

THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

TEMEKE HIGH COURT – SUB REGISTRY

(ONE STOP JUDICIAL CENTRE)

AT TEMEKE

CIVIL APPEAL NO. 7337 OF 2024

(Originating from the ruling of District Court of Temeke at One Stop Judicial Centre in Probate and Administration Cause No. 27 of 2021 before Hon Swai – SRM)

ADAM NELSON MYUNGILE.....1st APPELLANT

AMINA ABDU KABWE.....2nd APPELLANT

ZAHRA ABDU KABWE.....3rd APPELLANT

VERSUS

ZAINABU NELSON MYUNGILE (The Administratrix of the Estate of the late Nelson Timothy Myungile) **RESPONDENT**

JUDGMENT

19/04/2024 & 19/06/2024

M.MNYUKWA, J.

The appellants herein are challenging the appointment of the administratrix done by the District Court of Temeke at One Stop Judicial Centre (the trial court) which granted letters of administration to respondent to administer the estate of the late Nelson Timothy Myungile. They unsuccessfully applied before the trial court for letters of administration to be revoked.

For better understanding of the brief account of the case, it is necessary to state briefly the facts leading to the same. It is in record that, the appellants and respondent are half-brothers and sisters as they



share the same mother but, the 1st appellant is a full brother of the respondent as they share the same father and mother. It is undisputed that the late Nelson Timothy Myungile contracted marriage with Chiku Mustafa Hakim, who is the mother of both parties in this case. After the demise of the late Nelson Timothy Myungile, no one petitioned before any court for him/her to be appointed as the administrator of the deceased's estate.

It is also in record that, after the death of the late Nelson Timothy Myungile, his properties were under the control of his wife for some years, unfortunately she is now a deceased too. The records reveals that, after the demise of Chiku Mustafa Hakim, the respondent petitioned before the trial court to be appointed as the administratrix of the estate of the late Nelson Timothy Myungile. The said prayer was granted and she was given letters of administration in respect of the estate of his father, the late Nelson Timothy Myungile.

The record further reveals that, in the process of filling inventory and accounts of estate is when the dispute arose for it was claimed that respondent did not include the appellants as heirs of the estate save for the 1st appellant. The main complaints of the 2nd and 3rd appellants was that their mother, being the wife of the late Nelson Timonthy Myungile had contribution in the acquisition of his estate and therefore, the shares



of their mother should be excluded first before the distribution of the deceased's estate. He claimed that respondent did not do that. But, instead, the eviction order dated 27th December 2022 shows that the legal heirs of the deceased's estate are the 1st appellant and the respondent while all of them are siblings who share the same mother.

The appellants also complained that there was no family meeting which appointed the respondent to petition for letters of administration and that she did not involve them in the process of identify, collect and distribute the deceased's estate while she was about to close the probate cause. Thus, due to what transpired in the estate of the late Nelson Timothy Myungile, the appellants filed application for revocation for the trial court to revoke the appointment of the administratrix. After hearing both parties, the trial court refused to grant the application for revocation.

Aggrieved with the decision of the trial court which refused the application for revocation of the administratrix, the appellants knocked the doors of this court armed with five grounds of appeal that;

- 1. That the learned trial magistrate erred in law and in fact ruling in the respondent's favour while the appellants herein adduced good grounds as to why the respondent's appointment as the administratrix should be revoked.*



2. *That the learned trial magistrate erred in law and in fact by deciding that the appellant reason or ground for revoking the respondent as the administratrix was personal reasons.*
3. *That the learned trial magistrate erred in law and in fact by misinterpreting the principle raised in the case of **Jacquiline Ntuyabaliwe Mengi & Two Others V Abdiel Reginald Mengi and Benjamin Abraham Mengi & Another**, Civil Revision No 1 of 2022 hence to erroneous decision.*
4. *That the learned trial magistrate erred in law and in fact for failure to observe that the property which the respondent applied to administer does not solely belong to the deceased and others does not belong to the deceased person at all.*
5. *That the learned trial magistrate erred in law and in fact for not considering the appellant's submissions hence reached to erroneous decision.*

It was thus appellant's prayer that, this appeal be allowed, Costs of the same be borne by the respondent and any other relief(s) this court deems fit and just to grant.

