

TANZANIA / JUDGMENT

CIVIL APPEAL NO

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA TEMEKE SUB-REGISTRY (ONE-STOP JUDICIAL CENTRE) AT TEMEKE CIVIL APPEAL NO. 22675 OF 2024 (Arising from Probate and Administration Cause No. 426 of 2023) JOSEPHINA GEORGE THEODORY..... 1st APPELLANT JOSEPHINA GEORGE THEODORY (as Next Friend of Maya Edmund Edward)..... 2nd APPELLANT VERSUS NEEMA JORAM MBOTO (Administratrix of the Estate of late Edmund Edward Kimbe Sailale)..... 1st RESPONDENT IAN EDMUND SAILALE (Administrator of The Estate of Late Edmund Edward Kimbe Sailale)..... 2nd RESPONDENT INNOCENT EDWARD SAILALE (Administrator of The Estate Of Late Edmund Edward Kimbe Sailale)..... 3rd RESPONDENT

JUDGMENT

30th October & 25th November, 2024 BARTHY, J.: Following the demise of Edmund Edward Kimbe Salailale, a petition was filed in the District Court at the One Stop Judicial Centre, Temeke (the trial court), where letters of administration were granted to the respondents i herein. The appellants subsequently filed an application before the trial court seeking, the revocation of the letters of administration issued to the respondents. The trial court dismissed the application for lack of merit, a decision that did not please the appellants. The appellants aggrieved with the decision of the trial court, in Probate and Administration Cause No. 426 of 2023, preferred this appeal based on the following grounds;

1. That, the district court magistrate erred in law by (sic) failure to be impartial in conducting the application thus reaching into bias and illegality (sic) decision.
2. That, the district court magistrate erred in law and fact by (sic) relying on untruth (sic) counter - affidavit by the respondents.
3. That, the district court magistrate erred in law through (sic) misapprehension of evidence adduced by the 1st appellant to be (sic) considered as the wife of the deceased thus entitled to be included in the heirs list.

4. That, the district court magistrate erred both in law and fact by (sic) ignoring the principle of *En Ventre Sa Mere* leading to a wrongful decision of not (sic) including the 2nd appellant in the list of the deceased's heirs; 2
5. That, the district court magistrate erred in law by (sic) refusing to grant the application whereas the appellants had proved the concealment by the respondents, of (sic) the existence of the appellants and other two children and exclusion of those (sic) in the list of heirs. At the hearing, both parties were properly represented, with the appellants' counsel, Mr. Lusajo Watson Mwakasege, seeking to have the appeal allowed, the district court's order quashed, and costs awarded. The respondents were represented by Mr. Michael Kasungu. Mr. Mwakasege on his submission in support of appeal, he started with the fifth ground, arguing that the trial court erred in making its findings that the appellants concealed material facts, specifically the omission of two children, Oprah Sailale and Edward Sailale, as heirs in the petition for letters of administration. He stated that the children were only added after the application for revocation has been filed. Stating the omission amounted to concealment, which was proven on a balance of probabilities. Arguing for the second ground based on the claim that the trial court wrongly relied on the counter-affidavit containing false statements, specifically a claim that the appellants' counsel appeared in court on 3 27/06/2023, when he was not yet enrolled as an advocate. He cited *Uthman Madati vs. Tatu O. Farahani & Another*, Misc. Land Application No. 388 of 2020 to assert that affidavits with falsehoods cannot support claims, and the trial court's reliance on this affidavit was a significant procedural error. Mr. Mwakasege argued the first ground that there was judicial bias, highlighting repeated adjournments favoring the respondents, denial of access to the probate file on 06/11/2023, and the granting of a last-minute adjournment on 05/12/2023. He claimed these actions violated the appellants' right to a fair hearing. Mr. Mwakasege on the third ground, he argued that the trial court failed to properly analyze the evidence regarding the first appellant's status as the deceased's wife. He stressed that the court recognized other women as wives without requiring proof, and unfairly dismissed the first appellant's claim, contrary to the law. Submitting for the fourth ground, he argued that the trial court overlooked the principle of '*en ventre sa mere*', which protects the inheritance rights of children born after the father's death. He cited *Black's Law Dictionary* to assert that the second appellant, born three days after the deceased's death, was a legitimate heir under this principle. 4 Mr. Mwakasege also cited Section 49(1)(b) of the Probate and Administration Act, contending that the grant of administration was obtained through fraud and the concealment of material facts. He prayed that the respondents' appointment as administrators be revoked and that the Administrator General take over the administration of the estate. Mr. Kasungu, in his response, addressed the grounds of appeal. Starting with the fifth ground, he argued that the appellants were bound by their pleadings, and none of the seven grounds addressed the issue of Edward and Oprah's inclusion as beneficiaries. These children were added by agreement during the trial, which is common in probate cases. He further claimed the appellants' argument regarding Maya Edward's exclusion was premature, as probate accounts had not yet been filed. On the second ground,

