IN THE COURT OF APPEAL OF TANZANIA

AT MOROGORO

(CORAM: MKUYE, J.A., KAIRO, J.A. And MLACHA, J.A.)

CIVIL APPEAL NO. 686 OF 2023

MIRAJI SALIMU NYANGASA ..... APPELLANT

VERSUS

RAMADHANI OMARY SEWANDO (As Administrator of Estate of the Late **HUSSEIN OMARY SEWANDO) ..... RESPONDENT**

(Appeal from the Judgment and Decree of the High Court of Tanzania (District Registry) at Morogoro)

(Ngwembe, J.)

dated the 29nd day of November, 2021
in

Civil Appeal No. 01 of 2021

JUDGMENT OF THE COURT

10th June & 17th September, 2024

MLACHA, J.A.:

This appeal is going to examine the law, practice and procedure of probate and administration of estates in Primary Courts. It originates from the Primary Court of Morogoro District at Urban Court in Probate and Administration Cause No. 217 of 2020. It is in respect of the estate of the late Hussein Omari Sewando who died on 01/05/2020 at Kihonda within Morogoro Municipal, Morogoro District. He left behind a wife, Nusrat @ Flora John Masasi but later, during the probate proceedings, the

appellant, Miraji Salum Nyangasa, appeared and claimed to be the first wife of the deceased. The Primary Court found that there was a marriage between the appellant and the deceased but it had ceased to exist due to long separation. It appointed the respondent to be the administrator of the estate of the deceased which comprised of the following assets: (i) 3 Motor Vehicles (one defective) – Toyota Hiace, 2 Toyota Double Cabins; (ii) NMB A/C No. 22102516185 and (iii) 2 Houses (at Msamvu and at Kihonda). It recognised Nusrat @ Flora and 4 children as the lawful heirs of the deceased. The appellant was left aside.

The appellant did not see justice in the decision of the Primary Court and accessed the jurisdiction of the District Court of Morogoro by way of revision in Miscellaneous Application No. 36 of 2020. It is not clear why the District Court entertained the revision given the fact that the appellant participated in the proceedings at the Primary Court. The decision of the Primary Court was upheld by the District Court. A further appeal to the High Court in Civil Appeal No. 1 of 2021 could not bear any fruits. Still undaunted, the appellant is now before the Court on a third appeal. For reasons which will be apparent soon, we shall not reproduce the grounds of appeal.

The appellant was represented by Mr. Marwa Masanda, learned advocate, whereas the respondent had the services of Mr. Kisawani Mandela, also learned advocate.

At the onset, the Court needed to satisfy itself with procedural issues hence, called the leaned counsel to address it on the following issues:

1. *Whether the procedure adopted by the Primary Court in conducting of the petition was correct.*
2. *Whether there is any variation between the judgment and proceedings of the Primary Court and if so, what are the effects.*

On taking the floor, Mr. Masanda submitted that the procedure adopted by the Primary Court was contrary to the Law. Amplifying, he contended that save for the respondent, all other witnesses did not take an oath before giving evidence. He went on to submit that there is a variation between the judgment and proceedings of the primary court. In elaboration, he contended that the judgment discussed things which are not reflected in the proceedings. On the way forward, he urged the Court to use its powers of revision to nullify the proceedings and vacate the decisions of the lower courts and order retrial.

On his side, Mr. Mandela conceded that the procedure adopted by the Primary Court was irregular because witnesses did not take oaths

before giving evidence. Citing our decision in **Iringa International School v. Elizabeth Post**, (Civil Appeal No. 155 of 2019) [2021] TZCA 496 (20 September, 2021) TanzLII which interpreted the provisions of section 4A of the Oath Statutory Declaration Act, he contended that it was mandatory for the witnesses to take an oath or affirmation before giving evidence. He argued that, the omission vitiated the evidence rendering it a nullity. He went on to submit that the judgment discussed points which were not raised in the evidence. He equally invited the Court to nullify the proceedings and decisions of the lower courts and order retrial before another magistrate.

We had time to peruse the record of appeal and consider the submissions of learned counsel on the issues pointed out by the Court. We think, for a better understanding of the problem before the Court, we should reproduce the proceedings and judgment of the Primary Court appearing at pp. 4 – 15 of the record of appeal. They read thus:

"MWENENDO

6/8/2020

Mbele ya A. Joshua – HAKIMU

Washauri:- 1. Mkilila

2. Mzigila

Mwombaji – Ramadhani Omary Sewando

Ndugu – Hawapo

Ombi la kuteuliwa kuwa msimamizi wa mirathi.

<u>Mahakama</u>:-

Shauri litangazwe kwenye gazeti na kupangiwa tarehe ya kusikilizwa.

Amri: -

Shauri litasikilizwa tarehe 6/10/2020 upande wa maombi. Matangazo yatolewa ili kila mwenye kuhusika mirathi hii aweze kuhudhuria, na mwenye pingamizi alete kabla ya tarehe 6/10/2020.

WASHAURI

1. Mkilila
2. Mzigila

A. Joshua – HAKIMU
sgd
6/8/2020

6/10/2020

*Mbele ya A**. Joshua – HAKIMU***

Washauri:- 1. Mzigila

2. Juma

Mwombaji – Ramadhani Omary Sewando - yupo

Ndugu – wapo

A. Joshua – HAKIMU
Sgd
6/10/2020

Amri

Shauri linasikilizwa upande wa maombi kwa kuwa hakuna mgogoro wa pingamizi lililojitokeza mpaka sasa.

