IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF MANYARA

AT BABATI

PC CIVIL APPEAL NO 11 OF 2023

(Arising from Civil Appeal No. 7/2022 of the District Court of Hanang, Originating from Probate and Administration Cause No. 44/1987 of Hanang Primary Court at Katesh)

AMINA KHALILE ALLY.....APPELANT

VERSUS

ALLY OMAR ABDI.....1ST RESPONDENT
HASSAN OMARI ABDI ALLY.....2ND RESPONDENT

JUDGMENT

5th & 26th September,2023

KAGOMBA, J.

This appeal represents one of the saddening and mind-boggling instances of intestacy. Khalile Ally Haldid ("the deceased") died intestate on 17th January, 1981 at Katesh in Hanang district in what is came to be known as Manyara region. After nearly 42 years since his demise, the administration proceedings initiated on 8th December, 1987 in respect of his estate have not been closed. Both of his two issues who were earlier known to have survived him have also died, leaving behind a relentless legal battle for inheritance of his estate. The scramble for inheritance is

between the appellant, who confidently claims to be a daughter of the deceased and the first respondent, a near relative of the deceased.

On 8th January, 1990, Yusuf Khalile Ally, the deceased's undisputed son, successfully petitioned for letters of administration of the deceased's estate vide Probate and Administration Cause No. 44/1987 opened at the Katesh Primary Court ("the trial court"). In this unchallenged petition, Yusuf told the trial court that the deceased was survived by two issues only, to wit, Yusuf himself and his sister Hawa Khalile Ally. Also, in the list of the deceased's survivors was Abdi Ally, the deceased's brother, who is the grandfather of the respondents herein. It happened that Hawa Khalile Ally died next after her father, and on 31st May, 2011 Yusuf also succumbed to death. Fate had it that both Yusuf and Hawa died without being survived by any children of their own. Their mother had died earlier than their father.

The death of Yusuf Khalile Ally confirmed the vacuum in the administration of the deceased's estate that already existed, as Yusuf had encountered a road accident that left him paralyzed and was in the home care of the respondents' father. According to the respondents' side, on 28th December, 2005 before Yusuf returned to his creator, he saw a point in being thankful to those who took good care of him by bequeathing the

deceased's house known as Plot No. 30 Block E, Area F located at Majengo, Arusha, ("Arusha property"). It is claimed that he did so in his capacity as the administrator of the deceased's estate, in consideration of natural love and affection. Hence, the first respondent claims ownership of the Arusha property through this process.

Amina Khalile Ally, the appellant herein, has surfaced from abroad to claim her inheritance eying the very same Arusha property. She claims to be the only surviving daughter of the deceased. She was born in Singida in 1958 and went to live in Ethiopia and later to Canada where she was married. It appears that her life in diaspora has boldened her zeal to fight for what she considers to be her right. Before this court no side has shown any sign of quitting the battle field.

To show how intense this battle is, the rival parties have been to the primary court all the way to the Court of Appeal, Police, the Registration, Insolvency and Trusteeship Agency (RITA) and the Land Registry. While the immediate concern is who should take over as the administrator of the deceased's estate following the demise of Yusuf Khalile Ally, the fight for such an appointment is so fierce that one may wrongly think the court is undertaking distribution of the deceased's

estate. For now, this anecdote should suffice to introduce the nature of the matter before the court and what lies ahead.

On 19th October, 2015, the appellant herein unsuccessfully applied to the trial court to be appointed the administratrix of the deceased's estate to take over from the late Yusuf Khalile Ally whom she claims to be her brother from another mother. In her application, she claimed to be the only surviving daughter of the deceased. Following her application, on the same date the trial court ordered a public notice (general citation) to be published and it sat 30th October, 2015 for mention. In response thereof, the first respondent turned up in court on that mention date aiming at placing an objection against the appellant's application ("the first objection"). As it shall be revealed in due course, these proceedings were stayed because there was an appeal which was preferred by the first respondent to the Court of Appeal. There were some other proceedings initiated by the appellant for which a little digression is imperative to bring the same on board for a comprehensive understanding of this matter.

Before filing the unsuccessful application in 2015, rejection of which is now the subject of this appeal, in 1996 the appellant had successfully applied for, and was granted letters of administration by Maromboso Urban Primary Court in Arusha ("Maromboso Court") in respect of the

same deceased's estate. By utilizing the said letters of administration, she sued the first respondent, among others, for recovery of the Arusha property vide Land Case No. 9 of 2013 of the High Court of Tanzania in Arusha ("the Land Case"). The first respondent had already registered the Arusha property in his own name following the purported bequeathal, as aforesaid. The Land Case was decided in favour of the appellant, who was declared to be the only surviving child of the deceased. The court also declared null and void *ab initio* the purported transfer of property from the late Yusuf Khalile Ally to the first respondent. It ordered, among other things, that the first respondent should yield the said property to the appellant to process the administration of the deceased's estate.

Not unexpectedly, the above decision prompted the first respondent to prefer an appeal to the Court of Appeal which eventually overturned the decision made in the Land Case, on technicalities, and quashed the substantive part of its proceedings. The Court of Appeal further ordered the Land Case to be determined afresh by another Judge subject to satisfying himself as to whether this court has jurisdiction to determine the matter. The fresh proceedings were heard and determined by High Court at Arusha as PC Civil Appeal No. 2 of 2017 whereby, in the end, the

trial court was ordered to proceed with the stayed administration proceedings from where it had ended, during the first objection.

After this brief digression, be it reckoned that in his first objection which was heard by the trial court on 15th December, 2015 the first respondent testified that on 21st July 2005 he was duly given the Arusha property by Yusuf Khalili Ally, as administrator of the estate, before he died on 31st December, 2011. He stated that he was opposing the appellant's appointment because the administration of the deceased's estate was already closed by the late Yusuf Khalile since 8th January 1990. He also talked about the Land Case, its outcome and the notice of appeal to the Court of Appeal which he had lodged to challenge the decision in the Land Case.

Eventually and as intimated earlier, on 9th March, 2015, the trial court ordered stay of proceedings in respect of the appellant's application for letters of administration and maintained status quo as to the position of the estate administrator. The stay order lasted for approximately seven (7) years until 22nd July, 2022 when the trial resumed following the order made in PC Civil Appeal No. 2 of 2017, as aforesaid.

Upon resumption of proceedings, on 28th July, 2022 the trial court acknowledged receipt of another objection from the first respondent ("the

second objection"). Serious discontents were made by both the appellant and his advocate who told the court of their knowledge of "the game" that was being played in the trial court. The appellant believed that the second objection was not supposed to be entertained for being hopelessly time barred. Beside this ugly part of the proceedings which ended up with an apology from the learned counsel who was also reprimanded, the second objection was heard by the trial court. In its judgment, the trial court rejected the appellant's application for letters of administration to succeed the late Yusuf Khalile Ally. Instead of appointing the applicant, the trial court used its discretion to appoint Hassan Omari Abdi Ally, the second respondent herein, who is a brother to the first respondent, to be the administrator of the deceased's estate.

In rejecting the appellant's application, the trial court was convinced that her claim to be a daughter of the deceased was very doubtful, buying the argument by the respondents' counsel that the appellant was not mentioned by the late Yusuf Khalile Ally in the court forms when he applied to be appointed the estate administrator. Other reasons considered by the trial court in rejecting the applicant are; she was unknown to the deceased's clan members, she didn't know the estate of the deceased, she didn't know when her purported father Khalile Ally and

her purported brother Yusuf Khalile Ally died, and even her birth certificate was prepared and issued during the pendency of these proceedings, implying that the birth certificate was not genuine.

The trial court also found that the appellant was not trustful citing her act of opening probate and administration proceedings at Maromboso court in 1996 during the pendency of these earlier proceedings at the trial court, on the same inheritance. She was also blemished for lacking coherence in her testimony.

