IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

TEMEKE HIGH COURT SUB-REGISTRY

(ONE STOP JUDICIAL CENTRE)

AT TEMEKE

PC. CIVIL APPEAL NO. 47 OF 2023

(Arising from the judgment and decree of the District Court of Temeke at One Stop Judicial Centre in Probate Appeal No.33 of 2022 and originating from Kawe Primary Court in Probate Cause No.253 of 2018)

ASHURA SELEMANI FARAJA.....APPELLANT

VERSUS

IBRAHIM HASSAN HANZURUNI ..... RESPONDENT

JUDGMENT

11/03/2024 & 27/03/2024

SARWATT, J.

This is a second appeal whereby the appellant challenges the decision of the District Court of Temeke at One Stop Judicial Centre with the following seven grounds of appeal;

1. That the trial Court erred in law and fact by determining the appeal without giving the administrators of the estate of the deceased the

right to be heard

2. That the appeal was wrongly preferred against the appellant while she was not an administratrix of the estate of the deceased

3. That the trial Court erred in law and, in fact by determining that the parties should make fresh distribution of the estate of the deceased while everyone has already taken their share.

4. That the trial Court erred in law and fact by determining that the Court does not have jurisdiction to inquire on applicable law.

5. That the trial court erred in law and fact by determining that the applicable law is Islamic law while the deceased was not a good practicing Muslim.

6. That the trial court erred in law and fact by determining that the contribution of the deceased's wife in the distribution of the matrimonial property should not be considered.

7. That the trial court erred in law and fact when reaching its decision by relying on the proceeding which the High Court ruled out.

A brief narration of facts arising from this case at the lower Courts is necessary to understand this appeal better. The appellant (Ashura

Selemani Faraja) and respondent (Ibrahim Hassan Hanzuruni) are a widow and a stepson who are the sole heirs of the late Hassan Hanzuruni. The deceased died intestate on 2/7/2018. After his father's death, the respondent herein, through probate case No. 253/2018, applied before Kawe Primary Court to be appointed as administrator of the estate. His application went unchallenged. Thus, on 20/3/2019, he was officially appointed to administer the estate of the late father, Hassan Hanzuruni. The respondent (the administrator), through the assistance of BAKWATA, distributed the estate using Islamic law. This distribution did not amuse the appellant, as it seemed unfair to her.

Dissatisfied with the distribution, the appellant lodged a formal complaint before the trial Court alleging that the respondent was incorrect in using Islamic law in distributing the deceased estate and that he had not filed an inventory. After hearing the complaint, the trial Court decided to revoke the appointment of the respondent. It appointed the Administrator General as the administrator of the estate of the late Hanzuruni, the decision which did not also amuse the respondent, who unsuccessfully decided to challenge it in the District Court of Kinondoni. The respondent further appealed to the High Court, which was of the view that the trial Court had

no jurisdiction to appoint an Administrator General. It revoked the appointment and ordered the trial Court to appoint a reputable and impartial person to be an administrator pursuant to paragraph 2(b) of the Fifth Schedule of the Magistrate Court's Act.

Upon the trial Court received suggestions from the heirs(appellant and the respondent), it appointed Bakari Abdallah Mkomeni and Hilda Michael Semzei, who were Court assessors, as administrators of the estate of the late Hanzuruni. Just after their appointment, the administrators filed an inventory and estate account before the trial Court after distributing the properties. This triggered the respondent to file a complaint against the administrators, objecting to the distribution for the reason that the administrators did not indicate which law they applied during the distribution. Upon hearing of the complaint, the trial Court concluded that it is the customary law used in administering the estate. Thus it dismissed the complaint as raised by the respondent.

Aggrieved by the trial Court's decision, the respondent, through probate appeal no. 33/2023, instituted an appeal at Temeke District Court at One Stop Judicial Centre against the other heir (the appellant herein), challenging the trial Court's decision. After hearing the appeal, the Court

nullified the trial Court's distribution and ordered the estate administrators to make a fresh distribution by using islamic law, the decision which did not amuse the appellant, hence the present appeal.

At the appeal hearing, the appellant was represented by Maria Mushi, the learned advocate, while the respondent enjoyed the service of the learned advocate, Kenedy Sangawe. Both counsels agreed that the appeal should be heard through written submission.

Submitting in support of the first ground of appeal, the appellant's counsel argued that the appellant was not the administrator hence, she was not the one who made the distribution. Since it was the administrators who made the distribution, they were the ones who had a duty to explain themselves before the Court if there was any concern regarding the distribution.

