

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**TEMEKE SUB-REGISTRY**

**(ONE STOP JUDICIAL CENTRE)**

**AT TEMEKE**

**PC CIVIL APPEAL NO. 18 OF 2023**

**ZAITUNI HUSSEIN NASSORO (administratrix of the**

**Estate of Nassoro Laizer.....APPELLANT**

**VERSUS**

**ZAYDA MOHAMMED MANSOUR (administratrix of the**

**Estate of Nassoro Laizer .....RESPONDENT**

*(From the decision of the District Court of Temeke, One Stop Judicial Centre at Temeke)*

*(Msafiri, PRM)*

*dated 24<sup>th</sup> February 2023*

*in*

*Probate Appeal No. 49 of 2022*

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**JUDGEMENT**

12<sup>th</sup> September & 16<sup>th</sup> October 2023

**Rwizile, J.**

The appellant, **ZAITUNI HUSSEIN NASSORO** appeared in the Primary Court of Kawe (the trial Court) with a prayer to be appointed as administratrix of the estate of her late father Hussein Nassoro Laizer. Before the appointment, the respondent **ZAYDA MOHAMMED MANSOUR** entered a caveat objecting inclusion of some of the properties

to the deceased's estates subject to distribution among rightful heirs. The trial court heard the matter and dismissed the caveat. The said decision discontented the respondent who thereafter appealed to the District Court which decided in her favor.

Aggrieved by the said findings, the appellant preferred this appeal armed with eight grounds of appeal faulting the first appellate court in the following ;

- 1. The Honourable District Court Magistrate erred in law and facts in determining new matters which were not raised and determined by the Trial Primary Court of Kawe.*
- 2. The Honourable District Court Magistrate erred in law and facts by evaluating new evidence without giving the parties an opportunity to be heard on the same.*
- 3. The Honourable District Court Magistrate erred in law and facts by holding that on record there was evidence of inventories, property tax demand note, and even the form of Maadili of the deceased proving that the landed properties on plot No. 311/6 Block KK Oloirien at Arusha, Plot No. 292 with Title No. KBM/KBM/943 belong to the respondent, the facts are not true, and neither has its veracity ever been tested on the evidence in the Trial Primary Court nor the District Court.*
- 4. The Honourable District Court Magistrate erred in law and facts by holding prematurely that the respondent and her daughter were denied rights to inherit from the deceased's estate.*

- 5. The Honourable District Court Magistrate erred in law and facts by directing the administrator to divide the remaining properties of the deceased to all legal heirs while **ipso facto** there is no duly and properly appointed administrator of the estate of the late Hussein Nassoro Laizer.*
- 6. The Honourable District Court Magistrate erred in law in determining ownership of the landed properties of the Respondent without prerequisite jurisdiction.*
- 7. The Honourable District Court Magistrate erred in law and facts by holding that the trial Primary Court Magistrate erred in law, assuming the duty of the administrator of the estate.*
- 8. The Honourable District Court Magistrate erred in law and facts by improperly failing to reevaluate evidence on record.*

When this appeal was called on for hearing, the appellant was present in person and represented by Mr. Opanda learned advocate whereas the respondent enjoyed legal representation of Mr. Paul Patience learned advocate. The appeal was argued by way of written submissions. I truly commend learned advocates for their helpful submissions.

On the first ground of appeal, Mr. Opanda argued that it is on record that the title deed in plot No.311/6 Block KK at Arusha had never been tendered and admitted as an exhibit before the trial Court. According to the appellant's counsel, the matter was surprisingly raised in the District Court. He added further that Plot No. 311 Block KK is not among the properties listed on pages 7 and 8 of the proceedings.

On that note, Mr. Opanda was of the view that the District Court being the 1<sup>st</sup> appellate court lacked requisite jurisdiction to entertain the matter which was not determined by the trial court. The counsel referred this court to the case of **Lista Chalo vs. The Republic**, Criminal Appeal No. 220 of 2017, CAT, on page 9 where it was insisted that the appellate court cannot decide on a point that has not been decided by the court from which appeal the emanates.

