

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

TEMEKE SUB-REGISTRY

(ONE STOP JUDICIAL CENTRE)

AT TEMEKE

CIVIL APPEAL NO 66 OF 2023

(Originating from Misc. Civil Application No.196 of 2022 at Temeke District Court at One Stop Judicial Center)

FIDEA FUMBO MSAFIRI.....APPELLANT

VERSUS

EMMANUEL FUMBO ABEL.....RESPONDENT

(Administrator of the estate of the late Abel Msafiri Fumbo)

JUDGMENT

12/04/2024 & 10/05/2024

SARWATT, J.;

Upon the demise of the late Abel Msafiri Fumbo on 26th June 2017, the respondent herein, through probate cause no. 196 of 2022, uncontested applied before the District Delegate of Temeke to be appointed administrator of his estate. On 2nd June 2022, the District Court appointed the respondent as the estate administrator of the late Abel Msafiri Fumbo. Upon his appointment on 21st October 2022, the respondent filed before the trial Court inventory and final account, which were not objected to by all the

beneficiaries. Therefore, the trial Court approved them.

Later on, the appellant, through Misc. Application no 196 of 2023, applied before the trial Court for revocation of letters of administration granted to the respondent and for the Court to disapprove the distribution of the estate done by the respondent. Upon full trial, the Court dismissed the application for being an afterthought since the appellant had confirmed that the inventory and estate of account were proper and correct.

Aggrieved, the appellant has now appealed to this Court premised on the following three complaints faulting the trial magistrate. The grounds as per the petition of appeal are;

- 1. That the trial Magistrate erred in law and fact for not considering the evidence provided by the appellant(sic).*
- 2. That the trial Magistrate erred in law and, in fact, was based in favour of the respondent while was not brought any evidence before the Court to make clear beyond reasonable doubt(sic).*
- 3. That the trial Magistrate erred in law and fact by not considering that the respondent had sold some properties of the deceased after the granted letter of administration hence is to be revoked*

to be administrator (sic).

In this appeal, the appellant prays before this Court for the decision entered by the trial court to be quashed and set aside, the Court to revoke letters of administration granted to the respondent, a dwelling house which the appellant stays to be excluded in the list of the estate for distribution to beneficiaries and any other relief that this Court may deem fit and just to grant.

During the hearing, the appellant was represented by Laurencia, a learned advocate, while the respondent had the service of Karilo Mlimbo Karilo, and the appeal was heard by way of written submissions.

Taking the floor, the appellant's counsel argued grounds one and two together and submitted that the trial Court ruled that the appellant's actions were an afterthought because she had never challenged the grant nor the inventory and account of the estate.

It was the appellant counsel's contention that the Court had a duty not only to ask the appellant whether the inventory and accounts were correct and accurate and whether she accepted the same but also to ensure that she understood what she was accepting. According to the counsel, the appellant,

being a widow of the deceased, understood that among the two houses in the estate of the deceased, she could not have a share in the first house, which was bequeathed to the children of the deceased while the second house which was developed when the deceased and the appellant were living together was supposed to be bequeathed to the beneficiary after the share of contribution on the matrimonial assets was taken away.

The appellant's counsel went further and submitted that when a person dies leaving behind a spouse, then the share of the spouse being contribution to the matrimonial asset has to be taken away before the estate is distributed therefore, failure of the respondent to exclude the share of the widow before distributing the same was fatal and would have called for revocation.

On another note, the appellant's counsel faulted the trial Court for dismissing the application in favour of the respondent without the respondent bringing any evidence to prove his innocence. He added that the appellant had brought evidence to show she had a share in the matrimonial home, while the respondent only claimed that the document was forged without bringing proof to his claim. Furthermore, the trial court accepted the accounts without noticing that the respondent was not acting in good faith since he wanted to sell the house and give the appellant 19% of the proceeds of the sale of the

matrimonial home, thus leaving the widow with nowhere to live.

On the third ground of appeal, the appellant faulted the trial Court by not considering that the respondent had sold some properties, such as farms located at Kibiti and a motorcycle of the deceased, after he was granted letters of administration. The appellant further argued that, since the respondent appropriated the sale by himself and failed to show that in the inventory of the estate, then he should be revoked as administrator.

On his submission opposing the appeal, the respondent's counsel argued both grounds of appeal and submitted that, upon being appointed, the respondent filed an inventory of the estate where all heirs were summoned and examined if any had any queries or dissatisfaction. Consequently, all the heirs, including the appellant, had no quarrel relating to the division of the estate. Surprisingly, later on, the appellant lodged an application seeking an order to revoke the respondent's appointment.

