

# **IN THE HIGH COURT OF TANZANIA**

**AT DAR ES SALAAM  
PC CIVIL APPEAL NUMBER 13 OF 2010**

**ASIA YUSUFU.....APPELLANT**

**VS**

**RASHIDI KIMEA.....RESPONDENT**

## **JUDGMENT**

Date of last Order: 14-09-2010  
Date of Ruling: 05-11-2010

### **JUMA, J.:**

This is a second appeal arising from the judgment and decree of the District Court of Temeke (Civil Appeal No. 2 of 2008- M.S. Mnzava-PDM) dated 23<sup>rd</sup> September 2008 that had quashed the decision of the trial Primary Court Temeke (Probate Cause No. 334/2006). The District Court Magistrate had decided that the trial primary court should not have distributed the estate of the deceased DHIKIRI OMARI KIONDO because that duty belonged to the administrator appointed by the court. In addition, the appellate district court ordered that the inventory which the first administrator of the estate had presented to the trial court should stand as lawful and correct distribution of the estate of the deceased to the heirs. The appellant (a widow of the deceased) is aggrieved by the decision of the District Court of Temeke hence this appeal to this court. Appellant has preferred three grounds which in reality boil down only two grounds namely,

- i) The distribution of the estate of the deceased should not have been based on an inventory prepared by a single administrator whereas two administrators had been appointed;
- ii) Having contributed to the acquisition of the deceased's estate, the widow (appellant) was entitled to a bigger share of the estate than what the single administrator had manifested in the inventory.

The background facts leading up to this second appeal arises from the death of Dhikiri Omari Kiondo. Following this death, the family meeting was held on 16-09-2006 under the chairmanship of the respondent (Rashidi Kimea) to appoint an administrator of the estate of the deceased. The attendance records of the meeting shows that the respondent; Muritaza Kiondo (son of deceased); Shufaa Kiondo (daughter of deceased); Habiba Kiondo (daughter of deceased); Muhusini Kiondo (son of deceased) and Sajadi Kiondo (secretary to the meeting)- attended and signed to signify their attendance. The family meeting nominated the respondent and one Juma Yusuph (appellant's brother) to administer the estate of the deceased. Later the respondent and Juma Yusufu were on 18<sup>th</sup> September 2006 appointed by the Primary Court Temeke (Probate Cause No. 334/2006) to be joint administrators of the estate of the deceased Dhikiri Omari Kiondo.

On 19<sup>th</sup> November 2007, upon application by the appellant and the second administrator, the trial primary court ordered the two administrators to distribute the estate of the deceased. On 30<sup>th</sup>

November 2007 the trial primary court issued another order, this time directing the two administrators to conduct valuation of the estate and give half of the evaluated estate to Asia Yusuf (the appellant herein). Yet still on 5<sup>th</sup> December 2007, the trial court vacated its 30<sup>th</sup> November 2007 order and this time around ordered the administrators to distribute the estate of the deceased. On 6<sup>th</sup> and 7<sup>th</sup> December 2007 the respondent convened a family meeting where he explained how he distributed the estate of the deceased. Because the appellant and second administrator did not attend that family meeting, respondent herein sent them a copy of the minutes showing how he distributed the estate.

On 11<sup>th</sup> December 2007, the respondent herein presented the inventory to the trial primary court. This inventory was rejected by the primary court on the ground that it was unfavourable to the widow. When the respondent and the family of the deceased re-appeared before the court on 14 December 2007; the trial magistrate asked the respondent and the family members in attendance to sign that they had surrendered their powers to the primary court. The primary court ordered the sale of the proceeds of the estate and half of the estate be given to the widow on the ground that the widow had participated in the acquisition of the estate.

Respondent was aggrieved by the decision of the trial primary court and preferred an appeal to the District Court of Temeke. In his appeal before the District Court, respondent contended that the trial primary court erred in law by carrying out the actual distribution of the estate which was a duty of the administrators of the estate. The

District Court disposed of the appeal by finding that the decision of the Temeke Primary Court was not supported by law and fact.

In quashing the decision of the trial primary court, the district court relied on the decision of this Court in **Ibrahim Kusaga v. Emmanuel Mweta [1986] TLR 26** to the effect that a primary court should not distribute the estate of the deceased because that duty belongs to the administrator appointed by the court. The appellate district court ordered that the inventory which was presented by the first administrator should stand as lawful and correct distribution of the estate of the deceased to the heirs.

