IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

(DODOMA DISTRICT REGISTRY)

AT DODOMA

DC CIVIL APPEAL NO. 37 OF 2022

(Originating from the District Court of Dodoma at Dodoma in Misc. Civil Application No. 44 of 2022 and Probate and Administration Cause No. 107 of 2021)

MS. ELLYNEEMA SUDA MWASALANGA.....APPELLANT

VERSUS

SIMMON AUGUSTINO MTANINGU..... RESPONDENT

JUDGMENT

27/03/2023 & 27/6/2023

KHALFAN, J.

The Appellant, has lodged this appeal challenging the decision of the District Court of Dodoma at Dodoma ('the trial court') in Misc. Civil Application No. 107 of 2021. The impugned decision revoked the Appellant's appointment as an administrator of estates of the late FLORA MTANINGU SIMON vide Probate and Administration Cause No. 107 of 2021.

The Petition of Appeal filed by the Appellant constitutes a total of nine (9) grounds of appeal. With such grounds, this Court was asked to quash and set aside the decision of the trial court and declare the Respondent not a beneficiary and has no interest in the deceased's estate. The Court was also asked to make an order as to costs, and grant any other relief(s) that

the Court may deem just and equitable to grant. The grounds of appeal include:

1. That, the trial Magistrate erred in law and in fact by holding that, the Respondent is a beneficiary to the estate of the late Flora Mtaningu Simmon.
2. That, the trial Magistrate erred in law and in fact by holding that, the Respondent is a beneficiary to the estate of the late Flora Mtaningu Simmon although the Respondent admitted in his rejoinder that he was not a beneficiary to the said estate.
3. That, the trial Magistrate erred in law and in fact by revoking the appointment of the Administrator of the estate of the late Flora Mtaningu Simmon for the application brought by the Respondent who has no interest in the estate of the deceased person.
4. That, the trial Magistrate erred in law and in fact by holding that, the Respondent was not involved in the appointment of the administrator of the estate of the late Flora Mtaningu Simmon.
5. That, the trial Magistrate erred in law and in fact by holding that, the appointment of the administrator of the estate of the late Flora Mtaningu Simmon was obtained fraudulently by making false

suggestion or by concealing from the Court something material to the case.

6. That, the trial Magistrate erred in law and in fact by referring the Appellant as Ms. instead of Mr. Ellyneema Suda Mwasalanga.
7. That, the trial Magistrate erred in law and in fact by disregarding the position of the Appellant as husband of the late Flora Mtaningu Simmon.
8. That, the trial Magistrate erred in law and in fact by not putting into account that the Application brought by the Respondent was overtaken by event.
9. That, the trial Magistrate erred in law and in fact by ignoring the preliminary objection raised by the Appellant as the same touches the competence of the application before it.

This Court ordered the appeal to be disposed of by way of filling written submission and both parties filed their submissions in accordance with the Court's scheduling order. The Appellant's submissions were drawn and filed by Mr. Chrispinus R. Nyenyembe, learned advocate while Mr. Kelvin Kidifu, learned advocate drew and filed reply submission for the Respondent.

On the first ground of his appeal, the learned advocate for the Appellant contended that it was wrong for the trial Magistrate to hold that

the Respondent was among the beneficiaries of the deceased while the Respondent admitted that he was not a beneficiary through his rejoinder considering that the parties are bound by their pleading. Reference can be made to the case of **Glory Pancrasy Njau vs VCS Vehicle Consulting Company**, High Court of Tanzania, Revision Application No. 134 of 2021 which referred the case of **Yara Tanzania Limited vs Charles Aloyce Msemwa and 2 Others**, Commercial Case No. 5 of 2013, High Court Commercial Division, Dar es-Salaam.

The Appellant contended further that the Respondent despite being a biological father of the deceased, he cannot be a beneficiary because the deceased, professed a Christian mode of life under which it is the Appellant and his two children that acquire absolute right to benefit from the estate. He referred to Sections 29 and 30 of the Indian Succession Act, 1865 to support his contention.

