

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

**ARUSHA SUB-REGISTRY
AT ARUSHA**

PC CIVIL APPEAL NO. 40 OF 2023

*(Arising from Civil Appeal No. 06 of 2023 of Ngorongoro District Court and
Originating from the Probate and Administration Cause No. 19 of 2022 at Loliondo
Primary Court)*

NEEMA JAMES NDEKARISHO..... APPELLANT

VERSUS

HELENA PHILIPO MAIGE RESPONDENT

JUDGMENT

17th April & 24th May 2024

Masara, J

Before the Primary Court of Loliondo (“the trial court”), the Respondent herein successfully petitioned for the grant of letters of administration of the estate of the late James Ndekarisho Kisamo (“the deceased”). As per the records of the trial court, the Appellant and the Respondent are co-wives of the deceased. While the Appellant contracted a civil/Christian marriage with the deceased, the Respondent had a customary marriage with the deceased. During the petition for the grant of letters of administration, a caveat was raised against the Respondent by the Appellant herein. After the trial court heard the parties in respect of the

caveat raised, it was satisfied that there were no reasonable grounds to prevent the appointment of the Respondent as the administratrix of the estate of her late husband. The caveat was overruled whereby the trial court proceeded to appoint the Respondent as the administratrix of the estate of the late James Ndekarisho Kisamo.

Being aggrieved by the trial court's decision, the Appellant preferred an appeal to the District Court of Ngorongoro at Loliondo ("the 1st appellate court") through Civil Appeal No. 04 of 2022 in an attempt to challenge the trial court's decision. The 1st appellate court upheld the trial court's decision. There was no appeal filed against that decision. When the Respondent filed the inventory and Statement of Accounts, the Appellant was not satisfied with the allocation granted to her by the administratrix. She filed an objection, which was dismissed by the trial court. Undaunted, the Appellant filed Civil Appeal No. 6 of 2023 at the 1st appellate Court. The appeal was likewise dismissed. The Appellant, dissatisfied, preferred this second appeal on the following grounds, reproduced verbatim:

- 1) That the court made a legal mistake by appointing the respondent as the administrator of the estate when the appellant had already filed an objection.*

- 2) *That, the court erred by accepting without confirming the model of the properties left by the deceased which were listed by the respondent as true and existing.*
- 3) *That, the court was unable to do justice in reviving any asset that were distributed to the appellant me by the deceased and the court gave the respondent the opportunity to manage them again when the assets that were given to his children in the same division were already sold.*
- 4) *That, the court made a legal mistake in rejecting the decision of the division of the deceased assets made in traditional procedures carried out by the elders and finally accepting the respondent the benefit of being legal heir and manager of the deceased property.*
- 5) *That, the court failed to question the decision made by Longido Primary Court by calling my tenant to the court without appellant being present and telling them from that time they will pay the rent to the respondent because she is the administrator of the estate.*
- 6) *That, the trial court made a legal mistake by rejecting a valid marriage certificate and accepting the respondent marriage which is traditional bound and does not have any evidence as to whether it was bound and trust the court gave the respondent a benefit.*
- 7) *That, the trial court made a legal mistake in reaching decision by accepting the defence from the respondent that the appellant did not contribute anything during the life of the deceased because the time they lived with the deceased was short so she found all things.*

At the hearing, the Appellant appeared in person; while Mr Nerius Lugakingira and Ms Leticia Leonard, both learned advocates, appeared for the Respondent. Hearing of the appeal proceeded orally.

Submitting in support of the appeal, the Appellant did not submit on the 7 grounds seriatim. She stated that she appealed because justice was not accorded to her being the sole wife of the deceased. She stated that the deceased had distributed all his properties before he died. That, the Respondent who, at the trial alleged to be the deceased's wife and was appointed the administratrix of her husband's estate distributed even those properties left for her by the deceased. The Appellant stated that the Respondent does not want her to do anything regarding properties left behind for her by her late husband.

