IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

PC PROBATE APPEAL NO. 10 OF 2020

JONATHAN K. NGOMERO ..... APPELLANT

VERSUS

ESTHER JULIUS ..... RESPONDENT

(Appeal from the decision of District Court of Musoma at Musoma in Probate Appeal No. 34 of 2020, Originating from Probate Cause No. 01 of 2020 Mugango Primary Court at Musoma)

JUDGMENT

30th March and 12th May, 2021

KISANYA, J.:

At the Mugango Primary Court, the respondent, Esther Julius applied to be appointed as the administratrix of estates of her late husband one, Mujungu Kabura. But before the application was heard and determined, Jonathan Ngomero successfully filed objection on the ground that, a clan meeting had not been convened to appoint Esther Julius as administratrix of the estate of the deceased. The primary court went on to direct parties to convene the clan meeting under the supervision of the village and kitongoji chairperson.

Esther Julius was aggrieved by that decision. She appealed to the District Court which reversed the decision of the primary court. The first appellate court held that it was very possible for the respondent to apply for appointment as an administratix of her deceased husband in the absence of

the minutes of the clan or family meeting. It went on to hold as follows on the defects in the minutes of clan meetings appended to the respondent's application: -

> *"The appellant is the deceased wife, thus the one who was expected to convene a meeting was the respondent (the deceased brother) but he did not do the same for the reasons only known to him."*

Upon overruling the appellant's objection, the first appellate court quashed the proceedings and set aside the trial courts' order. It went on to order that the application be heard afresh by another magistrate with different set of assessors.

This time Julius Ngomero is anguished with the District Court's decision. He lodged this second appeal on the following two grounds:

1. *That, the 1st appellate Court erred in law to order trial de novo while the application before the trial court is incompetent.*
2. *That, the trial Court erred in law and fact for failure to consider that the appointment of the administrator/administratrix of the deceased estates begins in the family.*

At the hearing of this matter, the appellant was represented by Mr. Daudi Mahemba, learned advocate whereas the respondent appeared in person. In the course of hearing the appeal, I probed the parties to address the Court on the legality of the retrial order issued by the first appellate court.

Mr. Mahemba, commenced his submission by addressing the first ground of appeal. He argued that the first appellate court erred in ordering trial *de novo*. His argument was based on the contention that the application before the trial court was incompetent for want of Form No. 1 as provided for under rule 3 of the Primary Court Administration of Estate Rules, GN No. 49 of 1971. He was of the view that much as the application was incompetent, there was nothing for the trial court to retry.

As regard to the second ground, the learned counsel contended that the administrator of the deceased estate is appointed by the clan or family members for purposes of efficiency in administration of the estates. Although Mr. Mahemba conceded that failure to convene the clan meeting does vitiates the proceedings, he urged me to quash the judgment of the District Court and advise the parties to hold a clan meeting with a view of appointing the administrator of estate.

The respondent resisted the appeal. She submitted that the District Court did not error in its decision. She went on to contend that, she was nominated by the clan meeting held on 29/12/2019. The appellant told the Court that she filled the required form at the time of instituting the application for appointment as administratrix of the deceased estate.

I have dispassionately considered the records and submissions by both parties. I should now confront the grounds for determination as appearing in the petition of appeal.

I start my determination of the contending matter in the appeal by addressing the first ground that the matter before the trial court was incompetent for being initiated by a letter and not Form I. This ground should not detain me. It was not raised and determined before the two lower courts. The law is that the second appellate court cannot hear matter not raised at the lower courts. However, since this issue goes to the root of the matter on the competence of the application filed before the trial court, I am obliged to address it.

The procedure for institution of application for appointment of an administrator of the estates of the deceased before the Primary Court is provided for in rule 3 of the Primary Court (Administration of Estates) Rules, GN No. 49 of 1971 which reads:

> *"An application for the appointment of administrator under paragraph 2(a) or 2(b) of the fifth schedule to the Act shall be made in Form 1".*

In the light of the above cited provision, a person applying for appointed of administrator is required to fill in Form 1 set out in GN No. 49 of 1971. Such requirement must be complied with. See **Elias Madata Lameck vs Joseph**

Makoye Lameck, PC Probate and Administration Appeal No. 1 of 2019, HCT at Musoma (unreported) where this Court (Kahyoza, J.) held as follows:

> *"... a person appointed by the deceased's clan or family to administer the deceased's estate must fill in "Form 1 and file it with the Court. Likewise, an interested person who wishes to apply to administer the deceased's estate in the absence of the minutes of the family meeting, should, fill in Form I. This requirement is provided for by rule 3 of the Primary Courts (Administration of Estates) Rules..."*

I went through the record. Although the respondent wrote a letter requesting for appointed as administratrix, the said letter did not institute the probate proceedings. She was filled in and lodged Form No. 1 as required by the law. Therefore, the appellant's contention in the first ground is devoid of merit.