At the hearing the parties were represented, for the appellant was Mr. Ambrose Menance Nkwera, learned counsel, whereas Mr. Elifuraha Eliudi appeared for the respondent. The appeal was argued by way of written submissions.

Supporting the grounds of appeal, it was Mr. Nkwera, the learned counsel who argued on ground 1, 2, 4 and 5 conjointly by averring that



respondent is entitled to be revoked as he contravened the provision of section 49 (1) (a) and (b) of the Probate and Administration of Estate Act, **[Cap 352 R.E 2002]** (PAEA). He submitted that the respondent did not involve other heirs in the process of applying, granting and administering the deceased's estate until she is about to close the probate case.

Mr, Nkwera blamed the respondent as he claimed that she listed all the matrimonial properties which the deceased acquired with appellants' mother by virtue of being husband and wife. He said that, after the death of her father in 1998 the properties were under the control of their mother who maintained them until 2003 when she passed away. He went on to argue that, the appellants' mother had her shares as the wife of the deceased as it was stated in the case of **Bi. Hawa Mohamed v Ally Seif** 1983 TLR 32.

He cemented that, all parties herein are entitled to inherit by virtue of being the biological children of the late Chiku Mustafa Hakim, their mother. He is therefore complaining on the act of the respondent to include all the properties and treated them as the properties solely owned by the deceased without considering that some are matrimonial properties which were acquired by both deceased during the subsistence of their marriage. He said that what did the respondent do was not correct since it denies the 2nd and 3rd appellants' right to inherit their mother's property



as the legal heirs. He was of the view that, at any rate that could not be a personal reason but a valid legal reason under the ambit of the provision of section 49(1) (a) and (b) of the PAEA.

Elaborating further on the joint ground of appeal, the appellants' learned counsel submitted that, respondent did not seek consent of other heirs as it is provided for under Rule 39, 71 and 72 of the Probate Rules. He cited the case of **Afra Upendo Haule (Magdalena Alois Haule) and Michael Alois Haule v Beatus Alois Haule (the administrator of the estate of Alois Lewis Haule)**, Civil Appeal No 898 of 2024. He therefore prays the appeal to be allowed.

Arguing on the 3rd ground of appeal, Mr. Nkwera submitted that the trial court magistrate misinterpreted the principle stated in the case of **Jacquiline Ntuyabaliwe Mengi & Two Others V Abdiel Reginald Mengi and Benjamin Abraham Mengi & Another**, Civil Revision No 1 of 2022. He said that, the trial court wrongly interpreted the above case and reached a wrong conclusion that a probate case cannot entertain an issue as to whether the disputed properties are the deceased's properties or matrimonial properties, He said that the trial court erred when it said that it has no jurisdiction to determine the above raised issue. He claimed that, reading on pages 19 and 20 of the said Judgment, there is nowhere the court held that a probate court cannot determine an issue of whether



the disputed property is a matrimonial property or not. He insisted that if one spouse dies, the surviving spouse cannot claim his share on the matrimonial cause rather in the probate case since the family court lacks jurisdiction to deal with matrimonial property. He averred that, since both parties are now the deceased, there is no way respondent can be sued in the normal court and that the only option is to sue her in a probate case. He cited the case of **Leticial Mtani Ihonde v Aventine Valentina Masonyi**, Civil Appeal No 521 of 2021 to support his argument. He also referred the case of **Benson Benjamin Mengi and 3 others v Abdiel Reginald Mengi and Another**, Probate Cause No. 39 of 2019 and the case of **Elizabeth Mohamed v Adolf John Magesa** (2006) TLS LR 114 to say that it was the duty of the respondent to identify the share of each spouse first before distribution of the deceased estates since it is not the entire share of the deceased which is subject to distribution. He therefore, prays the appeal to be allowed.

Contesting, the respondent's counsel contended that on the jointly grounds of appeal the main complaints of the appellants are basically two; First, respondent listed or included matrimonial properties without regard to the share of the appellants' mother in the acquisition of the properties. Two, that the respondent did not obtain consent of heirs when she petitioned for letters of administration.



