

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
TABORA DISTRICT REGISTRY
AT TABORA

PC. PROBATE APPEAL NO. 01 OF 2023

*(Arising from Igunga District Court in Probate Appeal No. 01 of 2022, Originated
from Igunga Urban Primary Court in Probate Cause No. 40 of 2021)*

MWASHI NCHUNGILA.....1ST APPELLANT
MHINDI SENGEKA.....2ND APPELLANT
NSHOMA KASEMA.....3RD APPELLANT
SARA SENGEKA.....4TH APPELLANT
MWAKA SENGEKA.....5TH APPELLANT
VERSUS
PAGI SENGEKA.....RESPONDENT

JUDGMENT

Date of Last Order: 5/9/2023

Date of Judgment: 20/10/2023

KADILU, J.

This appeal challenges the key aspects of the administration of estates in primary courts. The respondent, Pagi Sengeka was the applicant at Igunga Urban Primary Court. He filed an administration cause seeking to be appointed the administrator of the estate of the late Sengeka Mahona. The late Sengeka Mahona died intestate on 15/8/2021. He lived in accordance with customary rites. He left five wives and twenty children. Among the 20 children, 18 of them are from the five wives whereas the other 2 are from two women who were not married to him during his life time.

The parties to this appeal are daughters and sons of the deceased coming from different mothers. The deceased left some properties including the landed ones which have brought a tag of war at the family

leaving it apart. The appointment of the respondent as the administrator of the estate and the distribution which he made is what prompted this appeal. The case was registered as Probate and Administration Cause No. 40 of 2021 before Igunga Urban Primary Court and placed before Mdonya J.S, RM for determination. The respondent was appointed by the primary court. While filling an inventory form, the appellants objected to the distribution of properties.

The magistrate dismissed the objection after hearing the parties. He proceeded to make a ruling blessing the distribution. The appellants could not see justice in the way the objection was treated and the ruling which resulted thereto. They filed an appeal to the district court of Igunga in Probate Appeal No. 01 of 2022 challenging the procedure used in appointing the administrator and the distribution which followed. The magistrate could not see anything wrong in the proceedings of the primary court. The appeal was therefore dismissed hence, this appeal.

The background of this matter is necessary to recap herein with a view to point out a clear picture of its genesis. The respondent being the first son of the deceased from the first wife, petitioned for the letters of administration which was preceded by his nomination by the clan meeting sat on 19th day of August, 2021 to petition for the letters of administration in the manner appearing in the trial court's records. The respondent having been successfully appointed by the trial court, performed his administration duties as envisaged by the law and further, he filed into the court a true statement of assets and accounts.

The appellants were uncomfortable with the distribution of the said estate and they unsuccessfully contested it in the trial court to have such

distribution nullified as it allegedly resided on an unequal basis. They thus preferred an appeal to the District Court. The district court heard the appeal to the end and dismissed it. Aggrieved, the appellants came before the High Court with five grounds of grievance as hereunder:

- 1. That, both lower courts erred in law and fact by entertaining the matter to the finality while it was tainted with gross irregularities.*
- 2. That, both lower courts erred in law and fact when they failed to revoke the respondent's letter of administration while he was strongly objected by the appellants.*
- 3. That, the appellate court erred in law and fact by upholding the uneven distribution of the estates of the deceased.*
- 4. That, the appellate court erred in law and fact when it failed to determine as it did, the 93 hectors of land owned by the deceased despite of the strong evidence of the appellants.*
- 5. That, the appellate court erred in law and fact by upholding the decision of the trial court by allowing the division of the personal properties of the 3rd appellant into the deceased estates.*
- 6. That, the appellate court erred in law and fact when it failed to find an error by the trial court not ordering the deceased's properties to wit, a car and two motorcycles be sold and the monies be divided among all legal heirs of the deceased.*
- 7. That, the lower appellate court erred in law and fact by not quashing and nullifying the decision and proceedings of the trial court which dealt with two applications for letters of administration in one file.*
- 8. That, both the trial and appellate courts erred when they failed to consider strong evidence of the appellants in this contentious probate.*

During the hearing of the appeal, the appellants were represented by Mr. John Stanley Chigongo, learned Advocate whereas the respondent enlisted the services of Mr. Thadeus Fredrick Kivulunzi, learned Counsel.