The counsel further argued that it is meaningless for the appellant to narrate her contribution towards acquiring matrimonial assets between her and the deceased in the probate case, whereby no one will defend the deceased's contribution.

Further, the learned counsel submitted that in terms of section 49(1)(b) and (c) of the Probate and Administration of Estate Act, Cap 352, and rule 29(1) of the Probate Rules, the Court has power to revoke the grant of letters if it is proved that the grant was obtained fraudulently by making false suggestion or by concealing from the Court something material to the case or that the grant was obtained through untrue allegation of facts essential in point of law to justify the grant. It was the respondent counsel's further argument that the appellant sought to revoke the appointment of the respondent based on inventory, which is not among the grounds for revoking the appointment set out by the law in such an application.

Regarding the allegation that the respondent had sold some immovable properties, the respondent's counsel submitted that those were mere allegations without proof. According to the respondent counsel, the principle is that whoever desires the Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist as provided in section 110(1) (2) of the Evidence Act.

Furthermore, the respondent prayed for this Court to dismiss the appeal since the appellant had not advanced any applicable law and valid reason for revoking the grant.

On rejoinder, the appellant counsel reiterated what she submitted in chief and added that she was willing to let the children of the deceased have one house by themselves because it was obtained by the deceased and his first wife, who died and upon marrying her in 1994, the deceased and her acquired their matrimonial house, which the respondent wants to deny her share. She insisted that the surviving spouse's share must be ascertained before asset distribution. To support her assertion, she cited the case of **Benson Benjamin Mengi and others v Abdiel Reginald Mengi and Another**, Probate and Administration Cause no 39 of 2019, HCT at Dar es Salaam.

The appellant's counsel further argued that the respondent referred only to section 49(1) of Cap 352 and rule 29(1) of the Probate Rules for revocation of administrator. However section 49(2) of the Probate Act, the Court may remove the administrator from office if the interest of the beneficiaries so requires. In the matter at hand, since the interest of the appellant, who is also a beneficiary, is jeopardized by the administrator's action, therefore, he should be revoked.

Having heard the contenting arguments of both parties, this Court is tasked to determine if the present appeal has merit. Going through the appellant's

submission and prayers before this Court, the main complaint of the appellant against the trial Court in its failure to revoke the appointment of the respondent based on two primary reasons. First, for his inability to exclude the matrimonial contribution of the appellant before distribution, and second, that the respondent sold some of the deceased properties and appropriated the sale by himself without including them in the inventory.

From the submission filed, it is apparent that the submission made by the appellant is different from the ground of appeal raised; however, since the ground of appeal and the submission are shown to have been drawn and filled by the appellant herself, who is a lay person, for the interest of justice, I will determine them.

In addressing these reasons, I will start with the allegations that the respondent had sold some of the properties and appropriated the sale proceeds to himself, which is ground three of the grounds of appeal. The appellant complained that the respondent should be revoked because he had sold some properties and did not show them to inventory. She alleges that the respondent when granted letters of administration, sold a farm located at Kibiti and a motorcycle and appropriated the proceeds of the sale by himself, the allegations that the respondent strongly disputed.

Section 49(1) of the Probate and Administration of Estate Act, Cap 352, provides for the reasons that, when proved, the grants of letters of administration may be revoked. The provision reads;

'The grant of probate and letters of administration may be revoked or annulled for any of the following reasons,

- a. That the proceedings to obtain the grant were defective in substance*
- b. That the grant was obtained fraudulently by making a false suggestion or by concealing from the Court something material to the case,*
- c. That the grant was obtained by means of untrue allegation of a fact essential in point of law to justify the grant, though such allegation was made in ignorance or inadvertently,*
- d. That the grant has become useless and inoperative,*
- e. That the person to whom the grant was made has willfully and without reasonable cause omitted to exhibit an inventory or account in accordance with the provisions of Part XI or has exhibited under that Part an inventory or account which is untrue in a material respect."*

If the allegations by the appellant were proved to be true, then under section 49(1)(e) of the Probate and Administration of Estate Act, the respondent's letters of administration may be revoked for exhibiting untrue inventory. In the present case, the appellant didn't provide any evidence to substantiate her claims despite raising the above allegations. It is well well-settled principle of the law that whoever wants the Court to believe the existence of certain facts has the burden of proving the same. Section 112 of the Law of Evidence Act provides;

'The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence unless it is provided by law that proof of that fact shall lie on any other person.'

In the present case, since the appellant didn't provide any evidence to substantiate her claim, this Court finds that the ground lacks merit and is hereby dismissed.