On the other hand, the trial court also found that it couldn't appoint the first respondent, who was the objector in those proceedings, for having conflicting interest in the matter. He was adjudged conflicted for his persistent claim about the bequeathal of the Arusha property in his favour. He also claimed that the clan meeting proposed him to apply for the letters of administration to succeed the late Yusuf Khalile Ally.

Apparently, the observations and decision reached by the trial court came to be approbated, in the first appeal, by the District Court of Hanang at Katesh ("first appellate court") which found no fault in the decision of the trial court. This decision broke the appellant's heart leading to this second appeal.

The instant appeal, therefore, impugns the whole judgment of the first appellate court delivered on 14th July, 2023 based on the following ten (10) grounds:

1. That, the learned District Resident Magistrate erred both in law and fact by stating that the 2nd objection by the 1st respondent was not time barred contrary to the direction of the High Court of Tanzania at Arusha in PC. Civil Appeal No. 2 of 2017.
2. That, the learned District Resident Magistrate erred both in law and fact by failure to analyze and or decide on the issue of letters of administration to appellant by misapprehending the facts and evidence before it and thereby reached into an erroneous decision.
3. That, the learned District Resident Magistrate erred both in law and fact for failure to consider the supplied decided cases of the High Court, Court of Appeal of Tanzania and submissions made thereto by the appellant's counsel contrary to the law.
4. That, the learned District Resident Magistrate erred both in law and fact by holding that the appellant is not an honest person as she instituted Probate Cause No. 149/1996 at Maromboso Urban Primary Court secretly.

5. That, the learned District Resident Magistrate erred both in law and fact by stating that the Appellant **"intended to secretly petition for letters of the deceased's estate just as she did previously"** contrary to the principles of impartiality under the adversarial system.
6. That, the learned District Resident Magistrate erred both in law and fact for considering the proceedings of the quashed decision of Land Case No. 9/2013 to justify unfaithfulness of the Appellant contrary to the principles of natural justice. i.e. right to be heard.
7. That, the learned District court Resident Magistrate grossly erred in law and fact by not recognizing the appellant as the only surviving heir of the late Khalile Ally despite the existence on record of the unchallenged documentary evidence.
8. That, the learned District court Resident Magistrate erred in law and fact stating that the Appellant did not have a clan minute of the family approving her to seek for letters of administration contrary to the existing court records and law,
9. That, the learned District court Resident Magistrate erred in law and fact by stating that there are lot of doubts regarding the Appellant **"Whether she knows the deceased's relatives and his properties as she has been residing abroad"**

contrary to the rules and practise governing probate matters in our jurisdiction.

10. That, the learned District court Resident Magistrate erred in law and fact stating that the 2nd respondent was rightly appointed as administrator of the estate of the late Khalile Ally despite the fact that he appeared to testify in favour of the 1st respondent at the trial court contrary to the law.

When the matter was called on for hearing, Messrs Omary Iddy Omar and Innocent Mwanga, learned Advocates appeared for the appellant while Messrs Gwakisa Sambo and Patrick Paul also learned Advocates represented the 1st and 2nd respondents respectively. Mr. Mwanga submitted on the grounds of appeal, and while aiming to be concise he preferred to submit ground No. 1, as stand alone; grounds No. 2,7,8 and 9 combined; ground No. 3 as stand alone; ground No. 4,5 and 6 combined and the last ground No. 10 as stand alone.

On ground No. 1 of the appeal, learned counsel for the appellant impugns the first appellate court for deciding that the second objection filed by the first respondent in the trial court was not time barred. He submitted at length on this ground, basing his contention on the following points: **One**; the first objection which contained three grounds for

opposing the appellant was eventually dismissed by this court in Arusha via PC Civil Appeal No. 2 of 2017 which ordered hearing of the application to proceed from where it had ended but the said order was not complied with. Instead of proceeding from where the first objection had ended, the trial court allowed the first respondent to file the second objection on 26th July, 2022 after approximately seven (7) years from the first objection. It was wrong in law for the trial court to despise the order of this court aforesaid, by allowing the first respondent to come up with another objection after the first one was heard, decided and collapsed.

Two; in the second objection the first respondent raised new allegations against the appellant's parentage and her purported rejection by a clan meeting, which allegations he didn't raise in the first objection. Hence, the second objection should have been regarded as an afterthought.

Three; despite the normal period for general citation being 90 days, or at least 4 weeks in some instances, the trial court allowed the first appellant to submit his objection after a lapse of more than seven (7) years. He cited the case of **Beatrice Brighton Kamanga and Amanda Brighton Kamanga vs Ziada William Kamanga**, Civil Revision No. 13 of 2020 High Court of Tanzania at DSM, on the practice of 90 days' notice.

Four; while objections on probate and administration matters can be brought up before appointment, during administration and even after administration, allowing the first respondent to bring up the second objection after dismissal of the first objection is as good as allowing him to keep doing the same until he gets satisfied with one that fits him the most, which is against the practice.

Learned counsel concluded on this ground that the learned Magistrate of the first appellate court ought to have found that it was wrong for the trial court Magistrate to entertain the second objection after dismissal of the first objection. He prayed the court to uphold this ground.

On the grounds No. 2, 7, 8 and 9, learned counsel faults the first appellate court Magistrate for failure to properly re-assess the evidence of the trial court as required of first appellate courts. He cited the cases of **Ndizu Ngasa vs Masisa Magesha** [1999] T.L.R 202 and **Deemay Daati & 2 Others vs Republic** [2005] T.L.R 132 on the duty of first appellate courts. According to the learned counsel, one of the misapprehended matters was the allegation that the appellant is not deceased's daughter.

It is his contention that since the law under the Evidence Act [Cap 6 RE 2022] requires one who alleges to prove, the first appellate court

had a duty to see if the first respondent proved his allegation that the appellant is not a daughter of the deceased, which contributed to rejecting her application for letters of administration.

He trivialized the reliance on the claims that the appellant was not mentioned in the first probate application by the late Yusuf Khalile Ally and she does not know deceased's relatives, properties and the date he passed away. According to the learned counsel, these claims were insufficient to reject his client's application, adding that even her filing of the administration proceedings at Maromboso Court does not establish that she is not deceased's daughter.

He also attacked the second objection for challenging the paternity of the appellant without the support of a DNA test. He argued that, if the first appellate court had properly analysed the trial evidence, it would have come up with a different decision because the appellant managed to prove vide exhibit D1 that she is a daughter of the deceased. The contention is that for as long as the appellant managed to prove her paternity by producing exhibit D1, all the arguments raised against her by the first respondent where *ipso facto* disproved.

He cited the case of Muhibu **Sefu Mohamed vs. Hawa Hemedi Malivata**, Civil Appeal No. 1 of 2022, High Court, Mtwara on how to

establish parentage, adding that the learned Magistrate could have taken judicial notice of exhibit D1 as a document of the Registrar-General of RITA hence uphold its contents.

Mr. Mwanga turned to other arguments which were considered by the lower courts in rejecting the appellant's application for letters of administration. He argued that since the purpose of granting letters of administration is to empower the grantee to collect properties belonging to the deceased's estate, lack of knowledge of such properties ought not to be the reason for turning down the application.

On absence of minutes of the clan meeting, he argued that if the first appellate court Magistrate had gone through the records, she could have found that the minutes were attached to the appellant's application since 2015. Besides, he argues, it is the position of the law that clan meeting cannot appoint one as an administrator. Hence, the first appellant court wrongly refused to grant his client the letters of administration for lack of the said minutes. He supported this contention by citing **Flora Augustine Mmbando vs Abdul Daud Chang'a**, Civil Appeal No. 243 of 2021, High Court at DSM; **Kijakazi Mbegu & 5 Others vs. Ramadhani Mbegu** [1999] T.L.R 174 as well as **Allan Alfred Leo & Another vs. Karen Kindondoche Leo**, Misc. Civil Application No. 34 of

2018, High Court at Arusha. Having so submitted, he prayed the court to uphold the consolidated grounds of appeal No. 2,7, 8 and 9.