On the 2<sup>nd</sup> ground of appeal, Mr. Opanda submitted that the District Court which is mandated to evaluate new evidence after being accorded the parties with the opportunity of the right to be heard failed to reevaluate the evidence adduced in respect of the property at OLEIRIEN Arusha claiming that, the plot was not one among the respondent's documentary evidence before the trial court and that there was no certificate of title tendered by the respondent proving ownership. Therefore, it was the argument by Mr. Opanda that, the deceased owned two houses in Plot No. 311/6, Block KK at Arusha hence the subject of the estate of the late Hussein Nassoro.

Arguing on the 3<sup>rd</sup> ground, Mr, Opanda submitted that the certificate of title of the respondent as held by the District Court was not tendered and its veracity was not tested on evidence by parties, particularly Plot. No. 311/6 Block KK Oleirien at Arusha.

He wondered how the District Court considered the said plot without any exhibit to prove it. Substantiating his argument, Mr. Opanda cited the case of **Juma Idd@ Dude vs. The Republic**, Criminal Appeal No. 558 of 2020, CAT. On the same strength, the appellant's counsel cited the provisions of sections 110 and 111 of the Evidence Act [Cap 6 R.E 2019] and the case of **Antony M. Masanga vs Penina (mama Mgesi) & Lucia (Mama Anna)**, Civil Appeal No. 118 of 2014, as cited in the case of **Geita Gold Mining Ltd and Managing Director GGM vs. Ignas Athanas**, Civil Appeal No. 227 of 2017, CAT.

On the 4<sup>th</sup>, 5<sup>th</sup>, and 7<sup>th</sup> grounds of appeal, Mr. Opanda argued them together and pointed out that, up to this moment no administrator is appointed to administer the estate of the late Hussein Nassoro. He said neither the appellant nor the respondent had been appointed the administratrix of the estate of the deceased by a probate court. He insisted that Zaituni Hussein and Zayder Mohamed Mansour were appointed interim administrators *[pendente lite]*. He thus challenged the 1<sup>st</sup> appellate court to determine the matter of who was the rightful heir which was not yet before him as there was no administratrix appointed by the court to administer the said estate.

On the 6<sup>th</sup> ground, the appellant's counsel argued that the District Court being an ordinary court determined the matter without jurisdiction

because the land disputes are in the domain of the land courts as stipulated under Section 3(1)(2) of the Land Disputes Courts Act, [ Cap 216 R.E 2019].

Arguing the 8<sup>th</sup> ground, Mr. Opanda submitted that if the 1<sup>st</sup> appellate court could reevaluate the evidence properly, the decision and the position could be different in the sense that the properties of the late Hussein Nassoro and of the respondent could have been identified properly by cogent evidence and could find that the property located at Arusha belong to the late Hussein Nassoro. He referred this court to the case of **Asha Ramadhani Songasonga vs. Ahmad Juma Rajabu (Administrator of the estate of Mwahija Mohamed Masilini)**, Land Appeal No. 203 of 2006, HCT Land Division at Arusha.

On the other hand, Mr. Hyera advocate for the respondent strongly opposed the appeal. Replying on the 1<sup>st</sup> ground, he argued that it was hopeless because plot No. 311/6 Block KK at Arusha had not been proven to be part of the estate of the late Hussein Nassoro. He argued, that there is no evidence on record that could change the fact that the respondent is the sole owner of the said property and if so, should not be included as part of the assets left behind by the deceased person. He added that it was the appellant's duty as an administrator among other duties to

conduct a search in the land registries in order to know the truth about ownership of plot No. 311/6, Block KK at Arusha and other properties. He referred to section 97(1)(2) of the Land Registration Act, [CAP 334 R.E 2019]. According to him, the provision gives room to any person to inspect and conduct an official search in respect of any land in question. The respondent's counsel equally, submitted that to list Plot No. 311/6 Block KK in the deceased estate is like allowing the respondent to inherit her personal property which is an appalling vista on her part. He insisted that the District Court was correct in its decision and that the case cited on this ground is distinguishable.

