

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(ARUSHA SUB-REGISTRY)**

**AT ARUSHA**

**PC CIVIL APPEAL NO. 29 OF 2023**

*(C/f the District Court of Arumeru, Probate Appeal No. 5 of 2023: Originating from Enaboishu Primary Court, Probate and Administration Cause No. 7 of 2022)*

**ELIESHI ELISA MBISE ..... APPELLANT**

**Versus**

**DICKSON ELISA LOSIYOO MBISE ..... RESPONDENT**

**JUDGMENT**

15<sup>th</sup> & 30<sup>th</sup> April, 2024

**MWASEBA, J.**

This is a second appeal by the appellant against the decision of the District Court of Arumeru (hereinafter "the first appellate court"), in the exercise of its appellate jurisdiction, in Probate Appeal No. 5 of 2023, which was delivered on 14/06/2023. The first appellate court altered the decision of Enaboishu Primary Court (hereinafter "the trial court"), which had appointed the appellant as the administratrix of the estate of the late Elisa Losiyoo Mbise, in Probate and Administration Cause No. 7 of 2022, dated 02/02/2023. Basically, after the appellant was appointed by the trial court, the respondent was dissatisfied by that decision. His appeal was successful because the first appellate court



appointed him co-administrator of the deceased's estate along the appellant.

Facts antecedent forming the basis of the matter leading to this appeal can be recapitulated briefly as follows: The deceased Elisa Losiyoo Mbise, died interstate on 23/02/2006. Prior to his demise, he married the appellant herein in 1960, and they were blessed with seven children, the respondent being the second born. Shortly after burial services, the clan convened a meeting on 20/06/2006, nominating the respondent as caretaker of the family and administrator of the deceased's estate.

According to the appellant, things run smoothly, until 2018-2020, when she befell seriously sick. While bed ridden, the respondent disposed some of the properties left by his father including landed properties, a motor vehicle, herds of cattle and by that time he stopped the appellant's daughters and grandchildren from visiting and attending her in the house she lived. According to the appellant, after she recovered, she attempted to cultivate in one of her farms left by the deceased, but to her dismay, she was forcefully evicted by the respondent in that farm, who harvested the crops she had planted. She also accounted that the respondent has always been benefiting from the deceased's estate at his own advantage in exclusion of her daughters

who inherited nothing from their father due to discriminatory Meru customs.

Following deprivation of her right to inherit her husband's estate and the fact that the respondent stayed idle from 2006 when he was nominated as administrator without petitioning for letters of administration, on 11/02/2022, the appellant petitioned for letters of administration at the trial court so as to administer the deceased's estate. The respondent entered caveat, objecting her appointment for a couple of reasons, including the fact that he was the person appointed by the clan to administer the deceased's estate. He further challenged the appellant's appointment on the ground that the probate was time barred since it was preferred after lapse of 16 years after the deceased's death.

After full trial, in its decision delivered on 16/05/2022, the respondent's caveat was found devoid of merits. The trial court appointed the appellant to administer the deceased's estate. The respondent was aggrieved by that decision, he appealed to the first appellate court vide Civil Appeal No. 19 of 2022. The first appellate court in its decision dated 20/10/2022 invoked its revisional powers nullifying the proceedings of the trial court which she held were in breach of the rules of natural justice. The decision of the trial court was quashed and

set aside along the subsequent orders. The first appellate court remitted the file to the trial court for a fresh hearing by another magistrate.

On 31/10/2022, the appellant approached the trial court reviving the probate proceedings. The respondent was summoned to ascertain if he still entertained any objection. He appeared before the trial court on 21/11/2022, intimated his intention to object the appellant's appointment on the same reasons he advanced in the earlier petition. According to the record, in the pendency of the probate proceedings at the trial court, on 08/01/2022, the respondent clandestinely petitioned for letters of administration in respect of the same estate at Emaoi Primary Court, vide Probate and Administration Cause No. 46 of 2022. On 28/11/2022, he was appointed as the administrator of the deceased's estate by Emaoi Primary Court.