The counsel further argued that, since the appointed administrators were not parties during the appeal at the District Court and that they were not given an opportunity to be heard, it was not proper for the District Court to order them to distribute properties by using Islamic law without giving them a chance to be heard. To support her assertion, she cited the Court

of Appeal cases of **Haji Mradi v Linda Sadiki Rupia Civil Appeal No. 24 of 2016, Mbeya Rukwa Auto Parts and Transport Limited v Jestina George Mwakyoma, Civil Appeal No. 45 of 2000.**

The appellant's counsel contended that ordering the administrators to distribute properties using Islamic law without hearing them on merit is a serious irregularity as it violates the rule of natural justice, which requires the Court to adjudicate a matter upon the parties' full hearing. To cement this ground of appeal, she cited the cases of **National Housing Corporation vs. Tanzania Shoes and Others (1995) TLR 251, Abbas Sherally & another vs. Abdul S.H.M Fazalboy, Civil Application No.33 of 2002, EARL vs Slatter&Wheeler(Aerlyne) LTD[1973]1 WLR 51, A.G v RYAN(1980) A.C 718, VIP Engineering and Market Limited and Others vs City Bank Tanzania Consolidated Reference No. 6,8 and 8 of 2006.**

On the second ground of appeal, the counsel for the appellant submitted that since administrators have the power to sue and be sued, therefore it was wrong to sue the appellant as if she was the one who did the distribution. The counsel further submitted that, in this case, the administrators were proper parties. Their presence was necessary for a

complete and final decision on the distribution of the deceased estate. Therefore, it was improper for the respondent to have preferred an appeal against the person who did not effect the distribution. The appellant's counsel contended that the defect is fatal, which renders the suit unmaintainable for suing the wrong party. To support her position, she cited the Court of Appeal case of **Suzan Waryoba vs. Shija Dalali, Civil Appeal No. 44 of 2017,** which insisted that where a litigant sues as an administrator of an estate, the same should be reflected in the title.

Regarding the third ground, the counsel for the appellant submitted that once appointed, the estate administrator is required, with reasonable diligence, to collect the deceased's properties and debts, pay them, and then distribute the deceased's estate. The counsel contended that the administrators, in this case, had already exercised their duties to the fullest, and the heirs had already taken their share. Thus, it was wrong for the Court to order fresh distribution at this stage. The counsel cited the case of **Mohamed Hassani vs Mayasa Mzee and Mwanahawa Mzee [1994] TLR 225** to emphasize her point.

The counsel for the appellant argued to the fourth ground that it was wrong for the Court to hold that it does not have jurisdiction to inquire on

the applicable law, while it was one of the grounds raised in the respondent's appeal. The counsel added that the District Court has appellate jurisdiction in all civil matters in primary Courts. This case being originated from the said Court, the District Court had jurisdiction to determine the matter raised in the appeal.

As far as the fifth ground, her submission supporting the appeal, the counsel for the appellant submitted that since, in the probate cause, there were objections to the application of Islamic law, it was wrong for the Court to choose Islamic law, disregarding that the deceased was not a believer and no proof was brought as to the opposite. Thus, customary law was the perfect applicable law in administrating the deceased estate. The counsel cited the case of **In the Matter of the Estate of the Late Salum Omari Mkelemi [1973] LRT No.80.** She also cited the case of **Beatrice Brighton Kamanga and Amanda Brighton Kamanga vs. Ziada William Kamanga Civil revision no 13 of 2020,** which provided for the 3 test to be applied before Islamic law is applicable. Thus, the counsel argued that the Court erred when it held that islamic law should be used without showing if all three tests succeeded. The counsel also cited the case of **Violet Ishengoma Kahangwa and Jovin Mutabuzi vs The**

Administrator General and Mrs. Eudokia Kahangwa [1990]TLR 72.

Submitting on the sixth ground, the counsel for the appellant contended that the Law of Marriage Act, Cap 29 under section 60 allows spouses to have personal properties, and the appellant has some of her properties purchased by her earnings alone, but they were held in joint names. The counsel further argued that upholding the Court's ruling would be against the right to own properties, enshrined in the Constitution. Thus contribution of the deceased's wife should be considered during distribution as long as some of the properties belonged to her.

On the seventh ground, the counsel for the appellant submitted that the Court, when determining the case, relied on the ruling of the High Court, which had already been ruled as nullity. The counsel suggested that the Court was supposed to base its decision on what happened after the decision of the High Court and not before.

In his reply to oppose the appeal, the counsel for the respondent, on the first ground of appeal, submitted that the District Court's decision was correct as it had followed all procedural rules for probate cases. The counsel contended that there were no administrators that the Primary

Court had appointed. It just directed two Court officers, and at the appellate Court, the respondent's aim was never for them to be heard but to challenge the distribution of the deceased estate without following proper procedure in law.

The counsel further submitted that since the magistrate ordered the appeal to be conducted through written submissions and each party obliged, it suffices to say each party was heard through written submissions. Thus, the assertion that the administrators were not given the right to be heard is misconceived in law since they were allowed to be heard on how they distributed the properties at trial Court.

According to the respondent counsel, the appeal was misconceived because the administrators can not be called again when the Court is exercising appellate jurisdiction. Since the administrators are Court officers appointed to distribute the estate, they have no interest in it. Thus, they can not be parties to the appellate stage.

The counsel for the respondent further argued that since this ground was not the issue before the District Court during the appeal, Therefore, it could not be raised in the present appeal. The counsel cited the case of

Arguing on the second ground, the counsel for the respondent submitted that, in this case, there were no administrators. Instead, they were Court officers.