On another note, the appellant contended that the respondent should be revoked because he failed to exclude the appellant's share of contribution towards the acquisition of matrimonial property before dividing the estate to

the heirs. According to the appellant, together with the deceased, they have acquired a house, which the respondent divided among all the heirs without first excluding her share as a contribution towards attaining the same. That is one of the significant reasons she decided to dispute the distribution.

The trial Court dismissed her claim as it held that it was an afterthought since the appellant didn't object when the inventory. In her submission, the appellant argued that it is the duty of the Court not only to ask the beneficiaries if they don't object to the inventory but also it has to make sure that the beneficiaries understand the inventory.

Despite the appellant's submission, the law under section 107(5) of the Probate and Administration of Estate Act placed a duty to the beneficiary or a person entitled to a share to inspect the inventory filed. The provision provides,

"Any beneficiary under a will, person entitled to a share under intestacy or an unsatisfied creditor shall be entitled to inspect the inventory and accounts of an executor or administrator."

Since it is the duty of the beneficiary to inspect the inventory, if she doesn't understand anything, it is upon her to advance if they don't understand

anything contained therein. If they don't advance any quarrel, the Court can properly form an impression that they understood and accepted everything. The Court cannot be faulted; objecting to it afterward may seem an afterthought.

However, this depends on the reasons for the objection advanced. Even though a person does not object to the inventory at first, so long as the probate case is not closed, depending on the reason advanced for objecting, a person may be allowed to object the same. In the present case, the appellant objected to the inventory because the administrator did not exclude her share of matrimonial property before distributing the same.

It is a known principle of the law that the properties that are subject to distribution to heirs are those that form the deceased's estate. If it is proved that a share of someone else, including the spouse, should be excluded from the deceased's properties before distribution. The essence is simple: what is inherited belongs to the deceased, not someone else.

This was also the view in the case of **Benson Benjamini Mengi and 3 Others vs. Abdiel Reginald Mengi and Another**, Probate Cause No. 39 of 2019, which cited with approval the decision in the case of **Elizabeth**

Mohamed vs. Adolf John Magesa [2006] TLR 114. In which the Court held;

"If there are properties jointly acquired by the deceased person and his wife or her husband, the share of the surviving spouse must be ascertained first and excluded from the deceased's estate, which is liable for the administration and consequently distribution to heirs is the estate of the deceased spouse and not the estate of the surviving spouse.

However, for a share to be excluded, it must be apparent from the available evidence on record. A claim of contribution on matrimonial assets is subject to proof of contribution rendered to ascertain what one is entitled to. Since the extent of contribution is a matter that is subject to evidence, then it raises a matrimonial dispute, of which a probate Court is not a proper forum to determine. The same was the view of the Court in the case of **Stephen Maliyatabu and Another v Consolata Kahulananga**, Civil Appeal No. 337 of 2020, Court of Appeal of Tanzania at Tabora, where the Court observed that a matrimonial dispute could not be adjudicated in a probate and administration cause.

When confronted with a similar situation, Manyanda, J in the case of **Stella Ernest Nyanda v Antony Magunguli**(as Administrator of the estate of the late Magunguli Zakaria Magunguli), Pc. Probate Appeal no 4 of 2021, HCT at Mwanza, had this to say;

"My considered opinion is that this, being a probate court, is not a proper forum for ascertainment of matrimonial issues. I say so because, if it is allowed to do so, there is a danger of turning a probate court into a matrimonial Court and hence mix up the issues."

Also, the case of **Sara Samson Kiyuga vs. Silas Lucas** (Administrator of Estate of the Deceased Philipo Manyumba Mapinda) PC. Probate Appeal No. 11 of 2020 (unreported) had a similar opinion that a probate case cannot determine the matrimonial dispute, where the Court made the following remarks;

"The other issue which needs to be made clear is that this is not a matrimonial dispute in which the division of matrimonial properties obtained or acquired by the spouses are divided after their marriage has been resolved. It is the probate in which the

deceased, who was a husband of seemingly two wives and father of about 12 children, has passed away, leaving that number of persons surviving him. All his properties form his estate and should be divided to all heirs including his wives and children."

In the present case, since the appellant claims exclusion of her share of the matrimonial property in a probate case, in my view, in the absence of the deceased, it will be tough to determine. For those reasons, this ground lacks merit, and it is dismissed.

For those reasons, I see no reason to fault the decision of the lower Court. In upshot, this appeal is dismissed, and this being a probate matter there is no order as to costs.

Dated at Dar es Salaam this 10th day of May, 2024.



S. S. SARWATT

JUDGE

Delivered in the presence of the appellant in person, Mngumi Samadani Advocate holding a brief for Laurencia Mayila advocate, for the appellant, respondent in person and Karilo M. Karilo advocate for the Respondent.

Right of appeal is fully explained.