IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

SHINYANGA SUB REGISTRY

AT SHINYANGA

PC. CIVIL APPEAL NO. 64 OF 2023

(*Arising from Civil Appeal zno.03/2023 before Kishapu District Court, J.P Rwehabula -SRM, the same arise from Probate Cause No. 13 of 2023 of the Kishapu District Primary Court at Mwadui before E.M.Gervas -RM)*

NYENYE SASA (ZOZOLO) .....APPELLANT

VERSUS

MONICA NILA MAKUZA ..... RESPODNENT

JUDGMENT

9th April & 29th April 2024

F.H. MAHIMBALI, J

The appellant and the respondent are step son and mother. Thus son and spouse to the late Edward Hondo Makamba respectively. The latter who died intestate on 21st May 2019. After it had passed sometime without the said probate being filed, the appellant initiated a family meeting which eventually empowered him to file a case for appointment as administrator of the estate of the deceased Edward Hondo Makamba. Just after filing it in court and publication being advertised, the respondent

showed up challenging the appointment of the appellant as administrator of the estate of the late Edward Hondo Makamba, arguing that she being the wife of the deceased, is a fit person, able and capable to administer the said estate. The trial court then, appointed the respondent instead of the appellant.

The appellant was not amused by the said decision, unsuccessfully appealed to the first appellate court. In quench of his justice, this is his second appeal armed up with a total of three grounds of appeal which can jointly be considered as one, that the first appellate court erred in upholding the trial court's findings instead of appointing the appellant as administrator but suo-motto appointed the respondent in his place. The main complaint being one, the respondent being the survivor wife of the deceased's five wives, has not been interested in filing the same, thus benefitting the said estate by herself and her children.

During the hearing of the appeal, the appellant was represented by Mr. Emmanuel Sululu whereas Mr. Paul Kaunda, stood for the respondent.

Arguing for the appeal, Mr. Sululu submitted that, the appellant's appointment application to be administrator followed the due process of the law i.e as per family meeting dated 15/9/2022 and 15/10/2022.

He clarified that, the deceased had a total of five wives, whereas the appellant is the son of the third wife of the deceased. Of all the deceased's five wives, only the respondent survives. From the deceased's demise, up to now, other beneficiaries of the said estate have not benefited anything in the said estate of the deceased. It is from this basis; the appellant was then approved by clan/family members in the aforesaid meetings to be appointed by the court administrator of the said estate. The respondent and her children defaulted appearance of the said meetings. It is from this background, the appellant went to the trial court seeking for appointment as administrator. The respondent resisted the appellant's appointment, claiming that she being a widow to the deceased, would administer the estate by herself.

It is his firm belief that the trial court's verdict of appointing the respondent as administratrix of the said estate instead of him was not justified in the circumstances of this case despite the fact that appointment of administrator is not necessarily to be preceded by family or clan meetings, but adherence to it is a good thing. It is Mr. Sululu's view that despite acknowledging at page 6 of the 1st appellate court's judgment (last paragraph) that it is a good practice for one seeking court's appointment as

administrator must first be proposed by a clan meeting /family meeting, the first appellate court as well as its subordinate court didn't adhere to this good principle. So long as the estate involves many wives, it was prudent that the appointment of the administrator to consider that fact.

With the second ground of appeal which is closely connected with the first ground of appeal, it has been argued that the respondent's conduct of not convening any meeting from when her husband had died todate, is a sufficient warning that she is not a good administrator of the said estate. As a lot of time has passed.

With the third ground of appeal, that the appellant will not do justice in his administration as administrator to the respondent simply because the name of the respondent does not feature out in the list of the attendants in the meeting appointing the appellant nor her name being in the list of the beneficiaries of the said estate, is more suspicion and not actuality.

In resisting the appeal, Mr. Kaunda firstly, submitted that the powers of the trial court in appointing the administrator of the estate is court's discretionary power. Thus appellate court is bound not to interfere with the discretionary powers of the trial court unless in the exercise of that discretion misapplied the law or erred in reaching that decision. On this, he

invited tis court to be inspired by the decision of the case of **Mbogo and Another vs. Shah**, (1968) EA 63 which listed three things for the appellate court to interfere with the trial court's discretionary powers.

- If the inferior court misdirected itself
- If it has acted on matters which should have not acted
- If it has failed to take into consideration matters which should have considered.

In his considered view, none of these have been stated by the appellant.