Submitting on ground No. 3 of appeal, Mr. Mwanga strongly faulted the learned first appellate court Magistrate for unjustifiably ignoring several authorities he had supplied to her. According to him, save for the case of **Beatrice Brighton Kamanga** (supra), six other cases he cited to support the appellant's arguments were ignored unjustifiably. He added that even the case of **Beatrice Brighton Kamanga** was not utilized to its fullest extent.

In addition to the case of **Beatrice Brighton Kamanga**, learned counsel mentioned the other cited but ignored authorities as **Geofrey Moses Mapalala vs. Flora Neema Daud**, Civil Appeal No. 51 of 2020, CAT Mwanza; **Joseph Shumbusho vs Mary Grace Tigerwa & 2 Others**, Civil Appeal No. 183 of 2016, CAT DSM, **Stephen Maliyatabu & Another vs Consolata Kahulananga**, Civil Appeal No. 337 of 2020, CAT Tabora. Other unconsidered cases are **Muhibu Sefu Mohamed vs. Hawa Hemedi Malivata** and **Flora Augustine Mmbando vs Abdul Daud Chang'a** (supra). The contention is that the first appellate court ought not to keep mum on these cases after being referred to them,

rather it was required to distinguish them or provide reasons for not following the legal principles contained therein.

The counsel's further contention is that by disapplying the cited authorities without assigning any reason, the decision reached by the first appellate court becomes arbitrary. He cites the decision of the Court of Appeal in **Tanzania Breweries Ltd. vs Anthony Nyingi**, Civil Appeal No.119 of 2014, CAT Mwanza for this contention. The counsel expressed his optimism that if the first appellate court had duly considered all the ignored authorities, it could have arrived at a contrary decision. He prayed the court to allow this ground of appeal.

Consolidating grounds No. 4, 5, and 6, Mr. Mwanga opposed the allegations that, **one**; the appellant was dishonest for filing probate and administration cause No. 149 of 1999 at Maromboso court. **Two**; the appellant intended to secretly petition for letters of administration as she previously did at Maromboso court, and **three**; the appellant had changed some her testimonies in the nullified proceedings in Land Case No. 9 of 2013.

He argued that while there was no issue before the lower courts concerning the reason for the appellant to prefer her application for letters of administration at Maromboso court, the lower courts condemned her

without affording her an opportunity to explain her side of the story. He clarified that there were only three issues before the trial court, and the Maromboso case was not one of them. There was also no issue on the Land Case for the parties to address, he argued, adding that after all, the proceedings in the Land Case were nullified while the proceedings of the Maromboso court were withdrawn by the appellant the moment she became aware of the existence of the proceedings at the trial court.

Learned counsel further faults the first appellate court for branding the appellant "unfaithful" by relying on cross-examination recorded in the nullified Land Case proceedings, and without availing her the right to be heard on the concerned allegation. According to him, mere opening of proceedings at Maromboso court ought not to justify the act of branding the appellant unfaithful since court proceedings are public. While emphasizing that it was wrong for the lower courts to deny her client letters of administration based on the said allegations, he prayed the court to uphold the grounds of appeal No. 4, 5 and 6 accordingly.

On ground No. 10, being the last ground of appeal, the learned counsel finds serious faults in the decisions of the lower courts to prefer the second respondent over the appellant to administer the deceased's estate. He has three reasons to justify his contention, as hereunder.

Firstly; he argues that the decision of the trial court in this aspect which was approbated by the first appellate court is not supported by any reason whatsoever. Citing the case of **Beatrice Brighton Kamanga** (supra), the counsel submits that it is a requirement of the law that under such a situation, good reasons must be recorded and explained to the petitioner, in this case the appellant, and other interested persons present. He submits further that apart from analysing exhibit D1, this legal requirement was not observed by the lower courts in the impugned decisions.

Secondly; he argues that the second respondent was a witness in these proceedings supporting his blood brother, the first respondent. For this fact, the learned counsel is of the view that the decision to appoint the second respondent is tantamount to granting the letters of administration to the first respondent. He invited the court to peruse the testimony of the second respondent during trial to appreciate this contention. Citing the decision in **Geofrey Moses Mapalala vs. Flora Neema Daud** (supra), he argues that if the court had reason to choose another person to administer the deceased's estate, such other person ought to be impartial. He emphasized that the second respondent doesn't fit the bill of impartiality, hence wrongly appointed.

Thirdly; he argues that the second respondent is not in the lists of descendants of the deceased, hence not an interested person, while the law requires the administrator to be an interested person or a beneficiary. If there was none, then the court could pick another person, he argued. On this aspect he also referred to the case of **Beatrice Brighton Kamanga** (supra).

Citing the case of **Stephen Maliyatabu & Another vs Consolata Kahulananga** (supra), where the Court of Appeal emphasized on the needs for courts to give priority on proximity to the family when exercising discretion to appoint an administrator, he expressed his surprise at the lower courts' decision to prefer a stranger over the appellant, who is deceased's daughter. He argues that both lower courts didn't exercise their discretion properly hence, the second respondent was appointed contrary to the dictates of the law.

To cement his contention further, the learned counsel cited the decisions of the Court of Appeal in **Joseph Shumbusho vs Mary Grace Tigerwa & 2 Others** (supra) and **Sekunda Mbwambo vs Rose Ramadhani** [2004] T.L.R 439 on factors to be taken into consideration in appointing an administrator. He argues that much as the first appellate court referred to the Act in it decision, it ought to have borrowed a leaf

from paragraph 2(a) of the 5th schedule to the Magistrates Courts Act [Cap 11 RE 2019] on matters to be considered in appointing the administrator. He prayed the court to uphold both this ground, and the appeal in its entirety.

On the reliefs side, learned counsel prayed the court to quash and set aside the appointment of the second respondent as administrator of the deceased's estate; proceed to grant letters of administration to the appellant and grant other orders which the court shall deem fit and just.

Mr. Gwakisa Sambo, learned counsel for the first respondent raised to oppose the appeal. He adopted the same modality as employed by his counterpart in submitting his reply.

On the first ground of appeal, Mr. Sambo replies that the same is a new matter which cannot be entertained by this court for lacking jurisdiction as it was not part of the grounds of appeal before the first appellate court. He invites the court to peruse the amended Petition of Appeal filed in the first appellate court on 17th March, 2023, and lower court proceedings, to find for itself that there was no complaint during trial and in the first appeal, concerning non-compliance with the direction of the High Court at Arusha.

He cites the case of **Grand Alliance Limited vs. Mr. Wilfred Tarimo & 4 Others**, Civil Application No. 187/16 of 2019, CAT DSM; **Simon Godson Macha (*Administrator of the estate of the late Godson Macha*) vs. Mary Kimambo (*Administratrix of the estate of the late Kesia Zebedayo Tenga)***, Civil Appeal No. 393 of 2019, CAT Tanga, and **Hadija Ally vs. George Masunga Msingi**, Civil Appeal No. 384 of 2019, CAT DSM for a contention that in appellate stage, the court cannot deal with new issues, for lack of jurisdiction.

To further expound his contention, learned counsel submits that the complaint that the second objection was contrary to the direction of the High Court at Arusha was not among the seven (7) grounds of appeal submitted to the first appellate court. Hence, it is contrary to the law to fault the first appellate court for a matter that had not been presented to it for consideration, bearing in mind that the decision of the High Court at Arusha in PC Civil Appeal No. 2 of 2017 was neither admitted as exhibit during trial nor produced as authority during the first appeal.

