IN THE HIGH COURT OF TANZANIA

TEMEKE SUB-REGISTRY

(ONE STOP JUDICIAL CENTRE)

AT TEMEKE

PC CIVIL APPEAL NO. 55 OF 2022

(Arising from Probate Appeal No. 5 of 2022 at the District Court of Temeke, One Stop Judicial Centre Originating from Probate No. 48 of 1989 of Temeke Primary Court)

ERNEST MWAFISI (As the Administrator of the estate of the late

MICHAEL SAMWEL MWAFISI) .....APPELLANT

VERSUS

FLORA MWAFISI.....RESPONDENT

***EX PARTE* JUDGMENT**

Date of last order: 24/07/2023
Date of Ruling: 23/08/2023

OMARI, J.

The Appellant herein, Ernest Mwafisi being aggrieved by the decision of the District Court of Temeke at One Stop Judicial Centre in Probate Appeal No. 5 of 2022 knocked the doors of this Court armed with three grounds of Appeal to wit:

1. That the trial Magistrate erred in law and in facts by failure to analyse the evidence of the Appellant.

2. That the trial Magistrate erred in Law and facts by not considering that the suit premises were divided equally to siblings.
3. That, the Magistrate erred in Law and facts by not considering that the suit property were innovated (sic) by two siblings after pay off (sic) the Respondent Tsh. 2,000,000/= and now the value is appreciated 10 times it was before.
4. That the trial Magistrate erred in law an in fact by (ordering) to fill form No. v and vi and show how (he) can distribute the said house to the sibling again.

It is on the basis of the four grounds that the Appellant is beseeching this court to quash the judgment of the District Court, declare that the Respondent was given her entitlement to the property and that this Court orders the distribution as was ordered in the trial Court.

When the matter was called for hearing on 06 June, 2023 the Appellant prayed for service through publication as the Respondent was not found for service. Even after publication of the notice of hearing the Respondent did not appear in Court on 24 July, 2023 so the Appellant prayed for the Court to hear the Appeal *ex parte*.

Mr. Martin began his submission by informing the Court that he has abandoned the first ground of appeal.

He submitted that the matter has its roots in the probate of Michael Mwafisi who died in 1988. In his lifetime the deceased had expressed that upon his death the properties should not be sold as he had a wife. This was heeded to. Upon the death of Michael Mwafisi's widow in 1999 the Respondent wanted the disputed house to be sold. The Appellant filed a probate matter in 2002 wherein it was decided the heirs each get an equal share of TZS 6,000,000 which was the value of the property at the time. As a result, the Appellant and one Maurice Mwafisi who is the parties brother agreed to buy out their sister, that is the Respondent.

Mr. Martin further submitted that the payment was made through court but no receipt was issued. Moreover, the Respondent did not collect the money through the trial court. Counsel submitted that the Respondent pitched up in 2012 when it came to light that she never collected her money and the same was lost. Counsel submitted further that after hearing her complaint, the trial court ordered the Appellant and Maurice Mwafisi to pay the Respondent TZS 2,000,000.

It would seem the Respondent was not satisfied she preferred an appeal vide Probate Appeal No. 5 of 2022 at the District Court of Temeke at the One Stop Judicial Centre. Through the Appeal the Respondent wanted the distribution to be redone and she no longer wanted the TZS 2,000,000. According to Mr. Martin at this time the Appellant and Maurice Mwafisi had already made improvements and the house had appreciated in value. The District Court made an order for it to be valued and the Respondent be given her share as per the current value of the house. Counsel finished off his submission by stating that the Respondent has a habit of disappearing and resurfacing after long periods of time and prayed, that the Appellant and his brother, Mourice Mwafisi be ordered to pay the TZS 2,000,000 as ordered by the trial court 10 years ago. He then prayed for the Appeal to be allowed the decision of the District Court to be quashed and for the Court to grant any other relief it deems fit to grant.

Having considered the Appellants submission there is only one issue for this court's determination; that is whether the Appeal is meritorious and if so what is the way forward. In doing so I shall look at the record of the trial court and what transpired in the first appellate court before venturing into the grounds of Appeal.

Vide Administration Cause No. 48 of 1989 dated 30 December, 2021 the Primary Court of Temeke made a Ruling that the Administrator of the estate of the late Michael Samwel Mwafisi had not transferred to the heir one Flora Mwafisi her right over a house in Keko which was TZS 2,000,000 and ordered the Administrator to do so and then lodge Forms No. V and forms No. VI which are the equivalent of the inventory and accounts of the estate in the Primary Court.

The matter dates back to 1988 as rightly narrated in the first appellate court's judgment which I wish not to repeat verbatim rather borrow snippets as need be. It would seem there was no closure of both 1989 the file or of the 23 May,2012 file which appointed the Appellant for the second time. The Respondent went back to the trial court in 02 December, 2021; ten years later complaining she was not accorded her rightful share to the Keko house which the Appellant and her other brother had leased and she getting nothing.The Respondent being aggrieved by the decision of the trial court preferred an Appeal to the first appellate court on one ground that the trial court erred in law and fact by failing to properly analyse the evidence she provided and hence declared that she has already taken her share to the inheritance.