Arguing in support of the appeal, the learned counsel for the appellants submitted that, the matter at hand was tainted with a number of irregularities before the trial courts. He went on mentioning a number of irregularities alleging that were conducted in the trial Primary Court that. **First**, there were two applications for letters of administration filed by the respondent which were dealt with in one file to wit Probate Cause No. 39/2021 and Probate Cause No. 40/2021. **Second**, the respondent was not appointed as the administrator of Probate Cause No. 40/2021 by Igunga Urban Primary Court, and that the probate was not published to the required standard in law. **Third**, there was no clan meeting which nominated the respondent the administrator of the estate of Sengeka Mahona. **Fourth**, Probate Cause No. 40/2021 did not follow legal procedures in its hearing. **Fifth**, there were procedural errors in law when determining the objections raised against the respondent to be appointed administrator of the estate of Sengeka Mahona. **Sixth**, there was confusion regarding the unit of measurement that was used in measuring the size of the farm befalling the estate in division.

Regarding the fourth and eighth grounds of appeal, the counsel for the appellants submitted jointly that the appellant's evidence was disregarded by the lower courts. He went further contending that the appellants adduced the existence of ninety-three (93) acres of farmland which the respondent did not show and allocated to the beneficiaries. He mentioned a number of people who rented some pieces of the said farm from the respondent namely; Dindai Sendama Mabula (20 acres), Tito Joghna Sado (3 acres), Mwinamila Masasila (3 acres), Juka Nindo (5 acres) and Kifu Tumo (20 acres). Also, he submitted that the respondent sold a portion of the said acres to some people and the sale agreements were

witnessed by the Buyumba-Mwanzugi hamlet chairman, one Fideli Chamasanga.

In yet another contention, the appellant counsel submitted that the evidence of SM2 testified that the deceased left more than 200 acres. The learned Advocate referred to page 2 of the trial court's judgment. He further submitted that the testimony was not disputed by the respondent or other witnesses and it should be born in mind that such evidence was given by one of the wives of the deceased, Sengeka Mahona. Nevertheless, the said evidence was not corroborated by any other witnesses to wit SM2, SM3, and SM4.

Regarding form No. V, it shows that the deceased left among other estates, a total of 35.5 acres, that there is confusion in court regarding the actual size of land left as the estate of which the appellant fought a tireless, but futile battle. On the fifth ground of appeal, the counsel for the appellants submitted on the error of the division of the personal property of the 3rd appellant as part of the estate of Sengeka Mahona. He further contended that the respondent evicted the 3rd appellant from her matrimonial house which she acquired jointly with her deceased husband, Sengeka Mahona and consequently, subjected the said house to estate division.

He went on submitting that this court needs to disregard the deed of settlement between the 3rd appellant and the respondent dated 19th May, 2023 since it was admitted without leave of the court. On the sixth ground, the counsel for the appellants submitted that, the two-motor cycles SUNLG making with registration number MC 660, BUG and Sinoray which was registered as MC 588, CEG were given to Hollo Mboje and Shija

Sosoma respectively while a car with registration number T772, AOO was bequeathed to Mwashī Nchungila and Mwalu Shija jointly without any legal justification for the exclusion of other heirs.

In reply, On the irregularities, the Counsel for the respondent submitted that it is not true that the respondent was not appointed as an administrator of the estate of the late Sengeka Mahona as there was no dispute that Igunga Urban Primary Court did appoint Pagi Sengeka as an administrator of the estate of the late Sengeka Mahona in the ruling dated on 10th December, 2021. The counsel maintained that the variation of the cause number as seen on the probate form number IV, V, and VI cannot set aside the order and power of the court in appointing the respondent since the errors were committed by the court's registry officers, and that can be rectified through overriding objective principle.

Mr. Kivulunzi, also submitted that it is a settled legal position that raising new matters during the appeal is not proper, and the court cannot act on the same since it was not raised during the trial or in the first appeal. He made reference to the case of ***Seifu Mohamed Seifu v Zena Mohamed Rajabu***, Misc. Land Appeal No. 84/2021, High Court of Tanzania (Land Division) at Dar es Salaam. He went further to submit that the probate cause was published and the appellants did not go to Igunga Urban Primary Court to object it. Mr. Kivulunzi argued that the respondent was nominated by a clan meeting and the court did appoint him.