In the second ground, the appellant faults the first appellate court for failure to consider that appointment of administrator of the estates of the deceased begins in the family. As rightly held by the first appellate court, there is no legal requirement which obliges a person to be nominated by clan or family meeting first before applying to be appointed as administrator of the deceased estates. That practice has been appreciated by the Court for years to reduce conflicts among beneficiaries of the deceased estates and to make the court's work easier. I am persuaded by what was stated by my brother

Kahyoza, J. in **Elias Madata Lameck vs Joseph Makoye Lameck, (supra)** that: -

> *"It is therefore, important and it is encouraged that a clan or a family of the deceased meets and appoints a person to be the administrator. The question is what should happen if the deceased's family does not meet and nominate a person to be the administrator of the estate of a person who died intestate? Is it the position of the law that if the deceased's family fails to appoint a person to be the administrator no one can apply to administer the estate?*
>
> *I will quickly reply that in the absence of minutes of the clan or family meeting to nominate a person to be the administer, a person with interest in the deceased's estate can still apply and be appointed by the primary court to administrator the deceased's estate provided the law is complied with."*

The Court also cited with approval the case of **Hadija said Matika V. Awesa Said Matika** PC. Civ. Appeal No. 2/2016, HCT in which his Lordship Mlacha, J held as follows on the matter under consideration: -

> *"In matters of probate and administration, the clan or family will usually sit to discuss the matter and propose someone to be the administrator. He will be sent to court with some minutes. This practice is encouraged because it makes the work of court easy. But once one or two members of the family have been selected, they should also fill Form No. 1 because filling the form is a legal requirement".*

I associate myself to the above position. In that regard, I am of the view that application for appointment as administrator of estates of the deceased cannot be nullified solely because the petitioner was not appointed by the clan or family members.

As regard the appeal at hand, it is not true that the first appellate court did not consider the importance of family or clan meeting in appointing administrator of estates of the deceased. That issue was duly considered. The first appellate court took into account the efforts made by the respondent to ensure that a clan meeting when it held:

> *"Reverting to the case at hand, it is evident that the appellant before seating in a repugned meeting, she tried her level best to per sued (sic) the respondent to convene a clan meeting but her effort ended in vain. Let that alone, the appellant was nominated following a clan/family meeting held on 29/12/2019 which comprised of twelve people."*

I have also noted the minutes of the clan meeting dated 29/12/2019 was appended to the application. The appellant's objected the said minutes on the ground that the meeting was not properly constituted by all clan members. In view of the above stated position of law, the application for probate instituted by the deceased wife could not be nullified because clan meeting is not a legal requirement. Therefore, the second ground fails as well.

The last issue was raised by the Court, *suo motu*. It relates to legality of the order for retrial issued by the first appellate court. I have alluded herein

that, the trial court upheld the objection filed by the appellant in respect of appointment of the respondent as administratrix of the estates of the deceased. However, reading from the judgement and findings of the first appellate court, it is clear that the appellant's objection was overruled. Therefore, upon setting aside the order issued by the trial court in the objection proceedings, the proper recourse was for the first appellate court to order the probate case to proceed where it ended before the objection proceedings. It follows that the retrial order was erroneously issued by the first appellate court

In the end, the appellant's appeal is dismissed in its entirety for want of merit. The Court exercises its revisional power to quash and set aside the retrial order made by the first appellate court. In lieu thereof, I order the probate case to continue at the stage where it ended before the objection proceedings. In consequence, all actions taken or things done in compliance with the first appellate court's order for retrial are hereby nullified, quashed and set aside. Considering the nature of this case, I make no order as to costs.

DATED at MUSOMA this 12th day of May, 2021.

THE HIGH COURT OF TANZANIA
MUSOMA

E.S. Kisanya
JUDGE

Court: Judgment delivered this 12th May, 2021 in the presence of the appellant and the respondent in person. B/C Simon RMA present.

Right of appeal explained.

E. S. Kisanya
JUDGE
12/05/2021