Opposing the contention that the court was to take judicial notice of the decision of High Court at Arusha, learned counsel submits that for the court to take such notice, there must be an order during trial, which is non-existing. To his opinion, the directive of the High Court at Arusha

did not bar the filing of the second objection. He says, the first respondent's objection which was rightly ruled not to be time barred, was delt squarely by the first appellate court.

On the 90-days' notice period relied upon by the learned counsel for the appellant for adjudging the second objection time barred, Mr. Sambo replies that the practice of 90-days as per the case of **Beatrice Brighton Kamanga** (supra) is not a bar to the filing of another objection. He takes a swipe at his counterpart for his inability to cite any written law or case law to support his contention. He argues further that even the Primary Court (Administration of Estates) Rules, GN No. 49 of 1971 and the Magistrate Courts (Limitation of Proceedings under Customary Law) Rules, GN No. 311 of 1964 do not provide time limit within which to file an objection.

Referring to **Beatrice Brighton Kamanga** (supra), he accedes to the position that an objection in probate matters can be brought up at any stage, even during the inventory, hence the second objection which was filed before the appointment of the administrator cannot be said to be time barred.

Yet on the filing of the objection, Mr. Sambo submits that it was only the first out of the three segments in the first objection that was

sustained, based on the notice of appeal that was laying before the Court of Appeal. Proceedings were stayed on 29th March, 2016 and the matter sailed up to the Court of Appeal vide Civil Appeal No. 419 of 2021 which was finally disposed of on 10th June, 2022. He argues that this is how the period of seven-years lapsed, adding that the first respondent could not file anything at the trial court during that period because the case file was with the Court of Appeal. According to him, the order for stay of trial court proceedings was, in law, vacated on 10th June, 2022 upon delivery of the ruling of the Court of Appeal.

Mr. Sambo further explains that the second objection was filed on 26th July, 2022, nearly 46 days after the vacation of the stay order, which is reasonably too short a period to for one to say that the objection was time barred. He begs to borrow a leaf and guidance from section 22 of the Law of Limitation Act [Cap 89 R.E 2019] that where an order for stay of proceedings is issued, it stays everything regarding that particular matter, including filing of documents.

He wound up his submission on the first ground of appeal by urging the court to find it devoid of merit, and dismiss it.

On the consolidated grounds of appeal No. 2,7,8 and 9, Mr. Sambo replies that the first appellate court properly evaluated the evidence in

line with the holding in **Ndizu Ngasa vs Masisa Magasha** (supra), and reached at a fair and just decision, as it was for the trial court. Citing **Seleli Dotto vs. Maganga Maige & 4 Others** (supra), learned counsel submitted that before appointing an administrator, evidence and general circumstances of the case must be considered. According to him, on balance of probabilities it suffices to say that the appellant miserably failed to prove to be a deceased's daughter.

Learned counsel despises his counterpart for shifting the burden of proof on his client's parentage to the respondents while it was the duty of the appellant. He adds that despite on whom the duty to prove lies, the documentary evidence produced by his client had cast enough doubts that the appellant is not deceased's daughter. He stresses that some of what his counterpart referred to as allegations against the appellant, were facts. He mentions such facts as; the appellant being left out of the list of heirs or beneficiaries of deceased's estate by her would-be brother Yusuf Khalile Ally; her lack of knowledge of relatives and properties of the deceased as well as the deceased's date of demise.

On the appellant's birth certificate (exhibit D1), learned counsel attacks it for being made to suit the occasion. He questions the reason for the applicant's failure to show it when she was seeking to take over

administration duties from Yusuf Khalile Ally. The learned counsel also points out that the exhibit was produced after closure of the objector's case. Citing the case of **Allan Alfred Lello & Another vs Karen Kindondechi Leo** Misc. Civil Application No. 34 of 2018, High Court of Tanzania at Arusha, which referred to a Kenyan case of **Gachigi vs Kamau** (2003) 1 EA 65(CAK) facts of which, according to him, are similar to the case at hand, the learned counsel prays this court to find that the evidence to prove that the appellant is deceased' daughter was insufficient, as exhibit D1 was prepared specifically for the case at hand.

He also cites the case of **Nyerere Nyangue vs. Republic**, Criminal Appeal No. 67 of 2010, CAT Arusha, for a contention that admissibility of an exhibit and its weight are two different things. He expresses his views that the lower courts properly evaluated exhibit D1 but couldn't place much weight on it, hence rightly held that the parentage of the appellant was in doubt and that the appellant cannot be trusted.

Still undone on exhibit D1, learned counsel also states another reason why the exhibit was not reliable evidence. He says that the name of appellant's mother in the said exhibit differs from the name in exhibit P8 prepared by the appellant in September, 2022.

He also picks another dent from the appellant's admission of her filing of the administration proceedings at Maromboso court in 1996 when Yusuf and Hawa Khalile Ally were still alive. He argues that this secret act of the appellant also proves that she was dishonest as correctly observed by the lower courts.

Back to exhibit D1 again, the learned counsel argues that the mere fact that it was issued by the Administrator General does not mean that that authority cannot be misled to produce a document based on information supplied to it. His doubt arises from the fact that when cross-examined, the appellant stated that she came from Canada and she had a passport, however she didn't tender it for reasons best known to herself.

On appellant's lack of knowledge of the deceased' properties, he submits that it is a legal requirement when one fills in Form No. 1 to have knowledge of properties of the deceased and the beneficiaries.

With regard to clan meeting, he concedes that it is not a legal requirement but hastens to add that in other cases, particularly **Elias Madata Lameck vs Joseph Makoye Lameck**, PC Probate and Administration Appeal No. 1 of 2019, High Court at Musoma, the court insisted that even if clan meeting is not a legal requirement, it is yet a cherished requirement that reduces conflict among heirs. Citing the case

of **Monica Nyamakare Jighaba vs Mugeta Bwire Bhakome**, Probate and Administration Cause No. 41 of 2016 High Court at Dar es Salaam on the same position as above, he submits that the practice to have minutes of clan meetings is encouraged. He prays this court to take the same route.

He distinguishes the cases cited by Mr. Mwanga not only for having different factual set up, but also for a reason that in this instant case the appellant is not a daughter of the deceased according to evidence tendered during trial. He, therefore, prays the court to find grounds No. 2, 7, 8 and 9 of the appeal devoid of merits and dismiss them accordingly.

Replying to ground No. 3, learned counsel invites this court to look at page number 5,7,9 and 16 of the typed judgement of the first appellate court where the cases cited by appellant's advocate were considered, contrary to the submission of Mr. Mwanga. He prays the court to find this ground devoid of merits too, adding that there was no prejudice caused to either party by the court's decision not to refer to some of the cited authorities.

Mr. Sambo distinguishes the case of **Tanzania Breweries vs Anthony Nying** from the case at hand for a reason that in the case at

hand the cases mentioned by Mr. Mwanga were considered. Hence, the decision of the first appellate court was not arbitrary, he submits.

On the consolidated grounds of appeal No. 4, 5 and 6, Mr. Sambo supports the decision of the lower courts in that the appellant showed dishonesty by filing administration proceedings at Maromboso court without consulting her purported relatives, adding that one cannot be appointed an administrator if he or she is dishonest.

On the argument that it was wrong for the first appellate court to refer to the quashed proceedings of the High Court in Land Case No. 9 of 2013, Mr. Sambo replies that quashing the proceedings on legal technicalities would not invalidate the evidence duly obtained therein. He maintains that what was invalidated is the proceedings and not the sworn statements therein.

As for the argument that the Maromboso probate cause was withdrawn by the appellant, learned counsel dismisses it for being a mere statement from the bar, as there was no withdrawal order tendered during trial.

On denial of the appellant's right to be heard, Mr. Sambo vehemently opposes this allegation. According to him, the concern that the appellant is not a deceased's daughter was first raised by the first

respondent and the appellant had unhindered opportunity to reply thereto. He argues, likewise, for the Maromboso probate cause. In the end, he dismisses this allegation as a lame excuse.

