IN THE HIGH COURT OF TANZANIA

AT SUMBAWANGA

PROBATE AND ADMINISTRATION APPEAL NO. 1 OF 2020

(From Mpanda District Court Appeal No. 1 / 2019, Original Mpanda Urban Primary Court Probate & Administartion Case No. 2/ 2019)

NEEMA HASHIM @ NGAJIRO.....APPELLANT

VERSUS

AGATHA CHARLES AMBAKISYE.....RESPONDENT

JUDGEMENT

28th April – 20th May, 2020

MRANGO, J

The appellant Neema Hashim @ Ngajiro has brought this appeal against the respondent Agatha Charles Ambakisye. This appeal is against the decision of the District Court of Mpanda of which the judgement was delivered in favour of the respondent on 25. 11. 2019 in a Probate Cause No. 1/ 2019. The same is originated from Mpanda Urban Primary Court in administration of estate cause No. 2 of 2019 which delivered the judgement on 25. 04. 2019.

The appellant and the respondent are fighting over appointment for the administration of Estate of the late Paskalina Yosia Sanga who died intestate in 21st of May, 2018.

The brief history of the matter is that, the appellant herein upon the demise of the late Paskalina yosia Sanga, applied for the letter of administration at Mpanda Urban Primary Court. In the course of hearing the said application and before granting of the same, a person namely, Jane Edward Mbogela appeared and contested the application by making an objection to the court so as not to appoint the appellant as she was not a relative of the deceased person. The trial court heard and determined the said objection in favour of the person objecting and proceeded to appoint respondent as administratrix of the deceased Estate instead of the appellant herein after being satisfied with the testimony adduced. In addition, the trial court appointed one Shukuru Killo to join the respondent as a second administrator.

Such decision of the trial court aggrieved the appellant who then lodged an appeal before the District Court of Mpanda (henceforth appellate court). Unfortunately, the appellate court maintained the decision of the trial court on the ground that the testimony as adduced by the appellant

was too weak to convice the appellate court. However, the appellate court revoked the appointment of the court officer as administrator for the ground that he was wrongly appointed and proceeded to confirm the appointment of the appellant.

Again, dissatisfied with the outcome of the appellate court decision, the appellant has preferred this appeal before this court by lodging a petition of appeal comprised of three grounds which are reproduced hereunder;

1. That the first appellate court having found out that the assessors did not participate in giving judgement it erred at law by its failure to nullify both judgement and orders reached by the said trial court.
2. That the first appellate court erred at law by its failure to notice that the evidence adduced by the respondent and his witnesses was full of contradictions and in consistence to sustain the judgement and orders reached.
3. That the first appellate court having found out that the trial court wrongly appointed shaban Mohamed Killo as the administrator of the Estate of the deceased it erred

at law by not dismissing the decision reached by the trial court.

When the appeal was scheduling for hearing before this court, both parties appeared in persons, unrepresented whereas the appellant prayed for the appeal be argued by way of written submission, the respondent had no objection. The court granted the prayer and set a date for each to file the same. The parties filed their respective submission as scheduled.

In supporting this appeal, the Appellant herein has put forward three gounds as contained in his petition of appeal.

She said before starting submitting on the grounds of Appeal she wished to give a brief history of the matter. She narrated that the deceased one PASKALINA YOSIA SANGA who was living alone in her house located at Mpanda town died intestate on the 19th day of May 2018. Following the situation that the deceased was living alone and there was no relative in Mpanda then following the document (correspondence letters) which were retrieved from the deceased house they found letters containing the name of the Appellant one Neema Ngajiro, Rehema Ngajiro and one Adolifina. Effort were made to trace the those relatives of the deceased as a result one Neema Ngajiro the Appellant herein received

information and went to Mpanda and participated in the burial ceremony of the deceased as the deceased was her aunt.

She further stated the appellant here in started administration of the estate process in respect of the deceased and in that case filed Shauri la Mirathi No.2/2019 at the Mpanda Urban Primary Court among other things applying to be appointed the administratix of the estate of her Aunt the late PASKALIA YOSIA SANGA.

She went on saying upon filing the said Probate case there appeared one JANE MBOGELA objecting the appointment of the Appellant herein as administratix alleging that the Appellant is not a relative of the deceased and she is a relative thus eligible to be appointed as administratix. In turn and even without any apparent reason the Trial Urban Primary Court appointed one AGATHA CHARLES AMBAKISYE and SHUKURU KILO to be the administrators of the deceased estate. The Appellant was aggrieved by the said Court decision and filed an appeal to District Court where she lost and then advanced an appeal to this Court.