A. Joshua – HAKIMU
Sgd
6/10/2020

SM1 RAMADHANI OMARY SEWANDO 82, MKUTU, DAR SALAAM, *anaapa anasema, nimekuja kwa ajili ya mirathi ya marehemu* ***HUSEEIN OMARY SEWANDO*** *hivyo nimekuja kuomba Mahakama initeue kuwa msimamzi wa mirathi hii, marehemu alifariki tarehe 01/05/2020 na kikao cha kuniteua kilikaa mara ya baada ya kumaliza msiba tarehe 08/06/2020. Marehemu alikuwa anaishi Kihonda Morogoro, alifariki katika hospitali ya Mkoa wa Morogoro. Marehemu hakuacha wosia, ameacha Watoto 4 na mke mmoja. Wazazi wake walishafariki. Aiiacha Watoto ambao ni Habiba Hussein 30yrs, Sabrina Hussein Sewando 28yrs, Nasra Hussen Sewando 26yrs, Nuru Hussein Sewando 21yrs,*

Marehemu pia aliacha mali zifuatazo:-

1. *Magari matatu 3. Mawili mazima moja bovu, Hiace 1, Toyota dabo Kebini 2.*

2. *Akaunti ya Benk ya NMB 22102516185*
3. *Nyumba 2, moja ipo Msavu na nyingine Kihonda.*

Warithi.

Kibwana Omary Sewando 60 yrs, mimi ni kaka wa marehemu, sina pingamizi lolote, nipo tayari yeye awe msimamizi wa mirathi hii.

Flora John Masasi 45 yrs, mimi ni mke wa marehemu, sina pingamizi iolote juu ya mwombaji asimamie tu.

Habiba Hussen Sewando 30 yrs, mimi ni mtoto wa marehemu, sina pingamizi lolote juu ya muombaji asimamie tu.

Nasra Hussein Sewando 26 yrs, mimi ni mtoto wa kufikia wa marehemu, mwombaji ni mdogo wangu. Sina pingamizi lolote nipo tayari awe misimamizi.

Miraji Salum 52 yrs, alieleza kuwa marehemu ni mume wangu na nina swali kwanini nyumba ya Kihonda haikutajwa? Naye muombaji alijibu kwamba tangu zamani marehemu alimpatia nyumba hiyo Habiba mtoto wake mkubwa na famiiia inajua. Nimeafiki swala na pia nakubali

mwombaji ateuliwe kuwa msimamizi wa mirathi hii.

Nuru Omary Sewando 59 yrs, alieleza kuwa marehemu ni kaka yangu naafiki muombaji kusimamia mirathi hii.

Nuru Hussen Sewando 21 yrs marehemu ni baba yangu naafiki mwombaji ateuliwe.

Maria Masud Seleman 36 yrs, marehemu ni mjomba wangu. Nami naafiki muombaji kusimamia mirathi.

WASHAURI

Nia yangu ya kufungua mirathi hii ni kukusanya mali za marehemu kuzigawa kwa warithi, hasa akaunti ya benki inahitaji kufungwa.

A. Joshua – HAKIMU

Sgd

6/10/2020

MAHAKAMA

Kwa kuwa hakuna pingamizi lolote, shauri limefungwa upande wa maombi, shauri hadi saa 8:30 pm kusomwa hukumu.

A. Joshua – HAKIMU

Sgd

6/10/2020

HUKUMU

....Marehemu enzi za uhai wake alikuwa analshi Kihonda, Morogoro na alikuwa muumini wa dini ya Kiislam. ***Marehemu aliacha wosia, lakini hata hivyo ulipokaguliwa ulionekana kutokuwa na vigezo vya wosia, kwani ulionekana uiiandikwa na marehemu pekee hakukuwa na shuhuda yoyote*** *wala mashahidi hivyo kuifanya mahakama hii kutupilia mbali wosia huo. Pia marehemu hakuacha wazazi wake wote walishafariki. Pia aliacha mke mmoja aitwaye Flora John Masasi,* ***hapa ndipo ilipoibuka hoja ya Miraji Saiumu aliyedai kuwa yeye pia ni mke wa marehemu jambo ambaio iiiipingwa vikaii na ndugu wa marehemu lakini alieleza kwamba alifunga ndoa mwaka 1991, ndoa ya kiserikali na kubahatika kupata mtoto mmoja****. Pamoja na hilo alileta cheti cha ndoa kilichothibitisha hilo, hata hivyo upande wa ndugu wa marehemu walishlndwa kuthibitisha kuwa Miraji Salumu hakuwa mke wa marehemu kwani hakuna hati ya talaka waliyoleta kuthibitisha hilo na hivyo kuifanya Mahakama hii kuamini kuwa Miraji Salumu ni kweli alikuwa mke wa marehemu lakini* ***walitengana kwa takribani miaka 25*** *ni sawa na kusema kuwa ndoa hii ilishakufa zamani kwani moja ya sababu ya ndoa kuvunjika ni*

utengano wa muda mrefu ... ***Flora John Masasi ndiye mke halali wa marehemu...*** *Hivyo basi marehemu aliacha mke mmoja (Flora John Masasi) na watoto wanne (4).*

