

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

PC CIVIL APPEAL NO. 28 OF 2017

(Arising from the decision of the District Court of Ilala at Samora in Civil Appeal No. 15 of 2016. Originating from the decision of Ukonga Primary Court in Probate Cause No. 220 of 2014)

IMELDA YAKOBO MLEKWA.....APPELLANT

Versus

ANDREA PETER.....RESPONDENT

JUDGMENT

B.R. MUTUNGI, J:

Originally the instant matter was referred to the Ukonga Primary Court in Probate Cause No. 220 of 2014 whereby the respondent successfully objected the appointment of the appellant as the administrator of Estate of the respondent's father (Peter Welelo Mlekwa). Among the

reasons advanced by the respondent therein were that, the appellant had tendered three disputed birth certificates of children alleged to be those of the respondent's father (born out of wedlock) a fact which was strongly refuted by the respondent. Further the respondent alleged had no knowledge of the application for letters of administration. He further claimed the appellant was misusing the estate. Consequently, the appellant's appointment was revoked and the respondent then appointed.

The appellant was dissatisfied, and she unsuccessfully appealed to the District Court of Ilala at Samora in Civil Appeal No. 15 of 2016 (the first appellate court). The appellant is still dissatisfied, hence this second appeal. In her petition of appeal, she has raised three (3) grounds of appeal as hereunder;

- 1. That the appellate District Court erred both in law and in fact for dismissing the Appellant's appeal*

without sufficient reasons and in total disregard of the Appellant's evidence on record which was not contradicted or controverted/ rebutted by the respondent at the trial Primary court.

- 2. That, the presiding appellate Resident Magistrate misdirected herself in relying on the weak evidence of the Respondent's oral testimony on record which resulted into granting the Respondent's caveat and annulling the appointment of the Appellant as Administratrix of the deceased's estate of one Peter Welelo Mlekwa which the same were not corroborated by any of the clan members or other beneficiaries of the deceased's estate.*
- 3. That, both the decisions of the trial primary Court and the appellate District Court were biased against the appellant's side and for the respondent's side.*

The appeal was consequently argued by way of written submissions in which the appellant was ordered to file her submissions on or before 11/10/2017. The Respondent

was to file his reply on or before 3/11/2017 and rejoinder if any to be filed on 10/11/2017. However, the court record reveals the rejoinder was filed on 13/11/2017 which obviously is out of the scheduling order and there is no evidence to suggest whether the appellant had sought leave to do so. In view thereof, I hereby expunge the appellant's rejoinder from the court record.

Basically, the appellant in her written submission challenged the respondent's allegations that, the respondent was not involved in the whole procedure of probate and administration cause as he was at school. She further challenged the allegation that the appellant disposed off the deceased's estates and the allegation the appellant had forged the birth certificates of the children alleged to be of the deceased. The appellant argued the said allegations were not supported by any evidence be it

documentary or oral evidence. In view thereof, the appellant prayed her appeal be allowed with costs.

In reply, the respondent supports the decisions of two lower courts. He further argues that, it was the appellant who had a duty to call witnesses from RITA to establish the genuineness of the alleged three birth certificates. He was further of the view that the said revocation was properly done by the trial court as per the Primary Courts (Administration of Estates) Rules GN No. 49 of 1971 under Rule 9 (1) (a). Further the appellant was availed an opportunity of hearing before the trial court.

As I have stated earlier, this is the second appeal, hence I am alive with the legal position that, this court can interfere with the concurrent findings reached by the lower two courts only if there has been a misapprehension of the evidence, miscarriage of justice or a violation of some principle of law or practice as per the case of **Amratlal D.M**

**t/a Zanzibar Silk Stores Versus A.H Jariwale t/a Zanzibar
Hotel [1980] T.L.R 31**

Bearing in mind the above legal position, I have thus gone through the entire court record as well as the submissions from both parties and find the issue to be determined upon is whether the appeal has merits or otherwise.

In my settled view, the first appellate court's decision was based on the grounds of appeal filed therein and the issues preferred in the said appeal. These were;

- a) *The trial magistrate erred both in law and fact in granting the respondent's caveat application annulling of the appointment of the appellant to be administrator of the deceased's estate Peter Welelo Mlelwa basing on weak evidence which was properly contradicted or controverted/ rebutted.*

b)The appellant was condemned unheard as opposed to the principles of natural justice.

c)That the appointment of the respondent to be an administrator of the deceased's estate of one peter Welelo Mlelwa replacing the appellant as former appointed administratrix was made contrary to the law and hence illegal.

