

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

CIVIL APPEAL NO. 24 OF 2023

(Originating from the District Court of Kibaha in Probate Appeal No. 07 of 2022)

KASSIMU MAGANGA KANUNGU APPELLANT

VERSUS

RUKIA ATHUMANI MSABAHA..... RESPONDENT

RULING

17th August & 24th November, 2023

BWEGOGGE, J.

This is an appeal against the decision of the District Court of Kibaha (the first appellate court) which reversed the decision of Mlandizi Primary Court in respect of the appointment of the appellant herein as an administrator of the estate of the late Catheline Malunguja who died intestate.

The factual background of this case, as entailed by the record of the court of first instance may be stated thus: The deceased person was a military servicewoman who resided and died a natural death at Mlandizi. The deceased had neither married nor begotten child. The deceased, on

consent of parents, had taken the respondent from her home village to help her with housekeeping work. The respondent lived with the respondent herein from her childhood to adulthood. Eventually, the respondent left the deceased having married and shifted residence within the proximity of the Mlandizi and maintained a close tie with the deceased. In later days, having retired from the military service, the deceased health deteriorated. The respondent had nursed the deceased until her death. The deceased died on 19th January, 2020 and was buried at Mlandizi according to traditional rites on the instructions given to the respondent. It was said by the respondent that the deceased informed her that she had no surviving relative(s). It was also narrated by the respondent in that the deceased vested her estate under her administration whereas the beneficiaries were the respondent herself and her son, to whom one of the deceased's properties was bequeathed.

However, a few days after the deceased burial, the appellant herein and her daughter featured as the surviving relatives of the deceased person with immediate interest in the deceased estate. Having mourned for the death of their beloved one, they proceeded to commence probate proceedings in the court of first instance afore-named. Hence, a fierce legal battle ensued between the respondent and the appellant in a contest

for the administration of the deceased's estate which rumbled for three years. The earlier appointment of the respondent herein was annulled by this court based on procedural flaw committed and an order for trial denovo was entertained. The 2nd appointment of the respondent herein was likewise annulled by the District Court of Kibaha on procedural flaw committed by the trial court and the order for retrial was likewise entered. The third appointment of the administrator of the deceased's estate entered in favour of the appellant was successfully challenged by the respondent in the District Court. The variation order entered by the first appellate court which resulted in removal of the appellant from administration of the deceased estate is the subject of this appeal.

The appellant advanced seven grounds of appeal in an attempt to defeat the decision of the first appellate court, which in substance boils down to two main grounds, as hereunder rephrased.

- 1. The learned magistrate erred in law and fact in quashing the decision of the primary court which appointed the appellant herein to administer the estate of his deceased sister.*
- 2. That the learned magistrate erred in law and fact for failure to consider evidence on the record furnished by the appellant.*

The appellant was represented by Mr. Mukhtary Hassan, learned advocate, whereas the respondent herein was represented by Ms. Ritha Ntagazwa, learned advocate. The counsel above mentioned argued the appeal herein by way of written submissions.

In substantiating the grounds of appeal above mentioned, Mr Mukhtary argued that the first appellate court failed to consider the evidence on record to the effect that the appellant is the biological brother of the deceased person. Likewise, the first appellate court turned a blind eye to the fact that the minutes of the family meeting held immediately after the burial of the deceased person named the appellant as the family representative with approval to petition for appointment of the administration of the deceased estate who died intestate.

Further, the counsel argued that the respondent's allegation in that the appellant is not the deceased relative is not supported by the evidence on record; hence, her objection proceedings were dismissed. The counsel opined that the decision of the first appellate court in varying the decision of the trial court was without any legal justification but based on lacking similarity in the names between the appellant and the deceased person.

On the above premises, the counsel prayed the appeal herein be allowed with costs.

On the other hand, Ms. Ntagazwa contended that there were sound reasons advanced by the first appellate court in varying the decision of the trial court. That the administrator of the deceased estate should be a person with integrity and the ability to collect the deceased properties and distribute the same to the lawful heirs. That the administrator should be one of the descendants of the deceased person. The case of **Sekunda Mbwambo vs. Rose Ramadhani** [2004] TLR 439 was cited to validate the argument. The counsel contended that the respondent lived with the deceased for consecutive 20 years whereas no relative of the deceased ever showed up in that period. Likewise, the counsel asserted that the respondent was the one who took care of the deceased person until her demise. The counsel herein opined that it is incomprehensive how the appellant herein would collect and administer the properties of the deceased which he doesn't know their whereabouts.

Further, the counsel contended that the appellant failed to prove his purported relation with the deceased person, leading the first appellate court to entertain doubts on the assertions made by the same. That it was strange that the appellant who purported to be the deceased's sole

surviving brother, was not aware of the deceased long-suffering. Therefore, as the appellant failed to discharge his burden of proof in respect of his relation with the deceased person, the first appellate court had justifiable reason to quash the decision of the lower court. On the above accounts, the respondent's counsel prayed this court to dismiss the appeal with costs.

I find it convenient to discuss both grounds of appeal rephrased by this court together. Primarily, it is in the record of both lower courts that the centre of controversy between the parties herein is whether the appellant herein is the surviving biological relative of the deceased person to be entitled to appointment to administer the deceased's estate. This question, I will attempt to answer. It is uncontroverted evidence that the respondent had lived with the deceased person for a considerably long period, approximately, 20 years. It is likewise, uncontroverted evidence that the respondent is not the deceased biological child neither close relative, but whom the deceased engaged as her housekeeper and who had taken care of the deceased until her death. It was the contention of the respondent in the trial court and first appellate court that the deceased ensured the respondent that she had no surviving relative, as her brother and parents had all died previously. And, that the deceased had

bequeathed one of the properties to her elder son in writing. In substance, the respondent sought to establish that she was considered by the deceased as her own child and the sole beneficiary of her estate. Unfortunately, evidence to that effect was found lacking by the court of the first instance.