On the second ground, the Appellant contended that it was a gross misdirection for the trial court to revoke his appointment as the administrator. He referred to Section 33(1) of the Probate and Administration Act, [CAP. 352 R.E 2009] ('PAEA') which clearly provides as to who may be appointed as an administrator. In the matter at hand, the Appellant suits the

requirement by virtue of being the husband of the deceased. Thus, he is entitled to the whole or part of the deceased's estate. The same states that:

> *'33(1) Where the deceased has died intestate, letters of administration of his estate may be granted to any person who, according to the rules for the distribution of the estate of an intestate applicable in the case of such deceased,* ***would be entitled to the whole or any part of such deceased's estate****.'*

The Appellant insisted that the minors that the Respondent intends to protect are biological children of the Appellant and are in the custody of the Appellant. As such, it is a surprise that the Respondent is protecting their rights while the administration is not completed. Also, he cited Section 49 of PAEA which has set the reasons for revocation in which this matter does not fall in either of the reasons considering that there is no proof that the appointment of the Appellant as the administrator was concealed from the Respondent and the whole family of the deceased.

The Appellant cited Section 110 (1) of the Evidence Act, [CAP. 6 R.E 2022] and the case of **Abdul-Karim Haji vs Raymond Nchimbi Alois and Joseph Sita Joseph**, Civil Appeal No. 99 of 2004, Court of Appeal of Tanzania, Zanzibar on the assertion that he who alleges must prove. It is the Appellant's contention that nothing was concealed from the Respondent

concerning the deceased's estate since the family meeting was convened on 21st August, 2021 but the Respondent and his family opted not to attend the meeting. He added that his petition for letters of administration was published in the Nipashe newspaper dated 17th September, 2021 and therefore the Respondent had ample time to object but he did not object.

Further, the Appellant argued that the family meeting is not a mandatory requirement. As such, the proceedings cannot be annulled for the reason that the family meeting was not conducted or the manner in which it was conducted. The case of **Yotam Ntenzikiba vs Haidan Lazaro (Administrator of the estate of the late Mjori Kaloza Yimbugwa)**, Pc Probate Appeal No. 04 of 2022, High Court, Kigoma was cited to support the argument.

On the third ground, the Appellant insisted that during trial the Respondent did not prove that he was not involved in the Appellant's appointment as the administrator and that the appointment was obtained fraudulently by concealing from the trial Court something material to the Court.

On the fourth ground, the Appellant expressed dissatisfaction on the act of the trial Court to refer to him as Ms. Ellyneema Suda Mwasalanga disregarding the fact that the Appellant was the husband of the deceased.

As such, he urged this Court to refer to him as Mr. Ellyneema Suda Mwasalanga and be recognized as the husband of the deceased.

On the fifth ground, the Appellant contended that the application before the trial Court which is the subject of this appeal is overtaken by event because since his appointment as the administrator, there was a lapse of almost nine months. It is Appellant's opinion that the Respondent had to file his case for revocation at the very early stage.

As to the sixth ground, the Appellant contended that the trial Court erred by not considering the preliminary objections raised by the Appellant as it is trite law that a preliminary objection has to be determined first once raised. He referred to the case of **Thabit Ramadhan Maziku and Another vs Amina Khamis Tyela** and Another, Civil Appeal No. 98 of 2021 and the case of **Alex Situmbura vs Mohamed Nawai**, Revision Application, No. 13 of 2021, High Court, Musoma.

In reply, the Respondent contended that following the demise of his daughter, Flora Simmon Mtaningu, the Appellant convened a family meeting without notifying him and his family and that they were informed but neglected to attend, is not proved. Therefore, the trial court was right to revoke the Appellant's appointment. Besides, the Respondent agreed with the Appellant that this family meeting is not a statutory requirement as

argued by the Appellant. However, it is his contention that he was supposed to be informed of such meeting being a vital process to the whole process of administration of estates of his daughter.

The Respondent further subscribed to the trial Court's finding that the Respondent was among the beneficiaries of the estates of his late daughter as provided under Section 35 of the Indian Succession Act, 1865. For that reason, the Respondent had a right to counter the appointment of the Appellant as the administrator having found that some assets which were owned by the deceased were not listed by the Appellant. He added that Section 29 and 30 of the Indian Succession Act, 1865 does not in any manner provide that the father of the deceased cannot inherit from the intestate of his daughter.