During hearing of the petition at the trial court, it is when he revealed his appointment by tendering the letters of appointment which were admitted as exhibit Mpingaji "B" collectively. After full trial, the trial magistrate found the appointment by Emaoi Primary Court inoperative because it was made while there were before her pending proceedings in respect of the same estate which were being carried out in compliance of the orders of the district court. On 02/02/2023, the trial



magistrate appointed the appellant as the administratrix of the deceased's estate, dismissing the respondent's objection.

That decision did not please the respondent who appealed to the first appellate court vide Probate Appeal No. 5 of 2023. In her decision handed down on 14/06/2023, the first appellate magistrate after considering the old age of the appellant and after bore in mind that both are interested parties in the deceased's estate, appointed the respondent as co-administrator along the appellant. That decision did not please the appellant, hence the instant appeal which was initially predicated on four grounds of appeal. On 26/02/2024 when the appeal was called for mention, counsel for the appellant sought and was granted leave to file additional grounds of appeal. She filed two additional grounds of appeal on 04/03/2024. In her written submission, after examining the original and additional grounds, she took on board the following three as the grounds of appeal, namely:

- a) *That the 1<sup>st</sup> appellate court erred in law and fact by appointing the respondent as co-administrator despite misappropriation of the deceased's estate done to the detriment of the appellant;*
- b) *That the 1<sup>st</sup> appellate court having found that the appellant is aged, erred in law and fact by failure to order appointment of co-administrator from other beneficiaries other than the respondent*



*to protect the appellant's rights prejudiced since the death of her husband; and*

*c) That the appellate court erred in law and fact in deciding the matter in favour of the respondent as co-administrator basing on flimsy and contradictory evidence.*

At the hearing of the appeal, both parties were represented. The appellant was represented by Mrs Christina Y. Kimale, learned advocate whereas the respondent enjoyed legal services from Mr. Alpha Ng'ondya, learned advocate. Hearing of the appeal was through filing of written submissions.

Submitting in support of the appeal generally, Mrs Kimale accounted that the deceased died in 2006, when the respondent was nominated by clan members to petition for letters of administration and ensure the deceased's estate is fully administered. However, the respondent kept holding the deceased's estate as his personal properties including disposal by sale without consulting any of the beneficiaries, as testified by the appellant at page 11 of the trial court proceedings. According to Mrs Kimale, the appellant's evidence that the respondent disposed part of the deceased's estate and that he turned it into his own properties was never challenged by the respondent in cross examination, which is tantamount to admission of its truth.



She added that the evidence by SM2 Silas Elias Mbise was to the effect that the appellant complained to the District Commissioner who summoned SM2, ordering him to ensure that the dispute in respect of the deceased's estate is resolved, yet the respondent did not take any initiative to petition for letters of administration nor account on how the deceased's estate was administered for the whole period of 16 years. It was appellant's counsel submission that even after the DC ordered that the estate be administered peacefully, the respondent did not take action to petition for letters, he remained mute until the appellant petitioned that is when he stood up to object her appointment. In her view, since the respondent remained idle for the whole period of 16 years without petitioning for letters of administration, that outrightly disqualified him from being appointed.

Mrs Kimale wondered how could the first appellate court appoint the respondent co-administrator without even assigning reasons for so doing. On the reason that the respondent was appointed since he is an interested party in the deceased's estate, in her view was misplaced because in the first place the delay to petition for more than 16 years could not be rewarded by being appointed as co-administrator. She insisted that there was no reason put forth by the respondent for failure to petition for letters and that he did not show how the beneficiaries of

the deceased's estate benefited from the deceased's estate during the 16 years he has been in administration.

