**IN THE HIGH COURT OF TANZANIA**

**TEMEKE SUB-REGISTRY**

**(ONE STOP JUDICIAL CENTRE)**

**CIVIL APPEAL NO. 17 OF 2022**

(Originating from Probate Cause No. 53 of 2021 of Kinondoni District Court).

**ADELICIOUS CRISPINE NGOWI ..... APPELANT**

**VERSUS**

**IBRAHIM MOHAMED NAWAB .....RESPONDENT**

**JUDGMENT**

Date of last order: 21/06/2023
Date of judgment: 24/07/2023

**OMARI J.,**

This Appeal arises from the Probate and Administration Cause No. 53 of 2021 at Kinondoni District Court where in the Appellant petitioned for the letters of administration of the estate of the late Aurelia Chrispin Nawabu, who is her sister. Ibrahim Mohamed Nawab, the husband of the deceased filed a caveat objecting the Petitioner as a stranger to the deceased's estate, stating he had lived with the deceased for 26 years and all the properties have been found through their joint efforts also because they have not been blessed with a child in their marriage he is the only heir and the right person to administer the assets of the deceased.

The district court appointed him to be the Administrator of the estate. It stated that the brothers and sisters of the deceased as remote beneficiaries are

entitled to receive a portion of the deceased's personal non-matrimonial assets which are bank accounts and employment benefits. The Appellant was dissatisfied with that decision, so she appealed to this court on the following grounds:

1. That trial magistrate erred in law and fact by failure to determine the applicable law on the estate of the deceased hence reached into wrong conclusions and erroneous decision
2. That the trial magistrate erred in law and fact by appointing the Caveator as administrator of the estate of the deceased despite not being selected by any clan meeting and the rival relationship he has with other heirs to the estate.
3. That the trial magistrate failed to acknowledge proper shares of the beneficiaries to the estate as illustrated under the Indian succession act.
4. That trial magistrate erred in law and fact by distributing shares of the estate to the beneficiaries without legal justification, the role reserved for the administrator of the estate.
5. That trial magistrate erred in law and fact by declaring Landed properties of the estate of the deceased as matrimonial properties and that they were acquired jointly, with no evidence on the record vindicating the same whereas this is probate and not matrimonial cause.

6. That trial magistrate erred in law and fact by ruling that the landed properties were jointly acquired and owned by the caveator and the deceased while evidence on record suggest the properties were exclusively owned by the deceased.
7. That trial magistrate failed to interpret the evidence presented in court and relied on the weak evidence adduced in the court by the caveator contrary to the rules of evidence.
8. That trial magistrate has failed consider the final submissions of advocates for the parties despite an order to file final submissions by the honourable trial court.

On the date set for hearing the Appellant was represented by Fratern Munale, learned advocate and the Respondent had the services of Samson Joseph Nnko, also learned advocate. The appeal was disposed by way of written submissions.

Before analysing the grounds of appeal, two points raised in the Respondent's submission need to be determined. The first one is that the Appellant has no *locus standi*. The Respondent's counsel submitted that the Appellant has no *locus standi* in both trial court and before this appellate court. He asserted

that before a court make its decision it must contemplate that the parties suing or appealing has any interest or *locus standi*. The counsel cited this court's decision in **Mary Tuvate v. Grace Mwambeja and Mwabha Andrea Mwasote,** Land Appeal No. 42 of 2019 where the term was extensively discussed.

In response the Appellant's counsel contended that the first point of law raised is devoid of merit for the reason that it was not raised in the trial court though this court is not precluded from determining it. He argued that by virtue of section 33 of the Probate and Administration of Estates Act, Cap 352 R.E 2019 (the PAEA) the law provides on who maybe be granted with letters of administration of estates of the deceased and, where a court has to appoint any other person it will consider the amount of interest, safety of the estate and probability of the estate been properly administered. Under these circumstances anyone can apply for letters of administration and be granted as long as they fit into the circumstances. He added that the proceedings in the trial court turned into a normal civil suit by virtue of section 52(b) of the PAEA, therefore, the judgment therefrom can be appealed by the parties.

Moreover, all the cases cited by the respondent are not applicable in the circumstances of this case. In conclusion on the first point he stated that the

Respondent has failed to show how the Appellant has no *locu standi* based on the circumstances.

