

**IN THE HIGH COURT OF TANZANIA**

**MWANZA DISTRICT REGISTRY**

**AT MWANZA**

**PC. PROBATE APPEAL No. 23 OF 2020**

*(Arising from Revision order of the District Court of Nyamagana District at Mwanza in Probate Revision No. 15/2020 which is originating from Probate No. 73 of 2019 of Mwanza Urban Primary Court of Nyamagana District)*

**MAZIN HUMAID KHALFAN..... APPELLANT**

**VERSUS**

**SHEKHA HEMED .....RESPONDENT**

**JUDGMENT**

*02<sup>nd</sup> & 29<sup>th</sup> December, 2020*

**TIGANGA, J**

Under the certificate of urgency certified by Mr. Anatory Karaba Nasimire, learned Advocate, the appellant herein filed an appeal in a two grounded petition of appeal challenging the decision of the Senior Resident Magistrate of Nyamagana District Court in Probate Revision No. 15 of 2020, which revoked the appointment of the appellant and other four persons who were appointed as the Co - Administrators of the estate of the late Hemed Khalfan Hamduni. The two grounds are as follows;



1. That the learned Senior Resident Magistrate erred in revoking the appointment of the appellant and other four persons as co - Administrator of the estate of the late Hemed Khalfan Hamduni as there were no good reason for doing so.
2. That the learned Senior Resident Magistrate was not justified in reinstating the respondent as Administratrix of the estate in question as the revocation of her appointment as such by the Primary Court was for good reasons.

He prayed the revision order complained against to be quashed and set aside and the appellant and his co - Administrators be reinstated as administrators of the said estate, the appointment of the respondent as administratrix of the estate be revoked.

With leave of this court the appeal was argued by way of written submissions. In the submission in chief filed by Mr. Nasimire, Advocate who represented the appellant in this appeal, the factual background of the appeal and the grounds of appeal were together narrated.

The facts background of the appeal are that, the late Hemed Khalfan Hamdun, the deceased, died on 16/01/2019 in Oman, he left six wives and about 18 children surviving him. Soon after his death, on 08/07/2019, the respondent filed Probate Cause No. 73 of 2019 before Mwanza Urban



Primary Court where on 15/07/2019, she was appointed as Administratrix in a trial speed which Mr. Nasimire referred as unprecedented and unexplained.

The appointment of the respondent was without the knowledge and consent of some of the heirs including the appellant. Following the complaint by those heirs, the court appointed two more administrators to assist the respondent. However, soon there after, the two added administrators opted out of their appointment on the ground that, they were not accorded sufficient support by some of the beneficiaries. When the two neutral administrators opted out the respondent continued to stand alone as administratrix of the estate. According to Mr. Nasimire, upon complaint by the appellant herein, regarding the conduct of the respondent, on 13/10/2020 the Primary Court revoked the respondent's appointment and instead appointed five administrators who would take care the interest of all the children of the deceased begotten from his six widows including the respondent.

The appellants complaint which led to the revocation of the appointment of the respondent is contained in the letter addressed to the Primary Court which complaints includes, the abdication by the respondent

of her role as Administratrix of the estate in question to her children and her advocate who went as far as appearing before the Primary Court contrary to section 33 (1) of the Magistrates Courts Act [Cap 11 R.E 2019] which bars the Advocate from appearing in the Primary Court.

The other complaint was the act of the respondent of allowing the children and advocates to demand payment of rent from the tenants who are in the houses which are part of estate, misapplying the proceeds of the estate by depositing the estate money in her personal account without prior consent of the beneficiaries and last was failure to of the administratrix to submit a true statement of all assets and liabilities of the estate within the time span provided by law.