He submits further that the totality of oral and documentary evidence that was adduced proved that the appellant went to Maromboso court secretly and she was dishonest, which disqualifies her to be appointed the administratrix of the deceased's estate.

Concerning the last ground of appeal, which is ground No. 10, learned counsel replies that the trial court gave reasons for its decision to appoint the second respondent as administrator, referring to page 17 to 18 of the typed judgment.

Regarding impartiality of the appointed administrator, the learned counsel submits that the fear expressed by appellant's advocate has no basis because the second respondent had not done any work to establish his impartiality. For this reason, he distinguishes the cases of **Mapalala** and **Maliyatabu** (supra) for having facts different with the case at hand.

Lastly, he adds to his reply on the ground No.1 that in the first objection filed by the first respondent there were two points of concerns which were not dealt with by the Court of Appeal. The first one was regarding ownership of the Arusha property and the second one was on

the clan meeting. According to him, each party had a right to submit on those aspects, hence no prejudice was occasioned to either party. He wound up his reply by praying the court to find the appeal devoid of merit and dismiss it with costs.

Mr. Patrick Paul, learned counsel for the second respondent also joins hands with Mr. Sambo to opposed the appeal.

On the ground No.1 of the appeal, it is Mr. Paul's submission that it is a new ground and therefore it does not deserve to be considered by the court. He refers to the case of **Simon Godson Macha** (supra) for this contention.

As for the copy of the decision of the High Court at Arusha in PC Civil Appeal No. 2 of 2017, which the learned counsel for the appellant supplied to the court, Mr. Paul's view is that new evidence cannot be tendered during appeal. He argues that the content of the said decision was not tendered during trial and was not argued upon before the first appellate court.

He also joins hands with Mr. Sambo to support the second objection arguing that, there is no law prohibiting it for as long as it was submitted before appointment of the administrator and neither party was prejudiced. Basing on the decision in **Beatrice Brighton Kamanga,** he finds it

acceptable that the first respondent reacted by filing his objection in response to the public notice (general citation) issued by the trial. He therefore finds nothing to fault the decisions of the lower courts.

On the grounds of appeal No. 2, 7, 8 and 9, the learned counsel for the second respondent is of the view that these too lack merit and should be dismissed. He argues that since the burden of proof in civil cases in on balance of probabilities, the trial court raised reasonable doubts on the evidence submitted by the appellant's side. He contends that the contents of exhibit D1 as to when it was issued, which is the year 2022, and the discrepancy between the name of the appellant's mother in that exhibit and the name of the same person as contained on page 39 of the trial proceedings, punch holes in the appellant's credibility and therefore her fitness to be appointed administratrix of the deceased's estate.

Learned counsel also questions the reason for the appellant's failure to tender the minutes of the clan meeting, and finds that it was proper for the lower court to draw negative inference against her. For all those reasons, he finds the decisions of the lower courts supportable and prays the court to dismiss the said grounds of appeal No. 2,7, 8 and 9.

As for the consolidated grounds of appeal No. 4, 5 and 6, Mr. Paul submits that the appellant was heard by the trial court as evidenced by

the proceedings thereof. He says, the appellant was duty bound to prove her fitness for appointment as administratrix of the estate and her failure to do so should not be branded as denial of right to be heard.

On the argument that the Maromboso proceedings were withdrawn, it is his views that the argument has not been substantiated, and even if the same was true, it would not negate the fact that the appellant lodged the said application in 1996. He applies the same line of argument for the Land Case, arguing that the quashing of its proceedings does not negate the fact that those proceedings once existed and that the appellant did testify in the said case.

He argues further that since the appellant acknowledges to have testified in that case where she stated a different name of her mother, the trial court properly referred to the quashed proceedings in analysing her fitness to be appointed the administratrix. He also supports the arguments by Mr. Sambo on the secret proceedings filed by the appellant at Maromboso Court and prays this court to find grounds No. No. 2, 7, 8 and 9 devoid of merits.

On ground of appeal No. 10, Mr. Paul submits that he didn't hear the counsel for the appellant mentioning any law that was contravened by the lower courts. According to him, the trial court complied with Rule

2(a) of the 5th Schedule to the Magistrate Courts Act [Cap 11 R.E 2022], in appointing the second respondent as the administrator of the deceased's estate with reasons therefor stated on page 18 to 19 of the trial judgment. He says that the trial court analyzed the evidence and found both the appellant and the first respondent unfit to be appointed, hence looked at a person who is fit and picked the second respondent.

On the fact that the second respondent gave evidence in favour of the first respondent, Mr. Paul submits that such a role doesn't disqualify the second respondent from being appointed the administrator, provided he is fit for the task. Citing the case of **Sekunda Mbwambo** (supra), he joins hands with Mr. Sambo in arguing that the fears of impartiality against the second respondent were unfounded and premature. He advises that the parties would still reserve their rights to come to court for guidance and directions if the administrator wouldn't perform his work well. He also underscores the fact that when one is appointed an administrator, he does not automatically become the owner of the deceased's estate. He urges this court to find nothing illegal in the appointment of the second respondent.

On ground No. 3, learned counsel's view are that it lacks merits because the submissions made by the counsel for the appellant and the

authorities which were cited were all considered by the first appellate court. He refers this court to page 9, 14, 15, 16 and 17 of the impugned judgment of the first appellate court. The statement of the first appellate court Magistrate that she had gone through the submissions by both parties before arriving at her decision, appeases the learned counsel.

As for the authorities cited by the appellant's counsel, Mr. Paul is of the view that some of the points therein are distinguishable and some do provide assistance the court for determination of this case, upon proper reading. He gives an example of **Mapalala's** case where the court appointed a concubine to be an administrator, to show how far the court can go in sourcing administrators of estates.

He also mentions the case of **Beatrice Kamanga** for several positions of the law, including the power of the court to change what the administrator may wrongly do. He expresses his optimism that if the authorities submitted are fully considered, the appeal will be dismissed in its entirety and prays accordingly.

In his rejoinder, Mr. Mwanga first and foremost maintains his submission in chief and expresses his disagreement with both counsel for the respondents.

He maintains that the first ground of appeal is properly before the court, and is supported by both the proceedings of the first appellate court on page 19,20 and 21 and the judgment thereof from page 5 to 9. He maintains that his counterparts didn't grasp his contention concerning the second objection, adding that if his contention was in respect of the period after the appointment or after the inventory, then his counterparts could have a point.

Regarding the decision of the High Court in PC Civil Appeal No. 2 of 2017 which he supplied to this court, learned counsel rejoins that the same is a court decision which cannot be treated as evidence. It is not a strange document as it is part of the court's record which prompted the parties to go back to Katesh Primary court for continuation of the trial.

Rejoining on grounds No. 2,7, 8 and 9, learned counsel states that his counterparts have not pointed out where in the judgment of the first appellate court did the Magistrate specifically evaluate the evidence tendered in the trial court.

As for the contention that it was a duty of the appellant to prove her paternity, he maintains that his counterparts went astray because the allegation that the appellant is not deceased's daughter was raised in the second objection and not the first one. He argues that that duty will never

shift to the appellant, adding that the first appellate court didn't discuss it at all and also didn't evaluate the trial court's position on exhibit D1.

Regarding reference to the nullified proceedings (exhibit P8), Mr. Mwanga reiterates that once the court declares proceedings a nullity, such proceedings will always be nullity, adding that, that was not an issue for the lower courts to determine, after all.

On clan meeting, he maintains that the first appellate court failed to evaluate the evidence. He also maintains his submission in chief with regard to ground No. 3.

Mr. Mwanga further rejoins that even in the Maromboso proceedings there was no issue to be determined therefrom. According to him, it was contrary to normal practice and the law for the lower court to decide the case based on such proceedings.