The Appellant also challenged the allegations made by the Respondent to the effect that the Appellant had no right to inherit from her husband and made a list of all the properties of the deceased and informed the trial court that those properties had not been distributed by the deceased. She also conferred that, in the process of the administration of the estate, she was arrested and imprisoned while the Respondent took all her properties including forcing her tenants to pay rent to the Respondent. Further, that

the Appellant was stopped from finishing her four bedrooms house on ground that it is not her property.

It was the Appellant's further claim that before the demise of the deceased, the deceased never introduced the Respondent as her co-wife, rather she was only introduced to the children and those children were allocated of their lands and the Appellant was the one who showed them those areas.

Furthermore, the Appellant conferred that, after the death of her husband, a clan meeting was convened by elders to confirm the allocations made by her husband before he died and, in that meeting, they prepared minutes which included the two families, leaders, elders and neighbors. That each side got their entitlements as per the will/wish of her late husband. That all children were given their rights and the Appellant together with the Respondent were present and they were satisfied with the allocations and signed the minutes.

The Appellant finalized her submissions by stating that justice has not been accorded to her by the lower courts as a widow and she has been living like a refugee with nowhere to lean on, as she is being harassed by the Respondent.

Opposing the Appeal, Counsel for the Respondent urged that ground 1 and ground 6 of the Appeal are interrelated and that they are new grounds, not considered by the 1st appellate court, hence the same cannot be entertained by this Court. He referred this Court to the Court of Appeal decision in **Nyerere Nyanguye vs Republic, Criminal Appeal No. 67 of 2010** and prayed that those grounds be dismissed.

Responding to the claim that the Appellant was not accorded rights by the Administratrix, the Respondent's Counsel challenged that assertion citing page 4 of the 1st appellate court's Judgement where the 1st Appellate Magistrate stated that the minutes allegedly left by the deceased was unlawful, and the minutes of 17/12/2020 did not confirm what the Appellant alleged. That, the Respondent was justified in her division of the deceased's properties as per para 5 of the 5th Schedule to the Magistrates Courts Act, Cap. 11; and that the Respondent divided properties equally as all the six children got their share of the estate. That even the distribution of the house in which the Appellant lived to the Respondent was justified.

The learned Advocate further stated that the trial court decided at page 7 of its judgment that properties be distributed in accordance with chaga customs and, that, according to that culture and customs the 1st wife gets

a larger share. It is thus the submission by the learned counsel for the Respondent that the appeal be dismissed for want of merit.

With regard to the issue of tenants, the learned advocate contended that it is true she did so because she was the administratrix, and the court was justified to direct them to pay rent to the Respondent.

In a brief retort, the Appellant stated with regard to the 1st and 6th grounds of appeal that those were not new grounds as she did inform the trial court and this Court about the status of the Respondent with her husband. To her, the Respondent just had children with the deceased and thereafter she left in 1986 and went to Kenya. That in the 10 years that she lived with together with the decease, the Respondent never surfaced.

With regard to the issues of minutes, the Appellant stated that they are all genuine as the Minute of 17/12/2020 were signed by the Respondent who never stated that she was married to the deceased or when did she build the house the Appellant was living in. It is the Appellant's further claim that the Respondent's intention is to evict her so as to sell the house and relocate back to Kenya. To her, if the Respondent is to administer the estate, she should only deal with properties bequeathed to the Respondent's children and not those allocated to her and her children.

I have considered records of two lower courts and the submissions by the parties in this appeal. There are three issues calling for the determination of this Court: **one**, whether grounds number 1 and 6 are new grounds not determined by the 1st appellate court; **two**, whether there was division of properties already done by the deceased before his demise, and lastly, whether the trial court rightly handled the administration cause before it.

Starting with the first issue, it has been argued by the Respondent that the 1st and 6th grounds of appeal are new grounds raised at this Court but were not dealt with by the 1st appellate court. Ordinarily, this Court, when it is called to examine a second appeal, will only deal with grounds of appeal dealt with the lower trial or appellate court. This position was expounded by the Court of Appeal in **Galus Kitaya vs Republic, Criminal Appeal 196 of 2015 [2016] TZCA 301, Tanzlii.**

In the instant appeal, as the record reveals, before the 1st appellate court, the Appellant advanced four grounds of appeal, namely:

- 1) That, the trial magistrate erred in both fact and law arriving at the erroneous decision in ignoring the fact that the late James Ndekarisho distributed all his estate to the beneficiaries including the respondent.*
- 2) That, the decision was wrong for ignoring the fact that the said appointed administrator distributed the house, six farm acres and*

garden which was distributed to the appellant by the late James Ndekarisho during his life time.

