IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

PC. PROBATE APPEAL NO. 3 OF 2020

(C/O Probate Appeal No. 1/2019 Melele District Court, from Misc. Probate Application No. 1/2019 Inyonga PC, originating from Probate Case No. 4 of 2018 of Karema Ward Tribunal)

SHABANI JORAM DANA ..... APPELLANT

VERSUS

EMMANUEL ISAVIKE ..... RESPONDENT

Date: 30/11/2021 & 07/01/2022

JUDGMENT

Nkwabi, J.:

On 01/03/2019, the trial court, appointed the respondent Emmanuel Isavika administrator of the estate of his late brother Joram Dana Kaswiza, (hereinafter referred to as **the deceased**) who died intestate on 23/08/2009. In the record of the trial court, there is family meeting minutes dated 22/10/2018 signed by the appellant as one of the issues of the deceased. In this meeting, the respondent was proposed, by the family of the deceased, to apply to the court to be appointed administrator of the estate of the deceased.

On 02/11/2018 the respondent lodged with the trial court a letter seeking he be appointed administrator of the estate of the deceased. His request was granted hence the probate application No. 4/2018 was opened. Hearing of the application was conducted and seven witnesses were heard including the widows of the deceased. No one objected the application. In the culmination of the application, the respondent was ruled suitable for the administration of the estate. The trial court appointed the respondent administrator of the estate of the deceased and ordered him to submit inventory of the estate by 01/07/2019.

The applicant in the trial court, who is the Appellant in this appeal, filed an application for revocation of the letters of administration the respondent had been granted by the trial court. The reasons for the application are that, **one,** the respondent has failed to collect and administer the properties of the deceased. **Second**, the respondent has sold the piece of land of the widow of the deceased without her consent. **Third,** the respondent has advertised sale of other pieces of land contrary to the family resolution and **fourth,** the respondent has personally benefitted from such administration.

In his complaint letter to the trial court, the appellant indicated that the respondent failed to administer/distribute the estate contrary to the law. The respondent forged documents and sold piece of land of the widow of the deceased, without her consent. He has advertised to sell other properties contrary to the resolution of all the family members. The respondent has done all that at his personal benefit. He claimed his application is for saving the estate of the deceased from waste.

After hearing 5 applicant's witnesses and three respondent's witnesses, the trial court dismissed the application for want of merits. The appeal to the District Court was thrown out. This is, therefore, a second appeal. This court, has definitely to look at whether the lower courts misdirected or non-directed themselves on law, evidence or practice as per **Ahmed Said v Republic, Criminal Appeal No. 291/2015** CAT (unreported). See also **Neli Manase Foya v. Damian Mlinga [2005] T.L.R 167**.

In this appeal, the appellant is faulting the decisions of both lower courts for **1.** deciding in favour of the respondent while the respondent had insufficient

evidence, **2.** The trial court is at fault for taking into account irrelevant facts and disregarded relevant facts adduced by the appellant. **3.** The first appellate court was wrong in its failure to quash the decision of the trial court while there was sufficient evidence that the respondent has misappropriated the properties of the deceased. **4.** The trial magistrate failed to entertain the case hence unfair decision. The appellant prayed the decision of Mlele District court be quashed with costs. The respondent sturdily resisted the appeal.

When the appeal was called up for hearing both the appellant and the respondent appeared in person.

In his submission the appellant criticizes the decision of the District Court in the first appeal in that there were witnesses who heard another witness testify which is illegal. The appellant further attacks the decision the district court that it did not consider the forgery of the clan meeting minutes dated 10/03/2019. The names of persons who attended were false eg. Magdalena Dana and Leonard Joram. That is tantamount to forgery.

On the 3rd ground of appeal, the appellant reproves the findings of the district court in that the respondent ought to have sought their approval for the sale of the house/plot at their amount of money of choice. He raised the concern in the trial court, he added.

He further argued that, there was division of the property of the deceased to Felist Ngugo in the minutes dated 22/10/2018. She was given Tshs. 500,000/= and she did not sign as she does not know how to write and read. That woman was divorced to their father and was married by another man. I hasten to say here that that was not raised in the trial tribunal. The record reveals that he is the one who seems to have invited her. Neither was she called by the appellant to give evidence in court.

On the 4th ground of appeal, he asserts that he gave several evidence but the trial court failed to evaluate it hence it reached to a wrongful and illegal decision. The pieces of evidence were the minutes of the family and sale contract of the plot and the documentary evidence from the village leadership.

The appellant's orison is that this court does him justice.

In reply, the respondent contended that the appellant failed to prove his allegations in the trial court. The properties of the deceased were identified to him by the children themselves.

The rebuttal presentation by the respondent on the 2nd ground of appeal was that the respondent disputed it. He added that as to Felista Ngugo she was not objected. It was the family itself which involved her. The respondent approved the decisions of the trial court and the 1st appellate court in that they did not error in law in entertaining the probate case and the lower courts were justified in their decisions.

In rejoinder the Appellant maintained that the respondent had no sufficient evidence. The minutes of the family were false and that the respondent failed to prove his case.

I begin my consideration and determination by looking at the 2nd ground of appeal which is the trial court is at fault for taking into account irrelevant facts and disregarded relevant facts adduced by the appellant. Expounding on this ground of appeal, the appellant suggests that the decision the district court did not consider the forgery of the clan meeting minutes dated 10/03/2019. The names of persons who attended were false eg. Magdalena Dana and Leonard Joram. That is tantamount to forgery.

The reply by the respondent was a total denial of this justification of appeal and sided with the concurrent decisions of both lower courts.

