

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. 42 OF 2023

(Arising from the judgment and decree of the District Court of Temeke at One Stop Judicial Centre in Probate Appeal No.58 of 2022 and originating from Manzese Primary Court in Probate Cause No.199 of 1998)

RUKIA HAMADI NYUMBU.....APPELLANT

VERSUS

OMARY HAMADI NYUMBURESPONDENT

JUDGMENT

20/03/2024 & 12/04/2024

SARWATT.J;

Upon the death of one Bakari Hamad Nyumbu on 7th May 1998, the respondent herein, Omari Hamad Nyumbu, through probate cause no 199 of 1998, successfully applied before Manzese Primary Court to be appointed as administrator of his estate. In 2021, the trial Court received

an official complaint from the appellant, acting on behalf of the deceased mother, claiming that the respondent used the estate to his advantage. Thus, he should be revoked, and in his place, the appellant should be appointed administrator of the estate of the late Bakari Hamadi Nyumbu.

Upon hearing the complaint, the trial Court ruled that the respondent had failed to do his duties under rule 5 of the fifth Schedule of the Magistrate's Courts Act, Cap 11, (MCA) as he had failed to file inventory and he was dishonest as he refused to acknowledge the wife of the deceased. In the event, the trial Court revoked the grant of letters of administration to the respondent and appointed the appellant to administer the deceased estate.

Aggrieved by this decision, the respondent lodged an appeal before the District Court of Temeke at One Stop Centre, and upon the hearing, the first appellate Court was of the view that there is no record that the trial Court authorised the appellant to represent the deceased mother. She had no legal power to prosecute the application on her behalf in the event the whole proceedings were rendered defective, and the first appellate Court ordered the file to be remitted back to the trial court so that the complaint could be heard according to the law.

Aggrieved by the decision, the appellant lodged an appeal before this Court with four grounds of appeal;

- i. The Honorable Senior Resident Magistrate erred in law and, in fact, by nullifying the proceedings of the trial court despite the fact the respondent's (Omary Hamadi Nyumbu) Letters of Administration were revoked on the firm ground that he had not filed inventory and final accounts of the deceased estate.*
- ii. The honorable Senior Resident Magistrate erred in law and, in fact, by holding that the appellant (Rukia Hamadi Nyumbu) had no legal power to prosecute despite the fact that the Primary Court admitted the appellant's mother's letter and the minutes of the family meeting, which both authorized and proposed the appellant to administer the estate.*
- iii. The Honourable Resident Magistrate failed to evaluate evidence adduced from all witnesses and, as a result, arrived at a wrong and biased conclusion.*
- iv. That the Honourable Senior Resident erred in law by disregarding the overriding objective of the Court to dispense*

justice without being bound by legal technicalities.

At the appeal hearing, the appellant was represented by Julius Manjeka, Learned counsel, while the respondent was represented by Mganga Paulo, learned counsel, and by agreement of both parties, the appeal was heard through written submissions.

The appellant counsel started by submitting together on grounds 2, 3, and 4. Submitting on those grounds, the counsel stated that the appellant vide the letter dated 21st December 2021 initiated the revocation proceedings, which were heard *ex parte*, and a judgment given, which was later, upon the application by the respondent, was set aside to allow both parties to be heard. It was the counsel's contention that the Court's findings that there is no record indicating that the appellant applied for revocation of the respondent is untenable.

According to the counsel, the Primary Court judgment never meant that the deceased mother was the applicant, nor was the appellant her legal representative. That is why, in her *ex parte* judgment, which was later set aside, the trial magistrate acknowledged that the appellant brought a complaint letter to revoke the respondent.

Furthermore, the learned counsel stated that legal representation was not the issue before the trial Court, and the counsel for the respondent came up with the issue of legal representation after reading the forewords of the Primary Court judgment. Thus, the District Court should have taken regard to the overriding objective of the Court to dispense justice without being bound by legal technicalities.