On the 2<sup>nd</sup> ground, Mr. Hyera argued that this ground is unfounded. He said the right to be heard was fully observed on the part of the appellant. He added, that she was present in court and never tendered documents, particularly on pages 8,9, and 10 of the proceedings. Mr. Hyera went further stating that the appellant should not consider a certain property to be the deceased's by assumption. He said it should consider land records available in land registries. According to him, it was not proper to include any property as she wished in the estate of the deceased without proof.

Arguing the 3<sup>rd</sup> ground, Mr. Hyera insisted that, whether a particular property belongs to the deceased or not, is not a thing to guess, but due

diligence should be done before it is included in the estate of the deceased. The question of ownership, he argued, is a matter of proof and the appellant has a legal duty to look for proof. He referred this court to the case of **Monica Mnyemakera Jigamba vs. Mugeta Bwire Bakone and Another**, Civil Application No. 199/2019 CAT on page 15 where it was insisted, that the executor or administrator has to be reasonably diligent in collecting assets of the estate of the deceased.

On grounds 4, 5, and 7, the respondent's counsel argued that on grounds 7, the District Court was correct to hold that the Primary Court Magistrate was wrong to assume jurisdiction of the administratrix. On ground 5, the learned counsel was of the view that the district court was correct when it ordered that the administrator has to divide the remaining properties among all legal heirs and file inventory and final account. According to Hyera, being an interim administratrix does not do away with the powers of administrators within the scope of their duties.

As to ground 4, the respondent's counsel argued that the District Court was correct in stating that all the heirs should obtain shares, and the reasons for that are deliberate. According to Mr. Hyera, it was due to the act of the Primary Magistrate to distribute the respondent's property to herself and the tendency of the appellant to force the property of the respondent to be treated as the property of the deceased person.



Submitting on the 6<sup>th</sup> ground, Mr. Hyera argued that the District Court did not determine the ownership question, but what it did was just to appreciate the record from the Primary Court that properties that do not belong to the deceased should not be listed as part of the deceased's property.

On the 8<sup>th</sup> ground, the counsel for the respondent argued that the ground is meritless because the appellant should not assume ownership of properties as co-administrator, but that one of her roles was to conduct a search to identify which properties belong to the deceased person. He then invited this court to dismiss the appeal

In rejoinder, Mr. Opanda reiterated his submission in chief and prayers thereof.

Before dealing with the merits of this appeal, I have to note that, the record shows, that the impugned judgment was delivered on 31<sup>st</sup> March 2021 by the trial court, which is not correct. It is on record that the trial court proceeding shows, the hearing was concluded on 7<sup>th</sup> December 2021. The judgment was delivered on 31<sup>st</sup> March 2022, but signed on 31<sup>st</sup> March 2021. This is not practically possible. This is an error on the face of the record. Further, the appointment *pendente lite* was made on the 10<sup>th</sup> of June 2021.

The parties also did not in any way address the court on this matter despite being apparently glaring in the face of the record. But the silence of the parties brings the picture that the same is not at issue. I have meditated on the position to take in this respect and I am of the conclusion that since parties are not prejudiced and justice has not been occasioned on the parties. I think it is curable under the principle of the overriding objectives.

Dealing with the merits of the appeal, I have to say that after going through the submissions of the parties, I found the first and third grounds meritorious. The title deed on plot No.311/6 Block KK at Arusha was never tendered in evidence. It should be noted that it is a cardinal principle of law that he who alleges must prove. This principle is enshrined under the provisions of sections 110 and 111 of the Evidence Act, [Cap.6 R.E.2022]. The burden of proving facts rests on the party who substantially asserts the affirmation of the issue and not upon the party who desires it. The respondent as the caveator was required by law to show that those properties including plot No. 311/6 Block KK at Arusha did not belong to the deceased.

The second ground on the right to be heard. I find no merit in this ground. This is because the parties were given the right to be heard. I have gone through the proceedings of the first appellate court and found that on

page 8, the court had an opportunity to discuss the matter. I have not seen any violation of the principle of natural justice because both parties were heard through the representation of the learned counsel.

