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 28219 OF 2023

(Arising from the Judgement of Temeke District Court in Probate Appeal No. 52/2022 and originated from the Judgement of Temeke Primary Court at One Stop Judicial Centre in probate and administration cause no. 681/2022)

ZULFA SHABANI SWALEHE.....APPELLANT

VERSUS

AYOUB HASSAN BANKOLE.....RESPONDENT

JUDGMENT

12/04/2024 & 07/05/2024

SARWATT, J.;

The parties, Zulfa Shabani Swalehe and Ayoub Hassan Bankole are a mother and a son. After the death of the late Hassan Ramadhani Bankole on 23rd February 2011, who was a husband and a father to the parties respectively, the respondent herein, through probate cause no 681/2022, applied before

the Temeke Primary Court at One Stop Judicial Centre to be appointed administer his estate. The appellant objected to his application, before the trial Court, on the ground that the respondent stole from her Ths.250,000/= and the land ownership documents. She had instituted criminal proceedings against him, which she later on withdrew it. She also did not participate in the meeting, which proposed the respondent to petition for letters of administration.

After a full trial, the Primary Court overruled all the objections against the respondent and appointed him to administer the estate of the late Hassan Ramadhan Bankole. Being dissatisfied, the appellant challenged the decision before the District Court of Temeke at One Judicial Stop Centre. Still, her effort was unsuccessful, as the first appellate Court dismissed her appeal. Hence she decided to appeal further to this Court, hence the present appeal. The grounds of appeal as per the memorandum of appeal are;

1. *That, the honourable Magistrate erred in law and, in fact, for failure to consider that the respondent had a criminal record yet ignored the submission submitted by the appellant and delivered the judgment in favour of the respondent.*

2. *That, the honourable Magistrate erred in law and, in fact, failed to consider that no evidence tendered by the respondent proving that the clan meeting was before the Primary Court.*
3. *That, the honourable Magistrate erred both in law and fact by not taking due diligence as to the procedure taken prior to the preparation of the purported clan minutes, which is said to have proposed the name of the administrator.*

During the appeal hearing, the appellant appeared in person while the respondent enjoyed the service of Deinio Joseph Msemwa, learned advocate. By consensus of both parties, the hearing appeal was through written submissions.

In her submission supporting the appeal, the appellant stated that the respondent was accused of stealing from the appellant Tsh.250,000/= and a sale agreement of land properties located at Kibaha and Kinyerezi, and the matter was reported at the police station. Eventually, a criminal case no 128/2022 was instituted before Ukonga Primary Court. Following a family meeting held on 22nd January 2022, the criminal case was withdrawn, and the respondent agreed to return the stolen sale agreements to the appellant.

It was the appellant's further argument that the respondent stealing the sale agreement created doubts and a loss of trust, which is why she is objecting to the respondent's appointment, and if the respondent proceeds as administrator, the appellant will likely get nothing from her late husband's estate.

Submitting on the 2nd and 3rd grounds, the appellant advanced that, in trial Court records, the respondent and his witnesses, in their testimonies, told the Court that they conducted several family meetings to appoint the respondent to be an administrator. However, according to the appellant, despite this evidence from the respondent and his witness, the minutes were not tendered before the Court to justify what they testified. Thus, it was the appellant's prayer that this appeal be allowed and the decision of the Primary Court be quashed so that the family can convene another meeting to appoint another administrator or add a second administrator with no personal interest in the deceased's estate.

On his part, the respondent's counsel, in his submission opposing the appeal, stated on the first ground of appeal that the appellant alleges that the respondent has a criminal record and, thus, does not qualify to be appointed administrator. The counsel further submitted that the criminal record

requires the highest degree of proof, as it was held in the case of **Magendo Paul & Another v Republic** (1993) TLR. According to the respondent, a person must be convicted before a Court of law to have a criminal record, and the appellant has not given any evidence to that effect.

As to the second ground of appeal, the respondent counsel argued that the records are clear that the meeting was convened on 7th February 2022 with nine members, the appellant being one of them, and she signed the extract of the meeting acknowledging the family proposal for the respondent to be appointed as administrator. Since the appellant had not made any efforts to inquire about the authenticity of the minutes, she agreed with the minutes tendered before the Primary Court.

On the third ground of appeal, it was the respondent counsel's contention that no law prescribes a procedure to call for and conduct clan meetings, and the appellant did not cite any law providing for the same. It was the respondent counsel's further argument that, although clan meeting is important as it allows members to give their opinion on matters for proposing of administrator, its absence does not vitiate the appointment of administrator so long as rule 3 and rule 5(2) of the Probate Rules have been

adhered to and since the respondent has made all the necessary steps to the appointment.