1. *Habiba Hussein Sewando 30 years.*
2. *Sabrina Hussein Sewando 28 years.*
3. *Nasra Hussein Sewando 26 years.*
4. *Nuru Hussein Sewando 21 years.*

Marehemu aliacha mali zifuatazo:

1. *Magari matatu, mawili mazima moja bovu, Hiace 1, Toyota double cabin 2.*
2. *Account Bank NMB 22102516185.*
3. *Nyumba 2 moja ipo Msamvu na nyingine Kihonda"*

AMRI YA MAHAKAMA

1. *Muombaji ameteuliwa kusimamia mirathi hii atajaza fomu No.III akiwa na wadhamini wawili ili aweze kushughulikia mirathi.*
2. *Muombaji ataleta taarifa ya orodha ya mali za marehemu Fomu No. 5 tarehe 21.11.2020.*
3. *Muombaji ataleta mgawanyo wa mali za marehemu kwenye Fomu IV alizogawa kwa warithi halali tarehe 22.12.2020 ili shauri lifungwe."*

(Emphasis supplied)

Apart from what was pointed out by learned counsel, which we acceded, we see other shortcomings in the proceedings and judgment of

the Primary Court calling for an examination of the law and procedure in details, for future guidance. We plan to start with jurisdiction.

The jurisdiction of Primary Courts in probate and administration of estates is provided by section 19 (1) of the Magistrates' Courts Act, (Cap 11 R.E. 2019) (the MCA) which states thus:

> *"19.-(1) The practice and procedure of primary courts shall be regulated and, subject to the provisions of any law for the time being in force, their powers limited -*
>
> *(a) N/A*
>
> *(b) N/A*
>
> *(c) in the exercise of their jurisdiction, in* ***the administration of estate, by the provisions of the Fifth Schedule*** *to the Act;*
>
> *and, in matters of practice and procedure, by* ***rules of court for primary courts*** *which are not inconsistent therewith; and the said* ***code and schedules*** *shall apply thereto and for regulation of such other matters as are provided for therein."*
> *(Emphasis added)*

The import of the above provision is that, the jurisdiction of Primary Courts in probate and administration of estates is exercised under the

Fifth Schedule to the MCA and rules of court for Primary Courts which are not inconsistent with the Fifth Schedule. The rules of Primary Court referred to under this section are those which were made under the Magistrates' Courts Act 1963 and served by section 72 (3) of the MCA which reads; *"Any applicable regulations made under the Magistrates' Courts Act, 1963, and in force to the date upon which this Act comes into operation, shall remain in force as if they have been made under this Act until such time as they are amended or revoked by rules made under this Act."* The rules/regulations referred to in section 72 (3) of the MCA are; (i) The Primary Courts (Administration of Estates) Rules, GN 49 of 1971 (the Administration of Estates Rules), (ii) The Magistrates' Court (Civil Procedure in Primary Courts) Rules, GN 310 of 1964, (iii) The Primary Court Evidence Rules, GN 22 of 1964, and (iv) The Customary Law (Limitation of Proceedings) Rules 1964, GN 311 of 1964. The Primary Court may also apply rules made under the Second Schedule (Sheria za Urithi) to the Local Customary Law (Declaration) No.4 Order 1964, GN No. 436 1964, (made under section 11 of the Judicature and Application of Laws Act, Cap 1 R.E. 2019). These laws apply to the Primary Court in the exercise of its jurisdiction in probate and administration of estates but

subject to the Fifth Schedule. It means that, in case of conflict, the Fifth Schedule takes precedence.

Rule 1 (1) of the Fifth Schedule gives the Primary Court power to administer the estate of the deceased where the law applicable is Customary or Islamic law and where the deceased, at the time of his death, had a fixed place of abode within the local limits of the court's jurisdiction. The local limits of the jurisdiction of the Primary Court is not the ward or division it serves, but the area of the district within which the court is established. See section 3 of the MCA. So the deceased must have had a place of abode within the district in which the court is established. Rule 1 (2) (a) of the Fifth Schedule restricts the application of the Probate and Administration of Estates Act, [Cap. 352 R.E.2002] in Primary Courts. It also restricts to conduct proceedings where administration is undertaken by the Administrator General under the Administrator General (Powers and Functions) Act, [Cap.27 R.E. 2002]. In the latter category, it means that, under whatever circumstances, the Primary Court cannot appoint the Administrator General to administer an estate of the deceased in proceedings before it.

The Primary Court has power under rule 2 of the Fifth schedule to appoint and revoke appointments of administrators. It has power to

control the process, but is not expected to interfere with the functions of the administrator who must work independently. See the decision of the High Court made in **Ibrahim Kusaga vs Emanuel Mweta** [1984] TZHC 8 (16 April 1984) which we subscribe.