The district Court found in favour of the Respondent that the Appellant when acting as the Administrator had not fulfilled his legal obligations. He has delayed the collection and distribution of the deceased's properties to the rightful heirs. The learned magistrate remarked that this was sufficient cause to revoke the Administrator's appointment however, considering that the matter has been in court for a long time and in the interests of justice he refrained from doing so. Instead, he ordered the Administrator to file Form No. V and VI within 30 days. In his conclusion he stated as follows:

> *"Hoja kuwa thamani ya nyumba imebadilika haina nafasi wakati huu kwa kuwa haijawahi kugawanywa kwa warithi halali."*

This unofficially translates to the argument that the house has appreciate in value is not meritorious as the same has never been distributed to the rightful heirs. This made me go back to the trial court's record. The file albeit being a duplicate does not contain Forms No. V and VI which the Administrator is obligated under Rule 10 of the Primary Court (Administration of Estates) Rules GN No. 49 of 1971 to submit to court as an inventory and accounts of the deceased's estate.

Furthermore, the Appellants contention that he had paid the TZS 2,000,000 to the Respondent which was her share to the Keko property is not supported by evidence as rightly refuted by the trial court.

I am of the considered view that since there is nothing on record to support that the Respondent was paid her share after her brother's allegedly bought her out of the said property neither is there evidence that the Administrator exercised his duty to file the requisite forms after they pay out; whether or not the payment was actually done. This means the Administrator had not distributed the estate (or part of) and what he is alleging to be part of his and his brother's share after the alleged pay out in reality includes the Respondent's share.

It is now opportune for me to canvas the grounds of appeal as submitted by counsel.

On the ground that the trial magistrate erred in law and in fact by not considering that the suit premises were divided equally to siblings, in my view is not something that is disputed. The deceased Michael Samwel Mwafisi left three children; the parties here in and their brother Maurice Mwafisi. The question as to the estate being distributed equally between the siblings was not a matter in contention in the trial court and even in the first

appellate court. What the Respondent was complaining about was not the ratio of distribution but the fact that the trial court had declared she had already taken her share to the inheritance and one of the orders sought was for the Administrator to distribute the properties of the deceased. There is nothing on record to suggest that the Respondent was disputing the equal share between three siblings. It is for this reason that this ground fails.

As for the second ground that the magistrate erred in law and in fact by not considering that the suit property was renovated by the two siblings after paying off TZS 2,000,000 to the Respondent thus, it has appreciated in value. This should not detain me as already discussed there is no evidence of the pay out, neither is there evidence of the resultant closure of the probate after the alleged payment. This ground also fails for lacking merit.

On the last ground that the court erred in law and fact by ordering that the administrator fills in Form No. V and Form No. VI so that he can distribute the said house to the heirs again. In my considered view the law is very clear; upon appointment as per Rule 7 of the Rules the Administrator is issued with Form No. IV which is the grant and he is required to sign an undertaking, the terms of which are explained to the Administrator before

signing as provided for under Rule 7(2) of the Rules. For clarity I shall reproduce the concerned undertaking as follows:

> *"I /We hereby solemnly and sincerely declare that I/We will well and faithfully administer the estate of the above named deceased person, paying his just debts and distributing the residue of his estate according to law, will keep true and fully detailed accounts of all and singular the estate and effects of the deceased and of my/our dealing with the property and produce them to the said Court whenever required."*

In the record there is a copy of Form No. IV that the Appellant signed which has the same words as above expect they are in Kiswahili. There is no record of the said Form No. V and Form No. VI being filed in the trial court thus, the contention that the first appellate court erred in ordering the forms to be filed and the distribution be done again is in my view misconceived. As stated in the second ground there is no evidence in file that confirms the distribution was done neither are there any Forms filed after the distribution. In other words, the Administrator has not adhered to his undertaking of one distributing the residue of the estate according to law, two keeping a true and detailed accounts and producing the same in court when required to do so. In that regard the probate has never been closed despite the Appellants contention that he has distributed the estate. I am inclined to agree with the

first appellate magistrate, if it were not for the time that has lapsed the Administrator ought to be revoked for failure to discharge the duties of the Administrator. In this regard this ground also fails for being unmeritorious.

Consequently, the Appeal is dismissed for lacking merit. The Appellant is ordered to comply with the order of the first Appellate Court and file in the trial Court Form No. V and Form No. VI within 30 days of this judgment. Because of the nature of the matter I make no orders as to costs.

It is so ordered.

A.A. OMARI

JUDGE

23/08/2023

Ruling delivered and dated 23rd day of August, 2023.

A.A. OMARI

JUDGE

23/08/2023