The learned counsel further stated that had the appellate Court evaluated evidence from all witnesses, it would come up with a finding that the deceased mother was not the applicant but a mere witness, and since the respondent had failed to file an inventory while using all the deceased estate to his advantage, the Court was supposed to revoke his administration even without any application for revocation.

Submitting on the ground no 1 of the petition of appeal, the learned counsel stated, The provisions of the MCA require the administrator of the deceased estate to collect all the properties of the deceased, distribute the same to the beneficiaries, and file inventory and statement or account in the Court. According to the counsel, the evidence given to the trial Court shows that the respondent failed to file inventory for years since his appointment. Thus, by operation of the law, his appointment is invalid, and

the Primary Court was correct to revoke his appointment. To support his assertion, he cited the case of **Beatrice Brighton Kamanga and Amanda Brighton Kamanga vs. Ziada William Kamanga**, Civil Revision No. 13 of 2020, HC, DSM.

In response, the learned counsel for the respondent submission was in the same order of presentation adopted by the appellant counsel by consolidating grounds of appeal. He stated that the decision appealed against centered on the question of locus standi. According to the learned counsel, the deceased mother initiated the revocation proceedings. The trial Court ordered her to appear in the next session.

The counsel further submitted that there is no proof of initiation or authorization from the deceased mother, as alleged by the appellant. Since the law under rule 1(2) of the rules of the first schedule of the Magistrate Court's (Rules of evidence in primary courts) regulation GN No. 22 of 1964 puts a legal burden of proof on the one who alleges, then the appellant failed to justify her claim. To support his assertion, he cited the case of **Marenga Investment Company Ltd v Denis Linus Mtenga** and Case No. 37 of 2017, HC, Moshi.

Furthermore, the learned counsel stated that it was misleading to state that the deceased mother's letter and the family meeting minutes were admitted as there is nowhere in the Court's proceedings they were tendered and admitted as exhibits for them to acquire evidential validity. They were mere paper with no evidential value, and the appellate Court could not act and rely on them. To support his assertion he cited the case of **Japan International Cooperation Agency v Khaki Complex Limited**(2006) TLR 343, **God bless Jonathan Lema v Mussa Hamis Mkanga and two others**, Civil Appeal No. 47 of 2012, **Shemsa Khalifa and others v Selemani Hamed Abdalla**, Civil Appeal No 82 of 2012, **Total Tanzania Ltd v Samwel Mgonja**, Civil Appeal No.70 of 2018, **Zanzibar Telecommunication Ltd v Ali Hamad Ali and others**, Civil Appeal no 295 of 2019, **Wire Futakamba Mndisha@Willy Futakamba v Felix Boniface and 4others**, Civil Appeal No.2 of 2021(2021) TZHC5647(18th August,2021) Tanzlii.

The counsel further submitted that the party's representation in Primary Court is not automatic as a person ought to make the application and the Court has to grant it or otherwise, citing the provisions of section 33(2) of the MCA and rule 21 of the Magistrate's Courts(Civil procedure in Primary

Courts) Rules, GN No. 310 Of 1964. It was the contention of the counsel that even if the deceased mother was the one who initiated the matter by writing a letter, there is no indication in the proceedings that she applied to be represented, and the Court granted the same.

It was the counsel's argument that, without permission of the Court, the appellant was acting without authority and had no locus. He cited the case of **Hamis Mohamed vs. Damian Michael Mgalagasye, Consolidated PC Civil Appeal No. 2&12 of 2020, HC, Mtwara**, to support his argument. Furthermore, according to the learned counsel, even if the deceased mother had properly applied to be represented, her duty to testify remains so as to justify her claim as she bears evidential value, and failure to testify turns the whole testimony hearsay thus inadmissible.