Apart from the primary function of appointing administrators, revoking the appointments and controlling the process, other functions of the Primary Court are contained under rule 8 of the Administration of Estates Rules. They read thus:

> *"8. **Other matters to be decided by the court** Subject to the provisions of any other law for the time being applicable, the court may, **in the exercise of the jurisdiction conferred on it by the provisions of the Fifth Schedule to the Act, but not in derogation thereof,** hear and decide any of the following matters, namely –*
>
> *(a) whether a person **died testate or intestate;***
>
> *(b) whether any document alleged to be **a will** was or was not a valid or subsisting will;*
>
> *(c) any question as to the identity of persons named as **heirs, executors or beneficiaries in the will;***

*(d) any question as to the **property, assets or liabilities** which vested in or lay on the deceased person at the time of his death;*

*(e) any question relating to **the payment of debts** of the deceased person out of his estate;*

*(f) any question relating to **the sale, partition, division or other disposal** of the property and other assets comprised in the estate of the deceased person for the purpose of paying off the creditors or distributing the property and assets among the heirs or beneficiaries;*

*(g) any question relating to **investment** of money forming part of the estate; or*

*(h) any question relating to **expenses to be incurred on the administration** of the estate."*

(Emphasis added)

Issues coming under rule 8 must be entertained as interlocutory matters. They must be raised and decided before the probate or administration is closed.

The rules are silent on when should the petition be filed in court. There is a gap in this area which has been a subject of abuse with some people filing petitions after years with an evil mind thereby disturbing

harmonious relations in the society. We think we should borrow a leaf from section 31 (1) of the Probate and Administration of Estates Act, Cap 445 R.E. 2002 to fill in the gap. In that section it is provided that, in any case where probate or administration is for the first time applied for after expiration of **three years** from the date of the death of the deceased, *the petition shall contain* ***a statement explaining the delay***. We think that, where the statement is found to have no sound reasons, the court, in its discretion, can decline to entertain the petition. See the decision of this Court in **Mwaka Musa vs Simon Obeid Simchimba**, (Civil Appeal No. 45 of 1994) [1995] TZCA 56 (6 November, 1995) TanzLII.

Next is the actual practice. Ordinarily, the matter will start with the clan/family meeting. This meeting originates from rule 6 of the Second Schedule (Sheria za Urithi) to The Local Customary Law (Declaration) Order 1963, GN 279 of 1964. Rule 6 states; "*Baaada ya matanga watu wa ukoo hukusanyika na kuhesabu urithi na kushauriana juu ya madai na madeni yote aliyokuwa nayo marehemu."* This literally means that, after burial the clan will sit to deliberate on issues touching the assets and liabilities of the deceased. This was later developed, through precedents, to include the element of proposing a fit person to administer the estate of the deceased. It is a meeting of close family members which may be

comprised of the father, mother, brothers, sisters, uncles and aunts of the deceased. Relatives of the wife may also be invited. It is an important forum which is encouraged because it assists in filtering issues and reduce future tensions in court. If this forum is used properly, it can make the business of the court easier at the later stage; during the appointment of the administrator or executor of the will, identification of heirs, identification of assets of the deceased and the choice of the applicable law. But, where for some reasons, the clan/family have failed to meet, or have met but a person, let say the wife or a child of the deceased, has been excluded from the meeting, he can still come to court by way of objection and get his right. And if no petition is filed, he can obtain a referral letter from the local authority explaining why the clan/family meeting did not include him. In such a situation, the court if satisfied with the information contained in the letter, it should allow him to file the petition. The court may require an affidavit to accompany the letter. See the position set by the High Court in in **Hadija Saidi Matika vs Awesa Saidi Matika**, PC Civil Appeal No. 2 of 2016 (unreported) and **Shabani Musa Mhando vs Ester Msafiri Mhando**, (Probate and Administration Cause No. 75 of 2020) [2021] TZHC 677 (16 July, 2021) TanzLII which we subscribe.

Once a person is in possession of the minutes of the clan/family meeting duly signed or a letter from the local authority and an affidavit as the case may be, he will fill Probate Form No. I as required by rule 3 of the Administration of Estates Rules. It is important here to note that the scheme is regulated by 6 forms available in the Schedule to the Administration of Estates Rules which must be used. These forms regulate the process from the beginning to the end. See **Hadija Matika** (supra), **William Simon Chuwa vs Cosmas Joseph Massawe,** (Probate Appeal No. 3 of 2022) [2022] TZHC 13367 (28 September, 2022) TanzLII, **Jonathan K. Ngomero v. Esther Julius,** (PC Probate Appeal No. 10 of 2020) [2021] TZHC 3177 (12 May, 2021) TanzLII and **Bernard Serikali v. Valerius Thomas Munegena,** (PC Probate Appeal No. 69 of 2022) [2022] TZHC 13469 (5 October, 2022) TanzLII, decisions of the High Court which we subscribe.

Form No. 1 will lead the petitioner to provide the following information to the court: (i) the name of the petitioner, his address and why he is seeking to be appointed; (ii) the name of the deceased, the date of death and his last place of abode; (iii) the will of the deceased and name of the executor, if any; (iv) the list of relatives of the deceased

and their relation to him; (v) the list of assets of the deceased and their estimated value; (vi) tribe and religion of the deceased.

The information provided in Form No. I will lead the magistrate to check his jurisdiction up front. This will be known by a look at the last place of abode of the deceased, his tribe and religion. This will give him a hint on territorial jurisdiction and whether Customary or Islamic laws are applicable. The name of the petitioner, the list of relatives and their relation with the deceased and list of assets will be useful to people who has an interest in the estate of the deceased. It is thus important to fill this form carefully.