The issues therefrom were as hereunder;

- 1. Whether the appellant was condemned unheard as opposed to the principle of natural justice.*
- 2. Whether the respondent to be administrator of the deceased's estate of one Peter Welelo Mlelwa replacing the appellant as former appointed administratrix was made contrary to the law and hence illegal.*

Considering the above, the first appellate court found the appellant was not condemned unheard and further found the appellant had made false allegations and had committed a fraud by tendering forged birth certificates of three disputed children.

Having analyzed as above, what the court has to do is to see if there is any miscarriage of justice or a violation of the principle of law or practice in this matter occasioned by the two lower courts. It is crystal clear that the dispute boiled up after the respondent had applied for objection proceedings against the appointment of the appellant in the trial court.

The trial court did summon the appellant after the objection was raised and reading from the trial court's record, the respondent appeared and told the court that he was never consulted or present during the family meetings were convened. He made it very clear that this could not be possible, since at the alleged time he was in school. Further he complained that, the appellant (incidentally his aunt) had sold some properties on the pretext that, she was in need of his school fees. To add salt to the wound, the respondent explained that his aunt

(appellant) had altered false allegations to the effect that, the deceased had left four surviving children (heirs) while knowing very well that, the respondent was the only child (heir) left behind. Thereafter the respondent was cross-examined by both the appellant and the court. It is surprising that, the appellant was given an opportunity to simply tender the alleged birth certificates (of the three children), she was not given an opportunity to counter the claims levelled against her.

The court then proceeded to write its judgment and as would be expected revoked the appellant's appointment. The court gave reasons that, it was true the respondent had not been involved in the whole process of her appointment and the tendered birth certificates were forged. In other words, the appellant had made fraudulent untrue allegations that the respondent was aware of the application and grant of the letters of administration. The

trial court was satisfied that the appellant had withheld this vital and material evidence in this matter.

Upon scrutinizing the record, the court has found the objection proceedings (caveat) was heard and decided from the evidence adduced by one side (respondent). The appellant's side of story is not shown, as though she was not in court. For any stretch of imagination there was a clear miscarriage of justice. Another glaring feature is that the trial court had proceeded suo mottu and disqualified the birth certificates tendered on the basis that they were all issued on the same date and year.

In the settled opinion of this court, the above leaves a lot to be desired. The court was not justified to such a finding which was baseless and the validity of those birth certificates was still unresolved. It is very clear that, the respondent ought to have had sufficient evidence to support his objection proceedings which resulted into the

annulment of the appellant's appointment whilst the appellant had no right of hearing.

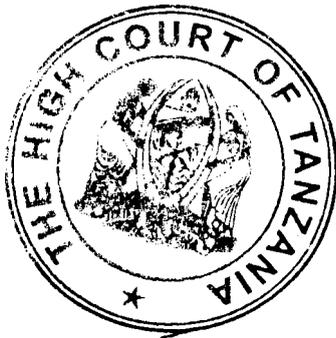
The court has further considered the findings of both the lower courts and is of the view, once the appellant had been found unfit and her appointment cancelled or revoked, the respondent was consequently automatically appointed to replace her which act was wrong. It is on record that, the appellant's appointment was graced by the majority of the clan members without these, the probate court would not have appointed her. To the contrary there was no evidence from the clan members or other beneficiaries that they conceded to have the respondent replace the appellant as an administrator of the said estate.

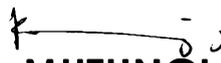
There was no evidence to show that after the **annulment as per the Primary Court (Administration of Estates) Rules G.N No. 49 of 1971**, the court had other

sufficient evidence to form its opinion in appointing the respondent as the new administrator. This is despite the evidence of the clan members and the evidence of the three birth certificates (though discredited). It would have been expected of the trial court to have invoked its wisdom in this matter. I thus conclude and agree that the new appointment was made contrary to the law hence illegal.

In the upshot the appeal is accordingly allowed and the judgments of the lower court's quashed and set aside. The respondent if he still so wishes to have the appellant's appointment revoked should file a new caveat and the same be heard on merits. In the event there would be a need of appointing a new administrator the same should be done so to the satisfaction of the lower court and in accordance to the law.

Considering the relationship of the parties herein, I
make no order to costs.




B.R. MUTUNGI

JUDGE

13/3/2018

Read this day of 13/3/2018 in the presence of S.K. Madulu
(Advocate) for the appellant and the respondent in person.




B.R. MUTUNGI

JUDGE

13/3/2018

Right of Appeal Explained.




B.R. MUTUNGI

JUDGE

13/3/2018