The record of the court of first instance entails that one Wolfram Kopatu Chuwa (PW2) a retired military serviceman, deponed that he knew well the deceased person since 1999. They both worked at Mafinga and Ruvu military camps until they retired. PW2 acknowledged the fact that previously, the deceased person introduced the appellant as his brother. And, in 2007, the appellant's daughter namely, Amina Kassim, had visited and stayed with the deceased for a while. In the same vein, PW2 enlightened the trial court that the respondent herein was engaged by the deceased as her maid and stayed together since 2007.

In tandem to the above, one Stumai Abdallah Kifani, PW4, deponed that she was the deceased neighbour. That previously, the deceased introduced one Amina Kassimu as the daughter of his brother whom they shared a biological mother. Likewise, PW4 confirmed that in 2007, the respondent was introduced by the deceased as her maid. The said Amina Kassimu, testified as PW3. She confirmed that the appellant herein is her

biological father and surviving brother of the deceased person. She likewise enlightened the court that she is well acquainted with the respondent though she pretends not to know her.

Based on what was deponed by PW2 and PW4, the trial court found the appellant as the surviving near relative of the deceased, with interest in the deceased estate, entitled to grant of letters of administration of the deceased's estate. Likewise, the trial court, admittedly, found the respondent as the person who had stayed with the deceased for a considerable period but not the close relative neither beneficiary to the deceased estate. Eventually, the trial court granted letters of administration of the estate to the appellant. The respondent was not amused. She appealed in the first appellate court.

In varying the decision of the trial court, the first appellate court reasoned that there was no sufficient evidence proving the fact that the appellant was related to the deceased person. That it was inexplicable that the appellant would not be aware of the deceased's ailment which persisted for a long period and the consequential death. Further, the trial court reasoned that no siblings would bear unrelated surnames. And, the fact that the appellant only shared a single biological mother but different fathers, further inclined the court to entertain suspicion on the purported

relationship. Hence, the first appellate court opined that the respondent, the only person who resided with the deceased until her death, was the person with great and immediate interest in the deceased's estate.

Admittedly, I join hands with the first trial court, in that the appellant herein had no ties with the deceased person. It doesn't ring in anyone's sane mind that the appellant, as the only surviving deceased brother, would not be aware of her beloved sister's ailment and consequential death. It was until the deceased death, that the appellant was informed by her daughter (PW3) of what had befallen the deceased. Indeed, it is in the record of the trial court that the appellant deponed that the last time he set his eyes on the deceased person is in 1999.

Likewise, I join hands with the first appellate court in that it is the respondent who was the closest person to the deceased; she had taken care of the deceased person during her ailment and the deceased had instructed her on how and where she preferred to be buried according to her traditional rites. However, the respondent's assertion that she was considered by the deceased as her sole child with right to inherit her estate, could not be substantiated by evidence.

The observations made by the first appellate court notwithstanding, it is my settled view that there is uncontroverted evidence in the court of first

instance emanating from PW2 and PW4 in that the appellant was the only person whom the deceased introduced as her only surviving sibling. I find no cogent ground to differ from the finding of the trial court. The close ties between the respondent and the deceased person cannot override the appellant's status as the only surviving relative of the same.

It is the settled law that the administration of the deceased estate should be granted to the person with the greater and immediate interest in the probate. See the cases; **Shumbusho vs. Mary Grace Tigerwa and 2 Others**, Criminal Appeal No. 183 of 2016 [2020] TZCA 1803, and **Seif Marare vs. Mwadawa Salum** [1985] TLR 253, among others.

Based on the above observations, I find the 1st and 2nd grounds of appeal with substance.

In passing, I find it pertinent to address one delicate issue that arose in the lower court. The respondent had all along asserted that the deceased person having informed her that she had no surviving relative, she regarded her as her own daughter. That the deceased footed the expenses of the education of her child namely, Innocent Juma. And, eventually made an express statement in writing that the rents generated from one of her properties at Tabata, be used to meet the child's education expenses; and, when he attains the age of majority, ownership

and possession of the property be vested to the respective child. This written statement was tendered as a will in support of the respondent's objection proceeding in her ambition to be appointed administratrix of the estate to protect the interest of her child. The trial court invoked a legal test on the document purporting to be a will and reached conclusion that the respective document didn't pass the legal test. Hence, disregarded the document.

I have anxiously scrutinized the document. Based on what is gleaned from the declaration made, I am of the settled view that the trial court strayed into an error to have considered the document as a will. The respective evidence is patently a bequeathing document, not a will. And, it is my settled view that the trial court is obliged to test the validity of the document from a legal perspective and determine the status of the purported beneficiary in the deceased's estate prior to the filing of inventory and accounts of the estate. This would prevent unnecessary objections proceedings and appeals, as I apprehend that such a document purporting to bequeath the disputed property is the source of legal battles between the parties herein.

In sum of the above, I find the appeal herein meritorious. I hereby allow the appeal. For clarity, I hereby enter orders as hereunder.

1. The decision of the first appellate court is hereby quashed and set aside.
2. The decision of the court of first instance is hereby restored and upheld.
3. The court of first instance to determine the validity of the bequeathing declaration made in favour of the respondent's child, Innocent Juma, in respect of the deceased's property and his status in the deceased estate prior to filing of inventory and accounts of the estate by the reinstated administrator.
4. Based on the nature of the case herein, I enter no order for costs.

So ordered.

DATED at DAR ES SALAAM this 24th November, 2023.



O. F. BWEGOGGE
JUDGE