

TANZANIA / JUDGMENT

civil decision 2024 12 23 16 41 37

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23 December 2024

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THE JUDICIARY OF TANZANIA IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA AT
KIGOMA CIVIL APPEAL NO. 000009625 OF 2024 MUSA VALES LIJE
COMPLAINANT / APPELLANT / APPLICANT / PLAINTIFF VERSUS JOSEPHINA MALILA& 2
OTHERS RESPONDENT / DEFENDANT

JUDGMENT

RWIZILE, J, The appellant petitioned for grant of letters of administration of the estate of his deceased father Vales Lije Kanzo who died intestate on 16th April 2023. Surviving him were two widows who had mothered a good number of children with the deceased. The appellant among others is from the senior wife. Before the petition was heard by Munyama Primary court of Buhigwe District, the 1st, 2nd and 3rd respondents filed a caveat in respect of the grant. The caveat cantered on four points; First that being children of second wife, they were not involved in the family meeting that appointed the appellant to administer the estate of their late father. Second, the appellant does not know all the deceased properties and so did not list them all. Third, that the appellant lied that Jetruda Vales did not deliberately attend the family meeting, when she in fact with a mental illness. Fourth, the appellant, was appointed without consultation of the other family members of the deceased (from second wife). The trial court was therefore asked to appoint another person who would better hold the office of the administrator of the estate of their father justly. The trial court heard both sides and was satisfied that the appellant was not fit for the appointment. The second respondent, Retisia Vales Lije one of daughters of the deceased was appointed instead, and the chairman of Kasumo village, whose name was unfortunately not named in the order. The appellant was aggrieved by the decision of the trial court. He appealed to the district court of Buhigwe unsuccessfully, this appeal was therefore filed with following grounds: -

1. That, both the trial court and the appellate court erred in both law and facts for the decision they reached for appointing the second respondent herein to be administratrix of estate of late Vales Lije Kanzo while she never prayed to be appointed.
2. That, both the trial court and the appellate court erred in both law and facts for the decision they reached for appointing the second respondent herein to be administratrix of estate of late Vales Lije Kanzo while she is not aware of properties of the deceased. Page. 1

3. That, both the trial court and the appellate court erred in both law and facts for the decision they reached for appointing the Kasumo Village Chairman (Mwenyekiti wa kijiji cha Kasumo) who never prayed to be appointed as the administrator of the estate of the deceased.
4. That, the trial court and the appellate court both erred in both law and facts for the decision they reached by assuming that both families cannot sit together for the purpose of conducting a family meeting of choosing the administrator of deceased estate who would be accepted by both families.
5. That, the trial Court Magistrate misdirecting himself without considering willingness of both families towards appointment of a new administrator/Administratrix who will be accepted by both Before this court, the appellant was under services of Mr. Kalimunda Yugalila learned advocate, while the respondent was serviced by Mr. Bahati Hamisi learned advocate. Hearing was by written submissions. Mr. Kalimunda argued on the first ground that, Retisia Vales Lije, 2nd respondent was appointed to administer the estate when she did not petition for appointment. He said, the court ought to allow both families to select the administrator of their choice. The case of Eckson Mtafya vs Maiko Mtafya, (HC), Probate Appeal No.06 of 2020, was cited to strengthen his argument. The learned counsel added that the court cannot grant an order which was not asked. By appointing the administrator and administratrix who did not so petition, the trial court made a fatal decision in breach of Article 13(6)(a) of the Constitution of the United Republic of Tanzania, and the case of Boulangerie Saint Thomas vs Tanzania International Containers, Misc. Civil Revision No. 4 of 2022 (HC), where it was held that an adverse party must be given a room to contradict if necessary. On the 2nd ground, it was submitted that at the trial court, it is the appellant who named the assets of the deceased, the 2nd respondent could not. Still, it was added, the first appellate court, found her appointment was proper under rule 2(b) of the 5th Schedule to Magistrates' Courts Act, when in fact, the appellant was not afforded a chance to comment on his conduct. It was the view of the learned counsel that the decision contradicted the decision of this court in the case of Boulangerie Saint Thomas(supra) on the right to be heard. Mr. Kalimunda's argument on the third ground of appeal was that, it was not proper to appoint the village chairperson without consulting him. He added, consultation was done after the appointment which is a procedural irregularity. The fourth ground contends that the lower courts assumed that the two families of the deceased cannot meet while there is no evidence to that effect. The learned counsel held the view that courts are prohibited to assume the facts. Lastly, Mr. Kalimunda contended, it was a misdirection by the two courts below to believe the two families of the deceased Lije cannot sit and appoint a new administrator. It was submitted further that the two-competing side of the deceased's family are ready to meet and choose a person who could best do so. The resistance occurred on the side of respondents' family to meet and appoint a new administrator who is accepted by both sides. Generally, it was the respondent's prayer that this appeal be allowed. Page. 2 Mr. Bahati on the other side, before arguing together the 1st and 2nd grounds of appeal. He said, since this is the second appeal, the grounds herein were not raised before the first

