported by either the law or the evidence on record.

At the hearing, the appellant had legal services of Mr. Joseph Bitakwate, learned counsel whereas, the respondents were represented by Mr. Nathan Alex, learned counsel.

In his submission, Mr. Bitakwate contended that, the reasons advanced by the respondents were based on suspicion as there was no any evidence to prove that, the appellant was unfaithful warranting to be revoked. He went on stating that, the trial court in its ruling satisfied itself that, the respondents failed to prove that the appellant was unfaithful and unfit to administer the estate of the deceased. He added that, the allegation of unfaithfulness is not among the reasons to revoke the appointment of administrator which are mentioned under rule 9 (1) (a) to (e) of the Primary Courts (Administration of Estates) Rules GN No. 49 of 1971 ("the Rules"). He supported his submission with the case of **May Mgaya v. Salim Said and Another (as administrator of estate of the late Said Salehe)**, Civil Appeal No. 264 of 2017 CAT (unreported).

It was further his contention that, the first appellate court came up with its own reasons contending that, the appellant was unfaithful for failure to disclose some of the properties left by the deceased when he filled Form No. 1, and this reason formed the basis of revocation of appointment of the

appellant. He added that, at the time of filing Form No. 1 at the trial court, the appellant was not in a position to know all properties left by the deceased because he had not yet identified and collected the deceased's properties. The appellant could have listed all properties in Form No. V after being appointed as administrator. He further argued that, the appellant did not mention all properties because some of the them had encumbrances and hence, if he had listed them, he could have caused more disputes over the deceased's properties. With that regard, Mr. Bitakwate was of the view that, there is no proof that the appellant was unfaithful to the extent of failing to administer the estate of the deceased and the contention of the respondents that the appellant was unfaithful was prematurely raised.

Concerning the existence of oral will, Mr. Bitakwate submitted that, it was not proper for the first appellate court to invalidate the oral will on the reason that, it was not discussed at the family meeting that proposed the appointment of the appellant on 16/02/2021 because those who witnessed oral will did not participate in family meeting because they were not beneficiaries and that issue was not discussed at that meeting. On the other hand, Mr. Bitakwate was of the view that, had the first appellate court found that the oral will was invalid, it would have permitted the appellant to proceed with administering the estate under rule 4 (2) of the Rules instead of revoking him. He concluded his submission with a prayer to quash and

set aside the decision and orders of the first appellate court and uphold the decision of the trial court because the decision of the first appellate court was based on extraneous matters without being supported with law or evidence on record.

In his reply, Mr. Alex submitted that, the first appellate court did not revoke the appointment of the appellant as contended by Mr. Bitakwate. However, it quashed and set aside the decision and orders of the trial court because what transpired before the trial court was objection against application for appointment of the appellant and not application for revocation after appointment and hence, the cited case of **May Mgaya v. Salim Said and Another** is inapplicable. He further submitted that, at the trial court, the respondents objected the appointment of the appellant based on two reasons; one, the deceased did not leave oral will and the appellant was not faithful. However, their objections were overruled and the trial court appointed the appellant as administrator of estate. Their appeal to the first appellate court was based on three main complaints to wit; unfaithfulness of the appellant, the deceased did not leave any will and three the proceedings of the trial court was tainted with irregularities.

He further submitted that, the first appellate court properly reached into decision that the faithfulness of the appellant was questionable because when filling Form No. 1, the appellant did not mention some of the properties

while the attached affidavits of four persons alleged to have witnessed oral will, mentioned the properties of the deceased. Besides, the affidavits were sworn on 12/04/2022 while the application was filed on 11/05/2022. According to Mr. Alex, had the decease left oral will, that will would be raised at the meeting that was held on 16/02/2021 but it was not raised, and hence, raising it one year later, casts doubt on faithfulness of the appellant. Therefore, the first appellate court rightly held that, the appellant was unfaithful and thus, unqualified to be appointed as administrator of estate. Mr. Alex rebutted the contention of Mr. Bitakwate that the objection was prematurely raised contending that it ought to be raised at the stage of filing inventory. According to him, the objection was raised at the right time, it was not proper to raise it at the time of filing the inventory. He cited the case of **Sekunda Mbwambo v. Rose Ramadhani** [2004] TLR 439 to support his argument on the issue of administrator to be faithful.

Concerning the existence of oral will, Mr. Alex argued that, the first appellate court was right to conclude that, the deceased did not leave oral will because that issue was not raised at the clan meeting held on 16/02/2021. He added that, according to Haya custom, that issue ought to be raised at the clan meeting. Apart from that, one of the deponents and the wife of the deceased, Alistidia Emmanuel participated in the meeting that proposed the appellant but they did not raise the issue of oral will at that

meeting. Moreover, the deceased who was alleged to have made the oral will on 8/8/2018 he died on 9/2/2021, almost three years later, and hence, it is surprising for him to make oral will which lasted for three years while he knew how to write and read. With those flaws, he argued that, it was correct for the first appellate court to rule that there was no valid will made by the deceased and therefore, its decision was not based on extraneous matter but on evidence on record. He urged the court to dismiss the appeal for want of merit.

In his rejoinder, Mr. Bitakwate insisted that, quashing the decision of the trial court and setting aside the orders made thereof, is equal to revocation of appointment. He went on stating that, there was no proof that the appellant was not faithful because he had not yet filed inventory. It would be from filing inventory where unfaithfulness of the appellant would be revealed. He further contended that, at the meeting of 16/02/2021, the only agenda was to propose the administrator and the minutes did not reveal if there was oral will or not. He insisted that, it was not proper for the first appellate court to quash the decision of the trial court and therefore, he prayed for the appeal to be allowed.