Following the procedure contained under the Magistrates Courts (Civil Procedure in Primary Courts) Rules, the magistrate will insert the Coram of the day in the presence of the petitioner, and make on order directing the citation of the petition. This is usually done ex parte. The citation is done in Form No. II. It must be published in a newspaper with wide circulation and affixed at the court building and other public buildings in the locality which may include the street, village or ward offices. The court may also issue personal summons to people whose names appear in Form No. I being heirs or relatives of the deceased. Publication and service of summons must be done carefully to ensure that the information

circulate and reach all the people who have an interest in the estate of the deceased. The rules do not contain a fixed period in which the publication should stand. But it should not be hurried for obvious reasons. The High Court in **Hadija Matika** (supra) suggested a minimum period of 4 weeks. We think we should adjust it to be 30 days. This means that, the gap between the date of publication in the newspaper and the date when the court will convene again should not be less than 30 days. We hold this view because, as was said by the High court in **Hadija Matika** (supra), quick appointments are dangerous and are the source of many complaints in probate and administration cases. See also the decision of the High Court made in **Beatrice Brighton Kamanga and Another v. Ziada William Kamanga,** (Civil Revision No. 13 of 2020) [2020] TZHC 1428 (10 July, 2020) TanzLII. A smart magistrate will thus fix a mention date ahead of his order of citation and fix the hearing date at a later stage.

After receiving proof of publication and being satisfied that it was properly done, the case will move to the hearing stage. If there is an objection to the petition, it must be attended at an early stage. Objections may be on the appointment of the petitioner or any other issue; the most common being on the list of heirs, assets of the deceased and validity of the will. Ordinarily, objections are resolved before the hearing of the

petition but, given the simplicity of procedures at the Primary Court and the need for an early determination of the petitions, an objection to the appointment of the petitioner can be combined with the petition and be heard together. See **Hadija Matika** (supra). If this practice is opted, the petitioner will take an oath and present his case stating why he thinks he is the fit person to administer the estate. His witnesses will follow. The objector will come in as a respondent and adduce evidence to show why the petitioner is not the fit person but him or some other person. He may also bring witnesses to support him.

Where the objection is on the will, the list of heirs, the list of assets of the deceased or the wife of the deceased, it must be heard separately at an early stage, unless the objector does not object the appointment. Where it is based on the legality of the wife, as was in this case, the court may apply the Law of Marriage Act, Cap 29 R.E. 2002 to resolve the issue. See the decision of the Court in **Hamisi Saidi Mkuki vs Fatuma Ally**, (Civil Appeal No. 147 of 2017) [2018] TZCA 341 (19 November, 2018) TanzLII, where the presumption of marriage contained under section 160 of the Law of marriage Act was used to establish that the respondent (Fatuma Ally) who had lived with the deceased for 9 years under the same roof had attained the status of a wife. See also **Mariamu Juma vs Tabea**

Robert Makange, (Civil Appeal No. 38 of 2009) [2016] TZCA 736 (29 January, 2016) TanzLII and **Stephen Maliyatabu and Another vs Consolata Kahulananga**, (Civil Appeal No. 337 of 2020) [2023] TZCA 132 (22 March, 2023) TanzLII. Depending on which law is applicable, the Law of the Child Act may be invited to resolve issues of legality of children.

It is important that all objections must come *in writing* or if the objector does not know how to read and write, they can be reduced in writing by the clerk or some other person in attendance and not the magistrate. The magistrate should not assist to write the objection to avoid future complaints. Once written, it will be received formally by the magistrate, read in open court and put as part of the record.

Where there is no objection to the appointment, the petitioner will appear with his witnesses who must necessarily be among those who attended the clan/family meeting, to support the appointment. Hearing will be done *ex parte*.

In all scenarios, the court will follow the procedure outlined under rules 46 and 47 of The Magistrates' Courts (Civil Procedure in Primary Courts) on taking and recording of evidence: (i) hearing will be done in open court in the presence of the parties and other interested parties; (ii) witnesses will take an oath or affirmation before giving evidence; (iii) a

witness shall first be questioned by the party who calls him and then be cross examined by the other party; and (iv) the court may also put questions to witnesses. See the proviso to section 19 (1)(c) of the MCA and rule 11 of GN 49 of 1971.

Once hearing is complete, the Primary Court will exercise its jurisdiction under rule 2 (a) of the Fifth Schedule to make the appointment based on the evidence received. The emphasis here is that the court can appoint any person in possession of qualifications stated in rule 2 (a) and (b) of the Fifth Schedule. The person coming from the clan/family will not have better qualifications than the objector. The court can appoint him, the objector or any other person other than the Administrator General.