On the concern that in the first objection, only one, out of its three ingredients was adjudicated upon, the learned counsel finds the reply by Mr. Sambo misconceived. He says, what was raised in the first and second objections were two different matters.

Regarding the contention that exhibit D1 was prepared based on the information supplied to the Administrator General by the appellant, Mr. Mwanga rejoins that such a reply was shocking because information

on birth registrations cannot be said to be provided by a person to the Registrar. He adds that such a contention suggests to undermine the Registrar who is a competent authority created by statute. He considers the other issues raised in this line as irrelevant as they do not arise from the discussion before the court.

On the argument by Mr. Paul that the appointment of his client is based on testimonies presented to the trial court, Mr. Mwanga finds it to be untrue. He argues that what is stated on the cited pages is hearsay. According to him, having found the 1st respondent unfit for having interest in some of the properties of the deceased, the court ought not to appoint the first respondent's brother. In the end, Mr. Mwanga prays the court to allow this appeal.

The above rival submissions reveal that the crux of the matter is whether it was proper for the lower court to appoint the second respondent instead of the appellant. And if, not, who should be appointed to administer the deceased's estate under this protracted environment. However, there are other issues which need to be addressed as well. In totality, the following four issues emerge for this court's determination. **One**; whether ground of the appeal No.1 is a new matter hence unmaintainable. **Two**; whether the second objection filed by the first

respondent in the trial court was time barred. **Three**; whether the appointment of the second respondent and the rejection of the appellant as administrator of the deceased's estate was lawful, and **four**; whether the appeal has merit to support the prayers made by the appellant herein.

While embarking on this most difficult journey in trying to resolve this dispute, I appreciate the fact that this is a second appeal, whereby there is are concurrent findings of the two lower courts on all the relevant facts and law. It is trite law that the second appellate court should restrain itself from meddling in the concurrent finding of the lower court save where there are misdirection and non-direction on the law or evidence by the lower courts. In cases where there are misdirections or non-directions on the evidence a court is entitled to look at the relevant evidence and make its own findings of fact. (See **Director of Public Prosecutions vs Jaffari Mfaume Kawawa** (1981) T.L.R. 149). I shall abide by this principle.

The first issue shall not detain me since the answer is in the records of the court. While submitting on the first ground of appeal that the second objection was time barred, Mr. Mwanga made four points as recorded herein. **One**; the lower courts disobeyed the order of the High Court in PC Civil Appeal No. 2 of 2017 to proceed with hearing from where

it had ended. **Two**; the grounds of objection in the first and the second objection differ, hence the second objection should have been regarded as an afterthought. **Three**; the normal period for public notice (general citation) is ordinarily 90 days, or at least 4 weeks but the second objection was allowed after more than seven (7) years. **Four;** while objections in probate matters can be brought up before appointment of administrator or during administration or even after administration, allowing the second objection was tantamount to enabling the first respondent continue with filing objections until he got satisfied with one that fits him the most.

It is apparent from records that the complaint that the second objection was time barred was raised by the appellant right from the trial court. In the first appeal, the same was framed as issue No. 1 as appearing on page 2 to 3 of the typed judgement of the first appellate court. This issue was determined accordingly. After the decision of the first trial court, the appellant is still aggrieved, and has substantially raised it in this second appeal. Under such circumstances, this issue cannot be said to be a new matter altogether, before the court.

It is apparent that the arguments put forth by Mr. Mwanga regarding the order of the High Court that the trial should proceed from where it had ended, was also raised in the first appellate court. It is

recorded on page 20 of the typed proceedings of the first appellate court. The same was not raised as a separate ground of appeal. I am little surprised why Mr. Mwanga didn't see that he was mixing up arguments and was derailing himself from his main contention that the second objection was time barred. It is obvious to me that an argument that the trial court was ordered to proceed from where it had ended and the argument that the second objection is time barred are different arguments altogether. I agree with Mr. Sambo that this argument was new, hence unmaintainable. In **Juma Manjano v. Republic**, Criminal Appeal No. 211 of 2009, the Court of Appeal held thus;

> *"As a second appellate court, we cannot adjudicate on a matter which was not raised as a ground of appeal in the first appellate court"*

For the foregoing reason I shall not consider the argument that the trial court disobeyed the order of this court to proceed from where it had ended. However, the argument that the normal period for general citation is 90 days, or at least 4 weeks but the second objection was allowed after more than seven (7) years, is not a new matter. It has been a persistent argument in the appellant's first ground of appeal. Under such

circumstances, therefore, the first issue is answered in the negative, to the extent specified above.

Regarding the second issue as to whether the second objection filed by the first respondent in the trial court was time barred, Mr. Mwanga has repeatedly beaconed his argument on the existing practice in primary courts. Normally, a general citation or public notice as commonly used in primary courts, will be issued for 90 days. In some instances, shorter periods have been preferred by court. As correctly submitted by Mr. Sambo, there is no strict law against which one can reckon the time for public notice in probate and administration matters at primary courts to see if an objection has been filed in time or not. I appreciate the great efforts by Mlacha,J (as he then was) to stabilize this aspect of the law based on obtaining practice. In respect to time duration for general notices or citation, he stated in **Beatrice Brighton Kamanga and Amanda Brighton Kamanga** (supra) thus;

> *"Citation is done in form No. 2 and in my view, there must be a gap of at least 4 weeks in between to allow the information to circulate in the society widely.* ***The usual practice is 90 days but it is discretionary****. Going below 4 weeks takes us to quick appointments (vodafasta). It is dangerous and must be discouraged". [Emphasis supplied].*

It is therefore acknowledged that the time set for general citation is based on the practice and not on statutes. Besides, what is considered dangerous and a matter to be discouraged is to shorten the process. Short notices raise fear of disinheriting eligible heirs or other interested parties merely because they were unaware of the proceedings. Under these circumstances where there is no law specifically setting time for filing objection, the court may seem to lack strong legal basis to rule that the objection time barred.

However, the court is not oblivious of the negative repercussions this state of affairs may bring to the court practice. Mr. Mwanga has hinted on one already, that by entertaining the second objection after more than seven (7) years, it implies that the trial court could continue allowing the first respondent to bring up other objections until he gets one that fits him the most. Obviously, the law cannot operate against its own objective of attaining expedience in disposition of disputes.

It is my considered view that, even under the circumstance where there is no specific law setting time limitation for filing objections in administration proceedings, such a right cannot be left open-ended. The trial court ought to have invoked the reasonableness test, based on the prevailing practice. Hence, as correctly stated in **Beatrice Brighton**

Kamanga and Amanda Brighton Kamanga (supra), the normal practice is to allow 90 days for general notice to circulate to the public. The time can be less than the 90 days, but usually not more. I am mindful of the argument by Mr. Sambo that his client could not file his objection within that period of seven years because the court file was sent to the Court of Appeal, and that he did file his objection within only 46 days after its return. This argument was not traversed by the appellant's counsel, who chose to rely on the order of the High Court that the trial court should proceed from where it ended.

Having carefully considered all these arguments and peculiar facts of this case, I don't agree with Mr. Sambo that the filing of the second objection was not time barred. In deciding so, I have considered the fact that in practice 90 days is standard maximum time for publication of general citation. I have also considered that according to the trial proceedings, on 19th October, 2015 when the trial court received the application for grant of letters of administration from the appellant herein, it ordered the general notice to be issued, while setting 30th October, 2015 as the date for mention. Having received the first objection, the same was scheduled for hearing on 15th December, 2015, being fifty-eight (58) days from the date of general citation. Considering the practice in primary

courts, the time allowed of 58 days is within the acceptable time stated in **Beatrice Brighton Kamanga and Amanda Brighton Kamanga (supra).**

Trial proceedings reveal that by the time the trial court pronounced its decision on the first objection on 29th March, 2016, no any other objection was received to oppose the grant of letters of administration to the appellant. From 19th October, 2015 when the general citation order was made to 29th March, 2016 when the trial court decided on the first objection, the court file was within the trial court. It had not been sent to the Court of Appeal yet. This period makes a total of **163** days. By benchmarking this duration with the 90days established by practice and case law, plus the 46 days spent by the objector after the decision of the Court of Appeal which in effect removed the trial court's stay order, the second objection was brought up after a total of **209** days. In my views the second objection was hopelessly out of time. Had the first appellate court properly directed itself to these facts on record and the case law as cited by the appellant's advocate, it would have come to a conclusion that the second objection was indeed time barred.

