

IN THE HIGH COURT OF THE UNITED REPUBLIC TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

(PC) CIVIL APPEAL NO. 03 OF 2020

(An appeal arising from the judgement and decree of District Court of Kinondoni at Kinondoni in Probate Appeal No. 7 of 2018 delivered on 23rd September 2019 before Hon. A.A. Mwingira, RM; Originating from the Primary Court of Kinondoni at Kinondoni – Probate Cause No. 251/2018)

MARIA GILI JOSEPH.....APPELLANT

VERSUS

SALOME JACKSON LEGUNA.....RESPONDENT

JUDGEMENT

Date of last order: 07.05.2020

Date of Judgement: 30.06.2020

EBRAHIM, J.:

This appeal originates from the Administration Cause No. 251/2018 filed at the Primary Court of Kinondoni at Kinondoni where the respondent herein petitioned to be appointed as the administratrix of the estate of the late Andrea Nassoro Salehe who died intestate. The respondent was objected by the appellant herein on the basis that she was the legal wife of the deceased where they contracted a monogamous marriage and the

respondent was not a legal wife of the deceased because she (the appellant) was not divorced by the time the deceased passed on. After hearing the testimonies of a number of witnesses, the trial court framed issues as to how many wives the deceased had; whether he had children; and the validity of the clan meeting. After considering the framed issues, the trial court nullified the clan meeting and ordered the family to convene again and appoint the administrator.

Aggrieved by the decision of the Primary Court, the respondent (petitioner) appealed to the District Court raising one ground of appeal that trial magistrate erred in law and fact for failure to observe that the marriage between the appellant herein and the deceased was illegal.

The first appellate court swimming in the same wave addressed at length the issue of the lawfulness of wives of the deceased and went on to nullify the marriage between the appellant and the deceased. She went further to appoint the respondent as the administratrix of the estate of the late Andrew Salehe Nassoro.

Aggrieved the appellant lodged the instant appeal raising four grounds of appeal which can be reduced to three challenging the decision of the appellate court of nullifying the marriage without substantial evidence to

prove the same; and that the appellate magistrate concentrated on matrimonial relationship instead of probate and administration issues. She also challenged the act of the appellate magistrate of entertaining an appeal brought by a person not a party in the original suit.

In this appeal, the appellant was represented by advocate Felix Makene and the respondent was represented by advocate Odhiambo Felix. When the matter was called for hearing, counsel for the appellant prayed for the appeal to be disposed of by way of written submission, the prayer was granted by the court and set a schedule thereat.

Nevertheless by the time of composing this judgement it was only the appellant that filed the submissions. The respondent has neither filed the reply to the submission nor applied for any leave to file her submission out of time. This court shall therefore proceed to consider the submissions filed by the appellant only. Failure to adhere to the court order amounts to none appearance which amounts to ex parte hearing against the respondent (see the case **Fredrick A. M. Mutafurwa Vs CRDB (1996) Ltd & Others**, Land Case No. 146 of 2004).

I have carefully read the submissions by the counsel for the appellant. Arguing in support of appeal, counsel for the appellant submitted at

lengthy that the appellate magistrate court wrongly directed itself on the matrimonial issue while she should have confined herself to the grant of letter administration. To cement his argument he cited the case of the Court of Appeal of **Mariam Juma Vs Tabea Robert Makange**, Civil Appeal No. 38 of 2009 (Unreported).

I must state here that in determining this appeal, I shall confine myself to the question as to whether the appellate court rightly directed herself in determining what was before her?

As intimated earlier, this matter originated from a probate cause whereby the respondent applied for a grant of letters of administration of the deceased's estate (the late Andrea Nassoro Salehe). The issue as to whether the respondent was a lawful wife of the deceased or not? emerged when the appellant herein filed a caveat against the respondent. She claimed that the respondent was not the lawful wife of the deceased. The trial court was in any circumstance required to entertain the objection to determine who would faithfully and diligently administer the deceased estate and not invoke into determining the matrimonial issue as to who is the lawful wife or rightful heir of the deceased as that would be the duty of the administrator. The issues as to whether who was the lawful wife of the

deceased; or how many children did the deceased have was not what was before him. Going by the records, the trial court did not at all consider the issue of appointment of the administrator of the estate instead framed its own issue and proceeded to consider as to whether there was a valid clan meeting. That was wrong. The duty of the trial court was to address the issues pertaining to the objection raised then come to the findings as to who would be the administrator of the deceased. I can safely say here that the trial court failed to exercise its jurisdiction and embarked on adjudicating the matters which was not before him.