Digesting from the first ground of appeal, while criticizing it as not legally a framed ground, he eventually gathered two complaints from which:

- The heirs of the deceased's estate have so far not benefited anything from it.
- Secondly, the respondent had not convened any meeting since the demise of the deceased.

To start with the issue that the respondent has not convened the meeting. He argued that to his knowledge, the administrator of the estate

only commences duty/ assumes office upon such an appointment. He recited the decision of this court in the case of **Benard Serikali vs. Valerius. Thinas Munegana**, PC Probate Appeal No. 69 of 2022, cited earlier before the first appellate court.

Thus, the argument that the respondent is self-benefiting is more speculative. Therefore, it is not a good basis to act on the said speculation. Even if it was; the same was not first raised at the trial court, thus it needed proof of the said fact of misadministration. He argued that the powers of Primary court in appointing administrators are traced from the 5th schedule of MCA, paragraph 2(a) and (b). Therefore, a person to be appointed as administrator must have interests on the deceased's estate, added Mr. Kaunda.

The argument that the both convened meetings appointed the appellant as administrator is irrelevant as the determining factor is interest. Citing the case of **Angela Philemon Ngunge vs Philemon Ngunge** in probate Appeal new 2/2020, Hc Songea at page 4, 6, he emphasized that the requirement of clan meeting is not a legal requirement. Thus any person interested with the said estate of the deceased can be appointed as administrator.

Therefore, both lower courts, were in his considered view, rightly appointed the respondent as administrator as she had highest interests in the matter. By the way, she is not objected by any other child out of eight children save the appellant. As to this fact, the respondent is a proper person to administer as appointed.

It is also interesting to note that the respondent is married to the deceased since when she was 15 years old, thus has better interests than any other.

Mr. Kaunda further argued that, there is no any record that the respondent had any ill will against anyone of them. The argument that the respondent will do injustice is a bankrupt issue. Let her be given chance. If there will be any misappropriation, then the trial court can intervene.

In the case of **Sekunda Bwambo vs. Rose Ramadhani**, (2004) TLR 239 at page 443 and 444, the High Court made a very good endorsement. This decision was endorsed by the CAT in the case of **Naftary Petro vs Mary Protas,** civil Appeal No. 103 of 2018, CAT at Tabora.

It is his considered view that this application is premature before the court.

It is Mr. Kaunda's firm view that it is the appellant's conduct in this matter which is vivid that he wants to benefit from it. Form No. 1 of the administration of the estate lists who are beneficiaries in this matter. The respondent's name being a spouse is missing. Therefore, a court of law can draw an adverse inference against such conduct of the appellant.

In the scales of justice, the appellant in this matter has no good interest than the 1st respondent. On that basis the trial court and the first appellate court didn't error anything.

Mr. Kaunda finally concluded that from the conduct of the appellant, the appeal is baseless and ought to be struck out with costs.

By way of rejoinder, Mr. Sululu maintained his submission in chief and added that though the appointment of administrator is the trial court's discretion; however, the same must be exercised judiciously. The respondent having not opted to initiate the administration duties timely, raises doubt if at all is anxious enough with the said duties. He queried, if the respondent is the proper person to be appointed as administratrix, she would have discharged her duties timely as provided by law.

I have closely followed the arguments by both sides. The controversial issue here for deliberation is who between the appellant and

the respondent is fit person to administer the said estate. I firmly agree with Mr. Kaunda, that it is only a person with interests with the deceased's estate who can be appointed as administrator of the said estate. These can be chidren, heirs, spouses etc. However, in my considered view, being a mere son/daughter or spouse perse is not necessarily an automatic guarantee of having an interest to the estate of the deceased. It may largely accord with a presumption right. Be it known that, in our way of living, a spouse or children may have separate properties distinct from the deceased and thus no longer dependent to the deceased. Thus, upon his demise, it is not necessarily such a spouse or son/daughter assumes heirship right as well. It is only those who were mostly or in one way or another dependent to the deceased during his lifetime who are more interested with his estate who can be administrators as well as heirs of that estate. That means therefore, reading the law and position as stated in **Seif Marare v. Mwadawa Salum** [1985] TLR 253; and **Sekunda Bwambo v. Rose Ramadhani** [2004] TLR 439 administrator of the estate even if interested, is not necessarily a beneficiary to the estate of the deceased and further not an administrator necessarily comes from members of his household.

