

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF BUKOBA

AT BUKOBA

(PC) PROBATE APPEAL NO. 5 OF 2023

(Arising from Probate Appeal No. 03/2022 District Court of Karagwe Originating from Probate Application No. 2/2022 Bugene Primary Court)

GOSBERT ALEX..... APPELLANT

VERSUS

MENGLIDA ALEX..... 1ST RESPONDENT

VEREDIANA ALEX..... 2ND RESPONDENT

JUDGMENT

21st July, and 18th August, 2023

BANZI, J.:

Before this Court, the appellant is faulting the decision of Karagwe District Court (the first appellate court) which revoked his appointment and instead, it appointed the respondents to administer the estate of the late Alex Simon, the deceased.

Briefly, the appellant and the second respondent are siblings from the fresh and blood of the deceased while the first respondent is their step mother. Before Bugene Primary Court (the trial court), vide Probate Cause No. 3 of 2022, the appellant successfully petitioned for appointment of the estate of the deceased. Almost a month later, the respondents vide Probate Application No. 2 of 2022, went to the trial court applying for revocation of the appointment of the appellant on the reason that, there was no property

left by the deceased to be distributed by the appellant. The appellant on his side contended that, there were five farms which were not distributed. At the end, the trial court dismissed the application and it appointed the Ward Executive Officer (WEO) of Kayanga Ward as the second administrator. Eventually, it ordered them to continue with collection of the deceased's properties, distribute to the beneficiaries and file the inventory.

Aggrieved with that decision, the respondents successfully appealed to the first appellate court which revoked the appointment of the appellant and the WEO and in lieu, it appointed the respondents to be administratrixes of the estate. The decision of the first appellate court did not please the appellant who knocked the doors of this Court with two grounds of appeal thus:

- 1. That, the learned Magistrate gravely erred in law and fact by revoking the appointment of the Appellant and his co-administrator basing on the alleged non service of the Summons to the Respondents albeit the pursuit of the issue of citation that was properly conducted by the trial court as demonstrated in the records.*
- 2. That, the first appellate court immensely erred in law by appointing the Respondents as co-administratrixes without being clothed with the jurisdiction.*

When the matter was called for hearing, the appellant was represented by Mr. Lameck John Erasto, learned counsel whereas, the respondents appeared in person unrepresented.

Mr. Erasto began his submission by raising a point of law in respect of the proceedings of the trial court in Probate Application No. 2 of 2022. Relying on the case of **Elibariki Malley v. Salim H. Karata** (Civil Appeal No. 67 of 2022) [2023] TZCA 226 TanzLII which emphasised on the duty of the appellate court to look at matters of law even if they were not raised in the grounds of appeal, he contended that, upon perusing the proceedings of the trial court, he noticed that, both respondents testified without being sworn which is contrary to rule 46 (2) of the Magistrates' Courts (Civil Procedure in Primary Courts) Rules, GN. No. 310 of 1964. Therefore, the remedy is to nullify the proceedings and quash the decision thereof. According to Mr. Erasto, the appeal before the first appellate court is a nullity for being a product of nullity.

Submitting in support of grounds of appeal which he opted to argue jointly, Mr. Erasto submitted that, the first appellate erred in law and facts to revoke the appointment of the appellant on the reason that, the respondents were not served with summons while the notice of citation was duly issued. He added that, although the first appellate court had jurisdiction to revoke the appointment, it lacked jurisdiction to appoint the replacement

administrator because, such jurisdiction is vested to the trial court. Therefore, if there was error in the appointment of the appellant, the first appellate court was supposed to remit the records to the trial court for the appointment of another administrator. He cited the cases of **Mohamed Hassan v. Mayasa Mzee and Another** [1994] TLR 225 and **Rukia Amani Masalu v. The Late Amani Masalu Magwambele** (PC Civil Appeal No. 15 of 2021) [2021] TZHC 3400 TanzLII as well as rule 9 of GN. No. 49 of 1971 to support his submission. In that regard, he prayed for the appeal to be allowed by quashing the decision of the first appellate court.

In her reply, the 1st respondent contended that, the appellant is not qualified to administer the estate of the deceased because he is not faithful as he filed the probate secretly without informing them. Also, there was no notice of citation made by court as they became aware of the application after the appellant being appointed. On her side, the 2nd respondent contended that, the deceased distributed his properties before he died and hence, there was nothing to distribute save for one farm. She continued stating that, there was no family/clan meeting that was convened. Also, the notice of citation was not published on the notice boards. According to her, they are comfortable if the Ward Executive Officer will be appointed and not one amongst them.

In a brief rejoinder, Mr. Erasto was of the opinion that, under the prevailing circumstances there should be administrators from both sides or a neutral person as the law directs.

Having heard the submissions of both sides and after a thorough perusal of the record of lower courts, the main issue for determination is whether the first appellate court had jurisdiction to appoint the administrator after revoking the appointment of the appellant and WEO.