Mr. Kasungu defended the counter-affidavit as valid despite a clerical error, emphasizing that the trial court did not overly rely on it. He also argued that pleadings should be interpreted as a whole. Mr. Kasungu argued that allegations of bias must be supported by evidence, referencing *Mwesigwa Zaidi Siraji vs. Mara Textile Limited*, Civil Case No. 53 of 2021. He noted that no recusal prayer was made during the trial, implying the appellants were content with the magistrate's conduct. He further explained that adjournments were caused by issues 5 with previous counsel, and the claim of denied access to the case file was unfounded. Counter arguing the third ground, Mr. Kasungu stated that the appellants have failed to prove that the first appellant was the deceased's wife, as required under Section 110 of the Evidence Act. He pointed out that the respondents' counter-affidavit and supporting clan meeting minutes identified two other women as the deceased's wives, and the appellants had acknowledged the absence of a formal or customary marriage. Mr. Kasungu responding to the fourth ground concerning that parentage issues, he insisted it falls under the jurisdiction of the Juvenile Court as per Section 3(c) of the Law of the Child Act. He pointed out that the district court had already recognized Maya Edward as the deceased's child and directed any disputes regarding her status to the proper forum. He also stated regarding the appellants' claim of her exclusion from the estate was an afterthought, as the respondents had agreed to include her. Additionally, he was firm that the appellants failed to meet the burden of proof under Section 49 of the Probate and Administration of Estates Act, citing *Matter of the Estate of Ally Kleist Sykes* (Misc. Civil Application No. 85 of 2020). ~' - 6 In response to the appellants' prayer for the appointment of the Administrator General, he argued that this issue was not included in the grounds of appeal or the original chamber summons. He contended that the respondents had fulfilled their fiduciary duties and urged the court to dismiss the appeal with costs, permitting the respondents to continue managing the estate. The appellants emphasized compliance with Rule 28(1) of the Probate Rules, clarifying that Edward and Oprah were included in the pleadings. He added the principle of *en ventre sa mere* concerns inheritance rights, not parentage, rendering the respondents' reliance on the Law of the Child Act misplaced. They reiterated their initial prayers for relief. Having carefully considered the submissions of both sides, the court proceeds to determine whether the appeal has merit. The court, as the first appellate court, must re-evaluate the trial court's evidence and make independent findings, in line with the principle established in *Registered Trustees of Joy in The Harvest vs. Hamza K. Sungura* (Civil Appeal No. 149 of 2017, [2021] TZCA 139). In examining the first ground of appeal, which alleges bias by the trial magistrate, the court must determine whether the magistrate acted impartially in handling the matter. The appellants claimed that the 7 magistrate arbitrarily denied their prayer for perusal of records and unjustifiably granted multiple adjournments in favor of the respondents, referencing an incident on 18/09/2023 as an example. However, a review of the lower court's records indicates that on 18/09/2023, the applicants through advocate Lusajo Mwakasege, requested the adjournment contrary to the claim. Subsequent adjournments were attributed to procedural circumstances, such as the absence of parties, the engagement of new counsel, and scheduling challenges. Ultimately, the ruling was rescheduled multiple times and delivered on 24/07/2024. In *Mwesigwa Zaidi Siraji vs. Mara*

Textile Limited, Civil Case No. 53 of 2021, High Court at Dar es Salaam, where the court held: "For the ground of bias to stand against the judicial officer, strong reasons must be advanced supporting the contention that, with all his/her conducts, the judicial officer is not expected to discharge his duties fairly." The court further referred to the case of *R. vs. Australian stevedoring Industry Board, Ex parte Melbourne Stevedoring Co Pty Ltd* [1953] 88 CLR 100, quoted with approval in *Dhirajlal Walji Ladwa & 2 others vs. Jitesh Jayantlal Ladwa & Another*, HC-Comm. Cause No. 2 of 2020 (unreported), where it was held: 8 "To demonstrate disqualification for bias, it is necessary that there should be strong grounds for supposing that the judicial or quasi-judicial officer has so acted that he cannot be expected fairly to discharge his duties." In the matter before the trial court the records reveal the adjournments were necessitated by procedural issues affecting both parties, and the appellants' own counsel also requested adjournments on several occasions. This undermines the claim of partiality, as the magistrate's conduct appears impartial and consistent with the demands of the case. In light of these principles and the reviewed records, no strong grounds exist to support the contention of bias. The trial magistrate discharged her duties in accordance to the circumstances of the said matter. Consequently, the first ground of appeal lacks merit. The second ground of appeal concerns the claim that the trial magistrate relied on the respondents' counter-affidavit, which allegedly contained false statements. The appellants specifically argued that the counter-affidavit falsely indicated that the respondents' counsel appeared on 27/07/2023 when he had not yet been enrolled as an advocate. Additionally, the appellants contended that the deceased's mother had not 9 asserted ignorance of knowing the first appellant, rendering parts of the affidavit deceitful. In response, the respondents clarified that the statements in the counter-affidavit should not be read in isolation, pointing to annexure R-4 as evidence supporting their position. They further stated that the date in the affidavit was a clerical mistake, which should be corrected to reflect 27/08/2023. Upon examining the trial magistrate's ruling, this court finds no indication that the magistrate exclusively relied on the facts based on the said date stated in the counter-affidavit to determine the application. Instead, the ruling demonstrates that the magistrate undertook an analysis of all evidence presented by both parties. This is particularly evident on page 8 of the ruling, where the magistrate scrutinized the entirety of the evidence in the context of the main application for revocation of the letters of administration. It is a well-established principle that affidavits, as part of evidence, must be evaluated in their entirety and not in isolation. This principle is rooted in ensuring that no single piece of evidence is given undue weight, especially when corroborating evidence is available. Moreover, clerical errors, such as the incorrect date cited in the counter-affidavit, do not in themselves constitute substantive grounds for 10 overturning a decision, unless they significantly impact the fairness or outcome of the proceedings. In this case, the clerical error appears minor and I did not occasion any miscarriage of justice. The appellants' assertion that the ruling was based on falsehoods within the counter-affidavit is unfounded. Accordingly, the second ground of appeal lacks merit. Turning to the third ground of appeal, it contends that the trial magistrate misapprehended the evidence of the first appellant, who claimed to be the wife of the deceased. In response, the respondents,

through Mr. Kasungu, firmly asserted that the deceased's other wives were formally recognized, as evidenced by the minutes of the clan meeting. This court has carefully examined the affidavit filed by the first appellants before the trial court. Notably, in paragraph 5 of the affidavit, the appellants acknowledged that no formal marriage had been contracted with the deceased and that their relationship was based on an open marital arrangement. Under section 43 of the Law of Marriage Act, Cap 29, R.E. 2019, all marriages are required to be registered, and a certificate of marriage serves as primary proof of the marriage's existence. In this case, the appellants failed to produce any other form of proof to support her claim of being married to the deceased. (I ii Furthermore, sections 110 and 111 of the Evidence Act, Cap 6, R.E. 2019, place the burden of proof on the person who asserts the existence of a fact. As such, it was incumbent upon the applicants now the appellants to provide clear and convincing evidence of her marriage to the deceased. However, the facts deposed in her affidavit were inconsistent. She claimed to have lived with the deceased in Mwanza and Musoma, while the respondents presented evidence that the deceased was stationed and working in Tarime, Musoma and not in Mwanza. The appellant failed to reconcile these inconsistencies or provide corroborative evidence to substantiate her claims. Additionally, there was no testimony or evidence from the deceased's family members, colleagues, or workplace records affirming that the first appellant was recognized as the deceased's wife, either formally or under the presumption of marriage. The presumption of marriage, requires evidence of prolonged cohabitation and public acknowledgment of the relationship as a marital union. Without credible evidence to substantiate her claim, the appellant's assertion of being the deceased's wife—whether formally married or presumed—remains unproven. The trial court's conclusion that the appellant lacked evidence to support her claim is therefore upheld. 12 In light of the foregoing, this court finds no basis to fault the findings of the trial court. The appellant failed to prove the existence of a marriage to the deceased, and accordingly, the third ground of appeal is dismissed for lack of merit. The fourth ground of appeal concerns the appellant's assertion that the trial magistrate failed to consider the principle of 'en ventre sa mere'. This principle, entails that the child is considered to have existed at the time of the person's death for inheritance purposes. The appellants argued that this principle was disregarded in the trial court's analysis. However, this contention lacks merit, when closely examined against the trial court's findings. The trial magistrate explicitly addressed the status of the second appellant, stating: "Hence in that regard, the 1st applicant as the next of friend of the 2nd applicant has managed to prove that the 2nd applicant is the child of the deceased." This acknowledgment unequivocally confirms that the second appellant was recognized as the deceased's child, a fact that was neither disputed by the respondents nor contested in the proceedings. In light of the above, the fourth ground of appeal is unfoundedS. The trial court adequately addressed the issue of the second appellant's status as the child of the deceased, and no oversight of the principle of en ventre 13 sa mere occurred. Consequently, this ground of appeal is dismissed for lack of merit. Lastly, on the fifth ground of appeal, there is allegation of concealment of facts, with the appellants contending that the respondents filed the petition for the administration of the deceased's

estate while excluding the appellants and others as beneficiaries. The respondents' counsel countered this by arguing that the claim was raised prematurely and that, upon the consensus of the parties, the list of beneficiaries was subsequently updated to include additional names. To address this ground, it is critical to examine the legal responsibilities of an administrator as established under the Probate and Administration of Estates Act, Cap. 352, R.E. 2002. According to section 108 of the Act, an administrator assumes their duties only after their appointment. These duties include collecting the deceased's assets, settling liabilities, and ultimately identifying heirs for the proper distribution of the estate. This principle was reinforced in the case of *Monica Nyamakare Jigamba vs Mugeta Bwire Bhakome & Another* (Civil Application No. 199 of

2019) Court of Appeal at Dar es salaam [2020] TZCA 1820 (16 October

2020) ' / 14 The identification of heirs is not final at the stage of filing the petition but remains an ongoing process that culminates after the filing of an inventory and accounts. In this case, the allegation of concealment of heirs raised by the appellants does not meet the threshold for revocation under Section 49 of the Probate and Administration of Estate Act. The exclusion of some individuals as heirs in the petition is not, on its own, sufficient to constitute concealment or fraud, especially when the process of verifying and identifying all potential heirs is yet to be completed. Furthermore, the lower court's findings reflect that, upon the issue being raised, the parties reached a consensus to amend the list of beneficiaries, demonstrating the absence of any deliberate concealment. The trial court also rightly observed that no concrete evidence was tendered to prove that the respondents had knowingly and intentionally excluded the appellants as heirs. The appellants failed to provide sufficient proof of deliberate concealment, which is a prerequisite for invoking the ground of revocation under the relevant legal provision. Additionally, it must be emphasized that any interested party with a claim to the deceased's estate is afforded the opportunity to appear after the issuance of a general citation. This procedural safeguard ensures that all potential claimants can present their interests before the administration 15 process is finalized. The appellants, therefore, had ample opportunity to assert their claims during the administration process. In conclusion, failing to include certain heirs in the initial petition is not, in itself, a sufficient basis for revoking the appointment of an administrator. The allegation of concealment of facts is unfounded, as the evidence does not support intentional wrongdoing by the respondents. Given the foregoing, I find no merit in the fifth ground of appeal. Accordingly, the appeal is dismissed in its entirety. Due to the familial relationship between the parties, I make no order as to costs. Order accordingly. Delivered in the presence of Mr. Lusajo Mwakasege learned advocate for the both appellants, 1st respondent in person, Mr. Michael Kasungu learned advocate for the respondents and Ms. Bernadina Tayari, RMA. 16

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