She then came to argue those grounds of Appeal seriatim in the order as they appear as follows:-

In respect of the 1st ground of appeal which provides that the 1st Appellate Court having found out that the assessors did not participate in giving judgment it erred at law by its failure to nullify both judgment and orders reached by the said Trial Court. The record of the trial court reveals that at the court assessors did not participate in giving judgment but in the judgment it appears that they signed. This is not what transpired in court. The 1st appellate court misdirected on the position of the law in relation to the deliverance of Judgment.

She further argued that according to the provision of **Rule 3(1) (2) and 4(1) of the Magistrate Courts Primary Courts (judgment of the Courts) Rules 1987 GN No. 2 1988** the above said sections provides as follows he quoted;-

> **3(1) where in any proceedings the court has heard all the evidence or matters pertaining to the issues to be determined by the court, the Magistrate shall proceed to consult with the assessors present with the view of reaching a decision of the Court.**
>
> **3(2) if all the members of the court agree on one decision the Magistrate shall proceed to record the decision or Judgment of the Court which shall be signed by all the members.**

4(1) where after consultation in accordance with Rule 3 the issue is determined by the vote of majority, the magistrate shall proceed to record the decision or judgment of the majority which shall be signed by members of the Court.

She further said what has been transpired in the record of the Primary Court does not adhere to the above said provision of the law and it seems most of the Primary Court Magistrate are unaware on the existence of the said law. In this case therefore the trial Magistrate did not consult the members of the court as a result tendered to give a decision which on the eyes of the law is a nullity.

This position has also been discussed by this court when confronted with the scenario like this one in the case of **SUSANA JOSEPH vs WAMBURA IHEMBE [1992] TLR 375**

Whereby among other things the High Court held that;-

'It seems that neither the trial magistrate nor the appellate magistrate is aware of the Magistrates Courts (Primary Courts) (Judgment of Court) Rules, Government Notice No. 2 of 1988. I would particularly draw their attention to Rule 3 thereof which puts an end to the practice of summing up to

the assessors. The assessors are to be consulted for their opinions after the conclusion of the evidence without preliminaries'

She was of the firm view that in the proceedings at the Mpanda Urban Primary Court there is no where the members of the Court (assessors) were consulted which has made the Judgment and the proceedings thereof a nullity.

Coming to the second ground of appeal which provides that the 1st Appellate Court erred at law by its failure to notice that the evidence adduced and his witnesses was full of contradictions and inconsistent to sustain the orders reached. The evidence adduced at the trial Court especially adduced on the Respondent side was full of contradiction that is why even on the decision of the trial Court the Magistrate said, I quote;-

"Barua zilizokutwa ndani kwa marehemu hazitoshi kuthibitisha kama mwombaji alikua damu ya karibu na marehemu. Hata mpingaji naye hayupo karibu sana na marehemu lakini walau kwa uhusiano wa damu ingawa kwa umbali"

She argued that, that was the reasoning of a trial magistrate and was the basis of a decision in this case therefore he appointed the Respondent

and one SHUKUKURU KILO. That means even the Trial Magistrate is not aware of what he is doing he works on assumption. It is obvious that the evidence on the part of the Appellant on how is relating to the deceased is much more heavier than that of the Respondent because in the house of the deceased there were found letters which shows that the appellant is relating to the deceased. Even the evidence tendered shows that those letters were the one used to trace the relative of the deceased that resulted to the Appellant to be informed and she attended the burial ceremony of the deceased. In this evidence the act of the trial Magistrate not appointing the Appellant which was upheld by the appellate magistrate was tainted with irregularities.

In the 3rd ground of Appeal which provides that the 1st Appellate Court having found out that the trial Court wrongly appointed Shaban Mohamed Kilo as the Administrator of the estate of the deceased it erred at law by not dismissing the decision by the said trial Court. In the Record it is unknown why the Trial Magistrate appointed the said Shaban Kilo who is an officer of the Court there is nothing which moves the Court to that effect. The 1st Appellate Court removed the said Shaban Kilo but did not go

further to declare that the whole proceedings and Judgment is a nullity because it has been done on the irregular proceedings.

In this regard therefore, the Trial Court Magistrate and the 1st Appellate Court Magistrate misdirected themselves on the matters pertaining in this case they chose the Respondent who even does not relate with the deceased and that there is no any evidence let say Documentary evidence to that effect. But the evidence in relation to the Appellant is heavier as apart from oral evidence there is also documentary evidence which shows that the Appellant is the relative to the deceased. Thus this appeal ought to be allowed with cost.

She finally considered that this appeal has merits and for the interest of justice this appeal ought to be allowed, the Appellant herein be appointed the Administratix of the estate of the late PASKALIA YOSIA SANGA.

In responding, the respondent said that this is a written submission by the respondent in opposing an appeal by the appellant to show that the appeal brought before this Honourable Court has no merit and ought to be dismissed with costs.