Before winding up on this issue, there is yet another aspect of it I would wish to comment about. When the trial court allowed the first

respondent to file his second objection on 28th July, 2022, the rest of the general public was not availed with the same time extension to file their objections, if any. The window to do so was availed specifically to the first respondent alone. In my considered view, the right to file an objection in administration proceedings cannot be tailor-made for a specific person since the general public reserves such right when the law grants it. The objective of publishing the general notice (general citation) is to let all those interested in the proceedings aware so that they can take steps to claim their rights from the deceased's estate, if any. The trial court could not indiscreetly know who are interested in the matter before it. This order to allow the first respondent file the second objection was not only condoning an afterthought but was also quite injudicious. In the end, having considered the above reasons, I determine the second issue in the affirmative. This disposes the first ground of appeal.

The third issue is the bulkiest and carries the heart of this entire appeal. It is on whether the appointment of the second respondent and the rejection of the appellant as administrator of the deceased's estate was lawful. It covers the rest of the grounds of appeal.

The relevant submission by Mr. Mwanga on this issue has dwelt on showing this court how the trial court made wrong consideration, or failed

to grasp and apply well the law in rejecting the appellant's application, on one hand. On the other hand, it has tended to show how the trial court made an arbitrary decision in appointing the second respondent to administer the deceased' estate. The main contention by Mr. Mwanga is that much as there were matters to impeach the credence of the appellant as administratrix of the estate, the fact that she proved by her birth certificate to be deceased's daughter that fact overshined the other arguments against her appointment. It is about exhibit D1 factor. The learned counsel for the respondents maintained that the serious shortfalls observed by the lower courts proved, by balance of probability, that the appellant is not deceased's daughter hence supporting the decision to reject her application. The respondents' side also supports the appointment of the second respondent as administrator of the deceased's estate.

In the outset, I should state that the decision of the lower courts is not totally unsupported. There are reasons to question the credibility of the appellant and her suitability for appointment as administratrix of the deceased's estate. Particular questions may be asked of her admission that she went to open probate proceedings at Maromboso Court at a time when her would be siblings were still alive but she didn't involve them.

Her counsel was defensive that the appellant was not given time to explain why she preferred those Maromboso Court proceedings, charging that the lower courts adversely concluded on those accusations without affording his client her right to be heard.

However, when cross-examined by Mr. Sambo at the trial court on 10th October, 2022, the appellant replied that it was in 2013 when she came to know of the administration proceedings opened by Yusuf Khalile. By this reply, she was telling the trial court that she was unaware of the earlier appointment of his would-be brother, Yusuf, by the trial court. The two answers are obviously not in harmony to each other, and leave the court in darkness as to the real reason for opening the Maromboso proceedings.

Another dent on the appellant's case is on how she obtained death certificate of the late Yusuf Khalile Ally. On balance of probability, the testimony of the first respondent was not only credible as to the death and burial of Yusuf Khalile Ally but also poked holes on credibility of the appellant with regard to the closeness of communication between the appellant and Yusuf Khalile Ally. I have in mind the appellant's testimony that she was coming to visit her brother Yusuf and she gave him some money to build some structures at the Arusha property. Recalling that the

late Yusuf Khalile Ally had paralyzed for long time and was being taken care of by the respondents' family, it is unlikely that the appellant visited him and gave him the monies without visiting the respondents' home where he was residing. The minutes of the clan meeting, unexplained differences in the names of the appellant's mother, all add up to the reasons for the lower courts to doubt her.

However, something went totally wrong in the lower courts' decisions. Both the trial court and the first appellate court came to a conclusion that the appellant is not the deceased' daughter. In arriving at this conclusion, the first appellate court had this to say:

> *"As to the contention that the appellant is not the deceased's daughter, I have carefully gone through the record, the testimony adduced by the* ***first respondent and his witnesses show that they do not recognize the appellant as the deceased's daughter****. The available record shows that the deceased had two children namely Hawa Ally and Yusuph Ally (the former administrator).* ***Witnesses were consistent that they never knew or saw the appellant before****.*
>
> *On the other hand the appellant maintained that she is the deceased's daughter and* ***her mother's name is Ado Mohamed****, however on cross examination*

> ***she changed her story by stating that in Land Case which was pending at the High Court of Tanzania at Arusha she mentioned her mother's name to Bardo Haji*** *but she again mentioned* ***her mother as Haji Hersi*** *to be her mother. Further stated on cross examination she did not have affidavit to confirm her mother's names".*
>
> *[Emphasis supplied]*

After stating the above, the first appellate court went on to note that the appellant had a passport showing that she is a Canadian, and that it was in 2013 when she came to know that Yusuf Khalile Ally had petitioned for letters of administration. It is after these statements the learned Magistrate made a rather contradictory conclusion when she stated:

> *"In totality, on available record,* ***I came to the conclusion that there are a lot of doubts regarding the appellant whether she is a honest*** *(sic)* ***person*** *taking into account that she secretly instituted probate matter before Marombosso Primary Court while there was already probate matter filed before the trial court,* ***whether she knows the deceased's relative and his properties as she readily admitted that she has been residing abroad".***
>
> [Emphasis supplied]

In my considered view, the above conclusion is totally wrong for the following reasons: **One**; in her own words on page 14 of the typed judgment the first appellate court Magistrate was determining "*the contention that the appellant is not the deceased's daughter*" but ended up concluding that the appellant was not an honest person. Despite recording the submission of Mr. Sambo on page 10 of the typed judgment where the birth certificate of the appellant was put to question, nowhere in her judgment the learned Magistrate analyzed and decided upon the credence of the most important evidence in this aspect, which is the appellant's birth certificate (exhibit D1). This was a grave misdirection by the first appellate court, which erodes the foundation of its judgment.

I should add here that an omission of the same gravity was committed by the first appellate court through ignoring decisions cited to the court by appellant's counsel, most of which being the decisions of the Court of Appeal, without assigning reasons for disapplying them. This claim which was raised by the learned counsel for the appellant has gone substantially unopposed. After perusing the impugned judgment, I have formed the view that the said decisions were relevant to this case but were unjustifiably disapplied. In **Tanzania Breweries Limited vs. Anthony Nyingi** (supra), the Court of Appeal had this to say:

"If a court of law decides to accept or reject a party's argument, it must demonstrate that it has considered the same, and set out reasons for rejecting or accepting it. Otherwise, the same becomes an arbitrary one".

Two; while the issue under consideration by the first appellate court was the appellant's **paternity**, the learned Magistrate picked rather insignificant evidence of the first respondent and his witnesses who testified that they didn't know the appellant. Thereafter, while still dealing with the **paternity** of the appellant, the learned Magistrate surprisingly resorted to picking faults in the name of the appellant's **mother**. The spelling mistakes in the name of the mother had absolutely nothing to do with her paternity which was in issue. Again, if the learned Magistrate had properly analyzed the evidence on record, she would have realized that it was not necessarily true that the respondent's witnesses must recognize the appellant who was living abroad and wasn't sharing a mother with the late Yusuf and Hawa Khalile Ally. Neither would the appellant be expected to know all the properties of the deceased.