As regards this contention it is my considered view that as rightly submitted by the Appellant's counsel the Appellant became a party to the proceedings by virtue of her seeking to establish she has interest in the estate and when she Petitioned for letters of administration in the trial court, albeit unsuccessful. It is trite law that the decision can be appealed from. However, other than reproducing long quotations from the case of **Mary Tuvate v. Grace Mwambeja and Mwabha Andrea Mwasote** (supra) the Respondent's counsel has done a poor job of convincing this court how the Appellant is not with *locus standi.* Thus, this point is overruled.

The second point of law is on the application of the Indian Succession Act 1865 (the ISA 1865) in the administration of the deceased's estate; however, I shall not go into this this point for I do not see it as a point of law that can be determined in this manner.

Segueing back into the parties' submissions on the grounds of appeal and the record the issue for this court to determine is whether this Appeal is meritorious or otherwise.

The Appellant's counsel abandoned her eighth ground of appeal and sought to consolidate the third and fourth grounds of appeal into a single ground and the fifth and sixth into a single ground, basically leaving five grounds of appeal were submitted on.

On the first ground the counsel for the Appellant submitted that the trial magistrate erred in law and fact by failure to determine the applicable law hence reached into wrong conclusion and erroneous decision. He avered that the position of the law is that before a court determine any issue in a contentious proceeding in respect of the estate of the deceased it has to determine the law applicable in the administration of that estate and the case of **Re Innocent Mbilinyi** 1969[HCD] 283 which was restated by this court in the case of **Benson Benjamin Mengi and Others v. Abdiel Regnald Mengi and Another,** Probate and Administration Cause No. 29 of 2019. Counsel stated that in the present case at page 5 of the judgment the trial magistrate started to determine issues without determining the law applicable. He stated further that the position demonstrated under section 33(1) of the PAEA is that the court is at discretion to appoint administrator who according to the rules of distribution would get a share on the estate, and the same is amplified under section 88 of the PAEA, that the court to be satisfied in the law applicable according to the intentions of the deceased,

however, the trial magistrate did not adhere to it, therefore this being a fatal irregularity it qualifies to nullify the district court's decision.

In response to the first ground of appeal the Respondent through counsel submitted that the learned magistrate clearly adhered to the law as he followed the procedure prescribed in section 59 of the PAEA read together with Rule 82 of the Probate Rules 1963 as well as section 52 of the PAEA. He maintained that none of the parties ever introduced the question of the law to be applied as was in the case of **Re Innocent Mbilinyi** (supra)and that of **Benson Benjamin Mengi and Others v. Abdiel Regnald Mengi and Another** (supra). In both cases the issue of the law applicable arose as an issue to be determined due to the nature of the cases, this was not so in the case at hand. I am of the considered view that this was not a matter that was determined or at issue in the trial court thus cannot be raised on appeal. In the case of **Kassim Salum Mnyukwa v. The Republic,** Criminal Appeal No. 405 of 2019 and that of **Godfrey Wilson v. The Republic,** Criminal Appeal No. 168 of 2019 the court was of the view that a matter that was not at issue at the trial cannot be brought up at the appeal stage, see also **Richard Majenga vs Specioza Sylivester**, Civil Appeal No. 208 of 2018 where the Court of Appeal held:

*'It is a settled principle of the law that at an appellate level the court only deals with matters that have been decided upon by the lower court.'*

Therefore, the Appellant's first ground of appeal is dismissed for the reasons already stated.

The second ground of the appeal is to the effect that the trial magistrate appointed the Caveator as the Administrator despite not being selected by any clan meeting and the rival relationship he has with other heirs. Counsel submitted that under section 33(1) of the PAEA, appointment of the administrator of the estate may be granted to any person who is entitled to the share of the estate whether partly or whole. Therefore, according to the ISA 1865, the Appellant as the sister of the deseased is an heir to the estate entitled to the same hence she is qualified under the law to be appointed an administratrix of the said estate. Fortifying his argument with reference to the Court of Appeal case of **Joseph Shumbusho v. Mary Grace Tigerwa and Others**, Civil Appeal No 138 of 2016 counsel argued that in this case there is no reasons as to why the trial magistrate refused to appoint the Appellant as Administratrix despite been selected by the clan meeting.

He argued that, instead the magistrate erroneously used the principle that death of one spouse the property devolves to the surviving spouse if the

property owned jointly. This according to him was done without any evidence that the properties are matrimonial and without assessing the contribution of the Respondent to said properties before appointing the Respondent. Moreover, the record depicts it was also testified by the Appellant that Respondent petitioned for letters of administration without involving other heirs and attempted to distribute the estate to himself as per Exhibit P-3, therefore evidencing that he is unfair and the estate is not safe in his hands.