appellate court, therefore, this appeal is baseless. He further argued that, the trial court has excised powers under section 19 of the Magistrates Court Act (MCA) read with the 5th Schedule and the Primary Court (Administration of Estates) Rules GN. 49 of 1971. He said, based on the case of Naftary Petro v Mary Protas, Civil Appeal No. 103 of 2018 (CAT), the primary court may appoint and revoke the administrator of the estate for the interest of the deceased properties. The learned counsel added, Rule 2(2) of the 5th schedule to the Magistrates Court Act empowers the same court of its own motion or by the application of the interested person, appoint one or more persons to administer the estate. According to the learned counsel, the 2nd respondent as a heir, was rightly appointed an administratrix of the estate of her deceased father. It was his view that, it does not matter, if the 2nd respondent petitioned for appoint or not provided, the court found her a fit person for appointment and therefore the case of Eckson Mtafya (supra) is distinguishable. It was added that the case of Catherine Priscus Masawe vs Kamila Proti Masawe, Miscellaneous Civil Appeal No.5 of 2020, which also referred to the case of Eckson Mtafya as well, support the position of the trial court. The learned counsel further argued the 3rd and 4th grounds together. He said, that the two grounds were not raised at the 1st appellate court. In terms of Abdul Athuman vs The Republic [2004] TLR 151, the two grounds should not be considered for not being raised before the first appellate court. According to him, the trial court vested with powers to appoint any person did so on the village chairman and called him for filling form No. 4. This, he added, is not wrong. His arguments on the 3rd and 4th grounds of appeal, is not anything different from the 5th ground. It is on the said premises that, it is a new ground of appeal not raised before. This court was therefore asked to dismiss this appeal with costs. Having heard the parties' submissions, I find it better to determine together the 1st and 3rd grounds together as they challenge powers of the trial court to appoint the 2nd respondent and the village chairperson to administer the estate of the deceased. Powers of the primary court in administration estates are provided for under rule 2(a) (b) to the 5th schedule to the Magistrates Court Act [CAP 11. R.E 2019] as state hereunder: -

1. ...
2. A primary court upon which jurisdiction in the administration of deceased's estates has been conferred may-
 - (a) either of its own motion or 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 the administrator or administrators, thereof, and, in selecting any such administrator, shall, unless for any reason it considers in expedient so to do, have regard to any wishes which may have been expressed by the deceased; Page. 3
 - (b) either of its own motion or on application by any person interested in the administration of the estate, where it considers that it is desirable so to do for the protection of the estate and the proper administration thereof, appoint an officer of the court or some reputable and impartial person able and willing to administer the estate to be administrator either