On rejoinder, the appellant reiterated what she submitted in chief and added on the ground one that, the case was not conclusively determined as respondent apologized and requested the appellant to withdraw the case. The appellant added that since the respondent had acknowledged having stolen the appellant's documents and returned the same to escape criminal responsibility, the appellant had lost his trust.

On ground two, the appellant submitted that she was not informed about the meeting and did not attend it. The appellant contended that if there is her signature in minutes, it is forged. However, it was not tendered before the Court as an exhibit.

Having gone through the contending arguments of both parties and the records of the lower courts, this Court is tasked to determine if the present appeal is meritious.

Before I embark on discussing this appeal's merit, I have to point out that this is a second appeal. It is a well-established principle that the second appellate Court rarely interferes with the concurrent findings of the two lower

courts. It can do so if there is misapprehension of evidence causing miscarriage of justice. This was also the view of the Court of Appeal of Tanzania in the case of **Peter Joseph Kimath v The Republic, Criminal Appeal No. 373 of 2020**, which quoted with approval of the decision in the case of **Kubaja Omary v Republic, Criminal Appeal No.6 of 2017** where it had this to say;

> *"it is trite law that in a second appeal such as the instant one, the Court rarely interferes with the concurrent findings of the trial and the first appellate Court. The only exception is where it is clear that those findings are based on misapprehension of the evidence or misdirection causing miscarriage of justice."*

Having that in mind, I will begin my deliberation by addressing the first ground of appeal, which faulted the trial Court and the first appellate Court for not considering that the respondent had a criminal record. According to the appellant, the act of the respondent stealing money and the sale agreement from her made her lose trust in him, thus faulting the lower Court for not considering that fact.

The first appellate Court dismissed this ground because no judgment was tendered before the trial court to substantiate that the respondent was convicted before the Court of law. I agree with the first appellate Court that there is no proof that the respondent was convicted of that crime. Though the appellant argues that the respondent had stolen the said documents from the appellant, there is nowhere in evidence where this fact was proved. The respondent never admitted before the trial Court that he had stolen the said documents from the appellant. Even the letter (exhibit RST-1), which the appellant wrote to the Ukonga Primary Court requesting to withdraw the criminal case against the respondent, had nothing to prove that the case was withdrawn because the appellant had admitted to stealing from the appellant.

The argument by the appellant that the act of the respondent stealing from her made her lose trust in him, I think, can not hold water because the fact of stealing is a mere allegation that was not proved before the Court. After all, a reason she does not trust him cannot be a ground to fault his appointment because, if the respondent is allowed to perform his duties. If he fails to do justice to the appellant when making the estate distribution,

the appellant will have a chance to contest the distribution before the Court that made the appointment.

The allegation that the respondent will deprive her of inheritance is a mere speculation without any basis and is not sufficient reason to object to the appointment. For these reasons, I find no reason to depart from the lower Court's findings. For that matter, this ground lacks merit and is hereby dismissed.

Turning to the second and third grounds of appeal, the appellant faulted the findings of the lower Courts because, even though the respondent witnesses testified that there were several meetings that were conducted, the minutes of the said meetings were not tendered and admitted before the trial Court, thus the appellant prayed for the lower Court's decisions to be quashed to convene another meeting. Looking at the trial court record, it is true that the meeting minutes were never tendered before the Court as an exhibit.

Since there was an allegation from the appellant side that the meeting was not conducted, I agree with the appellant that, tendering of the same as exhibit was necessary. However non tendering of the same can not erase the oral evidence given by the respondent and his witnesses, who testified

on participating in the meeting and choosing the respondent as administrator.

Even if the appellant was not involved in the clan meeting, as the appellant stated, having a clan meeting to appoint an administrator is not a legal requirement, and the absence of it can not be used as a ground to fault the Court appointment of an administrator.

In the case of **Beatrice Brighton Kamanga and Amanda Brighton Kamanga v Ziada Brighton Kamanga**, Civil Revision no 13 of 2020, High Court of Tanzania at Mtwara, Mlacha J (as he was then) had this to say,

> *"The minutes from the clan/family are essential because they establish proof that a person who is named therein has the support of the majority members of the clan/family. It is a process of filtration which was developed through practice. The process is encouraged because in narrows the dispute. There is no rule prescribing for their existence but they are encouraged for that purpose."*

The primary factor to be considered in appointing a person to administer the deceased's estate is the interest one has in the deceased estate. Having an interest in the estate qualifies one to be eligible for appointment. (see **Naftary Petro v Mary Protas, Civil Appeal no. 103 of 2018, Court of Appeal of Tanzania at Tabora)**. In the present case, since the respondent

has an interest in the estate, I see no reason to interfere with his appointment. For that reason, 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 07th day of May, 2024.

S. S. SARWATT

JUDGE

Delivered in the absence of the appellant and the respondent in person.

Right of appeal is fully explained.