It is the opinion of the counsel for appellant that the Primary Court was justified in revoking the appointment of the respondent as Administratrix of the estate of the deceased in this case. He submitted that the powers to revoke the appointment are as provided by Rule 2 (c) in 5<sup>th</sup> schedule to the Magistrates Courts Act [Cap 11 R.E 2019] and the grounds for revocation of the grant are as contained in Rule 9 of GN No. 49 of 1971. He mentioned the grounds to be; **one**, where the proceedings leading to the grants are defective in substance so as to influence the





decision of the Court or where the grant has become useless or inoperative. He submitted that in this case, the respondent was properly revoked on the ground of the complaint that she failed to give and submit the true statement of the estate presumably in contravention of Rule 10 (1) of GN No. 49 of 1971 which requires the administrator to submit the said statement within four months of his appointment or within such further time as the court may allow. **Two**, upon the administrator contravention of the terms of the grant either willfully or negligently against the creditors, heirs or beneficiaries of the estate, Mr. Nasimire submitted that the respondent abdicated and delegated her responsibility to some other persons being delegate, the law does not allow her to delegate her duties to other person who is not he administrators.

He submitted that, the Primary Court acted within the ambit of its powers when it revoked the appointment of the respondent as Administratrix. To support his argument, he cited the decision of the Court of Appeal in the case of **Mohamed Hassan vs Mayasa Mzee and Mwanahawa Mzee** [1994] TLR 225, which held *inter alia* that, the Primary Court has powers to appoint and replace and administrator by



virtue of Rule 2(a) and (b) respectively of the 5<sup>th</sup> schedule to the Magistrates Courts Act.

Mr. Nasimire further cited the authority in the case of **Sekunda Mbwambo vs Rose Ramadhani** [2004] TLR 439, in which it was held, that, an administrator may be widow/widower, parent or child of the deceased or any other close relative of such persons who are not available, or if they are found to be unfit in one way or another, the court has the powers to appoint any other fit person to discharge the duty. Thus the revocation of the appointment of the respondent and her replacement with the appellant and other co - Administrators was quite in order.

He submitted further that, the basis of the order of the District Court revoking the appointment of the appellant and his co - administrators, based on the fact that the case leading to the appointment of the administrators (the appellant and his co - administrators) was made within three days and that no advertisement was made in terms of Rule 5(4) of GN No. 49 of 1971. Mr. Nasimire, submitted that the advertisement is purely optional and it is applicable when the application for appointment of the administrator is brought to court for the first time and that, even when



the appointment of the respondent was done, no publication of the notice of hearing was made.

According to Mr. Nasimire, Advocate, the reasons based on by the District Court to revoke the appointment of the appellant and his fellows were that they did not finalise the administration within time. This reasons is baseless, because, if one to blame, then must be the respondent because the appointment of the appellant was short lived as they were appointed on 13/10/2020 by the Primary Court, but the District Court revoked their appointment on 11/11/2020.

Furthermore Mr. Nasimire argued in his submission that, the appointment of the appellant with his co - administrators aimed at taking care of the interest of all the beneficiaries including those of the respondent, and since the revocation of appointment of the appellant and his co - administrator had no justification, he prayed the appeal to be allowed, the appellant be re - instated together with his co - administrators, as they are qualified to act as administrators of the estate of the deceased. He asked so because the respondent had failed that duty, it was unsafe to re appoint her as Administratrix.

In the reply prepared and filed by Mr. Bruno Mvungi - Advocate who represented the respondent, it was submitted that the appeal and submissions by the appellant lacks merits, he asked the same to be dismissed. Mr. Mvungi submitted further that, the revision order which the appellant is challenging originated from the order of the trial Primary Court in Probate Cause No. 73 of 2019 of Mwanza Urban Primary Court dated 13/10/2020 which directed all the deceased's premises to be closed.

That order resulted into a closure of a house in which the respondent who is the widow of the deceased, was living with her children. That act made the respondent to write complaint letter to the Judge in charge High Court of Tanzania Mwanza Registry complaining the manner in which the order was procured. That resulted into the administrative directives of the Hon. Judge in-charge to the District Court of Nyamagana to call for the record of the Primary court to satisfy itself on the propriety of the orders.

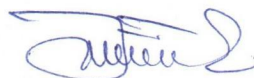
Mr. Mvungi, went a head and informed this court that, the allegation that the respondent abdicated her duties and role to the children and her advocate has not been supported by any evidence on record. This according to Mr. Mvungi, is so as well on the allegation of misappropriation



or misapplication of funds collected from the estate by the same in personal or individual account.

Further to that, the appointment of the Respondent was said to be in operative or useless, as the same has not been proved by evidence because the respondent has never acted in contravention of the terms of grant. He argued that it is the revocation of the appointment of the respondent which gave rise to the complaint before the Judge in charge, and gave rise to the District Court revision which held that the revocation was done without calling other administrators and beneficiaries to appear for determination.

To distinguish the authority cited by the counsel for the appellant, Mr. Mvungi, submitted that, the cited case of **Mohamed Hassan vs Mayasa Mzee & Mwanahawa Mzee**, (supra) depicts the correct position of the law, however it does not fit the circumstances of the case at hand because, the procedure for revocation in this case was not followed. This is also the position in the case of **Sekunda Mbwambo vs Rose Ramadhan** (supra) as other co - administrators do not live in Tanzania they are living in Oman.



Supporting the decision of the District Court, Mr. Mvungi, Advocate, submitted that, the procedure of appointing the administrators was not followed for not issuing Notice to the beneficiaries therefore the concern of the District Court was on the procedures not on whether the appellant and co – administrator are fit administrators.

He submitted that the District Court did not deal with the appointment of the appellant or the Co – Administrators, but it dealt with the order which closed the premises of the estate and nullified just that order only and declared it to be illegal as it was not even executed by the court broker, but by the appellant himself.

Further to that, he informed the court that the District Court said nothing about the reinstatement of the respondent but directed fair trial to start from the proceedings of 16/10/2019, and ordered the matter to be expedited and finalized as earlier as possible.

According to him, the court also gave the order for the probate to be finalised within two months. Having pointed out the gist of the said order, he submitted by way of conclusion that, the appellant and his co - administrators are living for gain in Oman, he asked this court to leave the issue of who is a suitable administrator to be determined by the trial



Primary Court after hearing all the caveat according to law. He at the end, asked for the appeal to be dismissed with costs.

In rejoinder Mr. Nasimire for the appellant disputed the appellant to have closed the respondent's house in which she is living, as the respondent is living in Oman and even those house which were closed, were re - opened by the order of the same Primary Court on 30/10/2020 in the presence of the appellant and the Advocate for the respondent.

Regarding the respondent's abdication of the administration responsibilities to the children and advocate, he submitted that there is enough evidence on record to prove that. Mr. Nasimire cited some evidence to prove that the respondent abdicated her duties to the children and her advocate.

He submitted that, the appointment of the appellant and his co - administrators was well grounded and since the matter was not new to the court, there was no need of publication of the notice before appointing the appellant and his co - administrator.

He said that the record is full of complaints by respondent of her illiteracy which in Mr. Nasimire's opinion is the ground as to why she was

abdicated her duties to the children and her advocate. Therefore it is a serious handicap on her part, which necessitated the abdication of her duties to her advocate and her children.

He submitted that since her interest are taken care of by her son as one of the co - administrators of the estate, there is no reasonable cause for alarm. He submitted while concluding that since revision order did not disclose the reason why it was given then there is no reason to sustain it.

He submitted further that since the proceedings in which the appellant and his co - administrators were quashed by the order of the District Court, then by all necessary implication, the respondent was reinstated as an administratrix, which said reinstatement was not proper. He prayed the appeal to be allowed without costs.

That being a comprehensive summary of the proceedings and argument as presented by the counsel for the parties, in dealing with the appeal, I will deal with one ground after the other. As earlier on indicated, this appeal is premised on two main grounds.

One, that the learned Senior Resident Magistrate erred in revoking the appointment of the appellant and his co - Administrators appointed by



the trial Primary Court on 13/10/2020 as there was no good reasons to do so.

Two, that the Senior Resident Magistrate was not justified in reinstating the respondent as administratrix of the estate in question as the revocation of her appointment as such by the Primary Court was for good reason.

As earlier on pointed out, the decision which is subject of this appeal stems from Probate Revision No. 15 of 2020, which arose from the complaint registered by the respondent to the Hon. Judge in charge who directed administratively the Hon. Resident Magistrate in charge of the Nyamagana District Court to call the record and examine the same, and make revision if he would find some errors to correct.

That was done after two orders which provoked the respondent to register such a complaint. The first order was that, the trial Primary Court on 13/10/2020 revoked her appointment as the administratrix, and appointed on her place, five administrators allegedly from all wives of the deceased on pretext that, each interested party be represented, secondly, the order which closed all the houses pending the new administrators assuming their duties.

To appreciate what happened, it is important to trace albeit briefly the background of this matter as reflected on the record.

As earlier on pointed out, the deceased in this case died intestate, he left wives and children be gotten from six different mothers. At first, the respondent was appointed as a sole administratrix of his estate, but when she was so carrying out her duties, she was objected on the ground that she was not a result of the consensus meeting of the family members and beneficiaries of the estate, also that she was not a neutral party.

Following that complaint, two other administrators were added, one of them being the young brother of the deceased who is the paternal uncle of the children of the deceased, the other one was a spiritual leader of the mosque in which the deceased was worshipping.

These two later added administrators, who were added to work with the respondent resigned from the office of the administrator on the ground that they were not accorded sufficient and necessary assistance and accommodation by some of the beneficiaries. After these two later administrators have opted out, and out of that state of affairs, the court after being approached by the appellant, and after his proposition that five administrators be appointed in the representative capacity who would



actually represent all interested parties including the respondent. It is from that order the complaint arose and revision was actually done.

Now from the record, it goes without saying that beneficiaries of this estate are from different mothers and the record has revealed them to be in irreconcilable antagonism. That was the reason some neutral parties, who included the paternal uncle and religious leader were appointed before they withdrew themselves from administering the estate. That being the case, then the restoration of the respondent alone in the office of the administrator will not work because it has earlier on proved to fail.

In my considered view, the only administratorship which can work is that one with the representatives encompassed with the representation of the interest of all heirs and beneficiaries from all mothers of all children of the deceased. That in my strong view, will take care the interest all beneficiaries including the respondent. Short of that, the appointment of any single administrator or the minority group will not work. I hold so because it has been established that there is no trust between all beneficiaries, unless everyone is represented the administration will be difficult. Alternatively by way of passing, if these five administrator appointed in the representative capacity will be rejected, the only remedy

available will be to appoint the Administrator General as a neutral party with the statutory powers to administer the estate and distribute to the heir. However as there is no any party who asked for that alternative, then let the appellant and his co administrator continue with the job, as the order appointing them was full of wisdom took into account the prevailing circumstance in this case.

That said, I find merit in the appeal in respect of the continuation of the five administrators appointed by the trial Primary Court to administer the estate of the deceased. However, I find no merit in the order closing the estate of the deceased; therefore the same was properly revised by the District Court.

It is also the fact that some of the appointed administrators were not consulted before they were appointed, however, after they became aware, they have never complained for being so appointed. That means by necessary implications, they accepted their appointment and are ready to work together.

For that reason, I find the appeal to be meritorious, it is hereby allowed to the extent explained above, the Administrators appointed by the trial Primary Court on 13/10/2020 continue to administer the estate as so



appointed, and are given four months to collect the estate, pay debt if any, distribute the residue of the estate to the heir and file inventory and final account as required by law.

It is so ordered.

**DATED** at **MWANZA**, this 29<sup>th</sup> day of December, 2020



**J. C. TIGANGA**

**JUDGE**

**29/12/2020**