Mrs Kimale insisted that there was no justification in the reasoning by the first appellate court that the respondent was appointed due the appellant's old age, expounding that it was unjustified to appoint the respondent who mismanaged the deceased's estate for a couple of years, turning it to his personal property. She maintained that by appointing the respondent as co-administrator, the appellant's rights will continue to be jeopardised and administration will not run smoothly, hence it will continue to be delayed. She was of the view that the law requires those who seek justice, to be diligent without delay. To support her argument, she referred the reported case of **Dr Ally Shabhay v. Tanga Bohora Jamaat** [1997] TLR 305.

She was stringent that the respondent's appointment be revoked in the interest of justice and any other family member put in his place to assist the appellant in the administration process. She urged the court to allow the appeal by quashing and setting aside the decision of the first appellate court by revoking the respondent and place any other family member to his position.

Resisting the appeal, the learned advocate for the respondent submitted that the respondent was duly appointed the administrator of





the deceased's estate by Emaoi Primary Court vide Probate and Administration Cause No. 46 of 2022 because the trial magistrate had no jurisdiction to decline his appointment. He added that the appellant never objected the respondent's appointment either at the trial court or at Emaoi Primary court, thus in his view, his appointment remained intact. Mr. Ng'ondya also subscribed to the submission by counsel for the appellant that due to her old age the appellant cannot administer the deceased's estate without being aided by co-administrator, hence appointment of the respondent as co-administrator in his view was justified. Regarding contention that another person from the family be appointed in the respondent's place, Mr. Ng'ondya had dissenting opinion. He submitted that the respondent was appointed by the whole clan including the appellant, he won trust of the whole family, therefore his qualification is unimpeached.

On the allegation that the respondent owned the deceased's estate for more than 16 years, counsel for the respondent submitted that such allegation is deficient of proof. He accounted that both the appellant and her witnesses admitted that the deceased had distributed his estate to all his heirs prior to his death referring page 11 of the typed proceedings where the appellant admitted that the deceased gave the respondent some of the properties. It was his insistence that neither

the appellant nor any witness declined the fact that the respondent was appointed by the family meeting in 2006, hence his appointment cannot be faulted. He justified that the respondent being appointed by family members as per the evidence on record, qualified him as a duly appointed administrator. He invited the appellant to retire and let the matter come to an end. In the premises, he urged the court to find the appeal devoid of merits and dismiss the same with no order as to costs.

In her rejoinder submission, Mrs Kimale invited the court to sustain the decision of the trial court but in the event, it finds it necessary that co-administrator be appointed, appoint any other person amongst the beneficiaries. She maintained that to further demonstrate that the respondent had an ill motive, he petitioned for and was duly appointed by Emaoi Primary Court in a period of 20 days in the pendency of the petition proceedings at the trial court. The learned counsel also denounced submission by counsel for the respondent which seemingly supported the respondent's evidence that since her sisters were already married, they forsaken their right to inherit from their father's estate, naming it discriminative which is strictly discarded by law. She reiterated the prayers made in the submission in chief.

I have carefully reviewed the grounds of appeal, the record of the lower courts as well as submissions by both counsel for the parties

herein. The main issue for determination is whether the first appellate court was justified to appoint the respondent as co-administrator.

As pointed earlier on while narrating facts of the matter, it is uncontroverted truth that following death of his father in 2006, the respondent was nominated by clan members to petition for letters of administration, to administer the estate of the deceased. That was clearly admitted by the appellant as apparent in the clan meeting minutes dated 20/06/2006. However, it is also uncontroverted that the respondent did not petition for letters of administration in any court of law. The law is trite that administrator of deceased's estate is appointed by court and not clan members. See **Mariam Juma v. Tabea Robert Makange**, Civil Appeal No. 38 of 2009 (unreported). The fact that the respondent was nominated by the clan members, that alone did not qualify him as the appointed person to administer the deceased's estate. A person nominated by the clan or family members, has to go to court with competent jurisdiction to petition for letters of administration so as to make him eligible to administer the deceased's estate.

