IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY

AT SHINYANGA

PC. PROBATE APPEAL NO. 2 OF 2018

(Arising from Probate Appeal No. 3/2017, District Court of Bariadi, original Probate Case No. 30/2017, Somanda Primary Court)

SAYI DANIEL APOLO.....APPELLANT

VERSUS

ELIZABETH NYAMALA.....RESPONDENT

JUDGMENT

19/11/2019&29/01/2020

G.J. Mdemu J.;

This is a second appeal. In the Primary Court of Somanda, Elizabeth Nyamala, the Respondent filed an application to be appointed as administratix of the estate of her late husband Daniel Apolo. Before hearing the Respondent in her petition, one Sayi Daniel Apolo objected to the petition. The Primary Court entertained the objection proceedings and in view thereof, dismissed the petition of the Respondent thus appointed the Appellant to be administrator of the estate of the late Daniel Apolo. This was on 7th of August, 2017. Being aggrieved by the decision of Somanda Primary Court, the Respondent appealed successful to the District Court of Bariadi. The latter on 22nd of December, 2017 quashed the decision of the Primary Court meaning that the Respondent got appointed an Adminstratrix. The Appellant thinking

that the decision of the Primary Court was un justified, filed the present appeal on the following grounds:-

1. *That, the trial Resident Magistrate presiding over the District Court of Bariadi both erred in law and in fact in holding only that, the respondent had more interest in the estate of the deceaseds husband and forgetting that the deceased left more heirs the appellant is inclusively.*

2. *That the trial Resident Magistrate presiding over the District Court of Bariadi both erred in law and in fact in holding that the appellant did not called to attend at the clan meeting while she was called but she rejected herself without sufficient reasons.*

3. *That the trial Resident Magistrate presiding over the District Court of Bariadi both erred in law and in fact in favoring the respondent without giving the reason for the decision.*

4. *That the trial Resident Magistrate presiding over the District Court both erred in law and in fact for failure to consider the clan meeting which sat and nominate the Appellant to be an Administrator of the estate of his late father.*

5. *That the trial Resident Magistrate presiding over the District Court both erred in law and in fact in holding that the trial court erred to appoint the Appellant to be an Administrator due to the fact that the Appellant did not applied letters of administration of estate and failed to consider that the court itself owed a power of itself (suo moto) to adjudicate the case in its own power.*

6. *That the trial Resident Magistrate presiding over the District Court both erred in law and in fact for his judgement which is not a judgement as it lacks the ratio decided of the case.*

On the 19th of November, 2019, the appeal was heard before me. Both the Appellant and the Respondent appeared in person without any representation. The Appellant argued all the grounds of appeal as one and also prayed his grounds of appeal and the written rejoinder be adopted as part of his submission. He submitted mainly in two items; **first**, he stated that, there were two minutes of the family meeting in which the Respondent did not attend in one of the meetings. The family meeting as in the minutes nominated the Appellant to be the administrator of the estate. He added that after presenting the minutes in the trial Court the Respondent also submitted her minutes indicating that she was nominated to be the administratix of the estate of the deceased.

The **second** item submitted by the Appellant was that, all witnesses in the trial court were in his favour. Therefore, he prayed the decision of Primary Court be upheld.

In reply, the Respondent first prayed her reply to the petition of appeal be adopted as part of her submission. She added that, she was never involved in a family meeting regarding administration of the estate of her husband. On this, she insisted that, the Appellant cannot be an administrator of the estates which are in her family because the Appellant has his mother and that the deceased had another wife living in a different place with her co wife and each had own properties. She thus concluded that, the submission of Appellant is unfounded and urged the appeal be dismissed

After having heard the Appellant and Respondent in their brief submissions, and after also having gone through the grounds of appeal, reply thereof, rejoinder and the entire record, I find it not disputed that, the Appellant was among the children of the late Daniel Apolo and the Respondent was the wife of the late Daniel Apolo. It is also on record that, the Respondent petitioned for appointment as an adminstratrx which petition got objected by the Appellant. It is further recorded that, there are two minutes of family meeting regarding nomination of administrator of the estate of the deceased. Family minutes dated 25th of October 2016 was submitted to court by the Respondent signifying her nomination and that of 30th of June

2017 was submitted by the Appellant also evidencing his nomination to the administration of the estate.

Having that settled position, the question is whether the court may appoint a person an administrator of the estate of the deceased in the course of determining objection proceedings. In other words, can the court appoint without there being a formal petition? In Primary Courts, the law governing appointment of administrators of estates is the 5th Schedule to the **Magistrates' Court Act, Cap. 11** in which under **paragraph 2** is provided that;

> *2. A primary court upon which jurisdiction in the administration of deceaseds' estates has been conferred may–*
>
> *(a) either of its own motion or on an application by any person interested in the administration of the estate, appoint one or more persons interested in the estate of the deceased to be the administrator or administrators thereof, and, in selecting any such administrator, shall, unless for any reason it considers inexpedient so to do, have regard to any wishes which may have been expressed by the deceased.*

In the above legal position, the observation of the learned Magistrate who heard the first appeal that the trial court should not have appointed the Appellant for want of formal application remain unfounded.