Regarding the appellant counsel's attachment of the letter written by the appellant in his submission, it was the counsel's argument that annexures should not be appended to submission save where the said annexure is an extract of a judicial decision, and to support his argument he cited the case of **Veta v Ghana Building Contractors, Civil Case no 198 of 1995, M. Rutakyamuru v Peter Joseph (1996) TLR 49, Tanzania Union of Industrial and Commercial Workers(TUICO) v Mbeya Cement**

Company Ltd and National Insurance Cooperation (T) Limited
(2005) TLR 41

Submitting on the first ground of appeal, the learned counsel contended that since the issue of not filing inventory was not among the issues raised for determination before the trial court, the first appellate Court was correct to hold that such argument was an afterthought.

On rejoinder, the appellant's counsel reiterated what he submitted earlier and added that it is strange that the respondent's counsel argues that the deceased mother's letter was not tendered and admitted as an exhibit for it to acquire evidential value while, during the hearing of the appeal at the District Court, he used the same letter to state that the deceased mother was the petitioner and not the appellant. At the same time, he denied admission of the same letter and prayed for the appeal to be allowed with costs.

Having gone through the submissions by both parties and having perused the records of the lower Courts, to dispose of this appeal properly, It is imperative to determine who initiated the revocation proceedings because it is the only reason the first appellate Court nullified the proceedings

before the trial Court, that is, it was because the appellant had no locus to prosecute revocation proceedings initiated by the deceased mother while she was not her representative.

It was the submission of the appellant's counsel that the appellant was the one who initiated revocation proceedings and not the deceased mother, as shown in the first appellate Court judgment, an argument that the respondent refuted because, according to him, it was the deceased mother who initiated revocation proceedings. Thus, the first appellate Court was correct to hold that the appellant had no locus.

According to the first appellate court decision, the appellant had no locus during the trial, as the record shows that she did not initiate the proceedings. Instead, the deceased mother initiated the revocation proceedings, as the only complaint letter in the case file was from her, and there is no record whatsoever indicating the respondent has ever filed an application for revocation, be it orally or by writing.

In the situation, I think the first appellate Court misdirected itself on who initiated the revocation proceedings. As per the trial Court record, on 21st December 2021, the appellant lodged the official letter requesting the

Court to revoke the respondent as an administrator, a letter the Court endorsed, and call upon the administrator and the beneficiaries to appear. This letter initiated revocation proceedings, which, according to the trial Court records, started on 29th December 2021. The deceased mother's letter was written on 8th January 2022 and was received in Court on 14th January 2022, long after the revocation proceedings had started. Therefore I agree with the appellant counsel that the appellant initiated revocation proceedings.

However, the counsel for the respondent argued that even if the appellant was the one who initiated revocation proceedings on behalf of the deceased mother, representation in the Primary Court is not automatic as one has to make an application and be granted before he could represent the other. It should be noted that representation before the Primary Court is governed by section 33(2) of the MCA and rule 21 of the Magistrate's Courts (Civil Procedure in Primary Courts Rules, GN NO 310 OF 1964, which reads;

"33(2) Subject to the provision of subsection(1) and (3) of this section and to any rule of the Court relating to the representation of the parties, a primary court may permit any

relative or member of the household of any party to any proceedings of a civil nature, upon the request of such party, to appear and act for that party

RULE 21

When a party to a suit appears by a relative or member of his household, and it appears to the Court that for the purpose of arriving at a just decision in the matter, it is necessary for the party to appear in person, it shall adjourn the hearing to another day and direct such party to appear on such day”.

Reading from those provisions of the law, it is clear that, upon request, a party may be represented by a relative or a member of his household. In the present case, the issue of representation does not feature because, in her complaint letter, which initiated the revocation proceedings, the appellant wrote the complaint in her personal capacity and requested the Court to revoke the respondent and not as a representative of the deceased mother.

Even if the appellant was representing the deceased mother, the fact that after her application, the deceased mother wrote a letter to the Court, requesting for revocation of the respondent and authorizing the appellant to be appointed administrator and the Court proceeded with the hearing of

the application can be considered as authorization of the respondent to proceed with the hearing on her behalf, especially considering the fact it was well known since the application for appointment of administrator, that the deceased mother is old and she is sick.