Submitting on the second ground of appeal counsel for the Respondent argued that it is a trite but true observation that section 33(1) of the PAEA grants that appointment of an administrator of the estate may be granted to any person who is entitled to a share on the estate whether partly or whole. The Appellant being a sister of the deceased claims that according to the ISA 1865 she is an heir and has been all the time trying to tie herself to the property of the deceased. However, counsel argues that she has failed to provide any provisions of the law which supports her contention. He avers that he has been too unable to find one and the case of **Joseph Shumbusho v. Mary Grace Tigerwa and Others**(supra) cited by the Appellant does not support that position. He then went on to vehemently argue that the Respondent by virtue of the ISA 1865 section 20, 21 and 22 and 24 and consideration of degrees of consanguinity, lineal consanguinity and collateral

consanguinity and that he and his wife not having a descendant then the Table of Consanguinity under Item 3 would apply to their estate.

On the argument that the magistrate should have appointed the Appellant after being selected by the clan meeting is erroneous. Counsel submitted that the said meeting was conducted by the members of Ngowi clan, the deceased became a member of the Respondent's clan by virtue of her marriage and the Ngowi clan has no authority over matters of Nawab clan unless invited by them. Therefore, the Respondent argued that the magistrate acted properly by declining the Appellant to be administratrix of the disputed estate.

He went on to argue that the Probate Rules 1963 specifically, Rule 39 sets forth the conditions to be observed by any Petitioner for letters of administration with regards to documents to be attached to the Petition, the minutes of the clan meeting is not among the listed document. The Respondent's counsel also made reference to this court's decision in **In The Matter Of the Estate of the Late John Peter Silveira and In the Matter Of Petition for Grant of Probate of the Late John Peter Silveira by Francisca Haruweru Silveira, and In The Matter Of Caveat by Gerald Francis Silveira And Solomon John Silveira,** Probate and Administration Cause No. 23 and 24 of 2019 wherein this court decided that the Petitioner

for letters of administration needs the consent of the heirs and not minutes from a clan meeting. Counsel concluded that the trial court's judgment could not be faulted on this ground.

It is my considered view that the Appellant is mistaken as indeed as provided in **In The Matter Of the Estate of the Late John Peter Silveira and In the Matter Of Petition for Grant of Probate of the Late John Peter Silveira by Francisca Haruweru Silveira, and In The Matter Of Caveat by Gerald Francis Silveira And Solomon John Silveira** (supra) and many other decisions there is no requirement of a person being nominated by a clan meeting for them to be granted letters of administration. Furthermore, the Respondent raises an interesting point that the clan that met and nominated the Appellant was the Ngowi clan and not that of Nawab. And, that the deceased had become a member of the Nawab clan by virtue of marriage. However, I reserve discussion on this point for a later date. For now, it suffices to say the trial court cannot be faulted for appointing the Respondent whilst he had no minutes of the clan/family meeting.

On the third ground which is the consolidated third and fourth grounds of appeal the Appellant's counsel submitted that in the judgment at pages 7 and 8 the magistrate distributed the shares to the heirs by specifically mentioning

that the relatives of the deceased should only get money in the bank account and employment benefits and all landed properties be devolved to the Respondent.

Therefore, according to counsel the magistrate distributed the estate and limited the heirs to inherit. Counsel argued that the law under section 108(1) of the PAEA is that, the duty to collect and distribute the estate to the heirs is only reserved to the Administrator and not the court also citing the Court of Appeal's decision in the case of **Monica Nyamakare Jigamba v. Mugeta Bwire Bhakome and another,** Civil Application No. 199/01 of 2019. Counsel added that in the case at hand the deceased professed Christianity therefore the law applicable in accordance to her mode of life is the ISA 1865, that is where the proper shares of the heirs should be ascertained if the question is posed to the court's determination.

Resisting the third ground of appeal as consolidated the Respondent's counsel argued that what the magistrate did was to order the Administrator to divide the property to beneficiaries and not distributing the estate, thus this is a false accusation. On the Appellant's assertion that the trial magistrate failed to acknowledge proper shares of the beneficiaries as per the ISA 1865 the Respondent counsel stressed that the Appellant is not aware and might not

have seen let alone read the ISA 1865. In the light of the case of **Juma Rhisi Nyanyange v. Shekhe Faris** [1999] TLR 29 he argued that, the court held that property jointly owned between spouses, death of one spouse the property devolves to the surviving spouse, which is also buttressed by section 26 and section 43 of the ISA 1865.