When this appeal came up for mention on 4<sup>th</sup> May 2010 the appellant was represented by Mr. Kinguji, the learned Advocate who was holding Mr. Magesa's brief. Respondent was absent. Notice on the respondent of the date of mention was returned without being served because respondent had reportedly travelled to Tanga. Upon application, I allowed the appellant to effect service to the respondent by way of substituted service. The court process was as a result published in the HABARILEO newspaper of Saturday 15 May 2010. On 10 June 2010 this Court allowed the hearing to proceed ex parte by way of written submissions. Appellant filed her written submissions on 24<sup>th</sup> June 2010 and the judgment was scheduled on 14<sup>th</sup> September 2010.

On the scheduled date of judgment (14 September 2010) respondent Rashid Kimea appeared in court for the first time. He seized the moment to explain why he failed to respond to the earlier summons to appear and respond to the appeal. Respondent drew

the attention of this court to his letter dated 30<sup>th</sup> August 2010 which explained that he only came to learn of this appeal on 29<sup>th</sup> August 2010 whilst he was in his home village- Mlola Village of Lushoto, Tanga Region. Respondent in other words requested this Court to mention the appeal on 14<sup>th</sup> September 2010 and to allow him time to file his own written submissions in exercise of his right to be heard in this appeal.

After hearing respondent's account of his delay I came to the conclusion that this is a right occasion for me to vacate my earlier order of ex parte hearing of appeal to allow the respondent more time to file his written submissions in response to the one filed by the appellant. Respondent was in my opinion prevented by sufficient cause from appearing when the appeal was called on for hearing. Mr. Kupeleka H.H. (Ward Executive Officer of Tandika Ward) who signed the court process on 12<sup>th</sup> April 2010 explained that respondent, was away in Tanga and no one else could have received the court process.

Submitting why he thinks that the District Court should not have based its decision on an inventory prepared by one of the two joint administrators, Mr. Magesa the learned Advocate for the appellant referred this Court to the statement by Bubeshi, J. in the **Matter of the Estate of the Late Mohamed Bakari Changale (Deceased)** of Dar es Salaam and in the **Matter of an Application for Letters of Administration by Mohamed Changale, Probate and Administration Cause No. 52 of 1999, High Court of Tanzania at Dar es Salaam (unreported),**

“..It follows therefore that the joint administrators were obliged under the law to have filed a joint inventory six months after their appointment... when two persons or more have been appointed to act as co-administrators, it is envisaged that both will act to administer the estate truthfully and faithfully..

In his reply in support of the trial magistrate's reliance on an inventory prepared only by one of the two joint administrators, respondent submitted that after the appointments of the respondent and Juma Yusuf as joint administrators of the deceased's estate, the whole family agreed to meet to propose the mode of distribution of the estate to lawful beneficiaries. That despite being aware of the meeting, Juma Yusuf (as second administrator) intentionally defaulted to appear. The family meeting proceeded to propose the mode of distribution despite the absence of the 2<sup>nd</sup> administrator. Respondent submitted further, that Juma Yusuf (as second administrator) did not file any objection to the mode of distribution that had been proposed in his absence. According to the respondent, after Juma Yusuf (the 2<sup>nd</sup> administrator) had abdicated his administration duties, the remaining administrator (respondent) had all the rights to proceed for the interests of the beneficiaries. Respondent in his submission wondered why the issue of non-involvement of the 2<sup>nd</sup> administrator which was never an issue at the primary and district courts could be raised at this stage of appeal. Respondent reiterated in his submission that the only legal remedy available to beneficiaries (like the appellant) who are dissatisfied

with administration of the estate or distribution of the deceased's estate is not to appeal to this court but to apply for the revocation of the letter of administration.