3) The trial court verdict was wrong for issuing order which directed the appellants tenant to pay administratrix the rent after she was appointed.

4) The appellant is dissatisfied with the listed portion of half acres as she is raising young kids who are issues of marriage with the deceased.

I agree with Counsel for the Respondent that ground number 1 is apparently a new ground raised by the Appellant in this Appeal. This ground aims at challenging the appointment of the Respondent as the administratrix of the estate. The records availed to me indicate that this ground was dealt with by the 1st appellate court in Civil Appeal No. 04 of 2022. The Appellant did not prefer an appeal against that decision; rather, she opted to go back to the trial court in order to dispute the distribution made by the administratrix when the latter filed an inventory and final accounts of the estate. When, finally, the trial court dismissed her objections regarding the administratrix's conduct and distribution she appealed against that decision, in Civil Appeal No. 6 of 2023, which has nothing to do with the appointment of the Respondent as the administratrix. This Court, therefore, would not ordinarily, in the exercise of its appellate jurisdiction, portend to resurrect a ground that the

Appellant, out of her own will, decided not to pursue on appeal after Civil Appeal No. 4 of 2022 was decided against her favour. It can only do so in the exercise of its revisional powers if the records are before it.

Regarding the 6th ground of appeal, I do not consider it to be a new ground as it can easily be a subset of the 4th ground of appeal considered by the 1st appellate Court. I do not find anything on record to dispute that the Appellant was a lawful wife to the deceased and that they had contracted a civil/Christian marriage which did not acknowledge the existing of another marriage by the deceased. I thus will not wish away this ground as submitted by the Respondent; it is not a new ground.

The second issue entails this court to ascertain whether there was division of properties already done by the deceased before his demise. In the administration process, the Court is enjoined to take into consideration the wishes of the deceased. The appointed administrator will not be allowed to go against that wish simply because the properties he or she is administering are not his, but of the deceased. From the evidence on record, the Appellant consistently stated that the deceased had already distributed his properties to his family members before he died. The Appellant relied on 3-page minutes dated 11/11/2013. The trial and the 1st appellate court did not consider these minutes to be restrictive of the

appointed administratrix power to redistribute. Through those minutes, the deceased distributed all or part of his properties to his family members including children the deceased had with the Respondent. The Respondent did not attend that meeting, as she had left the deceased in 1986.

The Appellant further alleges that the deceased left her some properties in writing, the properties that the Respondent took them and re-administered the same.

The trial court record also reveals that when the deceased died in 2020, elders and family member, now including the Respondent, met and confirmed the deceased's allocation of his properties. That is as per the Minutes dated 17th December 2020. These minutes made reference to the earlier stated family Minutes. Why these two minutes were not taken seriously by the two courts below remains paradoxical. There was oral evidence from the Appellant, family members and some elders who participated in those two meetings to support that what was contained in those minutes was nothing other than the wish of the deceased. The appointed administrator should not have been allowed to completely overhaul the deceased's wishes by distributing to herself what had been given to the Appellant by the deceased. I, therefore hold that there was

sufficient evidence to prove that the deceased had distributed his properties before his death, albeit not in a will legally so known. That distribution made by the deceased ought to have been respected by the appointed administratrix.

I now turn to the third issue whether the trial court rightly handled the administration cause before it. Flowing from the previous issue, it is evident from the decisions below that the issue of distribution of the properties of the estate of the late James Ndekarisho Kisamo was left at the sole discretion of the administratrix.

Undoubtedly, the jurisdiction of the Primary Court to appoint administrators of estates is stipulated by sub-paragraphs (a) and (b) of Paragraph 2 of the Fifth Schedule to the Magistrates' Court's Act, Cap. 11 which states:

"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 inexpedient so to do, **have regard to any wishes which may have been expressed by the deceased.**"* (emphasis added)

This position has been held sacrosanct in a number of decisions including the Court of Appeal decision in **Geoffrey Moses Mapalala vs Flora Neema Daudi, Civil Appeal No. 51 of 2020** (unreported).