Before determining the appeal, I would like to comment on the legal issue raised by Mr. Erasto, learned counsel for the appellant. It is undisputed that, as a matter of law, any proceeding before the Primary Court requiring reception of evidence from witness, the testimony of such witness must be taken under oath or affirmation unless the law provides otherwise. See rule 46 (2) of the Magistrates' Courts (Civil Procedure in Primary Courts) Rules and section 35 (2) of the Primary Courts Criminal Procedure Code. I have thoroughly perused the proceedings in Probate Application No. 2 of 2022 which arises from Probate Cause No. 3 of 2022. The matter was in a form of application whereby parties did not testify but rather, they made oral submission just like in any application before the court. Unlike testimonies, submissions are not made under oath or affirmation. In that regard, I decline the invitation to nullify those proceedings because there is nothing amounting to irregularity.

Reverting to the issue at hand, according to Paragraph 1 (1) of the Fifth Schedule to and section 18 (1) (a) (i) (2) of the Magistrates' Courts Act [Cap 11 R.E. 2019] ("the MCA"), the Primary Court has jurisdiction in administration of estate matters where the governing law is Customary and Islamic. Equally, the Primary Court is vested with powers to appoint one or more persons interested in the estate of the deceased or an officer of the court or some reputable and impartial person to be administrator of the estate of the deceased pursuant to paragraph 2 (a) and (b) of the Fifth Schedule to the MCA. Likewise, when it comes to revocation, according to rule 9 (1) of the Primary Courts (Administration of Estates) Rules, GN No. 49 of 1971, any person interested in the estate of the deceased being a creditor, heir or beneficiary, has a right to apply for revocation of the appointed administrator and the same Primary Court is vested with powers to revoke the appointment of such administrator pursuant to paragraph 2 (c) of the Fifth Schedule to the MCA.

Considering the above provisions of the law, it is apparent that, where the interested party is aggrieved by the appointment of the administrator, he should apply for revocation before the Primary Court, but where his application is dismissed, he has a right to appeal to the District Court. Likewise, where the District Court finds that there were sufficient grounds for revocation but the Primary Court did not consider them, it may revoke

the appointment of such administrator. However, after revoking, it should remit the file back to the Primary Court for appointment of appointment of a replacement. The District Court has no power to appoint the replacement after revocation because, such jurisdiction is vested to Primary Court pursuant to paragraph 2 (b) of the Fifth Schedule to the MCA.

Returning to our instant case, the respondents' application for revocation of the appellant was dismissed by the trial court, and after that, they appealed to the first appellate court against such dismissal. The first appellate court after being satisfied that, there were sufficient grounds, it revoked the appointment of the appellant and WEO. But it went further and appointed the respondents as the replacement. However, according to law, it had no jurisdiction to appoint the respondents as replacement administrators after revoking the appointment of the appellant and WEO. Such jurisdiction of appointing the replacement is vested to the trial court. Therefore, by appointing the replacement after revocation, the first appellate court usurped the powers of the trial court. Thus, I find merit on the second ground.

As far as the first ground is concerned, according to rule 5 (2) of the Primary Courts (Administration of Estates) Rules, after receiving the application for appointment of administrator, the trial court is required issue notice in the appropriate Form to all persons (other than the applicant)

known or alleged to be the near relatives of the deceased person, requiring their appearance in the court on such date and time as may be specified in the notice. According to sub rule (3), such notice is required to be served in accordance with rule 19 of the Magistrates' Courts (Civil Procedure in Primary Courts) Rules. On the other hand, the trial court has discretion under sub rule (4) to cause the notice to be advertised by such means as are used locally to make public announcements or by publication in a newspaper having a substantial local circulation.

In the matter at hand, it is undisputed that, the trial court after receiving the application by the appellant, it issued order for such application to be published to all people on notice boards and other places. However, there is nothing to establish that, the notice(s) were placed to the notice boards for the respondents to be aware of the existence of the application in question. Being among the heirs, the respondents were supposed to be served pursuant to rule 5 (2) of the Primary Courts (Administration of Estates) Rules and rule 19 (1) of the Magistrates' Courts (Civil Procedure in Primary Courts) Rules and unfortunately, that was not done. In that regard, I find nothing to fault the decision of the first appellate court in respect of the first ground of appeal.

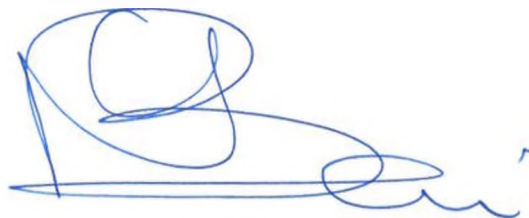
From the foregoing reasons, I partly allow the appeal by quashing the appointment of the respondents in replacement of the appellant and WEO

of Kayanga following their revocation because the first appellant court had no jurisdiction to appoint such replacement. On the other hand, I confirm the decision of the first appellate court which revoked the appointment of the appellant and WEO of Kayanga. Considering that, there is apparent conflicting interest between the appellant and the respondents, I direct the trial court to appoint the reputable and impartial person pursuant to paragraph 2 (b) of the Fifth Schedule to the Magistrates Courts Act [Cap. 11 R.E. 2019] to be the administrator of the estate of the late Alex Simoni in lieu of the appellant and WEO. Owing to the nature of the matter, I make no orders as to costs.



I. K. BANZI
JUDGE
18/08/2023

Delivered this 18th day of August, 2023 in the presence of Mr. Lameck John Erasto, learned counsel for the appellant and the respondents in person. Right of appeal duly explained.



I. K. BANZI
JUDGE
18/08/2023