IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

TEMEKE HIGH COURT SUB-REGISTRY

(ONE STOP JUDICIAL CENTRE)

AT TEMEKE

CIVIL APPEAL NO 713 OF 2024

(Originating from the ruling of the District Court of Temeke at the One Stop Judicial Centre in probate and Administration Cause no.243 of 2021)

MARIASTELLA CLEMENS .....APPELLANT

VERSUS

JOYCE RAYMOND TAMBARI (as administratrix of the estate of the late Raymond Steven Tambari).....**RESPONDENT**

JUDGMENT

10/05/2024 & 20/05/2024

SARWATT, J.;

The appellant and the respondent herein are a mother and a stepdaughter and are the only heirs to the estate of the late Raymond Steven Tambari, who died intestate on 12th August 2021. Upon the demise of the late

Raymond Steven Tambari, the respondent herein, as the daughter of the deceased, petitioned to be appointed as administratrix of his estate. The appellant challenged her application by filing a caveat. Upon full trial, the caveat was dismissed by the trial Court, and the respondent was appointed to administer the estate.

Following the appointment, the respondent exhibited before the Court inventory and accounts of the estate, which indicated that the appellant would get 30% of the house located at Kigogo Dar es Salaam and 100% of the house situated at Mgeta Village in Mvomero District.

The appellant had no objection to the filed inventory. She, however, objected to the account of the estate on the reason that the distribution was made unfairly, and she insisted that as the wife of the deceased she is supposed to get 70% of the house at Kigogo. The Court dismissed her argument as it observed that the distribution was done in accordance with section 27 of the Indian Succession Act.

Aggrieved, the appellant filed the present appeal, wishing to challenge the decision of the trial court. The grounds of appeal as per the amended petition of appeal are,

1. *That the honourable magistrate of the trial Court misdirected himself in law and, in fact, to uphold the division of property made by the administratrix, which was unlawful and unfair.*
2. *That, the honourable magistrate misdirected himself in law and, in fact, failed to determine the lawful division of property where the deceased has left a single child and a widow.*
3. *That, the honourable magistrate of the trial court erred in both law and fact and failed to consider that one of the properties as listed as part of the estate of the deceased was a matrimonial house the widow had acquired together with the deceased.*

By consent of both parties, the appeal was agreed to be heard by way of written submissions. The appellant's written submission was drawn by Everlasting legal aid foundation while the respondent enjoyed the service of Karilo Mulembe Karilo, learned Advocate.

In her submission supporting the appeal, the appellant's counsel argued together the first and the second grounds of appeal and submitted that, the appellant had been living together with the deceased since 1979, and they together developed the house at Kigogo as they jointly occupied the same. The appellant's counsel went further and referred the Court, section 161(2)

of the Land Act, which provides that when a land is held in the name of one spouse and the other spouse contributes their labour in improving the same, that other spouse acquires the interest in the land in the nature of occupancy in common. According to the appellant's counsel, it was unjust to make it part of the deceased estate solely and give the appellant only 30% of the said house while she contributed to its development.

Further, the appellant counsel referred this Court to Article 21(1) of the protocol to the African Charter on Human and People's Rights, which provides for the widow's right to an equitable share in the inheritance of the property of the deceased and the right to continue to live in the matrimonial house. It was the appellant's counsel's contention that she is entitled to remain in the house at Kigogo since the right of survivorship protects her to dwell as a sole owner of the estate.

It was the counsel for the appellant's further argument that, since the widow is an elder woman who is unable to work and build a new house, selling that house, which she depends much on living and collecting rent for her basic needs, is unfair.

With regard to the third ground of appeal, the appellant's counsel submitted that the Court erred in identifying the village house and including it in the deceased estate. This is because it is not a deceased house. According to the counsel, the village house belongs to the appellant's family. Hence, the property does not form part of the deceased estate.

The respondent counsel on his submission opposing the appeal, decided to argue the grounds in the manner adopted by the appellant. With regard to the first ground of appeal, it was the contention of the counsel that the administratrix of the estate divided the property of the deceased by filing Form no 80 and Form no 81, which are inventory and account, pursuant to the requirement of rule 106 of the Probate Rules. The filed forms show that the appellant was given 30% of the house located at Kigogo and 100% of the house located at Nyandira Village in Morogoro, making a total of 130%. According to the counsel, since the deceased was Christian, then the proper applicable law in the division of his estate is the Indian Succession Act.