She submitted that for the interest of justice and putting it clear about the history of the deceased in this matter is better to narrate a little. The

deceased Paskalina Yosia Sanga was a Tanzanian woman of Kinga tribe born at Maramba Village of Makete District in the now Njombe Region. The deceased was the first born in her family followed by her only brother one Onia Yosia Sanga who died in 1995 at Mbeya. The deceased and her brother were raised by their aunt, the grandmother of Jane Mbogela after the death of their parents in 1950's. The deceased attended the primary school at Mbeya and nursing college at Ilembula Mission Hospital in Njombe District now Wanging'ombe and was then employed at Mbeya Rufaa Hospital as a midwife nurse in Public Service.

The deceased was then married to Levy Mwakalundwa and got two issues though both of them have joined the heaven choir the first one in 1976 and the second one died in late 1990's. The deceased's husband died in 1985 at their dwelling home at Majengo in Mbeya City and it sparked matrimonial conflicts between her and relatives of the her husband causing the deceased migration to Sumbawanga then to Mpanda District avoiding the chaos and was not regularly contacting with her relatives in Mbeya. And the deceased continued to work in Public Service as a nurse at Mpanda District Hospital and lived in Mpanda ever since up to her retirement in Public Service the year 2000.

She went on saying the deceased managed to acquire properties *inter alia* in Mbeya a matrimonial house at Majengo as fore stated above and in Mpanda two houses one at Mjimwema Street and another one at Kotazi Street. Nevertheless the deceased has not survived with any child other than her niece one Agatha Charles Ambakisye the respondent who is the only child and daughter of the deceased's brother Onia Yosia Sanga. The deceased did not want to regularly contact any of her relatives in Mbeya other than herself visiting them during annual leaves. Even upon her death on 19th May 2018 no blood relative attended her burial ceremony as no information was timely passed to them about her death. But the Mjimwema Mtaa Committee managed to gather information through documents and reached the relatives of the deceased including Jane Mbogela and the respondent.

Having narrated in short the history of the deceased she then turn to grounds of appeal and responded as hereunder stated;

The general principle in civil litigation that he who alleges or asserts must prove on a balance of probabilities on the existence of material facts by adducing cogent evidence to the satisfaction of the court. This evidence

is well captured under the provisions of **Section 110(1) and (2) of the Tanzania Evidence Act [Cap 6 R.E. 2002]** which provides that;

> *"(1) whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. (2) when a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person"*

Also, the Court of Appeal of Tanzania sitting at Dar es Salaam in **The Attorney General and 2 Others vs. Eligi Edward Massawe, Civil Appeal No.86 of 2002, (Unreported)** has described this burden of proof on the shoulder of the plaintiff to be a heavy one on balance of probability and the Court said at page 7;

> *"We are satisfied that the plaintiffs did not establish the claim of subsistence allowance on the balance of probabilities because they adduced no evidence at all to substantiate the same at the trial..."*

On the first ground about the involvement of court assessors the appellant has not proved how were the Court Assessors not involved in the matter during trial at the Primary Court. The provisions of the

Magistrate's Court Act, Cap 11 of the laws of Tanzania and its rules well elaborate particularly **Rule 3(2) of GN. No.2 of 1988**. The rule provides that upon agreement reached between the members the Magistrate shall proceed to record the decision or judgment of the Court which shall be signed by all of them. This was the case in the decision of this matter at Trial Court and no single evidence is shown the appellant that the members did not agree to what they signed as the decision of the Court. Nevertheless the rules have not pointed out any other modality to be followed other than upon agreement and signing of the members to the decision reached.

Turning on the second ground of appeal as reiterated above by the respondent the appellant has failed to pin point the inconsistence and contradictions of the evidence adduced by the respondent. In the quoted page 15 of the Trial Court judgment the Trial Magistrate was narrating on the relationship between the objector Jane Mbogela and not the respondent. Thus with due respect the appellant should not mislead this Honourable Court in this matter. The mere communication letters found in the deceased's house cannot legalise the appellant to be the relative of the deceased. Moreover, the appellant has never been the relative of the

deceased neither she does not know any relative of the deceased who are living in Mbeya and their originality.

Lastly, arguing on the third ground of appeal the appellate court was smart enough to remove one Shukuru Mohamed Killo a Court Officer from administration of the deceased's estate as the Trial Court did not put clear on the reasons of his appointment. But reason cannot amount to declare the whole proceedings and judgment to be nullity. And if that is the case the appellant should not pray to be appointed as the administratix rather to declare the whole proceedings to start *denovo*. The evidence adduced by the respondent was tight enough to declare her the administratix of the estates of the late Paskalia Yosia Sanga. The proceedings at any stage did not show elements of lies neither irregularities by the respondent and her all witnesses. Thus declaring the whole proceedings and judgment of the Trial Court to be nullity it can amount to unprecedented injustice.