In the current matter, similarly, being a son to the deceased of **Edward Hondo Makamba** per se does not make the appellant a more interested in the administration of the said estate and thus more righteous beneficiary than a spouse, merely because comes from the third wife of the deceased. He has to show how much is he interested in the said estate. By the way having interest in administration is one thing but heirship is quite another. Anyone can be interested in the administration of the deceased's provided one is able, capable, willing and that knows thoroughly the assets, liabilities and heirs of the said deceased. Thus, we can have an administrator who definitely is not a heir and the opposite. I say so because, if one was not dependent to the deceased at the time of his demise for him to claim heirship, he is so remote in heirship. By the way, heirship is not by fashion, but by interests. Thus, a mere accreditation by a family or clan meeting, is not by itself a guarantee that one is interested in the said estate for him to administer in their behalf. If that is not clear, it may bring more chaos than administration in the said estate. It is my considered view that, administration of the said estate must also squarely take into account the interests of those dependants left behind by the deceased, as those are more interested persons in the said estate than the

elders/seniors. Therefore, other siblings or spouses may only benefit from his/her estate upon proof that they were dependent to him at the time of his/her death. Otherwise, it is wrong notion to treat an estate as a saccoss entity or kikoba that every surviving member of the family is entitled to a share. Probate in a strict sense is only eligible for distribution to those in dependence to the deceased at his life time.

So those applying for administration of the deceased's estate must first establish their interests thoroughly. Is it a mere administration or heirship? In our country, normally the latter, more prevails than the former and those assuming the office of administration consider themselves as priority persons in heirship. That is wrong. See, also, **Seif Marare v. Mwadawa**

Salum [1985] TLR 253; and **Sekunda Bwambo v. Rose Ramadhani** [2004] TLR 439.

I have keenly digested the concerns of Mr. Sululu, that why upon the appellant being accredited so by the family meeting/clan meeting was not appointed by the court as administrator of the said estate? I have no a different answer apart from the above observation. In my considered view, only a person with interests is eligible for being appointed as administrator.

In the current matter, as between the appellant and the respondent, I don't think if it was the interest of the deceased that, his properties (if any) should be administered by the appellant merely because he has been proposed by the clan or family meeting. In essence, in my reading of probate law, I know of no provision, that a family meeting or clan meeting can confer a party with a right of interests. What much they can do, is conferring trust to him for the protection of the estate of the deceased as per law and for that matter those accruing interests from it get assured of their share. In the absence of trust, administration vested to a relative is highly put into question and can be subject of squander.

In the current matter, by the appellant's conduct excluding the respondent in the family meeting and also into the list of heirship, raises more questions than answers, the respondent being the surviving spouse. Who then had been placed in more rights in heirship as between the appellant and the respondent? The fact that the respondent had not commenced administration of the said estate after the demise of the deceased is not by itself a conclusive view that she was intending to deny others from the enjoyment of it (if any). By the way, the surviving spouse may have more vested rights than any other over the husband deceased's

estate. On his demise unless the contrary is established, normally those assets follow the survivor. A deceased person does not have a right of heirship. Meaning that a deceased person cannot inherit from another deceased person.

In determining this matter, observance of the jurisdiction of the Primary Court in appointing administrators of estates as stipulated by sub-paragraphs (a) and (b) of Paragraph 2 of the Fifth Schedule to the MCA is necessary. The law provides:

> *"2. A primary court upon which jurisdiction in the administration of deceased's estates has been conferred may-*
>
> *(a) either of its own motion or on an application by any person interested in the administration of the estate appoint one or more persons interested in the estate of the deceased to be the administrator or administrators thereof, and, in selecting any such administrator, shall, unless for*

any reason it considers in expedient so to do, have regard to any wishes which may have

been expressed by the deceased;

(b) either of its own motion or an application by any person interested in the administration of the estate, where it considers that it is desirable to do for the protection of the estate and the proper administration

thereof, appoint an officer of the court or some reputable and impartial person able and willing to administer the estate to be administrator either together with or in lieu of an administrator appointed under sub paragraph (a)."[Emphasis added]

The Court of an Appeal had an occasion to consider the above provisions in **Mohamed Hassani v. Mayasa Mzee & Mwanahawa Mzee** [1994] TLR 225. It took the view that while sub-paragraph (a) above empowers a primary court to make a first appointment of an administrator

or administrators of a deceased's estate, sub-paragraph (b) vests in the primary court the jurisdiction to appoint a replacement administrator. In their view, the Court of Appeal considered that the latter sub-paragraph also permits the appointment of an additional administrator (co-administrator) to manage the estate together with an administrator appointed under sub-paragraph (a).