There is a need to effect substantive justice, especially in cases originating from the Primary Court, which is not suppose to be bound by the rules of technicality. On this point, I am firmly persuaded by the decision of this Court in the case of **Kenedy Makuza v Monalia Microfinance Ltd**, Pc Civil Appeal No. 1 of 2021, in which the following was observed;

“Traditionally, our Primary Courts were not forums for legal technicalities as they were presided over by lay magistrates to cater for ordinary citizens of this country. We are witnessing a wide range of reforms in the judiciary, primary courts inclusive. Certainly, the future looks bright with the ongoing reforms in terms of infrastructures, legally qualified personnel, and updated laws and regulations to govern proceedings in Primary Courts. However, as we cherish reforms in the primary Court, we should not let go of the need to uphold substantive justice, which is the first priority sanctioned by the Constitution. For this reason, the overriding objective principle has to be viewed from a far wider perspective, within the limit set by the law..”

Even though I have already discussed the issue of representation, which in my view is enough to dispose of the whole appeal, before I pen off, I feel the need to address the issue of failing to file inventory as raised on the ground no 1 of appeal.

According to the appellant counsel, the trial court revoked the respondent as he had failed to file inventory and final account before the Court. During the appeal at the first appellate, this issue was raised, but it chose not to be addressed for the reason that it is an afterthought to be raised during the appeal as it was not raised during trial. Despite this observation made by the first appellate Court, I think the failure to file inventory was not an afterthought. This is because it was one of the reasons that the trial Court revoked the appointment of the respondent.

On page 13 of the typed judgment, the trial Court showed the importance of the administrator filing inventory and closing the probate within four months of an appointment. It quoted the decision of the Court in the case of **Beatrice Brighton Kamanga, (Supra)**, and remarked the following;

.....ni lazima na hakuna mirathi isiyokuwa na mwisho na asipofanya hivyo anakuwa mara moja atenguliwe.

Under the circumstances, the trial Court, in my view, was correct to revoke the appointment of the respondent due to his failure to file inventory and statement of account. The respondent was appointed to administer the estate in 1998, and up to 2021, more than 20 years later, he had never filled any inventory before the trial Court. In all this time, there are allegations from the beneficiaries, including the deceased mother, who said that the respondent is collecting the deceased estate and using it to his own advantage without distributing a single cent to the heirs, including the sum of 200 million from Us embassy as compensation to the heirs of the victims of 11th September bomb attacks.

The law puts an obligation on the administrator to file an inventory within the period of four months since his appointment. Rule 10 (1) of GN No 149 of 1971 reads.

"Within four months of the grant of administration or within such further time as the liabilities court may allow, the administrator shall submit to the court a true and complete statement in form V, all the assets and liabilities of the deceased person's estate and at such intervals thereafter as the court may fix, he shall submit to the court periodical accounts of the estate in form VI showing therein all the money received, payments made, and

property or other assets sold or otherwise transferred by him."

In the case of **Beatrice Brighton Kamanga and Amanda Brighton Kamanga v Ziada William Kamanga (supra)**, this Court made the following observation;

"where the administrator has failed to file his inventory and statement of account for a period exceeding four months, and he remains so for a long time without an extension from the court which appointed him, his appointment becomes invalid and comes to an end by operation of the law."

Considering the strength of the above legal authorities, the trial court was correct to revoke his appointment, which was already revoked by the operation of the law for his failure to file inventory for more than twenty years since his appointment.

In the event, I find this appeal has merit, and I hereby nullify the whole proceedings and the judgment of the District Court, the decision of the Primary Court still stands. It is so ordered,

Dated at Dar es Salaam this 12th day of April, 2024.



[Handwritten signature]
S. S. SARWATT

JUDGE

Delivered in the presence of the Appellant and the respondent in persons.

Right of appeal is fully explained.