IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZNIA

IN THE DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

PROBATE APPEAL NO 7 OF 2020

JULIANA ABDALLAH RUGOYE .....APPELLANT

VERSUS

AMINA ABDALLAH .....RESPONDENT

(Original Probate Cause No. 7/2019 at Musoma urban primary court and probate Appeal Cause No. 10/2019 in the District Court of Musoma)

JUDGMENT

14th Dec & 12th Feb., 2021

Kahyoza, J

This is a second appeal originating from Probate No. 7/2019, which was instituted in the primary court. The first appeal went to the district court. The appellant, **Juliana Abdallah Rugoye** applied to the primary court to revoke the appointment of **Amina Abdallah**, the respondent to administer the estate of Abdallah Rugoye. The primary court dismissed the application for want of merit. Unsatisfied with the decision, the Juliana Abdallah Rugoye appealed to the district court, where she too lost the appeal.

Undaunted, she appealed to this Court on the following grounds of appeal:-

1) That, both subordinate court erred in law and fact for failure to determine that the respondent did not summoned (sic) the appellant

to attend the clan meeting for the purposes of appointing the administrator o the estate.

2) That, both subordinate courts erred in law and fact for failure disregard (sic) the evidence of the appellant who informed both courts that she attempted several times to summons the respondent and other clan members to attend the clan meeting for the purpose of appointing the administrator of the estate, but the respondent and other clan members decided to disrespect the call and decided to conduct the secret clan meeting without further notice to the appellant and appoint the respondent to be administrative of the estate without consent of the appellant who is the widow;
3) That, both subordinate courts erred in law and fact for failure to determine that the respondent did not call the appellant to participate in the clan meeting, as in prior time the respondent was attempt to be the administrator on its own wrong, by collecting the rents of the said house which occupied by the appellant and her expire husband by attempting to disposition the estate like house into her ownership;
4) That, the 1st appeal court erred in law and facts for failure to determine the principle of the survival ownership as the estate (house) was occupied by the appellant and her husband who is the deceased under co- occupier.
5) That, both subordinate courts erred in law and fact for failure to determine that appeal have no confidence with the respondent to

supervise the estate of her expired husband so she don't have trust over the respondent.

Did the two courts below err to hold that there was no ground to revoke the appointment?

All five grounds of appeal raised one issued, whether the respondent qualify to administer the deceased's estate. Background of this appeal is that; the late Abdallah Lugoye died intestate on the 15/3/1988. He was survived by a number of children and a wife (the status not subject of this matter). A number of children have since passed on. The respondent is the only surviving child of the late Abdallah Lugoye.

In 2019, the respondent applied and the court appointed her to administer the deceased's estate. The appellant, who alleges to be the late Lugoye's second wife, filed an application praying the primary court to revoke the appointment of Amina Abdallah, the respondent. The primary court declined the invitation. The district court upheld the decision of the primary court, hence this appeal.

I have pointed out above that this is a second appeal. The record shows that the findings of both courts were in favour of the respondent. Both courts did not see the reason to revoke the appointment of the respondent to administer the deceased's estate. It is trite law that a second appellate court can only interfere with concurrent findings of facts of the two courts or below where it is satisfied that the courts have misapprehended the evidence in such a manner as to make it clear that its conclusions are based on incorrect premises. **See Salum Bugu vs**

Mariam Kibwanga Civ. Appeal No. 29/1992. The Court of Appeal in another case of **Amratlal Damodar Maltaser and Another t/a Zanzibar Silk Stores Vs. A.H Jariwalla tla Zanzibar Hotel** [1980] T.L.R pg 31 where at page 32 the Court of Appeal stated:

> *"Where there are concurrent findings of facts by two courts, the Court of Appeal, as a wise rule of practicing should not disturb them unless it is clearly shown that there has been a misapprehension of evidencing a miscarriage of justice or violation of some principle of law or procedure."*

I scrutinized the records of both courts and found that both courts refused to revoke the appointment of the respondent basing on diverging reasons from each other. On one hand, the primary court refused to grant the prayer on the reason that there was no ground for revoking the appointment. It stated-