Looking at the testimony of the appellant in the trial court where he had these to say:

> *Sababu ya nne, wakati akiuza eneo hilo alitumia muhutasari ambao haukuwa umesainiwa na wajume wote, kama kielelezo kinachoelezea kuwa Watoto wote walikubali eneo la nyumba liuzwe wakati sio kweli. Hivyo alitumia muhtasari batili ...*

It could be that when the appellant said that *alitumia muhtasari batili* he meant that the minutes were a forgery. Be that as it may, selling the property which is part of the estate of the deceased does not require consent of the family members or clan. This lamentation by the appellant was justly dismissed by lower courts in line with **Mohamed Hassani v Mayasa Mzee and Mwanahawa Mzee [1994] TLR 225** (CA), Kisanga JJA, Mnzavas JJA and Mfalila JJA:

> *"The administrator is not legally required to obtain consent of all the heirs before disposing of property or sale of a house."*

So, the minutes of the meeting of the family members does not give or remove validity to what the administrator of the estate does in respect of the estate. The ground of appeal is meritless and is accordingly dismissed.

I turn to discuss the first ground of appeal which goes, the trial court erred in deciding in favour of the respondent while the respondent had insufficient evidence. This, in the first place goes against the well-established rule of evidence that he who alleged must prove. It was for the appellant who was the applicant for revocation of the respondent from being administrator of

the estate to prove his allegations. The authority for this proposition is not far-fetched, it is the case of **Mohamed Hassani** (supra):

> *It is up to the person challenging the validity of appointment of an administrator by the court to show that the person so appointed does not have the required qualifications to administer the estate.*

Did the appellant attain the onus of proof as such? I doubt too. With the greatest respect to the appellant, I hasten to quote the wise words of the Court of Appeal of Tanzania in **Mohamed Hassani** (supra) which fits the case at hand and what is demonstrated by the appellant:

> *We think and are satisfied that in the circumstances of this case, selling the house and distributing the proceeds among the various contending heirs, was the only sensible option open to the administrator. The record shows that there are two hostile contending groups among the heirs of the late Mzee bin Risasi. The heirs are grouped according to their mothers. There is absolutely no way of reconciling the two groups. We are therefore satisfied that the decision to sell the suit house was not arbitrary, in fact it was in the best interests of the estate and all the heirs. With regard to the question whether consent of all the*

heirs should have been sought before selling the house, firstly, it was impossible to obtain such consent from the two hostile groups.

This is what a witness of the appellant had to say in his testimony:

*"Maombi yetu ya mirathi ni kulinda rasilimali za marehemu na sio kuuza wala **kugawana**."*

I am satisfied, with such indicated above illegal intention of the appellant, it is impossible for the appellant to accept any tempt by the respondent to collect and distribute the estate of the deceased. They will do every effort possible to them to frustrate the administration of the estate. Any court of law cannot go along with such attempt.

The evidence of the respondent in the trial court was elaborate, cogent and was correctly accepted by the trial court. For instance, this is what he had to say:

Kuhusu uuzaji wa hilo eneo la nyumba, baada ya kumaliza mirathi tulifanya kikao tukiwa na wanafamilia Pamoja na Lucia Pius, tulikubaliana kwamba sehemu hii ni ndogo, inatakiwa iuzwe ili wahusika wapate haki zao, kwa kulinda heshima, tulikata

sehemu a nyumba ikabaki mikiononi kwake, na Watoto wawili wa Lucia Pius waliingizwa kwenye mgao. Hatukufanyia biasharasokoni, tulifanya biashara kwa mwanasheria ***kwa hiyo sijajinufaisha bali baadhi yao walikataa.*** (Emphasis mine)

The trial court cannot therefore be attacked for as alleged by the appellant taking into account irrelevant facts by the respondent and disregarding relevant facts adduced by the appellant. So far, there is nothing to validly challenge the actions of the respondent. The appellant too, cannot challenge the distribution of the property to Felista Ngugi as misappropriation due to the evidence that is in the record. That can be discerned from his own cross-examination of the respondent:

- *Muhutasari 22/10/2018 uliandaliwa na katibu anaitwa Geofrey*
- *Hakuna kitu kilichobadirishwa.*
- *Katika muhutasari huo, wapo waliohudhira na wasihudhuria.*
- *Wewe ndiye uliyeenda kumwita huyo mama (Felista Ngugi)*
- *Huna makosa yoyote kumwalika mama yako (Felista Ngugi) ulikuwa sahihi kabisa*

In the trial court, the respondent gave a detailed account of what he did, why he did as such, which in my view is not only logical but also sensible. The above excerpt leaves me with a view that there was nothing wrong with what the respondent did to the estate of the deceased, him being the administrator of the estate. It is obvious that the appellant's lamentation about the distribution of the estate to Felista Ngugi is lame, because he is the one who brought her and be that as it may, she had something to do with the deceased. So, there is nothing to fault the respondent in regard to Felista Ngugi.

The administrator of the estate of the deceased is not a rubber stamp to validate the decision of the members of the family or clan. His duties and responsibilities are bestowed to him by the law and not the family or clan.

The culmination of the above discussion, I find that the first appellate court was correct in upholding the decision of the trial court. I also find that the trial court did not fail to entertain the application. Its decision is fair. The appellant is not borne by the record on his claim that some witnesses of the

respondent heard other witnesses while giving evidence in court. The appeal is dismissed with costs.

It is so ordered.

DATED at **SUMBAWANGA** this 07th day of January, 2022

J. F. Nkwabi
JUDGE

Court: Judgment delivered in chambers this 07th day of January 2022 in the presence of the appellant in person but in the absence of the respondent.

J.F. Nkwabi
JUDGE

Court: Right of appeal is explained.

J.F. Nkwabi
JUDGE
07/01/2022