The counsel further submitted that the respondent's share of the deceased estate was effected as per the requirements of section 27 of the Indian Succession Act, no 10 of 1865, and in fact, the appellant received more share than that is required by the law.

On the second ground of appeal, the learned counsel supported the findings of the trial Court as the basis of that decision is section 27 of the Indian Succession Act, which requires the descendants to be bequeathed 2/3 of the estate regardless if it is a single child or more than one child. According to him, the allegations by the appellant that the division was wrong are incorrect since it was done following the dictates of the law.

Further, the counsel faulted the appellant for raising issues of matrimonial properties. According to him, for an asset to be regarded as matrimonial property, it is supposed to be a property acquired during subsisting of the marriage and by joint efforts. The married couple is to be alive, and the claim for matrimonial property has to be raised when one of them petitions for divorce. It is the counsel's further contention that it was wrong for the appellant to raise the issue of matrimonial assets when her husband had already died. To support his assertion, he referred the Court to the case of **Anjul Vical Saleem Abdi v Mrs Nassem Akhtar Saleem Zangie**, Civil Appeal No. 73 of 2003, and the case of **Leticia Mtani Ihonde v Adventina Valentina Masonyi**, Civil Appeal no 521 of 2021.

On another note, the counsel faulted the appellant for failing to produce evidence on what she considers to be matrimonial property other than

mentioning that she started to live with the deceased from 1979. He argued that the grounds raised have no merit. Therefore, the appeal should be dismissed.

Having heard the rival submissions of both parties, I'm tasked to determine if the present appeal is meritious. I will begin my deliberations by addressing the first ground, which faulted the trial Court for allowing the distribution of 30% on the house located at Kigogo. According to the appellant's counsel, it was unfair to regard the said house as the deceased property solely because she jointly acquired the same with the deceased. Therefore, she has an interest therein. Hence, she is entitled to be the sole owner of the estate as she has the right of survivorship.

As rightly pointed out by the appellant, if the title is held under a joint tenancy, and one of the parties dies, his rights cannot be passed to his beneficiary as the entire property survives to the remaining joint tenant. In this type of tenancy, owners of the property have undivided shares, and when one owner dies, the other owner absorbs the deceased interest as it creates the right of survivorship.

In the present case, there is no evidence produced by the appellant that the title in the house in question was owned jointly by the deceased and her. This is because if the property is jointly owned, its title must reflect the same. The appellant alleges to have the right of survivorship in the property because of her contribution. However, in my view, contribution to the acquisition of the property cannot entitle one to acquire an interest in the property as a joint tenant, as the same must be reflected in the certificate of title.

Section 45 of the Land Registration Act, Cap 45, requires any deed which is in favour of two or more persons to be registered. It must express if such persons are joint tenants or tenants in common. The sections provide;

> *"No deed drawn in favour of two or more persons shall be registered unless it expresses whether such persons are joint tenants or tenants in common, and, in the case of a tenancy in common, the share of each co-owner".*

Having that in mind, since there is no evidence whatsoever that the title was held under joint tenancy, therefore the claim of survivorship cannot stand, and the property was rightly regarded as the deceased property, which is subject to distribution. This ground is dismissed.

Regarding the claim of unfair distribution, it is the submission of the appellant that the respondent's distribution was unfair, as she was given only 30% of the house in Kigogo while she contributed to its acquisition. In my opinion, if the property is registered in the name of one spouse and that spouse dies, then the claim of contribution by the surviving spouse cannot stand as the property reverts to probate. This is because a claim for contribution is a matter of evidence, which can not be effectively determined if the other spouse is no more. Raising contribution presupposes matrimonial dispute cannot be justifiably determined in probate. In the case of **Stephen Maliyatabu and Another v Consolata Kahulananga**, Civil Appeal No. 337 of 2020, Court of Appeal of Tanzania at Tabora, it was observed that a matrimonial dispute cannot be adjudicated in a probate and administration cause. It can rightly be said that the properties left by the deceased are subject to distribution to the lawful heirs in accordance with the law.