Having thoroughly examined the records of the two courts below and the submissions of learned counsel for both sides, the issue for determination

is whether the first appellate court was justified to reverse the decision of the trial court.

It is worthwhile noting here that, one among the qualifications of administrator of the estate is honest and faithfulness. This was underscored by this court in the cited case of **Sekunda Mbwambo v. Rose Ramadhani** (*supra*). It is on that basis upon which the administrator of estate after being appointed is required to sign an undertaking to administer the estate of the deceased faithfully via Form No. IV.

In the matter at hand, the first appellate court upheld the objection raised at the trial court after concluding that, the appellant was not a faithful person. On the one hand, it was the contention of Mr. Bitakwate that, the issue of unfaithfulness was prematurely raised as it ought to be raised at the time of filing the inventory. On the other hand, Mr. Alex was of the view that the issue was rightly raised at that stage. On this, I am inclined to agree with Mr. Alex because, the issue of faithfulness of the administrator begins to be revealed and tested at the stage of filing the application when the applicant is filling in Form No. I which is found in the Schedule to the Rules. It is within Form No. I where it is stated when the deceased died, his last place of residence, if the deceased died testate or intestate, the religion he was professing and the properties left by the deceased to mention but few. To be precise, paragraph 5 of Form No. I requires the applicant to list properties

of the deceased and their value. Therefore, it is within Form No. I where all important information about the deceased should be stated and it is when the faithfulness of the applicant is tested.

Looking closely at Form No. I that was filled in by the appellant on 11/05/2022, it is apparent that, some of the properties of the deceased were not disclosed by the appellant such as one plot located at Buhembe, two houses at Rwamishenyi and one workshop for crafting crank shaft located at Rwamishenyi. All undisclosed properties are within Bukoba Municipality. It can be recalled that, when the appellant was filling in Form No. I, he had the knowledge of all properties of the deceased because his application was accompanied with the affidavits of the persons claimed to witness the deceased making the will orally and through that will, the deceased mentioned all of his properties. Thus, the argument by Mr. Bitakwate that, the appellant was not in a position to know all properties left by the deceased at the time of filling Form No. 1, is unfounded. Likewise, the issue of not mentioning some of properties due to encumbrances is not backed up with the evidence of the appellant because in his testimony, he said nothing about that. Thus, I agree with the finding of the first appellate court because the appellant's act of not disclosing some of the properties of the deceased in Form No. I, demonstrates unfaithfulness on his part considering the fact that, at that time he was filling in the said form, he had full knowledge of all

properties of the deceased. In that regard, he was unqualified to be appointed as administrator of the estate of the deceased. With this finding, the first and third grounds lack merit.

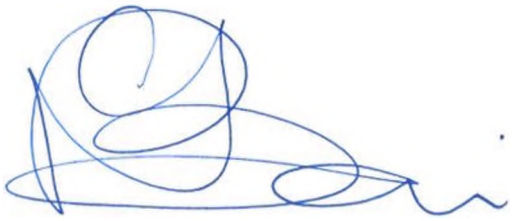
Reverting to the second ground, it is a long-established custom and or, practice that, following the death and burial of the deceased, members of the family/clan are convened to discuss matters concerning administration of the deceased estate including propose the administrator of the said estate. Equally, it is at the said meeting when it is revealed whether the deceased died testate or intestate which will determine the type of case to be filed either probate or letters of administration. In the matter at hand, it is apparent from the Minutes accompanying the application that, on 16/2/2021 the members of Abagaya clan convened the meeting concerning administration of the estate of the deceased. Among the persons who attended were the wife of the deceased Alistidia Emmanuel and SM4 who according to their testimony, they witnessed the said oral will. Nevertheless, neither Alistidia nor SM4 disclosed about existence of that will. It is also in the testimony of the appellant that, in December 2021, he convened another meeting. However, there was no one who revealed about the will in question. Surprisingly, one year later, Alistidia and SM4 appeared before the trial court and contended that, they witnessed the oral will of the deceased while they stayed mute at the clan meeting. Had the deceased left any will and Alistidia

and SM4 had knowledge of how the deceased's properties were distributed to the heirs, they would have stated so at the meetings convened.

Moreover, if SM1, SM2 and SM3 really witnessed the oral will of the deceased, they couldn't have stayed mute for more than one year before disclosing the same to family members and heirs. This in itself is a clear proof that, the existence of the alleged oral will is nothing but an afterthought. Their act of staying silence for one year and few months casts doubt on authenticity of the alleged will if at all, it existed from the first instance. In that regard, the argument by Mr. Bitakwate that, the persons who witnessed the oral will did not participate in the clan meeting held on 16/02/2021 is not only unfounded but also it aimed to mislead the court because the Minutes clearly indicates that, Pastory Rwekaza and Alistidia Emmanuel are among the participants in the said meeting. Thus, I concur with the findings of the first appellate court that, the purported will is invalid as its existence from the first instance is doubtful. For those reasons, it is the finding of this court that, the first appellate court was justified to find the appellant unfaithful and thus, he is unqualified to be appointed as administrator of the estate and the said oral will was invalid.

Having said so, I find nothing to fault the judgment of the first appellate court and it is hereby upheld. Consequently, the appeal is

dismissed for want of merit. Owing to the nature of the dispute, I make no orders as to costs. It is accordingly ordered.



I. K. BANZI
JUDGE
19/07/2023

Delivered this 19th day of July, 2023 in the presence of Mr. Joseph Bitakwate, learned counsel for the appellant also holding brief of Mr. Nathan Alex, learned counsel for the Respondents. Right of appeal duly explained.

I. K. BANZI
JUDGE
19/07/2023