The Respondent's submission disputed the findings by the trial magistrate that the brothers and sisters of the deceased are remote beneficiaries of the deceased estate deserving some shares in form of personal estate of the deceased. The counsel claimed that the current trend of distributing proceeds in law is to surviving spouse, their children and the surviving parents if any. In this case both parents of the deceased were deceased and the union with the respondent was not blessed with any issue. The surviving spouse, in law is the sole heir to his wife's property even employment benefits.

Starting with the argument that the district court magistrate was wrong to distribute the assets of the deceased to the heirs, records in the district court judgment shows the learned magistrate stated that he recognized the sisters and brothers of the deceased as remote beneficiaries, thus the siblings deserved to get a share in the deceased's personal properties, that is bank accounts and other employment benefits. This, in my considered view does

not fit the descriptor of distribution of the deceased properties or estate. It is clear that there was a dispute regarding the properties forming part of the estate as was the issue of who are the entitled beneficiaries and the court was supposed to decide on that, and in the end that is what the court did then it directed the administrator to distribute them to the heirs for the court does not have powers to distribute the estate of a deceased person. This position was propounded in the case of **Mahuza Joseph Mbiso v. Eglah George Makasi**, Probate Appeal No, 1 of 2015. it was state that;

> *'Courts have no power to distribute the estate of a deceased person, the power for distribution is vested to the administrator of the deceased estate under the Probate and Administration Act, Cap. 352 ... The District Court after it found that the disputed house is the property of the deceased then it should let the administrator to perform its function.'*

In that regard I also find this ground of appeal as lacking in merit since the court did not distribute any property rather it determined the issues as regards to which assets were part of the estate and who are the heirs entitled then went on to order the Administrator appointed to divide the estate to the heirs entitled.

With regard to the proper shares of the heirs the Appellant was of the view that the court failed to acknowledge proper shares of the beneficiaries with respect to the ISA 1865. On the other hand the Respondent avers that when property is jointly owned and one of the spouse dies, the right person to inherit is the deceased's widow. He has referred to the case of **Juma Rhisi Nyanyange v. Shekhe Faris** (supra) and section 26 and section 43 of the ISA 1865. He stated further that the court was wrong to say that the deceased's siblings are remote beneficiaries, as a matter of fact they did not deserve the proceeds in bank accounts and employment benefits. The court in arriving at the conclusion it did wad led by the evidence adduced by the parties and recognized the deceased's siblings as remote beneficiaries who deserve some share from her personal properties. I see no fault in this there being no one that is being disinherited by the said finding.

On ground five and six which were consolidated to become the fourth ground of appeal, the counsel for the Appellant disputes the trial magistrates' finding at page 6 of the judgment that the landed properties listed are jointly acquired by the deceased and the Respondent, hence they are matrimonial property. He avers that the Respondent's affidavit filed on 06 September, 2021 deponed under paragraph 9(a) that the properties are exclusively owned by his deceased wife and there was no anywhere he pleaded the existence of

matrimonial properties or any jointly acquired matrimonial property thus the same cannot be an issue to be considered by the court as the trial magistrate did on page 2 of the judgment by adding what was not in the pleadings. He maintained that the law is settled, parties are bound by their pleadings unless they acquire leave to amend them but the Respondent never amended paragraph 9(a) in the Supplementary Affidavit to support Caveat, therefore the Petitioner was taken by surprise by the issue of matrimonial properties.

The Appellant's submission also contended that the Respondent did not establish or prove facts by tendering any evidence to ascertain if at all the said properties are matrimonial. To support his contention, counsel cited the case of **Nacky Esther Nyange v. Mihayo Marijani Wilmore**, Civil Appeal No. 169 Of 2019 where the Court of Appeal discussed the requirement of proof as regards matrimonial property to cement his argument. Thus, he argued that the trial magistrate erred to rule that the landed properties were matrimonial.

Counsel concluded that as held in **Benson Benjamini Mengi and Others v. Abdiel Reginald Mengi and Another** (supra) that the law is certain that if the properties are matrimonial, the share of the surviving spouse should be

ascertained so that the share of the deceased could be put on the estate and be administered.