Indeed, **Section 2(a) of the Fifth Schedule to the Magistrate's Court Act, Cap 11. RE 2002** gives mandate to the Primary Court to appoint the administrator. The Section reads:

*"A primary court upon which jurisdiction in the administration of deceased' Power of estates has been conferred **may either of its own motion or 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 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;"*

It follows from the provision of the law above that in appointing the administrator of the estate of the deceased, it is not mandatory for the Court to collect clan views. What is required is for the court to consider the petition from the facts, evidence and circumstances surrounding the case

judiciously as clearly held by this Court in the case of **Kijakazi Mbegu and Five Others V Ramadhan Mbegu** [1999] TLR 174, 178-179. I associate myself fully with the wisdom of the court.

In a probate matter once a person petition to be appointed as an administrator the first main objective of the court is to appoint the administrator who shall have legal mandate to oversee the deceased's estate. In the event there is an objection pertaining to why the person should not be appointed as an administrator, the court shall determine that objection first. Such objection shall be confined to the fitness and suitability of the petitioner to be appointed as an administrator. In using the term fitness it means in appointing an administrator of the deceased estate the main consideration should be the reputation and capability of such person to act faithfully, diligently and impartially in administering the estate to the rightful heirs. The court is therefore mandated to appoint any reputable person who at times is not even a member of the family or officer of the court for that matter to be an administrator of the estate of the deceased. At this juncture I associate myself with the decision of this court where Rutakangwa, J. as he then was held in the case of **Sekunda Mbwambo V Rose Mbwambo**[2004] TLR 439 at pg 444 and 445 that:

*"An administrator may be widow/widows, parent or child of the deceased or **any other close relative**, if such person is not available or **if they are found to be unfit in one way or another**, the Court has the power to appoint any **other fit person** or authority to discharge this duty".*

Thus, the Primary Court instead of returning the matter to the clan to appoint an administrator, the appointment and grant of letters of administration was under its jurisdiction which unfortunately it incorporated other issues and went ahead to adjudicate upon them as correctly observed by the counsel for the appellant in his submission.

Now coming to the appellate court, again the appellate magistrate instead of directing herself on the probate issue she went on addressing the matrimonial issue at length in such a way that it was as if what was before her was a matrimonial proceedings. She even went further and nullified the marriage! Surely she usurped her powers as what was before her was a probate case and not a matrimonial case. I subscribe fully to holding of the Court of Appeal in the case of **Mariam Juma Vs Tabea Robert Makange (supra)**, where it held that:

"...the High Court Judge went beyond his jurisdiction of handling a caveat filed opposing the appellant petition for letters of administration. The finding he made that the appellant was not legal wife of the deceased and

that the appellant's children were not entitled to inherit from deceased estate were beyond the scope of his mandate in handling the caveat filed by the respondent."

The circumstances of the above cited case falls in ten with the circumstances of the instant case as both the trial magistrate and the appellate magistrate went on to determine issues which were beyond their scopes.


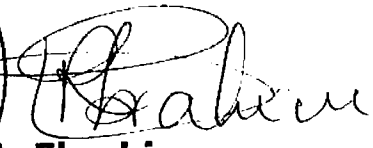
Counsel for the appellant cited the provisions of **Item 2(a) of the 5th Schedule of the Magistrate's Courts Act (Cap 11 RE 2002) and Rule 5(3) of the Primary Courts (administration of Estate) Rules** on the duty of the Primary Court to appoint an administrator and procedures thereof including issuance of notice to the interested parties. He stated further that the said mandate is for the Primary Court and not and not District Court hence the District Court acted erroneously for having no jurisdiction. I share his views.

Certainly, as stated above, it was the duty of the Primary Court to appoint the administrator and not the District Court. The District Court was supposed to exercise its revisional powers and direct the Primary Court to

exercise its jurisdiction and not proceed to appoint an administrator because that was not her call.

Given the above findings I invoke the revisional jurisdiction of this court under **section 30(1)(b)(ii) of the Magistrate's Court Act, Cap 11 RE 2002** to nullify all the proceedings, judgement and decree on appeal of the District Court of 23rd September 2019 in Probate Appeal No. 7 of 2018. I also quash and set aside the decision of the decision of the Primary Court of Kinondoni on Probate Cause No. 251 of 2018 of 27.02.2019 and its subsequent orders thereat. Subsequently, I remit the file to the Primary Court of Kinondoni with directives that they should proceed to determine and appoint the administrator of the deceased's estate as mandated by the law. The petition and the caveat should be placed before another magistrate with a requisite jurisdiction. Having regard to the nature of the case that it involves family members, I shall not order costs. Each party shall bear its own costs.

It is so ordered.

 
A. Ebrahim
Judge

Dar Es Salaam

30.06.2020