Coming to grounds 4, 5, and 7, the major argument is centered on the issue of the appointment of an administrator. In contrast, the appellant argues that no administrator is appointed to administer the estate of the late Hussein Nassoro reasoning that neither the appellant nor the respondent had been appointed the administratrix of the estate of the deceased by a probate court. He insisted that Zaituni Hussein and Zayder Mohamed Mansour were appointed interim administratrices ***[pendente lite]***.

On the part of the respondent, the argument was that being interim administratrix does not do away with the powers of administrators within the scope of their duties so the district court was justified to so decide.

About the issue of *pendente lite* administrator, if I were to borrow, section 38 of the Probate and Administration of Estates Act, [Cap 352: R. E 2019] provides that;

*"Pending the determination of any proceedings touching the validity of the will of a deceased person or for obtaining or revoking any probate or any grant of letters of administration, the court may appoint an*

*administrator of the estate of such deceased person, who shall have all the rights and powers of a general administrator other than the right of distributing such estate, and every such administrator shall be subject to the immediate control of the court and shall act under its direction."*

Reading between the lines in the above section, it is clear that the court has discretionary powers to appoint an administrator of the deceased's estate. The law empowers the administrator who has been appointed to have all rights and powers of a general administrator other than the right of distributing such estate.

Generally, administrator *pendente lite* means "administrator pending litigation on a dispute over a decedent's estate. It should be noted that an administrator *pendente lite* is appointed by the court to manage an estate during the pendency of the dispute, or until a more permanent administrator or executor of the estate in question is/are appointed. Generally, the interim administrator appointed is a special administrator who is appointed by a court to fill the role of a normal administrator, usually until a more permanent administrator is be appointed.

It is trite law that a special administrator may be appointed when someone needs to manage the assets and affairs immediately after

the death of the deceased or when the present administrator can no longer serve or the parties disagree over a long-term administrator. In most cases, the special administrator will have limited authority regarding distributing assets, and he/she will mainly be appointed to pay bills, taxes, and salaries of the employees and make any time-sensitive decisions. Indeed, the purpose of this appointment is to provide interim administration of the estate until the action is concluded, and basically nothing else.

Once the action has been concluded, this grant will cease, either upon the will being proved and probate granted or upon the will being set aside and letters of administration granted in its place.

In this case, the trial court granted interim administration orders to both appellant and respondent even without considering if the law gives such powers to primary courts. When granting the said order, the trial magistrate said on page 1 of the ruling dated the 10<sup>th</sup> of June 2021;

*“Hivyo Mahakama hii inamteua Zaituni Hussein Nassoro Pamoja na Zaydar Mohamed chini ya fungu 2(a) 5<sup>th</sup> MCA [CAP 11 R.E 2019] kwa muda, kwa ajili ya kufuatilia kodi ya nyumba ya Arusha...”*

The above, literally means the two were appointed for a single purpose of dealing with rent.

Looking at the cited law, the trial Magistrate misconceived, because what he cited gives the Primary Court powers to appoint administrators and not interim administrators as it was done in the impugned judgment. All in all, I find no merit in the three grounds. They are dismissed. This is because upon hearing of the objection the appointment of the two followed and this has been the subject of the appeal.

With respect to the 6<sup>th</sup> ground, it is clear to me that the probate court among other things has a mandate to determine all questions relating to the estate. This is not limited to appointment and revocation but also to other questions. In the case of **Mgeni Seifu vs Mohamed Yahaya Khalfan**, Civil Application No. 1 of 2009, the Court of Appeal held:

*"...As we have said earlier, where there is a dispute over the estate of the deceased, only the probate and administration court seized of the matter can decide on the ownership..."*

From the foregoing, I find no merit in the ground, it is as well dismissed.

I have said before when dealing with the other grounds of appeal. It is clear to me that the trial court had the duty to do what it did. The district court as an appellate court was to properly evaluate the evidence. I think it did not do so properly and came to the wrong conclusion. This ground has merit.

In the final analysis, this appeal has merit, it is allowed. The decision of the district court is quashed and resultant orders are set aside. In place, the decision of the trial court is restored.



  
**ACK. RWIZILE**  
**JUDGE**  
**16.10.2023**