In the case at hand, it is apparent that the deceased had expressed some wishes on how his properties were to be distributed once he died. Those wishes were reduced into writing. The records of the trial do not show any witness who challenged the authenticity of the distribution previously made by the deceased. Even if there were mistakes in the way the minutes of the distribution made by the deceased on 11/11/2013 were drafted, such mistakes were made right by a subsequent recognition by a family meeting of 17 December 2020 after the deceased had died. The Respondent and her children participated in that meeting and raised no concerns with the authenticity of the property distribution made by the deceased before his death. The trial court was therefore supposed to take into consideration the deceased's wishes when it was faced with an issue whether the distribution made by the appointed administratrix conformed with the deceased wishes.

It is not in dispute that the Respondent and the deceased lived together prior to 1986 and had four children. It is also not in dispute that the Respondent left the matrimonial home in 1986 only to return in 2020

when the deceased died. In between that period, the deceased and the Appellant got married in a monogamous marriage in July 2012, according to the marriage certificate obtained from the records of the lower court. This marriage was turned into a Christian marriage in November 2013. These undenied facts points to one conclusion; namely, at the time of his death, the deceased had only one wife, the Appellant. She lived with the deceased until his death and considered herself the lawful heir of the deceased. This does not, however, mean that the Respondent is not an interested party in the estate. She might be an interested party considering the time that she lived with the deceased. However, she should not have been allowed to take away the means of livelihood that the lawful wife of the deceased had, including the matrimonial home and the rented properties.

The vests to the administrator of the estate the power to administer and distribute the estate to the beneficiaries of the deceased's estate and none other. In the case of **Monica Nyamakare Jugamba vs Mugea Bwire Bhakome & Another, Civil Application No. 199 of 2019, [2020] TZCA 180, Tanzlii**, the Court of Appeal stated *inter alia* that:

"...the administrator must collect the properties of the deceased and pay the debts, identify the rightful heirs of the deceased, to whom the amount of residue of the proceeds of the deceased estate should

be distributed and what percentage each heir will be entitled to get depending on the law applicable in the administration of such estate.”

From the evidence on record, I do agree with the Appellant that the Respondent did not discharge her duties diligently. I say so on the ground that the Appellant, who was the only surviving wife of the deceased, was treated as a mere cohabiter of the deceased. Looking at the Respondent's evidence, it is obvious that she did not consider the Appellant as the wife or widow of the deceased. That explains why she gave her only ½ an acre of land from the large estate left by the deceased and intends to evict her from the matrimonial home, which she allocated for herself. By allowing that to happen the trial court and, indeed, the 1st appellate court did not properly handle the administrative process.

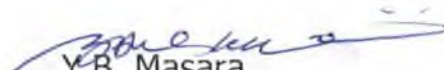
Although this appeal does not *per se* relate to the appointment of the administratrix, as I earlier stated, I do not believe that the Respondent will do justice if allowed to continue to administer the estate. She has, in my view, exhibited outright bias against some of the beneficiaries of the estate. In the exercise of my revisional jurisdiction under Section 31(1) of the Magistrates Courts Act, Cap. 11 [R.E. 2019] I hereby nullify the proceedings of the trial court, in Probate and Administration Cause No. 19 of 2022, and the 1st appellate court, in Civil Appeal No. 04 of 2022 and

Civil Appeal No. 06 of 2023, relating to the appointment and distribution of the deceased's estate.

In the upshot and considering all what has been explained above, the Appellant's Appeal has merit. It is hereby allowed in its entirety. I direct that the administration cause be expeditiously tried *de novo* before different magistrates and a new administrator or administratrix be appointed to administer the estate of the late James Ndekarisho Kisamo. Considering that this is a probate and administration cause, I make no order as to costs.

DATED and **DELIVERED** at **ARUSHA** this 24th day of May 2024.




Y.B. Masara

JUDGE