Submitting on the fourth ground of appeal the counsel for the Respondent contended that what the Appellant did was to twist the words to favour her illegal discourse and more lies. The Respondent's counsel submitted that this was discovered through perusal of the court file that there was allegation that the deceased's estate was individually owned and she left no survivor with life interest over her estate. Since it was in the Appellant's Affidavit the Respondent had to produce evidence to show his relationship to the deceased and the estate which was that of a husband and wife.

With regard to the fourth ground of appeal the Respondent contended that PW1 (the Appellant) testified that she was close with the deceased therefore she knows all her properties. She also acknowledged the Respondent as the deceased's' widower and admitted that he was living with his wife until her death. However, the Appellant did not produce any document to show that her deceased sister had property other than one in the marriage with the Respondent. At page 4 and page 5 of the trial courts judgment, the Respondent (DW1) testified that after marrying the deceased in 1988 they lived together happily for 26 years, until her death. He testified on how they

lived and the properties they acquired, there was no evidence that contravened this testimony. The same also applies to the testimony of DW2 one Rodgers Acquirine Tarimo.

As regards to the deceased's estate being individually owned, the records of the lower court depict that paragraph 9(a)of the Respondent's Affidavit was to the effect that he was surprised to get the information that *the deceased's* estate was individually owned by the deceased and left no survivors with life interest over her estate which the Appellant had in paragraph 8 of her Counter Affidavit. It is certain that the Respondent was disputing that allegation, he did not state that the deceased owned the properties in the said estate alone. It is my view that the Appellant on the other hand misconceived the contents of that paragraph as such the assertion is unjustified. Thus, the consolidated fourth ground of appeal also fails for lacking merit.

On the seventh ground of appeal which has now become the fifth and last ground, it was the submission of the Appellant's counsel that the trial magistrate failed to interpret the evidence presented in the court. He supported his argument by citing section 110 of the Evidence Act, Cap 6, R.E 2022 which provides that who alleges a fact and wants judgment in his favour must prove the same.

He also went on to submit that the law directs further that the burden of proof never shifts to the other party until who alleges the existence of a fact establishes the same as it was held in the Court of Appeal case of **Paulina Samson Ndawavya v. Theresia Madaha**, Civil Appeal No 45 Of 2017. Therefore, the Appellant argued that the court should have not required them to prove that the landed properties are matrimonial properties yet it was the Respondent who was alleging that and did not tender anything to prove ownership of the properties. Counsel also added that in his Affidavit, paragraph 9(a) the Respondent affirmed that the deceased estate is individually owned and left no survivor with life interest over the estate therefore, since an Affidavit amounts to pleadings and parties are bound by their pleadings it is evident that the estate is individually owned as expounded in the case of **Samwel Kimaro v. Hidaya Didas,** Civil Appeal No. 271 of 2018.

The Respondent's counsel disputed the Appellant's contention that the trial magistrate failed to interpret the evidence presented in court and relied on weak evidence adduced by the Respondent. He argued that it is the Appellant who claims to have right on her deceased sister's estate, also she is the one alleged that her sister owned property individually in paragraph 9 of her

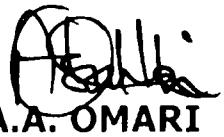
Affidavit therefore the burden of proof is on her and not that of the Respondent.

He fortified his argument with reference to the Court of Appeal's decision in the case of **Paulina Samson Ndawavya v. Theresia Thomas Madaha,** Civil Appeal No. 45 Of 2017 and section 52 (b) of the PAEA which makes him the defendant in the suit thus the burden of proof lies with the Appellant something that she has avoided and vested to the Respondent.

In the trial courts proceedings, it appears that the Respondent testified they owned the property together with the deceased, they also had joint accounts. He testified on how they acquired the landed properties after their marriage. The district court considered the Respondent's testimony and reached a conclusion that the properties in question are matrimonial. Therefore, the Appellant's contention that Respondent did not prove anything regards the properties in question lacks merit and consequently this ground of appeal fails.

Based on what I have elucidated on above, all the grounds of appeal fail, consequently the Appeal is dismissed, the decision of the District Court of Kinondoni is upheld and the Respondent who is the Administrator of the estate of the late Aurelia Chrispine Nawab is ordered to file in the trial court an

inventory of the estate within 120 days of the date of this judgment. I make no order as to costs.

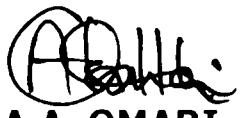


**A.A. OMARI**

**JUDGE**

**24/07/2023**

Ruling delivered and dated 24th day of July, 2023.



**A.A. OMARI**

**JUDGE**

**24/07/2023**