The essence of clan/family meeting was discussed in *extenso* by this court in the case of **Hadija Saidi Matika vs Awesa Said Matika**, H/C Mtwara, PC Civil Appeal No. 2 of 2016, wherein it was held:



*"In matters of probate and administration, 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. This practice is encouraged because it makes the work of court easy.** But once one or two members of the family have been selected, they should also fill Form No. 1 because filling the form is a legal requirement. Failure to use it make the proceedings illegal".*  
(Emphasis added)

The above partakes that after being nominated by the clan members, the person nominated does not automatically become the administrator unless and until duly appointed by the court. Therefore, the submission by counsel for the respondent that the respondent was dully appointed administrator, is without prejudice misplaced.

When cross examined on why he did not petition for letters of administration in any court of law, the respondent simply pleaded ignorance of law. He stated that he never knew that it was required by law that he should petition for letters of administration since their Meru customs cater that once a person is appointed by the clan members, he is duly appointed to administer the deceased's estate. However, in his evidence the respondent admitted that after her mother complained to the District Commissioner, it is when he became aware that he ought to have petitioned for letters of administration.



However, even after he became aware that there ought to be appointed administrator by court, he did not take any initiative. The record depicts that the appellant complained to the DC from 2019 to 2021. In all that period, there was no initiative taken by the respondent to ensure that he petitioned for letters of administration until his mother first petitioned for letters of administration in February 2022. After her petition, it is when he stood up to object her appointment. Therefore, correctly as submitted by Mrs Kimale, there was unbearable negligence and inaction on the part of the respondent in petitioning for letters of administration. The above observation dictates against the course taken by the first appellate court appointing him as co-administrator.

There was also allegation by the appellant that the respondent misappropriated the deceased's estate as he disposed by sale some of the properties forming part of the deceased's estate. She complained that the respondent was given shamba measuring 12 acres by his father, one cow for milking, irrigation water and a gun. However, during his administration, the respondent sold 12 acres of land belonging to the appellant, motor vehicle that belonged to the deceased, 17 herds of cows and four plots which belonged to the appellant without her involvement. That piece of evidence as submitted by Mrs Kimale was never contradicted by the respondent through cross examination, which

is tantamount to its admission. I am mindful of the settled law that failure to cross examine a witness on material part of evidence adverse to the other party is tantamount to its acceptance. In **Emmanuel Saguda @ Sulukuka and Another v. Republic**, Criminal Appeal No. 422 "B" of 2013 (unreported), the Court of Appeal cited with approval an old English case of **Browne v. Dunn** [1893] 6 R. 67 which held that:

*"A decision not to cross-examine a witness at all or on a particular point is tantamount to an acceptance of the unchallenged evidence as accurate, unless the testimony of the witness is incredible or there has been a clear prior notice of intention to impeach the relevant testimony".*

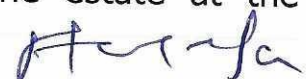
The above rule is applicable in the case at hand. The respondent did not cross examine the appellant on the allegation of misappropriation and beneficial interest he obtained from the deceased's estate. He also admitted in his evidence that in his administration, he distributed one shamba measuring 3 acres which came up after the deceased's death. He testified that the said shamba he distributed amongst him and his brother's wife. In the first place, as pointed out earlier, the respondent had no powers to distribute the deceased's estate as he was not duly appointed by any court. **Second**, he did not state why he decided to distribute the said shamba among himself and his



brother's wife. That has an implication that there was squandering and misappropriation of the deceased's estate by the respondent.

Another aspect is that that there is clear discrimination of heirs by the respondent which obviously disqualify him to be appointed as administrator. In his evidence he stated that he was the only heir since all his sisters were married and, in their customs, married daughters never inherit. One may wonder, in a family of seven children, how comes that the respondent claims to be the sole lawful heir, without even considering the effort placed by his mother in acquisition of the properties forming part of the deceased's estate. On her part, the appellant prayed to be appointed so that she distributes the estate to all lawful heirs, irrespective of their gender.