Submitting on a complaint of whether the consent of heirs were obtained or not, Mr. Elihudi averred that, this is a new ground which was never raised and determined by the trial court. And therefore, appellants are barred from raising the same in this stage since the trial court cannot be faulted on the decision that it did not determine. Nevertheless, he submitted that, the consent of heirs were properly obtained as it is seen in the trial court's record. He added that, looking at paragraph 3.6 of their submissions, the appellants' complaint was not on issue of consent of heirs but rather the alleged inclusion of the matrimonial properties and its consideration that the same are the sole properties of the deceased. He thus distinguished the case of **Afra Upendo Haule (Magdalena Alois Haule) and Michael Alois Haule v Beatus Alois Haule (the administrator of the estate of Alois Lewis Haule)**, (supra) with our case at hand by stated that, in the present case consent of heirs were sought and obtained unlike in the above cited case.

On the complaint of inclusion of matrimonial properties as part of the deceased properties, he was of the view that, this complaint is misplaced since the said properties bear the deceased's name as the owner and therefore, the respondent cannot invite the stranger to the deceased's properties since nothing were produced by appellants to prove that the said properties belonged to appellants' mother.



In regards to the third ground, Mr. Elihudi submitted that the case of **Jacquiline Ntuyabaliwe Mengi & Two Others V Abdiel Reginald Mengi and Benjamin Abraham Mengi & Another** (supra) was properly applied and interpreted and its decision is straight forward as it is reflected on page 21 of the decision. Therefore, he was of the view that the trial court cannot be faulted in its decision in regards to the interpretation of the above case. He also said that the case of **Benson Benjamin Mengi and 3 others v Abdiel Reginald Mengi and Another**, (supra) and the case of **Elizabeth Mohamed v Adolf John Mageza** (supra) cannot save the respondent since in our case at hand both parties are the deceased. He went on that, the appellants cannot benefit on the cited cases since appellants being the children cannot establish the contribution of their mother and its share thereof on the alleged matrimonial properties. He therefore prays the appeal to be dismissed for lack of merit.

Re-joining, the appellants' counsel did not add anything useful, he mainly reiterated what he had submitted in chief.

Having considered submissions of the parties and examined lower court records, the only issue for consideration and determination is whether this appeal has merit. To answer this issue, I shall deal with grounds of appeal as argued by the parties.



Before I embark on determination of the appeal, I must say this is the first appeal of which, as a matter of law I am allowed to interfere with the findings of the lower court and come up with my own finding depending on the facts and evidence found in record, but of course guided by principles of law.

Coming now to this matter at hand, I am with the same view with the learned advocate for the respondent that, grounds number 1, 2, 4 and 5 raises two issue which, *first is*, whether respondent listed or exhibited properties which were not solely owned by the deceased, and *second*, whether respondent failed to seek consent from other heirs to the estate.

Before going to the determination of the above mentioned issues, it is important to remind that, parties are maternal half – siblings, to whom they share a mother. And to be more precise, estate subject of this appeal is of respondent and 1st appellant's father, the late Nelson Timothy Myungile, whom for a fact is not a father to the 2nd and 3rd appellants.

After a clear enlightenment of the said facts above, let then go to analysis of the issues. As stated above, the first issue is in relation to deceased's properties exhibited by the respondent of which appellants claimed that, the same were not solely owned by deceased rather jointly owned by deceased and their mother, the late Chiku Mustafa Hakim, hence were



matrimonial properties and by virtue of the same being husband and wife, they are legal heirs to the estate ought to have been included in Probate Cause No.27/2021.

It is settled that, once administrator is appointed, he is required by law to exhibit an inventory which includes a true list of deceased properties by filing Form No.80 as prescribed in the first schedule to the GN No.10/1963. And the same was filed by the respondent (administratrix) as enshrined in record of this matter.

It appears therefore that, as far as the complaint by the appellants is concerned, they were supposed, as a matter of law, to prove their allegation that, the properties listed by the respondent were not solely owned by the deceased rather jointly owned by their mother and the deceased during the pendency of matrimony. Since, facts which are likely to be believed in court are those which are proved as per section 112 of the Evidence Act, **[Cap 6 R.E 2019]**. Indeed, the law is also clear under section 110 of Evidence Act, Cap 6 R.E 2019 that whoever alleges must prove. And, as transpired in the records, appellants failed to discharge this duty.