On the third ground, he submitted that the distribution was effected contrary to the law, and there was no proof that everyone had taken their shares. The respondent decided to appeal to the District Court to challenge the distribution.

As for the fourth ground, the counsel submitted that the issue that the Primary Court did not have jurisdiction to inquire about the deceased's mode of life was not the issue in this probate case. Therefore, this is not a ground of appeal to be addressed.

The counsel on the fifth ground, the counsel submitted that the issue that the deceased was a Muslim was never objected to, and the allegation that he was drinking beer is not a ground for making a person a nonbeliever of the Islamic religion. He further argued that, since they both agreed that the deceased was a Muslim, then the argument of the mode of life test

was supposed to be raised at the beginning and not until the time of distribution when the Primary Court decided that the applicable law is customary law without assigning any reasons for the decision.

Submitting on the sixth ground, the counsel argued that there is no proof that the properties belong to the appellant. To prove this point, he cited the case of **Leticia Mtani Ihonde vs. Adventina Valentina Masonyi(administrator of the estate of the late Buhacha Bartazari Kichinda) Civil Appeal no 521/2021.**

On the seventh ground, the counsel submitted that the order of the High Court was only to revoke the Administrator General as the estate administrator, and it did not nullify the proceedings. Thus, the assertion that the Court relied on the invalid proceedings is misconceived in law.

In her rejoinder, the counsel for the appellant insisted that the Court officers appointed were administrators, which is why they had the power to act. If there were any issues regarding the distribution, they have the duty to explain them. The counsel further argued that the judgment the respondent appealed was against the administrators who distributed the deceased estate and not against the appellant, as she was only an heir of

the deceased. Thus, it was wrong to institute an appeal against her.

On grounds no 2,3,4,5,6, and 7, the counsel for the appellant insisted on what she earlier submitted on submission in chief.

After reviewing all parties' submissions, I'm tasked to determine if these grounds of appeal have merit. On the first ground of appeal, the appellant is challenging the District Court's decision to determine the appeal without giving administrators the right to be heard. On the second ground, the appellant challenged the decision on appeal since it was preferred against the appellant and not the administrators. I will start with the second ground of appeal.

It is on record that when the High Court revoked the appointment of the Administrator General, it directed the trial Court to appoint another administrator. On 18/1/2022, the trial Court officially appointed Bakari Abdallah Mkomeni and Hilda Michael Semzai as estate administrators.

It is on record also the administrators were not parties at the District Court during the appeal. Since the administrators are the ones who distributed the deceased estate and the said distribution is the center of the appeal before the District Court, in my view, they were supposed to be the parties,

and the logic is simple, they were the ones who made the distribution. The law **under rule 5 of the fifth schedule of the Magistrate Courts Act, Cap 11**, Provides for the general duties of the administrator.

> *"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, after that, 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."*

Based on the directives of the above-quoted provision, it goes without saying that the administrators are the ones who had a duty to clarify how they made the distribution. I agree with the appellant's counsel that an appeal to the District Court was wrongly preferred against the appellant and this Court finds this ground has merit.

I now turn to the first ground of appeal, which challenges the District Court's decision to determine the appeal without giving the administrators the right to be heard.

It is a cardinal principle that, before a decision that adversely affects a party is given, he should be allowed to be heard. In the present case, the

District Court quashed the distribution made by the administrators and ordered them to make fresh distribution using Islamic law without allowing them to be heard. On page 4 of the typed judgment, the Court provided,

> *'Nimezingatia kikamilifu mawasilisho yote na ninaridhika kuwa rufaa hii ina mashiko na yafaa kukubaliwa. Kwa mustakabali huo, natengua amri ya mgawanyo wa mali iliyotolewa na mahakama ya mwanzo tarehe 31/5/2022. Badala yake, jalada lirudi mahakamani hapo na wasimamizi wagawanye mali za marehemu kwa kuzingatia sheria ya imani ya kiislamu ambayo marehemu alikuwa akizingatia enzi za uhai wake."*

This Court's directives, in my view, violate the administrator's right to be heard. Consequently, the decision can not be allowed to stand. The Court of Appeal of Tanzania has, on a number of cases provided the consequences of giving a decision without affording parties their right to be heard. For instance, in the case of **ABBAS SHERALLY & ANOTHER v ABDUL SULTAN HAJI MOHAMED FAZAL BOY, Civil application no. 33 of 2002,** the Court said:-

> *"The right of a party to be heard before adverse action or decision is taken against such a party has been stated and emphasized by the courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified, even if the same*

decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice. "

Since grounds 1 and 2 are sufficient to dispose of the appeal, I find no reason to discuss the other grounds. In the event and for the above reasons, I hereby quash the whole decision and proceedings before the District Court. The Primary court's decision stands undisturbed and if the respondent still wishes to appeal against it, he should make a fresh appeal subject to time limitation.

It is so ordered.

S.S.SARWATT

JUDGE

27/03/2024