From the opposing submissions, the main issue for my determination is whether distribution of the estate of the deceased should have been based on an inventory prepared two administrators of the estate instead of that which was prepared by a single administrator. In its judgment, the District Court found as a fact that the second Administrator of the deceased estate was not fulfilling his duty as an administrator, and the first Administrator (the respondent) was left with no option but to administer the deceased's estate. I have no reason to interfere with this finding of fact by the subordinate courts. I am of the opinion that the wisdom of requiring pegging the distribution of the estate of the deceased on an inventory prepared by two joint administrators is only applicable where both joint administrators diligently perform their duties of administration without any abdication. There is evidence on record that Juma Yusuf (as second administrator) did not exhibit that diligence and as a result the appellate District Court concluded that the second Administrator of the deceased estate was not fulfilling his duty as an administrator. In my opinion, the remaining Administrator (the respondent) was in the prevailing circumstances entitled to proceed alone with the administration of the deceased's estate.

Rule 8 of the **Primary Courts (Administration of Estates) Rules** gives primary courts wide powers when exercising of the jurisdiction conferred on primary courts by the provisions of the Fifth Schedule to

the **Magistrates Courts Act**. Primary Courts have the power to hear and decide any question relating to the sale, partition, division or other disposal of the property and other assets comprised in the estate of the deceased person for the purpose of paying off the creditors or distributing the property and assets among the heirs or beneficiaries. The primary court of Temeke (Probate Cause No. 334 of 2006) was within its power to allow the remaining administrator to file an inventory of distribution of the estate of the deceased instead of waiting for the 2<sup>nd</sup> administrator to appear.

From the foregoing, I will dismiss the first ground of appeal and I hereby hold that the distribution of the deceased estate in circumstances of the probate before the trial and appellate District Court of Temeke (Civil Appeal No. 2 of 2008) was properly based on an inventory prepared by one of the two administrators of the estate of Dhikiri Omari Kiondo.

In the second ground of appeal the appellant contends that being a widow of the deceased, appellant had contributed to the acquisition of the estate and was a result entitled to a bigger share in the estate of Dhikiri Omari Kiondo. In support of this contention the appellant's Advocate referred me to the decision of I.D. Aboud, J. in the **Application for Letters of Administration by Bakari Mohamed Changale, Probate and Administration Cause No. 52 of 1999, High Court of Tanzania at Dar es Salaam (unreported)**. In this cited probate cause Aboud, J had stated,



"...The 1<sup>st</sup> respondent is ordered to file in court an inventory or account of the estate of the deceased for the heirs within seven days... as well as the wife of the deceased who despite of her share as a wife of the deceased she contributed in acquisition of the estate..."

In his replying submission on this ground, respondent noted that the issue as to whether the appellant is entitled to a huge share from the deceased's estates because she had contributed to the acquisition of the deceased's estate does not fall within the jurisdiction of primary courts sitting as a probate court. Further, respondent submitted that jurisdiction and powers of a primary court as probate court is provided for by the FIFTH SCHEDULE to the Magistrates Courts Act prescribing the powers of primary courts in administration cases. Respondent concluded by submitting that distribution of estate to the beneficiaries in a probate case is not same as principles of distribution of property upon dissolution of a marriage.

In terms of Rule 7-(2) of the **Primary Courts (Administration of Estates) Rules, G.N. No. 49 Of 1971**, administrators of the deceased estate are required faithfully administer the estate by paying debts of the deceased, distributing the residue of his estate according to law, and to keep true and fully detailed accounts of all and singular the estate and effects of the deceased. Ultimately administrators are required to deliver to the primary court the detailed account on how he has dealt with the property of the deceased.

If the appellant is not satisfied with the way the respondent distributed the estate or if she is not satisfied with the law which the respondent/administrator had employed to distribute, she should lodge her objection before the same primary court before the administrator makes full account of his administration of the estate. Being the wife of the deceased or having contributed to the acquisition of the deceased estate do not *ipso facto* lead to entitlement to a bigger share of the estate of the deceased. Shares from the estate due to beneficiaries depend on whether there is any Will which the deceased left behind prescribing distribution of the estate. Otherwise in intestate succession, shares due to the beneficiaries depend on the law applicable to the distribution of the estate. The law here could be customary law or Islamic law, depending on circumstances of individual probates.

All in all, this appeal is dismissed in its entirety with cost to the Respondent.

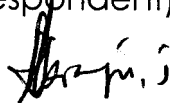


I.H. Juma,

JUDGE

05-11-2010

Judgment is delivered in presence of Mr. Magesa (Advocate for the Appellant) and Rashid Kimea (Respondent).



I.H. Juma

JUDGE

05-11-2010