> *"Hivyo Mahakama hii haijaona sababu yoyote ya msingi ya kumtengua msimamizi wa mirathi ya marehemu Abdallah Rugoye aliyeteuliwa katika shauri la mirathi Namba 07/2019 (Amina Abdallah) maana alifata maelekezo yaliyotolewa na mahakama ya Wilaya na hakuna mali ya marehemu iliyohamishwa au kuharibiwa maana bado mgawanyo haujafanyika na hakuna aliyetajwa kuwa ndiye mmiliki wa mali hiyo, hivyo Mahakama hii inamshauri mleta pingamizi kukaa na mjibu pingamizi ili kutatua migogoro iliyopo na kuondoa uchelewaji usio wa lazima"*

On the other hand, the district court refused to revoke the appointment after it made a number of observation not supported by evidence on record. The district court found that the appellant refused to attend the clan meeting without any justifiable reasons. It stated-

> *"It is my humble view and in fact my candid view that the act of the appellant to refuse to attend the clan meeting without any justifiable reasons was unhealthy to the family members and it was against the order already issued, in fact her reasons are baseless which in my opinion intended to prolong the dispute and I may say that what was done by the clan members to proceed with the meeting was proper as the appellant was given sufficient notice but she neglected"*

The district court further observed that-

> *"Before I wind up this judgment I have the following observation. Both parties under this dispute agree that the appellant was sometimes living with the deceased one Abdallay Rugoye and they were blessed with two issues but for reasons which are unknown to both parties to this dispute they separated, according to the trial court records that event took place in 1970. There is no any piece of evidence that they married under which law, but it is undisputed that the deceased was a Muslim, then after the appellant left home leaving two issues and the respondent supervised them till they grown up and started to live their own life but right now they have passed away* ***"MAY GOD REST THEM IN ETERNAL PEACE"****.*

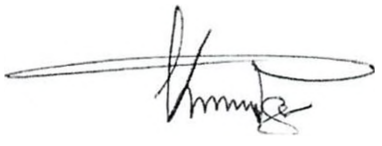
*The appellant told the trial court that her loved husband passed away in 1983 while the respondent said that her father passed sometimes in 1971, let take what was testified by the appellant; from there nothing happened and the respondent continued to live inside the house left by her beloved father till 2017 when the appellant came and asked for the said house, indeed she wanted to sell it in auction which was the reason why Beo Ally went at the trial court to ask for the appointment. Looking at this matter carefully you may find that the appellant's intention is not good at all and if they celebrated Islamic Marriage with the deceased and be divorced it is clear that the deserve nothing as she was required to be given only "**KITOKA UNYUMBA**" and nothing else, as there is no such evidence LET LIVE PIE AS PIE"*

A rule of practice demands an appellate court to determine an appeal on the strength of evidence on record of the trial court. Although, for reasons to be recorded in writing, the appellate court may direct the trial court to take additional evidence. (See section 21 of the **Magistrates' Courts Act**, [Cap. 11 R.E. 2019] (the **MCA**). In the current case, the appellate court considered evidence, which do not form part of the trial record without directing the trial court to take additional evidence. The appellate court stated that the respondent notified the appellant to attend the clan meeting and the latter refused. This piece of evidence is not part of the trial court's record. It was that piece of evidence, which formed the bases of decision of the appellate court. The appellate was not justified to amass its own evidence in order to determine the appeal.

In addition to the above, the appellate court made the observation not based on record. It observed that the appellant was entitled to nothing more than **KITOKA UNYUMBA,** as she cerebrated an Islamic marriage with the deceased and divorced. This finding was neither born out of the evidence on record nor was it one of the issues to be determined by the appellate district court. The issue before the appellate district court was whether the trial court was justified not to revoke the appointment of the respondent. The appellate district court's observation or finding was uncalled for.

Eventually, I find myself constrained to interfere with the concurrent determination of the courts below for the reason that the appellate court upheld the decision of the primary court basing on the evidence not found in the trial court's record. I invoke my powers of revision under section 31 of the **MCA**, to quash the proceedings of the district court, set aside its judgment and order the appeal to be heard afresh before another magistrate with competent jurisdiction. I make no order as to costs.

I order accordingly.



J. R. Kahyoza, J.

12/2/2021

Court: Judgment delivered in the presence of the appellant and the respondent. B/C Catherine present.

J. R. Kahyoza, J.

12/2/2021

Court: Right of appeal explained.

J. R. Kahyoza, J.

12/2/2021