Nevertheless, it is settled that issues of matrimony when it comes to deceased's estate cannot be raised since the law, as for deceased in this



matter was a Christian, is expressive for the share of a wife when a husband dies intestate. The provision to that effect is section 33 of Indian Succession Act of 1925, of which it gives one third of the estate to the widow. It is therefore that, the said provision or law does not establish issues of matrimonial properties or contribution thereof in determining shares of surviving spouses in probate matters.

Relatively, I am fortified by the decision of the Court of Appeal in the case of **Leticia Mtani Ihonde Vs. Adventina Valentina Masonyi** (*Administratrix of Estate of the late Buhacha Bartazari Kichinda*) Civil Appeal No. 521/2021 CAT at Musoma, however the facts in this case may differ from our case at hand but the principle remains that, distribution of matrimonial properties cannot be done through probate cause since the laws governing the probate in question, states the shares of all beneficiaries in the estate when deceased died intestate. With a clear mind, I humbly think, this is the basis of the decision of the Court of Appeal in the case of **Leticia Mtani Ihonde**, that a spouse can claim his or her share through a probate cause since the laws governing the same provide for entitlements of heirs to the estate.

Having said that, I can join hands with learned advocate for the respondent that, a complaint that the properties which were listed by



respondent was jointly owned by deceased and the late Chiku Hakim was not proved.

Though, respectful, I am in consensus with the learned senior resident magistrate in his ruling of 20th June 2022, that, appellant ought to have brought a complaint that their deceased mother was not listed as beneficiary to the deceased estate, since, despite her being a deceased now, she then survived her husband, the late Myungile for five years until when she died in 2003, therefore as a matter of law, as far as section 56 (1)(b) of the PAEA is concerned, she ought to have been listed as a beneficiary so that 2nd and 3rd appellants would have an opportunity to claim an interest on the same.

Coming to the issue of consent, this complaint should not detain me much since, consent of heirs is a requirement stated under Rule 39(f) and Rule 71 of Probate Rules, GN No. 10/1963 where a petitioner is mandated to procure consent from heirs before filing a petition in court. And as far in this case, records show that, petitioner filed among other documents, consent of heirs. What is not understood to the appellants is the fact that, consent is sought to the legal heirs of the estate, whereby in this case, as far as the estate in question is of the respondent's and 1st appellant's father, other members who do not share a paternal relationship cannot give consent and respondent was not obligated to



procure nor file their consent. For clarity Rule 71 of GN No. 10/1963 states that;

*Where an application for the grant of letters of administration is made on an intestacy the petition shall, except where the court otherwise orders, **be supported by written consent of all those persons who, according to the rules for the distribution of the estate of an intestate applicable in the case of the deceased, would be entitled to the whole or part of his estate.***

[Emphasis is mine]

Subscribing to the above provision, it is without doubt that in this matter at hand, since 2nd and 3rd appellants save for the 1st appellant, were not fathered by the late Nelson Myungile and the estate subject to administration by the respondent concerned him, their consent ought not to be sought.

That being said, the grounds number 1, 2, 4 and 5 lack merit and are hereby dismissed.

As for ground 3, this also cannot detain me much since as properly stated by the learned senior resident magistrate, the case of **Jacquiline Ntuyabaliwe Mengi & Two Others V Abdiel Reginald Mengi and Benjamin Abraham Mengi & Another** (supra) is in accord with the



principle that distribution of matrimonial properties cannot be raised in probate cause. Therefore, with all due respect to the learned advocate Nkwera, his argument in this issue is misconceived. This ground is also dismissed.

In totality, this appeal lacks merit, it is hereby dismissed. Considering the nature of this appeal being arising from probate matter I give no orders as to costs.

It is so ordered.

Right of appeal explained to the parties.




M.MNYUKWA

JUDGE

19/06/2024

Court: Judgement delivered in the presence of the counsel for both parties



M.MNYUKWA

JUDGE

19/06/2024