To further demonstrate the ill motive on the part of the respondent and his urge to continue owning and benefiting from the estate at the expense of the rest of the heirs, on 08/11/2022 during the pendency of the probate matter in the trial court, he clandestinely petitioned for letters of administration in respect of the same estate at Emaoi Primary court vide Probate and Administration Cause No. 46 of 2022. That clearly demonstrates that the respondent is not trustworthy person. He intends to make use of any opportunity in his favour to secure letters of administration so as to continue benefiting from the estate at the



expense of the other lawful heirs. The respondent's counsel must note that the letters issued by Emaoi Primary Court were secured fraudulently and the same were correctly revoked by the first appellate court after she invoked revisional powers under **Section 22(1) of the MCA** as reflected at page 7 of the typed judgment. His contention that the respondent is a duly appointed administrator vide Probate Cause No. 46 of 2022, is without mincing words, unfounded.

Another aspect casting finger on the respondent's appointment is the allegation by the appellant that he disowned her the farm that she cultivated, by harvesting the crops she had planted. Further, the respondent is accused by the appellant for denying access to the appellant's daughters and grandchildren in the house left by the deceased. The appellant went further that even the clan intervened with intention to disowning her the house left by the deceased. The allegations were not denied by the respondent at any stage, which render them true allegations in the absence of specific denials. All the above villainous attributed to the respondent's conduct, makes his appointment by the first appellate court illusory and impracticable.

Succinctly, the respondent misappropriated the deceased's estate at the expense of the rest of the lawful heirs. He never took any action to petition for letters of administration for about 16 years since his



nomination in the clan meeting. Further, he clandestinely petitioned for letters of administration at Emaoi Primary court in the pendency of these proceedings at the trial court, knowingly that there was an order from the district court that the matter was remitted to be tried at the same court by another magistrate.

The respondent is also accused to have discriminated some of the heirs based on their gender, and above all, he admitted to have distributed some of the properties forming part of the deceased's estate without involving other heirs. All the above denounce the respondent's appointment. Taking into account the above factors, it is the finding of this court that appointment of the respondent as co-administrator was erroneous because he lacked qualifications to be placed in the position of an administrator. His appointment cannot therefore be salvaged.

In appointing the respondent as co-administrator, the first appellate magistrate considered the appellant's old age and her energy which in her view she found physically weak. The first appellate magistrate was in error because she even failed to consider that it is the same appellant who initiated the battle way back 2019 commencing from the DC's office, to her first appointment in 2022 and even this subsequent appointment. Had she taken into account the enroute taken by the appellant in securing the letters of administration, she could have



relaxed that the appellant despite her old age, but still, she can ably engage herself in the administration process.

Mrs Kimale suggested that in the event the respondent's appointment is revoked, another beneficiary be appointed in his place. She did not even suggest who to be appointed. I do not buy her idea, because no any beneficiary who has expressed interest to be appointed co-administrator. Second, taking into account the journey taken through by the appellant in pursuit of her right to administer the deceased's estate, I entertain no doubt that she can administer the deceased's estate appropriately despite her old age because she admitted so in the trial court.

In the final analysis, guided by the above deliberations, I find the respondent was improperly appointed as co-administrator of the deceased's estate by the first appellate court.

Consequently, the appeal has merits, it is allowed in its entirety. The decision of the first appellate court is hereby quashed and set aside. The decision of the trial court appointing the appellant as the sole administratrix of the deceased's estate is hereby restored. Considering this to be probate matter and considering the nature of the parties, I order that each party bears their own costs.

It is so ordered

A handwritten signature in black ink, appearing to be 'H. Kimale', is written over a horizontal line.

**DATED** at **ARUSHA** this 30<sup>th</sup> April, 2024.



**N. R. MWASEBA**

**JUDGE**