The learned Advocate invited the court to refer to page 9 of the first appellate court's judgment and page 2 of the ruling of Probate cause number 40/2021 at Igunga Urban Primary Court dated 10th December, 2021. On the point of objection raised, the counsel submitted that in the

records of the trial court, there is nowhere the appellants had raised any objection against the appointment of the respondent as an administrator of the estate of the late Sengeka Mahona rather than objection to the distribution of the deceased's estate.

The counsel submitted in addition that in the distribution of the deceased's estate, the respondent stepped into the shoes of the deceased and distributed the estate in accordance with the wishes of the late Sengeka Mahona as he did not take any properties that were placed by the deceased to one wife and send them to the other wife in his distribution, but there is nowhere in the trial court's record that the respondent stated about the existence of a will.

On the issue of 93 acres, the counsel submitted that the deceased left only 33 acres, and both lower courts were correct to uphold the respondent's contention as the appellant did not prove the existence of the 93 acres. Mr. Kivulunzi explained that the people who have been mentioned to have rented some acres of land and the alleged sale agreements are mere misleading statements which were not raised during the trial. He argued that to raise them during the appeal stage is not legally acceptable hence, it should not be regarded by this court.

As regards the fifth ground, the Counsel for the respondent submitted that the allegation as submitted by the appellant's counsel is not true as there is no proof brought by the 3rd appellant during the trial to show his ownership of the properties that were included in the deceased properties. On the sixth ground, the counsel submitted that, the court has no mandate to sell the properties of the deceased to wit a car and two motorcycles so that the proceeds may be divided among all legal

heirs. Doing so will constitute the court's interference with the duty of the administrator.

He made reference to the case of ***Monica Nyamakare Jigamba v Mugeta Bwire Bhakome & Another***, Civil Application 199 of 2019, [2020] TZCA 1820, where it was held that the High Court grossly erred when it stepped into the shoes of the administrator. The probate or administration court has no powers to determine the beneficiaries and heirs of the deceased. In rejoinder, the counsel for the appellants reiterated what has been submitted in chief so, there is no need to reproduce it here.

I have examined the records of the two courts below carefully. I have also considered the grounds of appeal and submissions made by the learned minds herein. The district court concurred with the primary court on its findings and decision that, it is concurrent with the procedure adopted in appointing the respondent as the administrator of the deceased estate, and blessed the distribution made. This court being the second appellate court, is not expected to disturb the concurrent findings of the two lower courts unless there is a misdirection or non-direction on the evidence and the relevant law.

It is undisputed that the roles of the primary court in administration cases are to appoint the administrator, to hear objections to the appointment (if any), to receive the report of the administrator, and hear objections to the report (if any). The court may revoke the appointment on a successful objection based on good cause. Its other functions are as contained under rule 8 of G.N. No. 49 of 1971. I will now move to examine

the functions and powers of the administrator. They are contained under rule 5 of the fifth schedule. It reads as under:

"An administrator appointed by a primary court, shall with reasonable diligence, collect the property of the deceased and the debts that were due to him, pay the debts of the deceased and the debts and costs of the administration, and shall, thereafter, distribute the estate of the deceased to the persons or for the purposes entitled thereto, and, in carrying out his duties, shall give effect to the directions of the primary court."

This provision has been interpreted in various cases of this court. In ***Naftal Joseph Kalalu v Angela Mashirima***, PC. Civil Appeal No. 145 of 2001, High Court of Tanzania at Dar es Salaam, at 243 it was stated that:

"... the duty of the administrator is to make a collection of the deceased's property and distribute it to the heirs ..."

Thus, the administrator has the power to collect the assets and debts of the deceased. It is his duty to collect the assets and identify debts. He will thereafter pay the debts and distribute the balance to the legal heirs. He must file a report to court containing what he did. Filing the report is mandatory and none filing has some legal consequences. The report may also be challenged by any interested party. In ***Mwajina Abdul Maguno v Mwanahawa Maguno*** Civil Appeal No. 74 of 2004, High Court of Tanzania at Dar es Salaam, this court discussed the report and its legal consequences as follows:

"...Filing the inventory with the Kinondoni Primary Court which appointed her to administer the deceased's estate was one of her duties which she failed to do. ... I agree with Mr. Mniwasa

for the appellant's submission that a failure by the administrator to show how much property has been collected and how the collected property has been distributed to the entitled heirs is a serious breach of the administrator's duties which may render his or her appointment to be annulled."