In **Julius Peter Nkonya** (as legal representative of the late Canisius Ng'wandu Mbusa) **vs William Michael Kudoja**, (Civil Appeal No. 133 of 2021) [2024] TZCA 397 (5 June, 2024) TanzLII, the Court subscribed to the decision of the High Court made in **Sekunda Mbwambo vs Rose Ramadhani** [2004] TLR 439 where it was stated thus:

> " ... *The administrator must* ***come from amongst beneficiaries of the estate****, but he has to be very careful and impartial in the way he distributes the estates. Furthermore, it must by now be very obvious to all, such an administrator*

must be ***a person who is very close to the deceased and can therefore, easily identify the properties of the deceased****. He must also have the* ***confidence of all the beneficiaries or dependants*** *of the deceased. Such a person may be the* ***widow, or widows, the parent or child of the deceased or any other close relative*** *of the deceased. If such people are not available or if they are found to be unfit in one way or another, then the court has the powers to appoint* ***any other fit person or authority*** *to discharge this duty.*
" (Emphasis supplied)."

See also decisions of the High Court made in **Kipara Mediri v. Laison Mediri** (PC Civil Appeal No. 14 of 2021) [2022] TZHC 14764 (24 November, 2022) and **Seifu Marare vs Mwadawa Salum** [1985] TLR 253 and **Hadija Saidi Matika** (supra) which we subscribe.

Once appointed, the administrator will execute an administration bond in Form No. III. His appointment will be made in Form No. IV. There would be no grant of administration unless security for the due administration is done in Form III. See rule 2 (e) and (f) of the Fifth schedule to the MCA and rule 7 (2) of GN 49 of 1971.

There is a confusion in the application of Forms Nos. III and IV because the rules say that the grant is done in Form No. III and security for due performance is done in Form No. IV but in practice, security is done in Form No. III and the grant is done on Form No. IV. See rule 7(1) (2) and (3) of GN 49 of 1971. See also the remark of the High Court in **Hadija Said Matika** (supra). We suggest that the Rules Committee of the Judiciary must come in to harmonize the provisions.

We will now move to explain the functions of the administrator. The functions of the administrator are contained under rule 5 of the Fifth Schedule which states:

> *"5. An administrator appointed by a Primary Court, shall with reasonable diligence,* ***collect the property of the deceased and the debts that were due to him, pay the debts*** *of the deceased and debts and* ***costs of the administration*** *and shall, thereafter,* ***distribute*** *the estate of the deceased to the persons or for the purpose entitled thereto, and, in carrying out his duties,* ***shall give effect to the directions of the Primary Court****".* (Emphasis supplied).

The plain meaning of the above excerpt is that, the primary function of the administrator is to collect the assets of the deceased, pay the debts

(if any) and distribute the balance (if any) to the heirs of the deceased. It is also provided that he is subject to the direction of the Primary Court. See the decision of the High Court in **Betrice Brighton Kamanga and Amanda Brighton Kamanga,** (supra) on functions of the administrator, for which we subscribe.

The administrator of the deceased estate, once appointed, step into the shoes of the deceased as his legal personal representative, to act with all powers like the deceased, independently without being interfered by anybody, subject only to the law and directives of the court. He has power to deal with the assets of the deceased in the best way, as he can deem fit, without being interfered by anybody including the heirs. See **Mohamed Hassani vs Mayasa Mzee and Mwanahawa Mzee**, (Civil Appeal No. 20 of 1995) [1998] TZCA 4 (19 March, 1998) TaznLII, **Omary Yusuph (as Legal Representative of the late Yusuph Haji) vs Albert Munuo**, (Civil Appeal No. 12 of 2018) [2021] TZCA 605 (25 October, 2021) TanzLII and **Aziz Daudi Azizi vs Amin Ahmed Ally and Another**, Civil Appeal No. 36 of 1990 (unreported).

Despite the wide powers and independence of the administrator, taking into account his fiduciary relationship with the heirs and the beneficiaries, it is advisable that he must consult them before making the

distributions. This will minimize or remove objections to his reports. See **Joseph Sumbusho vs Mary Grace Tigerwa and 2 others**, (Civil Appeal No. 183 of 2016) [2020] TZCA 1803 (6 October, 2020) TanzLII.

At the end of the transactions, the administrator will present his inventory containing all the assets of the deceased in Form No. V. Thereafter, or side with Form No. V, he will submit Form No. VI exhibiting his proposal on how to distribute the estates of the deceased to the heirs. As intimated in the decisions of the High Court, for which we subscribe, the heirs of the deceased under customary law are the wife/husband, the children and parents of the deceased. By parents we mean the actual parents (father and mother), not uncles and aunts. Parents are heirs because in most of our communities, once aged, a father or mother falls under the protection of his children to the end of his or her life. Uncles, aunts, brothers and sisters of the deceased are not heirs and should not get any shares save where the heirs, for reasons which must be put in writing, have consented that some property or money can be given to him or her.

The follow up question now is what should be allocated to each heir? Generally speaking all hers are equal and must be given equal shares save that, the wife of the deceased, given her special position in the

family, must, as a matter of fairness, be given more. How much should be given to the wife will depend on special circumstances of each case, but we think a portion equal to 1/3 of the estate, must be allocated to the wife or wives of the deceased. That done, the rest of the estate may then be distributed to the remaining heirs on equal shares. Where there are no children or parents of the deceased, all the assets must go to the surviving spouse, and in case there is none, they can now go to the relatives of the deceased depending on proximity.