Three; in her uncontroverted testimony, the appellant testified that she was living in Ethiopia and later she went to live in Canada where she was married. If the first appellate court had properly analyzed the trial

evidence, it wouldn't have put much weight on appellant's lack of knowledge of deceased's relatives, lack of minutes of clan meeting, the Maromboso proceedings or any other mismatch in her evidence on matters which do not disprove her **paternity**. The fact that she was abroad for most of her time could inform the court that the appellant might not have no such strong connection with her siblings, Yusuf and Hawa and neither would it be a surprise that she didn't know the exact date the deceased, Hawa and Yusuf passed away. It wouldn't be a surprise also if she could not reach out to proper members of the deceased's clan (if any) to attend the clan meeting. After all, as repeatedly and correctly stated by my learned brothers in the cited cases of **Seleli Dotto**, **Joseph Makoye Lameck, Monica Nyamakare Jigabha, Flora Augustine Mmbando, Kijakazi Mbegu & Five Others** and **Allan Alfred Leo & Another** (supra) (the list is not exhaustive), much as the holding of a clan meeting is an encouraged practice, it is not a mandatory legal requirement for one to be appointed an administratrix of deceased's estate. And as correctly submitted by Mr. Mwanga, all these shortfalls should have been laid to ground upon proof of the appellant's paternity which was done vide exhibit D1.

During trial, the appellant firstly produced a certified copy of her birth certificate to prove that she was deceased's daughter. The same faced an objection for being a photocopy and was illegible. It is undisputed that the appellant sought and obtained leave of the court to produce a duplicate copy, which she eventually obtained. The same was tendered and admitted as exhibit D1, this time without any objection. These facts distinguish the matter at hand with the case of **Allan Alfred Leo & Another vs Karen Kindondechi Leo** (supra) cited to me by Mr. Sambo. Unlike the case of **Allan Alfred Leo** where the court found that the birth certificates and hospital cards appeared to be new and were made by the same hand to show that they were prepared specifically for that case, in the case at hand no such findings were made by the trial court in its proceedings or judgment. There was sufficient explanation from the appellant as to why she was not given a duplicate copy of her earlier tendered but rejected birth certificate.

It is the position of the law that the duty to remark on the admissibility of evidence is purely in the domain of the trial court. (See **Nyerere Nyague vs The Republic**, Criminal Appeal No. 67 of 2010 CAT Arusha). When no such remarks are made in the proceedings and the judgment of the trial court, the first appellate court lacked authority to

speaks about it save for evaluation of evidence which it didn't properly do. Apart from being cross examined, the appellant was able to see her re-issued birth certificate smoothly admitted in evidence as exhibit D1 carrying Serial Number 163586873047. The exhibit as admitted shows that the name of the appellant's father is Khalile Ally Hildid, whom under the context of the evidence tendered, is the deceased herein.

Under the above circumstances, if there were any doubt as to the genuineness of exhibit D1, it was not for the respondents' counsel to express mere doubts in court but to seek necessary orders of the trial court to have the exhibit proved by its maker. Besides, Section 4 of the Birth and Death Registration Act, Cap 108 RE 2002 provides:

> *(2) Any register in the custody of a district registrar, and any register, copy of a register, return, or index in the custody of the Registrar-General shall, on payment of the* prescribed fee and subject to the prescribed rules, be open to inspection".

Whoever doubted the genuineness of the appellant's birth certificate ought to have quenched his or her worries by doing the needful in accordance with the law. It is strange that the respondents' advocates opted not to follow the available legal procedure yet managed to convince the lower court on their unsubstantiated doubts. In my view, where there

are established legal procedures for verification of facts in disputes, the party in doubt has a duty to follow the available procedure for proving the disputed fact. This is akin to a duty placed upon a person who alleges existence of a fact.

In the cited decision of my learned brother Laltaika,J in **Muhibu Sefu Mohamed vs Hawa Hemed Malivata** (supra), proof of parentage has been exhaustively discussed. Referring to section 35 of The Law of the Child Act [Cap 13 R.E 2019], His Lordship mentions one of the items which the court shall consider as evidence of parentage, as "*the name of the parent entered in the Register of Births kept by the Registrar-General*". Therefore, by ignoring the parentage of the appellant contained in her Birth Certificate (exhibit D1), again, the lower courts committed a serious misdirection akin to ignoring a valid provision of the statute.

On the other hand, I have read the reasons given by the trial court and approbated by the first appellate court regarding the appointment of the second respondent. I agree with Mr. Mwanga that in view of availability of the appellant as the daughter of the deceased, it was wrong in law to appoint the second respondent to administer the deceased's estate. Consanguinity was supposed to be observed. The appellant was able to prove, especially through her unchallenged birth certificate that

she was deceased's daughter. This, in my considered view, was weightier than the evidence of the bigger number of witnesses who testified for the respondents. In the final analysis, therefore, the third issue on whether the appointment of the second respondent and the rejection of the appellant as administrator of the deceased's estate was lawful is answered in the negative.

The above deliberations lead to only one conclusion for the fourth issue. This appeal is full of merit and the appellant deserves to be availed with the remedy she craves for. It is not disputed that after the demise of Hawa and Yusuf Khalile Ally and before the appellant came into the scene, the deceased was not survived by any issues of his own. Those who are known to have survived him were Yusuf and Hawa. Now, since it has been proved that the appellant is another daughter of the deceased and is the only surviving issue, and since she is a matured person and of sound mind, and since she applied to be appointed as administratrix of her deceased father's estate, it follows that she stands to be trusted with administration of the deceased's property.

In the special circumstances stated above, the appellant befits the criteria stated by the Court of Appeal in **Joseph Shumbusho vs Mary Grace Tigerwa & 2 Others** and **Stephen Maliyatabu & Another vs**

Consolata Kahulananga (supra) in terms of being entitled to the whole or part of the deceased's estate; having greater and immediate interests in the deceased's estate, her being a daughter and the sole surviving issue of the deceased. There is no dispute and the trial court correctly observed and decided that since the deceased led an Islamic way of life, his estate be administered in accordance with the provision of section 5 of the 5th Schedule of the Magistrate Courts Act, Cap 11 RE 2019 read together with rule 10(1) of the Primary Courts (Administration of Estates) Rules, GN 49 of 1971 guided by Islamic inheritance principles enunciated in the Holy Quran. I am in agreement with this observation and decision.

In deciding as above, I also recall that the testimony adduced for the respondents emphatically pointed out that the deceased's estate was only comprised of no other item apart from the Arusha property. To the contrary, the appellant, on page 38 of the trial proceedings, testified to the effect that there were other deceased's properties some of which were being squandered. Whether her assertion is true or not, it would be for the interest of the deceased's estate that the appellant be given an opportunity to administer the estate and thus be enabled to collect the entire estate.

Accordingly, the appeal is allowed. Consequently, save as otherwise decided above, by applying the powers bestowed upon this court under section 44(1)(b) of the Magistrates Court Act, [Cap 11 RE 2022], I quash the decisions of both the trial court which appointed Hassan Omari Abdi Ally, the second respondent herein, as the administrator of the deceased's estate, and the first appellate court which confirmed the said appointment. In lieu thereof, and for reasons stated herein, I hereby appoint Amina Khalile Ally, the appellant, to be the new administratrix of the deceased's estate. She shall diligently and faithfully carry out her administration duties in full compliance with the law.

In pursuit of the above, within four (4) months from the date hereof the appellant shall be required to exhibit before the trial court a full and true inventory on administration of deceased's estate. The matter be mentioned on 29th January, 2024 before the trial court to ascertain whether the inventory has been filed.

Considering that all the parties herein claim to be related to the deceased, I restrain myself to make any order as to costs.

Dated at **Dar es Salaam** this 26th day of September, 2023.

THE HIGH COURT TANZANIA

ABDI S. KAGOMBA
JUDGE