In ***Ibrahimu Kusaga v Emanuel Mweta*** [1986] TLR 26, the court pointed out the situations where the administrator of the deceased's estate may sue or be sued. It stated:

"...there may be cases where the property of a deceased person may be in dispute. In such cases, all those interested in the determination of the dispute or establishing ownership may institute proceedings against the Administrator or the Administrator may sue to establish the claim of deceased's property."

What the court should do, is to sit down and wait for the report or allegations of misuse of power, the report becomes final and the court must make an order to close the administration. In that situation, the court has the power to hear the objections and make a ruling.

Coming to the present case, the record reveals that the case was registered as Probate and Administration Cause No. 40 of 2021 before Igunga Urban Primary Court, the respondent did fill out the administration Form No. I. On 17/11/2021, he merely presented the family meeting minutes as well as the certificate of death which were used as a base to open the case. In probate and administration matters, the clan or family will usually sit to discuss the matter and propose someone to be the administrator. He will be sent to court with some minutes.

After filling out administration Form No. I, the records also reveal that the court reacted by issuing a citation in Form No. II, and directed the part to be affixed at the court premises and other key buildings in the locality. The aim is to ensure that information is circulated to all interested parties, particularly the heirs, debtors, and creditors. Also, the record reveals that the case was held on 10/12/2021, it was almost one month since the information was circulated to the public. The record reveal that there was no objection then, the court proceeded to appoint him as an administrator.

The grant of administration is made in Form No III and it must state the property to be administered as seen in the record, which is provided under rule 7 (1) of G.N. No. 49 of 1971. Form No. III does not indicate that it has the grant of letters of administration. It is a bond, security for due performance of the administration. Form No. IV does not appear to be a bond as provided under rules (2) and (3), but it is the actual grant of administration. Up to the appointment of the respondent, there were no serious irregularities as it was stated by the appellant's counsel.

Again, in the record, it is not disputed that Form No. IV (appointment letter), Form No. V (inventory) and Form No. VI (statement of accounts) both stating as documents for Probate and Administration Cause No. 39 of 2021. What is in issue are the documents that initiated this appeal which bear the different number of cases as appearing in Form IV, V, and VI. I have read the records of the primary court. It is obvious that the errors are mere typographical errors which do not go to the root of the case.

The alleged irregularity that Administration Cause No. 39/2021 indicated on Form IV, V, and V does not tally with the case file number is not an irregularity in the legal sense perse, it is a slip of the pen that should be condoned. It is a clerical error that does not carry any miscarriage of justice to the litigants.

As to the existence of ninety-three (93) acres of farmland, the counsel for the appellant contended that some of the farmland had been rented and some had been sold. This is a new matter which has no room in the appeal stage since it needs evidence to prove the same.

On the issue of objections, I have perused the trial court's proceedings specifically the primary court, there is nowhere the appellants had raised any objection to the appointment of the respondent as administrator of the estate of the late Sengeka Mahona. They only objected the distribution of the asset of the late Sengeka Mahona. Since there was no application for revocation made to the trial court (primary court) to have the appointment of the respondent revoked, introducing such fact at the appellate stage is a waste of time and like the district court, this court cannot bless it as well.

Concerning the issue of selling the motorcycles and a car so as to divide the monies to all heirs, this point cannot detain me. It is a settled position that the court should not step into the shoes of the administrator and do the job. To be specific, the court has no legal mandate to distribute or sell properties, pay debts, and distribute funds to the heirs. Those acts are in the exclusive mandate of the administrator. After revisiting all the pleadings and arguments of the parties contained in the record I am of the decided view that it is in the interests of the beneficiaries that the

administration of the estate is concluded at the earliest possible time. In this case, the administration has taken too long to be completed, for everything will have to start afresh including collection of the properties and liabilities. There is eminent danger of misappropriation or deterioration of assets. To that effect, I hold that to protect the interests of the heirs, it is just to let the decisions of the two lower courts intact. Consequently, this appeal is dismissed. Given the nature of the case, I make no order to costs.

It is so decided.

The right of appeal is explained for any party aggrieved by this decision.


KADILU, M.J.
JUDGE
27/10/2023.

Judgment delivered in chamber on the 27th Day of October, 2023 in the presence of the parties except the first appellant.




KADILU, M.J.,
JUDGE
27/10/2023.