She concluded with a view that in the totality as narrated herein above it is her humble submission that the appellant failed to prove her case to the standards required y the law. Thus she said this appeal deserves to fail, the decision by the first appellate court be upheld and this appeal be dismissed with costs.

The question for this court to determine is whether the appeal has merit.

This court now propose to address the grounds of appeal as contained in the petition of appeal as follows;

As regard the allegation that assessors did not participate in giving judgement, the respondent argued that the trial magistrate faulted the **Provision of Rule 3(1) (2) and 4 (1) of the Magistrate Courts (Primary Judgement of the Courts) Rules 1987 GN. No. 2 of 1988** for failure to consult members of the Court as a result rendered the decision a nullity.

I have subjected the trial court's record under my strict scrutiny and found that the hearing of the probate cause No. 2 of 2019 was without doubt involved two assessors, namely Benezeth and Ndasi, who ultimately signed the delivered judgement on 25. 04. 2020.

The answer to the issue as raised by the appellant lies in **Rule 3 (1) and (2) of the Magistrate Court's (Primary Courts Judgement of Court) Rules, 1987 GN. No. 2 of 1988** as cited to me by the appellant above in her written submission. It provides as follows.

3(1) where in any proceedings the court has heard

all the evidence or matters pertaining to the issues to be determined by the court, the Magistrate shall proceed to consult with the assessors present with the view of reaching a decision of the Court.

3(2) if all the members of the court agree on one decision the Magistrate shall proceed to record the decision or Judgment of the Court which shall be signed by all the members. *[underlined is mine]*

3(3) For the avoidance of doubt a magistrate shall not, in lieu of or in addition to, the consultations referred to in sub rule (1) of this Rule, be entitled to sum up to other members of the Court"

The rule cited above does not demand the assessors to give their opinion on an issue before the court. It transpired that assessors are neither required to give their opinions nor have their opinions recorded by the magistrate.

To make the point clear, according to **rule 3(2)** above, all members of the court are required to participate in the decision making process of the court. Needless to say, assessors are members of the court, co-equal with the magistrate. After they have completed hearing the evidence from the parties, the stage is then set for the magistrate to consult with the assessors in order to reach a decision of the court. That entails that before

the court reaches a decision, there will be a conference of the members of the court to deliberate on the issues before them and reach a decision, which thereafter be signed by all members of the court as it was done in the trial court. The position was well articulated in the Court of Appeal case of **Neli Manase Foya versus Damian Mlinga, Civil Appeal No. 25 of 2002** at Arusha.

Therefore, the contention as raised by the appellant that Primary Court did not adhere to the provision of the law is without merit.

As regard the ground that the evidence adduced and his witnesses was full of contradictions and inconsistence. The appellant argued that the act of the presiding trial magistrate and the appellate magistrate to disregard the letter as found in the house of the deceased which show that the appellant is relating with the deceased, has depicted contradictions. However, the appellant has failed to pin point such contradictions and inconsistence of the evidence as adduced by witnesses to the knowledge of this court as rightly argued by the advocate for the respondent so as the court can deal with it promptly. The issue of inconsistences and contradictions of testimonies by witnesses was well addressed in the case

of **Mohamed Said Matola vs. Republic [1995] TLR 3** where it was observed that;

> *"Where the testimonies by the witnesses contain inconsistences and contradiction, the court had a duty to address the inconsistences and try to resolve them where possible, else the court had to decide whether the inconsistences and contradictions are only minor or whether they go to the root of the matter"*

Coming to our case, what was highlighted by the appellant as to be contradictions and inconsistences is the reasoning of the trial magistrate and the basis upon which he grounded his decision, which to my view is not contradictions. This ground by the appellant also is devoid of merit.

Lastly, as to the ground that the appellate court could have dismissed the entire trial court decision as it wrongly appointed Shaban Killo as a co administrator of the estate of the deceased. The appellate court was right to revoke the appointment of the court officer as the co administrator of the estate deceased. Such revocation does not necessary make the entire proceedings to become nullity. The appointment of one administrator

suffices for the undertaking otherwise is credibility is to be questioned so as to add another administrator.

In the light of the foregoing discussion, this court found that the appeal by the appellant has no merit. The same is dismissed with costs.

Order accordingly

D. E. MRANGO

JUDGE

20. 05. 2020

Date - 20.05.2020

Coram - Hon. D.E. Mrango – J.

Appellant | Both Present in persons

Respondent |

B/C - Mr. A.K. Sichilima – SRMA

COURT: Judgment delivered today the 20th May, 2020 in presence of both the parties in persons.

Right of appeal explained.

D.E. MRANGO

JUDGE

20.05.2020