Having been appointed by the Court as administratrix of the estate, the respondent was required to exhibit inventory and account of the estate, which basically provides for the manner in which the collected deceased assets were distributed to the lawful heirs. Any distribution done by the administratrix must be done in accordance with the law. In case of any

disagreement on the manner in which the distribution was made, the administrator must show the basis of the law that was used to distribute the same.

The distribution of estate may be governed by customary law, which depends on the customs of the particular tribe, and by Islamic law, which provides explicitly who should inherit and the amount to be inherited by the beneficiaries. Where these laws do not apply, the Indian Succession Act may come into play. However, in some cases, the beneficiaries may agree on how the estate should be distributed, and the Court usually does not interfere with their agreement if it complies with the law.

In the present case, the appellate disagrees with the distribution made by the administratrix on the ground that it is unfair, allegations that are strongly disputed by the respondent as she argues that the distribution was done in accordance with the Indian Succession Act which provides that the widow should get one-third of the whole estate and the remaining two third shall be shared equally to the children of the deceased.

Since the deceased is a Christian and has married under Christian rites, I can hold with certainity that his estate should be administered according to the

Indian Succession Act. Sections 27,28,29 and 30 of this Act provide that the widow takes one-third, and the remaining two-thirds is to be distributed equally among the children. The account exhibited by the respondent shows that the appellant was given 30% of the house located at Kigogo in Dar es Salaam, whose estimated value is Tshs 50,000,000.00, and 100% of the house located at Mgeta in Morogoro, whose estimated value is Tshs 5,000,000.00. Basing on that account of the estate submitted by the administratrix, it is evident that the distribution was done contrary to what the law provides. Hence, the administratrix is hereby directed to distribute the estate in accordance with the requirements of the law.

On the third ground of appeal, it was the contention of the appellant that the Court erred when it identified the village house as the deceased property and distributed it to her as the same is not the deceased house. My perusal of the lower Court's record reveals that this issue was never discussed in the trial court. There is nowhere in evidence that the appellant disputed that the house does not belong to the deceased. In fact, during the hearing of the caveat before the trial Court, in her evidence, she told the Court that the deceased left two houses, one in Kigogo and one in Mgeta. In her examination in chief, the appellant said;

"Baada ya kuzika, tarehe iliyofuata wakaja kuniuliza marehemu ameacha nini, mimi nikawaambia kaniacha mimi mjane, mtoto-mdai, nyumba kigogo & Mgetta."

Since the issue that the house does not belong to the deceased was never raised and determined by the trial Court, it can not be raised during the appeal stage as the Court lacks jurisdiction to determine issues that are never raised or determined at the trial court.

In the case of **Safari Mwazembe v Juma Fundisha**, Civil Application No.503/06 of 2021 Court of Appeal of Tanzania at Mbeya, when faced with a ground which was never raised in the lower Court, had this to say;

"Back to the application under our consideration, the question is whether the ground raised by the applicant under paragraphs 8 (a) and 9 merits serious judicial consideration by the Court. We entertain no doubt that the answer will be no, and the reason is not far-fetched. The applicant admittedly argued that this ground was neither raised nor determined by the High Court, and therefore this Court will not have any jurisdiction to determine. Time without number,and we need not cite any authority, this Court has clearly stated that usually the Court will look into

matters which came in the lower Court and were decided. It will not look into matters which were neither raised nor either by the trial court or the High Court on appeal."

The case of **Kennedy Makuza v Monalia Microfinance Ltd,** Pc. Civil Appeal No. 01 of 2021, High Court of Tanzania referred the decision of the Court of Appeal of Tanzania in the **Hassan Bundala @Swaga v Republic,** Criminal Appeal No.386 of 2015 that;

It is now settled that as a matter of general principle, this Court will only look on matters which come up in the lower courts and were decided and not on a new matter which were not raised nor decided by neither trial Court.

Guided by the above authorities, I can see my hands are tight to determine this issue, which arose during the appeal, as it can be considered as an afterthought, and for that reason, this ground lacks merit, and it is hereby dismissed.

In the event this appeal is allowed to the extent provided above, no order as to costs.

Dated at **Dar es Salaam** this 20th day of May, 2024.

S. S. SARWATT

JUDGE

Delivered in the presence the appellant, the respondent, Fardhia Akbar advocate for the appellant and Karilo M. Kazilo advocate for the respondent.

Right of appeal is fully explained.