There is the question of children born out of wedlock which is likely to arise. The Law of The Child Act 2009 and international instruments must be taken into account when dealing with this question. The rule is that, all children are born equal and have a right to inherit from their parents without discrimination. See Article 2 (1) of **The United Nation Convention of the Rights of the Child 1989** to which Tanzania is a signatory. Sub article (2) requires state parties to take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of status, activities, expressed opinion or belief of the children's parents, legal guardians or family members. The Law of the Child Act, 2009 was enacted in compliance with this requirement.

Sections 5(2) and 10 of the Law of the Child Act state thus:

> *"5 (2)* ***A person shall not discriminate against a child*** *on the ground of gender, race, age, religion, political opinion, health status, customs, ethnic origin ...* ***birth*** *...*
>
> *10. A person shall not deprive a child of reasonable enjoyment out of* ***the estate of parent****"*
> *(Emphasis added)*

The word "parent" is defined in section 3 to mean:

> ***"a biological father or mother****, the adoptive father or mother and any other person under whose care a child has been committed."*

What is important therefore is not whether the child was born out of wedlock or not, but whether the deceased recognized him as his child before his death. Recognition may be done in many ways; including introduction to the wife, grandparents, uncles, aunts or the other children of the family. If there is this evidence, then the child must be included in the list of heirs and get his share of the estate. The law is wider and cover adopted children and children who have been committed to live with the deceased under his care. To the last phase, we think there must be a qualification. The rule should not be extended to children of relatives who

were living with the deceased for a specific purpose, e.g. education or visitors.

There is also the question of when should Islamic law apply. The Primary Court has jurisdiction to apply Customary and Islamic Law as intimated above. Whereas customary law cut across for all, Islamic Law is applicable to Muslims only. It is applicable where there is evidence that the deceased intended his estate to be administered under Islamic Law. This is usually expressed by *a will or through his way of life*. Heirs may also agree that it should apply. Faced with the question of choice of law, between Islamic law and the Indian Succession Act, in a case originating from the High Court, the Court had this to say in **Hamisi Saidi Mkuki vs Fatuma Ally**, (supra).

> " ... ***the manner the deceased lead his life;*** *living with the respondent for nine years with two issues of the relationship without solemnizing the civil relationship in accordance with Islamic law which according to the appellant and Rashid Salum (DW3) was forbidden and was tantamount to "not living in Islam" ... a lovish life not within the tenets of Islam. ... We agree that given* ***the way the deceased led his life;*** *exhibited by living with the respondent for nine years and having two children with her as well as living a*

lovish ***life which was not in line with Islam,*** *the proper applicable law should have been the Indian Succession Act."*

Where there is a desire of the deceased expressed through a will or his way of life or where all heirs have reached an agreement that Islamic law should apply, the court must direct the administrator to administer the estate according to Islamic law. See decisions of the High Court in **Hadija Saidi Matika** (supra), **Betrice Brighton Kamanga and Amanda Brighton Kamanga** (supra) and **Mwajina Abdul Magumo vs Mwanahawa Magumo**, (Civil Appeal No.74 of 2004) [2005] TZHC 235 (16 February, 2005) TanzLII which we subscribe.

Finally is the closure of the administration. The administrator having filed his reports in Forms No. V and VI, the court has a duty under rule 10 (2) of GN 49 of 1971 to inform the creditors, heirs or the beneficiaries of the estate of the filing of the reports and the move to close the administration. To accomplish this duty, the court must issue a summons to heirs, debtors and creditors to appear before it on a date fixed in the summons to register their no objection to the reports. Once in attendance, the magistrate will supply copies of the reports to them for their perusal before inviting them to make a response. If they are not represented and

or are illiterate, the magistrate will read and explain the contents of the reports to them. In both situations, the magistrate will ask them if there is any comment or objection to the reports.

Parties must be made aware that, much as the administrator is an independent person who must work without being interfered but his reports are not without question. They can be objected by creditors, heirs or beneficiaries of the deceased's estate if they will be found to contain a *false information or a distribution which is unfair or fail to include an heir in the distributions*. If it is objected, the objection must be in writing and filed in court. The court will then invite the objector to state his case; adducing evidence to prove what he is saying. The administrator will be called to make his defence. The court will make a ruling on issues raised. If it will find a false information, an unfair distribution or a failure to include an heir in the distributions, it will desist to approve the reports and return them to the administrator with a direction to make corrections. The administrator will make the corrections as directed by the court and file the reports again. The direction is made under rule 5 of the Fifth Schedule and is binding on the administrator. It must be complied with. Failure to comply with the directive is a ground of revocation. See the position in the decisions of the High Court made in **Ndeshukurwa**

Elisaria Msuya vs Miriam Steven Mrita, (Misc. Civil Application No. 66 of 2019) [2021] TZHC 6923 (27 October, 2021) TanzLII and **Betrice Brighton Kamanga and Amanda Brighton Kamanga** (supra) which we subscribe.

Once the reports in Form No. V and VI are approved, the court will make an order closing the administration and discharging the administrator. It is important that this order is made or else the matter will remain pending endless contrary to public policy which require litigation to have an end. That marks the end of the probate and administration.

The order of the court closing the administration has the finality effect; it renders the court *functus officio.* The magistrate cannot reopen the matter again save on review. Any aggrieved party may therefore challenge the order before the district court by way of revision or appeal depending on whether he was a party in the proceedings or not.