I have also perused the proceedings and evidence of the trial Court, and I am of the view that, there were contradictions in the evidence of the Respondent who was the Applicant in the trial primary court. She testified that she was the one appointed by family meeting to be the administrator of the estate of late Daniel Apolo and tendered in evidence family minutes of the meeting conducted on 25th of October 2016(annexure A). I have not however seen anywhere in the minutes the nomination of the Respondent. The person nominated to administer the estate of the deceased was one **Sungw'hwa Kaja Mapembe**. For clarity, part of the minutes is reproduced as here under:

> *Wajumbe wote kwa kauli moja walimuteua ndugu **Sungw'hwa Kaja Mapembe** kuwa msimamizi wa mirathi na anapaswa kwenda mahakamani kufungua kesi ya mirathi ili baada ya kuthibitishwa na mahakama aweze kusimamia mirathi hiyo.*

The second contradiction is in the testimony of her witness SM3 Marko Lusweko who testified that on 30th of June 2017 they appointed the Appellant Sayi Daniel Apolo to be the administrator of the estate of late Daniel Apolo. At the trial court, part of his testimony is reproduced as hereunder (page 3 of the proceedings)

> *Pia tulikaa tarehe 30/6/2017 tukamteua SU1(Sayi Daniel Apolo) kuwa msimamizi wa mirathi na kikao kililkuwa Mwantani hivyo*

tunaomba mahakama ituruhusu kuwagawia mali yao ambayo ni nyumba na shamnba. Sina Zaidi.

The Respondent who was the (Applicant) at primary court never cross examined her witness about the family meeting and also whether the Appellant was appointed in that family meeting. This to me seems that, the evidence introduced by SM3 was correct and therefore relevant.

Since there were contradictions on the evidence of the Respondent and her witness and also that there is no any family meeting nominated her following contradiction between her testimony and the family minutes tendered, there was no justification for the learned magistrate in the first appeal to quash and set aside the decision of the trial primary court. There are all reasons to believe that there was no family meeting convened on 25th of October 2016 as observed at page 6 of the trial courts judgment in the following manner:

Hata hivyo mahakama imebaki na swali dogo la kujiuliza kwamba kama kweli ndugu Elizabeth Nyamala aliteuliwa na ukoo ni kwa nini tangu tarehe 25/10/2016 hakufika mahakamani kuomba kuteuliwa kuwa msimamizi wa mirathi? Hinyo katika kujibu swali hilo dogo, mahakama hii imeona kwamba kuna uwezekano mkubwa kikao hicho hakikuwepo na SM1 aliamua kufika hapa mahakamani baada ya kusikia kwamba kuna kikao kilichofanyika tarehe 30/6/2017 ambapo katika kikao hicho kinaonyesha

kwamba Ndugu Sayi Daniel aliteuliwa kuwa msimamizi wa mirathi.

I have also taken the, position that even if the family meeting got convened on that date as alleged by the Respondent yet, the person who was appointed was one **Sungw'hwa Kaja Mapembe** and not the Respondent. Had the Learned Appellate Magistrate took into account these facts he would not have concluded that, there was a family meeting that nominated the Respondent to administer the estate of the deceased.

As stated above, the trial court guided itself properly to appoint an administrator in terms of the provisions of Paragraph 2 of the 5th schedule to Cap.11 and made the following findings as seen in the judgement of Primary court at page 10;

"Hivyo basi kwa kuzingatia yote yaliyoelezwa hapo juu na kutokana na mamlaka iliyonayo mahakama hii chini ya kifungu cha ***2 (a) MCA (CAP 11) R.E 2002*** *Fifth schedule, Mahakama imefikia uamuzi wa kumteua ndg. Sayi s/o Daniel Apolo kuwa msimamizi wa mirathi ya marehemu DANIEL S/O APOLO ikiwa ni pamoja na kusimamia mali za marehemu na kuzigawa kwa warithi wake kwa haki."*

Having observed so, this appeal is hereby allowed. The decision of the District Court on appeal is thus quashed and set aside. Consequently, I

hereby, for reasons thereof, upheld the decision of Primary Court. Each part to bear own costs. It is so ordered.

Gerson J. Mdemu
JUDGE
29/01/2020

DATED at **SHINYANGA** this 29th day of January, 2020.

Gerson J. Mdemu

JUDGE
29/01/2020