In essence, as an epilogue, the Court of Appeal observed that that appeal was sadly an archetypical illustration of needless problems and long-drawn-out struggles in the appointment of administrators of deceased's estates in our country. The battles for appointment are most likely fueled by a misconception. The office of an administrator has always been closely linked with position and duties of an administrator of an estate. It is purely a duty of trust, not personal gain. The Court of Appeal in the case of **Naftary Petro vs Mary Protas** (Civil Appeal 103 of 2018) [2019] TZCA 357 (30 October 2019) while making reference to the case **Sekunda Bwambo v. Rose Ramadhani** [2004] TLR 439 which is the decision of the High Court by Rutakangwa, J. (as he then was), extracted in **Sekunda Bwambo** (supra) at pp. 443-444 describing it as a classic exposition of

qualifications of a fit person for appointment as an administrator as well as the duties and responsibilities of such a person, thus:

> *"The objective of appointing an administrator of the estate is the need to have a faithful person who will, with reasonable diligence, collect all the properties of the deceased. He will do so with the sole aim of distributing the same to all those who were dependants of the deceased during his life-time. The administrator, in addition, has the duty of collecting all the debts due to the deceased and pay all the debts owed by the deceased. If the deceased left children behind, it is the responsibility of the administrator to ensure that they are properly taken care of and well brought up using the properties left behind by their deceased parent After the administrator has so faithfully administered and distributed the properties forming the estate he has a legal duty to file an inventory in the Court which made the appointment giving a proper account of the administration of the estate. This action is intended to help any one of the beneficiaries who feels aggrieved at the way the property was distributed and thus dissatisfied to lodge his/her complaints to the Court which would in turn investigate the same and decide the matter in accordance with the dictates of the law.* ***In view of all this, it is evident that the administrator is not supposed to collect and monopolize the deceased's properties and use them as his own and /or dissipate them as he wishes, but he has the unenviable heavy***

responsibility which he has to discharge on behalf of the deceased. The administrator might come from amongst the 15 beneficiaries of the estate, but he has to be very careful and impartial in the way he distributes the estate." *[Emphasis added]*

Though each case must be decided by its own facts; I fully associate myself to the findings of the Court of Appeal to the position of the administrators in the estate of the deceased. It is an endless war between relatives. People must surely know the extent of their interests in the properties left by the deceased. Mostly, each one has to struggle for his own assets. Those in administration duties, should not interfere with the rights of the real heirs.

In the current matter, the appellant has to digest himself what interests has he in the said estate, the deceased having left him surviving by himself (over 60yrs old). Was he still a dependant to him? If not, what share has he or what vested interests is with him over the said estate to the extent that he is aggrieved by the respondent becoming administrator? The deceased estate being not a SACCOS property or M-Mkoba or a partnership firm with shares, not every live member is entitled to a share he/she did not contribute to it or. It is only those with more rights in dependence that are more

eligible in the administration and heirship with the deceased's estate. Thus, the respondent having yet failed to perform such a duty, let her proceed with the said duty as appointed and the appellant to wait if he will be aggrieved by such administration.

In addition, as I am penning down, I wish to reiterate what the Court of Appeal emphasized in times more than once that the grounds of appeal must substantially be precise and conform to the legal points or principle of law in violation (see the case of **Yakobo Magoiga Gichere v. Peninah Yusuph**, Civil Appeal No. 55 of 2017 and **Naftary Petro vs Mary Protas** (Civil Appeal 103 of 2018) [2019] TZCA 357 (30 October 2019) (unreported). In the current matter, what are said to be grounds of appeal are actually more explanations of grievances than grounds of appeal as suggested.

All this said and done, I agree with Mr. Kaunda that this appeal is devoid of any merit. The same is dismissed. The trial court rightly applied its discretion, and I have not seen any fault when arriving at such a decision. Equally, the first appellate court had rightly not interfered with that discretionary power of the trial court. I have also not seen one.

That said, the appellant's appeal is devoid of any merit and is accordingly dismissed.

It being a probate matter involving family members, parties shall bear their own costs.

DATED at SHINYANGA this 29th day of April 2024.

F.H. MAHIMBALI

JUDGE