It is worthy stating at this stage that we don't have endless administrations in our schemes. Administration has a starting point which is the date when Form No. I was presented to the court and an end which is the date when the matter is marked closed. Equally, we don't have **life administrators** or people who hold the assets of the deceased on behalf

of others for life. The administrator must finish his job at some time and be discharged. There is a time frame within which the administrator must accomplish his business. Rule 10 (1) of GN 49 of 1949 which states thus:

> "10. ***Statement of assets and liabilities and accounts of the estate***
> *(1) Within* ***four months*** *of the grant of administration or within* ***such further time as the liabilities court may allow,*** *the administrator shall submit to the court a true and complete statement,* ***in Form V,*** *all the assets and liabilities of the deceased persons' estate and, at such intervals thereafter as the court may fix, he shall submit to the court a periodical account of the estate in* ***Form VI*** *showing therein all the moneys received, payments made, and property or other assets sold or otherwise transferred by him."*

This means that, the administrator must file his inventory in Form No. V within **4 months** from the date of appointment or thereafter as the court may direct. He will thereafter submit his statement of accounts in form No.VI. There is no time fixed for submitting Form No. VI which in actual practice is the forum in which the administrator is exhibiting his proposal on how, if approved by the court, the distribution should be. The

practice of some magistrates has been to order both of them to be submitted within 4 months or within such further period as shall be extended by the court. We think this is a good practice which should be adopted.

In a good system of administration therefore, the court may make an order for both the inventory and the statement of account to be filed within 4 months from the date of appointment and direct that if for any reason the administrator cannot file any of them within 4 months, he must apply for extension of time. It will also inform him of the consequences operating over and above the period of 4 months without extension. His activities will be rendered illegal. To ensure a peaceful end, the magistrate must fix a mention date at the end of 4 months to remind the administrator and all interested people that the business must be accomplished within 4 months.

That said and done, we will now revert to our case to see if there was compliance to the law and the procedure as outlined above. It is obvious that there was laxity in the conduct of the proceedings leading to a violation of the law and procedure which has an effect in this appeal. On the first issue raised by the court, we find the record of appeal with the following defects: **One**, absence of minutes of the clan/family

meeting. There is mention of the clan/family meeting in the judgment but the minutes could not be located in the record. We think it was important to put them in the file with an endorsement of the magistrate, to form part of the proceedings and record of the Primary Court. **Two**, witnesses who appeared to give evidence in support of the respondent did not take an oath or affirmation as required by the law. Further, there was no evidence that they gave evidence. It appears that they were merely examined by the magistrate. Neither were they subjected to examination in chief or cross examination as required by the law. **Three**, the record shows that the appellant lodged an objection in respect of the house at Kihonda but the parties were not given a chance to adduce evidence for and against the objection. There is no proceedings or ruling of the court on the aspect. **Four**, the respondent was appointed and supplied with a list of heirs and assets of the deceased. We think that was not proper. At that stage, as we have demonstrated above, the court was only mandated to make the appointment. The list of assets and heirs could be submitted by the administrator at a later stage in his reports through Forms No. V and VI.

On the second issue raised by the Court, we find that the judgment made a decision on three critical areas based on facts which are not in

the proceedings thus creating a variance between the judgment and proceedings as follows: **One**, the judgment talked about the will of the deceased. It discussed and brushed it aside. But the will is not located anywhere in the proceedings. The proceedings are also silent on who tendered it. It is not even known who raised the objection. The ruling of the court on it is also missing. **Two**, the finding that the appellant deserted the deceased for more than 25 years has no bearing in the evidence on record. The respondent did not say so in his evidence. None of those who were referred as his witnesses said so. **Three**, the judgment said that the status of the appellant as wife of the deceased was objected by relatives seriously. This is not seen in the proceedings. It is thus obvious that the magistrate invited extraneous matters and made them the basis of his decision contrary to the law.

The shortcomings pointed above made the proceedings and decisions of the lower courts illegal calling for the exercise of the powers of revision.

In the exercise of the revision jurisdiction of the Court under section 4 (2) of the Appellate Jurisdiction Act, (Cap 141 R.E. 2019), the proceedings and judgment of the Primary Court are nullified, vacated and set aside. That also apply to the proceedings and judgments of both the

District Court and the High Court. We direct the petition to be heard afresh before another magistrate of competent jurisdiction and be completed within the time frame provided above. We make no order as to costs.

It is ordered so.

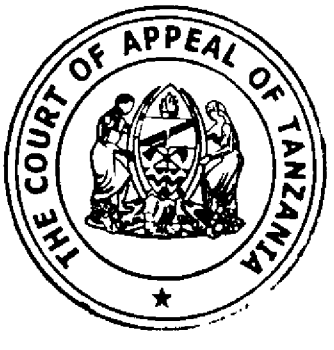
DATED at **DAR ES SALAAM** this 13th day of September, 2024.

R. K. MKUYE
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

L. M. MLACHA
JUSTICE OF APPEAL

The Judgment delivered this 17th day of September, 2024 in the presence of Mr. Kisawani Mandela, learned advocate for the Respondent via video facility from High Court of Morogoro and also holding brief for Mr. Marwa Masanda, learned advocate for the Appellant, is hereby certified as a true copy of the original.



R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL