

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(ARUSHA DISTRICT REGISTRY)
AT ARUSHA**

PC. CIVIL APPEAL NO. 43 OF 2022

(C/F in the District Court of Arusha at Arusha Civil Appeal No. 31 of 2021, original
Probate and administration cause No. 214/2020 Arusha Urban Primary Court)

WILLIAM OTIYOI MOLLEL (the administrator of the estate of the late
Batholomeo Lookaki Mollel) **APPELLANT**

VERSUS

GIBSON LOOKAKI MOLLEL **1ST RESPONDENT**

GRACE ALENDWA..... **2ND RESPONDENT**

JUDGMENT

04/05/2023 & 28/07/2022

GWAE, J

The decision of the District Court of District of Arusha at Arusha (1st appellate court) dated 24th February 2022 appointing one William Otiyoi Mollel (appellant) and one Gibson Lokaki Mollel now the 1st respondent) aggrieved the appellant herein. This appeal is thus the appellant's second bite. He is now challenging the 1st appellate court's decision with the following four grounds of appeal;

1. That, the 1st appellate court erred in law and fact when it appointed one Gibson Lokaki Molle to be the administrator of the estate of the late Batholomeo Lokaki Mollel (deceased) while he is not biological son the deceased who has other children/heirs
2. That, the 1st appellate court erred in law and fact when it appointed one Gibson Lokaki Molle to be the administrator of the estate of the late Batholomeo Lokaki Mollel (deceased) while he is not only the son of the deceased as the deceased who has other children/heirs.
3. That, the 1st appellate court erred in law and fact when it failed to consider that the evidence on record that, the said Gibson Lokaki Mollel was once appointed administrator by his appointment was revoked
4. That, the first appellate court erred in law and in fact when it ruled that the 1st respondent is only heir of the deceased

The saga or dispute between the parties can be traced back from Probate and Administration Cause No. 116 of 2016 before Arusha Urban Primary Court whose ends result on appeal in this court (**Mwenempazi, J**) vide PC. Civil Appeal No. 18 of 2018 whose judgment was delivered on 6th December 2019 directed compliance with decision of the District Court through Civil Appeal No. 2 of 2017 by either filing afresh the case or filing of an appeal to this court.

Consequent to the decision of the Court (**Mwenempazi, J**), the appellant herein filed a petition, registered as Probate and Administration No. 214 of 2020 in the Arusha Urban Primary Court (the trial court) for letters of administration of the estate of the late Bartholomeo Lookaki Mollel who died intestate on the 14th April 2016. However, the appellant's petition before the trial court was objected by the 2nd respondent who had civil marriage with the deceased since 7th day of January 2000. The 2nd respondent was the deceased's wife but their marriage was irreparably broken down by the District Court of law on 19th day of April 2016 through Matrimonial Cause No. 9 of 2014 instituted by the deceased in the Resident Magistrate's court.

The Arusha Resident Magistrate Court granted decree of divorce in favour of the deceased and it went on dividing to matrimonial assets (a mud house with three rooms and the house for leasing) between the 2nd respondent and deceased person by 20% and 80% of the said assets respectively. The judgment and decree of Arusha RM's Court (Jasmin) also declined issuing an order as to maintenance of the 1st respondent on the reason that, he was no longer a child.

The decision of the Resident Magistrate Court dated 19th April 2016 was confirmed by the court (**Mzuna, J**) on 25th September 2019. The

records further plainly reveal that, the appellant is uncle to the deceased, (marehemu ni mdogo wa mrufani kwa baba yake mdogo-the fathers of the appellant and deceased person were brothers).

In this court, Ms. Sarah Lawena and Mr. Ombeni Kimaro represented the appellant and respondents respectively. The parties' counsel sought and obtained leave to argue the appeal by way of written submission. However, I shall consider their rival submission when determining the above grounds of appeal. However, I shall refrain from arguing ground No. 1 of the appeal since the appellant's counsel has abandoned in her submission

In the 2nd and 4th ground, that, the 1st appellate court erred in law and fact when it appointed one Gibson Lokaki Molle to be the administrator of the estate of the late Batholomeo Lokaki Mollel (deceased) while he is not only the son of the deceased as the deceased who has other children/heirs.

Arguing this ground of appeal, Ms. Salar Lawena stated that, the 1st respondent will administer the estate in good faith considering there are other children either fathered or adopted by the deceased in accordance with customary law. The counsel further argued that, the respondents have clear intentions of accumulating properties of the deceased

On the other hand, the respondent's counsel argued that the issue that the deceased adopted other children does not feature in the trial court and first appellate court therefore not entertainable by the court as the 2nd appellate court. The issue whether or not the 1st respondent will discriminate other children of the deceased was not raised and not decided by the lower as rightly argued by Mr. Kimaro. Hence, this court 2nd appellate court cannot therefore be asked to determine it unless it were issue touching jurisdiction issue or limitation of time. This legal position has been consistently stressed by our courts, for instance in **Nurdin Musa Wailu vs. Republic** Criminal Appeal No. 164 of 2004 (unreported) that:

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

See also the case cited by the respondent's counsel **of Richard Majenga vs. Specioza Sylvester**, Civil Appeal No. 208 of 2018 where it was stated that it is the settled principle of the law that at an appellate court level, the court only deals with matters that have been decided upon by the lower courts. As per records, other children were enlisted as deceased's heirs as depicted in Form filled by the appellant and through

both proceedings relating to matrimonial case between the 2nd respondent and deceased as well as Probate and Administration Cause, nothing like complaint that the 1st respondent will deprive other heirs of the estate. Hence this complaint is unfounded. Above all, both respondents have interest in the estate taking into account that the decision of this court **(Mzuna, J)** confirmed the distribution of the matrimonial assets between the 2nd respondent and the deceased.

According to the records, the parties have been dragging in courts for no apparent reasons taking into account that the appellant is neither the deceased's heir nor does he have any interest unlike the respondents who have vibrant interests. The appellant is there only to safeguard the interests of other deceased's heirs. As the appellant is not entitled to the deceased's estate, he cannot therefore challenge the appointment of the ones who have interests in the estate of the deceased. This legal position was correctly demonstrated by the Court of Appeal in **Fatima Fatehali Nazarali Jinah vs. Mohamed Alibhai Kassam** (2016) TLR 262 where it was stated that

"Since the appellant in the present case was neither a beneficiary nor a person entitled to the estate of the deceased, we hold firmly that she could not have appropriately filed an application for revocation."

Perhaps the appellant would use his wisdom to have the deceased's estate distributed to those entitled. I thus hold the view that, the appellant is not entitled to challenge the first appellate Court's appointment of the 1st respondent for an obvious reason that he is entitled to the estate of the late Bartholomeo.

Had the marriage between the 2nd respondent and deceased not broken irreparably on 19th April 2016, the 2nd respondent would be more fit person for being appointed administrator of the estate of the deceased. Since the 1st respondent is the son of the deceased, thus he is more interested person in the deceased's estate and since he is the one in better position to properly protect the interest of the 2nd respondent taken into account the deceased met his demise before division of matrimonial assets between him and the 2nd respondent. I have further examined the impugned judgment of the 1st appellate court but nowhere it is written that the 1st respondent is only heir of the deceased. Hence, the appellant's complaint is unfounded. Consequently, the 2nd and 4th ground of appeal have no merit.

Regarding the 3rd issue, that, the 1st appellate court erred in law and fact when it failed to consider that the said Gibson Lokaki Mollel was once appointed administrator by his appointment was revoked

Having considered the parties rival submission and the records, it is certainly clear that, the appellant and 1st respondent were initially appointed co-administrators of the estate of the deceased. The position is clearly observed through Civil Appeal No. 29 of 2018, original Mtarimonia Cause No. 9 of 2014 where the 1st respondent and appellant were respondents and 2nd respondent was the appellant. The same position is seen through PC. Civil Appeal No. 18 of 2018. I firmly hold the view that, it is not proper to hold that, the previous appointment of the 1st respondent bars him from being re-appointed provided that, he has an interest to save and no evidence whatever exhibiting that, he will squander the deceased person's estate. It is even worse to see the appellant raising this ground of appeal while he was equally appointed an administrator of the deceased's estate as depicted in the said Appeals before this court (PC. Civil Appeal No. 18 of 2018 and Civil Appeal No. 29 of 2018).

It is however, the appellant's argument that, this court be pleased to appoint a neutral party since the appellant and 1st respondent cannot co-exist denoting that they cannot smoothly administer the estate. He bolstered his augment by the decision in **Eliud Philimon vs. Sira Philimon** PC. Civil Appeal No 4 of 2021 (unreported-H.C) where the


or presence of conflicting interests between them. It is at this juncture, proper to have a different and impartial person either appointed by the deceased person's family for the grant of letters of administration by the court or by the court after consultation with the interested persons in the estate.

Consequently, this appeal is allowed to the extent that both the appellant and 1st respondent are disqualified from being administrators of the deceased's estate. The family members of the deceased, Batholomeo Lookaki Mollel to seat as a family and re-appoint another person. Failure to do so the court shall proceed granting letters of the administration to any person whom it deems fit.

It is so ordered.

DATED at **ARUSHA** this 28th July 2023




M. R. GWAE
JUDGE