With regard to the issue of the Appellant being referred to as Ms. Ellyneema Suda Mwasalanga instead of Mr. Ellyneema Suda Mwasalanga; it is the Respondent's contention that this is an afterthought for he had time to challenge it the earliest. He cited the case of **Samwel Justin Magambo vs Juma Mfaume and Another**, Land Appeal No. 12 of 2021, High Court, Land Division, Dar es Salaam to cement his contention.

The Respondent went further to reply that the application for revocation can be brought to the Court at any time when there is a ground

to warrant revocation different from the caveat. In respect to the issue of preliminary objection which the Appellant contended that they were not determined by the trial Court, the Respondent replied that the preliminary objections were raised by the Appellant after the order of the Court to dispose the application by way of written submission while it is a clear principle that a notice of preliminary objection should be raised at earliest stage and should not be taken as a surprise.

In rejoinder, the Appellant reiterated his submission in chief and added that the provision of Section 35 of the Indian Succession Act is not applicable in this matter since the same applies where the deceased has left no lineal descendants, and because the deceased left a widower and direct lineal descendants Section 29 and 30 of Indian Succession Act shall apply. This means that the Respondent does not deserve to be the beneficiary of estate.

In order for the Court to dispose of the appeal; it shall determine if this appeal has merit.

I will begin with the last ground, (ninth ground), in which the Appellant has blamed the act of the trial court to ignore the preliminary objections raised by him. It is a settled position of the law that a notice of preliminary objection on point of law can be raised at any stage of the proceedings. See the Court of Appeal decision in **Zaidi Baraka and 2 Others vs Exim Bank**

(Tanzania) Limited, Civil Appeal No, 194 of 2016 (unreported) in which the Court held:

> *'There is consistent judicial pronouncements that* ***a point of law can be taken into cognizance and adjudicated upon at any stage of proceedings*** *provided that the facts admitted or proved on the record enable the court to determine the point of law in question.'*
>
> **(Emphasis added)**

Also, in the case of **Thabit Ramadhan Maziku and Another vs Amina Khamis Tyela and Another**, Civil Appeal No. 98 of 2011, CAT, Zanzibar, it was stated that:

> *'The law is well established that a Court seized with a preliminary objection is first required to determine that objection before going into the merits or the substance of the case or application before it'.*

Basing on the above position of the law and in the perusal of trial Court's record, it is evident that the trial court erred by not preliminarily determining the point of objection raised by the Respondent. I hold this view because the preliminary objection was raised by the Appellant on the date when he was filing his reply submission. This means that the trial Court after finding the notice of preliminary objection was supposed to allow the parties

to make their submission on the points of objection raised considering the prayer of the Appellant through his submission.

I thus decline to agree with the Respondent to hold that the preliminary objection was rightly ignored by the trial Court by being raised after the scheduling order for written submission. I therefore hold that the preliminary objection was properly raised before the trial court and the court was duty bound to dispose of the same.

It is trite law that once a preliminary objection is raised, it must be determined first. See the case of **Meet Singh Bhachu vs Gurmit Singh Bhachu**, Civil Application No. 144/02 of 2018, CAT, Arusha:

> *' This is because it has been the practice of this Court, which appeals to logic, that once a preliminary objection has been raised, it must be heard first,...'*

See also the case of **Khaji Abubakar Athumani vs Daud Lyakugile TA D.C. Aluminium and Another**, Civil Appeal No. 86 of 2018, CAT, Mwanza, where the Court of Appeal stated the following:

> *'The trial court ought to have heard the preliminary objection first before going into merits or substance of the suit'*

The Court went further to say that:

'...the trial judge ought to have heard first the preliminary objections raised by the 2nd respondent in its written statement of defence before proceeding to the full trial of the suit and issue its findings either before or in its judgment, depending on the circumstances of each case.'

It is in that respect that this court finds that failure of the trial court to dispose the preliminary objection amounts to a procedural irregularity that vitiated the entire proceedings from 25th day of July, 2022 when the notice of preliminary objection was filed.

In the upshot I find this appeal is meritorious. Therefore, with the guidance of the Court of appeal in the case of **Khaji Abubakar Athumani** (supra), I hereby set aside the ruling of the trial court and direct that the preliminary objection be heard before another Magistrate. Considering the nature of the case, each party shall bear his own costs. It is so ordered.

Dated at **Dodoma** this 27th day of June, 2022.

F. R. KHALFAN
JUDGE