together with or in lieu of an administrator appointed under sub-paragraph (a); It is clear from the law that, the trial court having heard the parties, was of the view that the 2nd respondent be appointed to also be assisted by the village chairperson. Under the law, the court has such powers provided the same are exercised within the ambit of the law. The first thing the trial court is to consider is if a person to be appointed has interest in the estate. The 2nd respondent is a daughter of the deceased. She has therefore vested interest in the estate. Even though the trial court did not assign reasons as to why selected her among many others, still I find no reason to fault the trial court decision. I am of that opinion because, the same did not act against the law or applied a wrong principle of the law in so appointing. In the second place, the appointment of the village chairperson was also an issue before the first appellate court. In the similar reasoning the first appellate court found no reason to fault the decision of the trial court. It is clear as well that, the trial court acted under rule 2(b) which allows appointment of any reputable person to hold the office of the administrator. The village chairperson it seems is a reputable person. The trial court was of that opinion. Being a village chairperson in my view, should not be taken as the basis of being a reputable person. The law plainly states that a person other than the interested person or officer of the court, any other person in order to qualify the appointment must not only be reputable, but also must be an impartial person, able and willing to administer the estate together with or in lieu of an administrator appointed. It seems to me that such powers although given by the law, should be sparingly exercised because it is to appoint a stranger to the estate of the deceased. I think, that should be done, where the family members are unable and it has so been proved that the same cannot do so without an assistance of someone else. In appointing him, the trial court reasoned that he will stand in between the two sides and coordinate them. In the words of the trial court, "Mwenyekiti akiwa ni mtu wa kati kuwaunganisha warithi wote". After mediating the reason so advanced, I think this was not right. How was the trial court sure that the village chairman is able, and willing to hold that office? Second, how did he know he is capable of being a uniting factor between the two sides. For the foregoing reasons, I hold, the trial court acted on the wrong assumption, and it is risky to so adopt his reasoning as the first appellate court did. I therefore partly find merit in these grounds, in that the village chairperson should not have been appointed into the estate of the deceased. It was therefore wrong to do so, and I hereby allow this ground partly. The second ground of appeal is baseless. The trial court found that the 2nd respondent is best placed to act for the rest of the family. There is nowhere in the proceedings, it was shown she does not know the property of the deceased properly. After all, reasons for appointment of the administrator or administratrix as the case may be, are stated under rule 2 of the Rules, not knowing the estate of the deceased well, is not one among such reasons. The administrator once appointed should do a thorough search of the deceased's property and file an inventory. He has the duty to consult any person whether natural or corporate in order to identify properly all properties of the deceased. That is why the law allows even a person without interest in the estate to be appointed provided he is reputable, impartial, able and willing to hold the office. I therefore find no merit in this ground as well. Page. 4 The 4th ground lacks merit, it is clear from the record that two sides

of the deceased had misunderstandings as testified by Josephine Malila, one of the two wives of the deceased as shown hereunder: - “Kikao ambacho ninakitambua ni kikao cha kumaliza Matanga na hicho kikao mwombaji alisema subirieni msiondoke kesho asubuhi alikusanya watu karibu hamsini asubuhi hiyo hiyo alitoa unga, vitu vyote akisema ngoja niwawekee vitu vyote msije mkafatilia kitu chochote hapa mfatilie mali za Kasulu. Mama yake na mwombaji alisema nisiwaone hawa Watoto wamekuja kudai mali hapa waishie hukohuko Kasulu” From the above extract, it is true that the two sides of the deceased’s family are not in good terms. Therefore, the court did not assume that they cannot be cooked in the same pot. But that does not mean, they cannot render support to the appointed administrator. After all, administration of the estate is not done at the whims of the person holding the grant. It is done subject to the law, whether customary, Islamic or under the Indian succession Act, to mention a few. All done and said, still the administrator is subjected to the compulsory court supervision. Therefore, this ground lacks merit too. Dealing with the 5th ground, it is true, it was not raised at the first appellate court, which is against the ratio in the case of Galus Kitaya vs The Republic, (CAT), Criminal Appeal No. 196 of 2015 on page 6, where it was held that; “As the Court said in the case of Nurdin Musa Wailu V R supra, the Court does not consider new grounds raised in a second appeal which were not raised in the subordinate courts...” From the foregoing, it seems to me, the ground of appeal was not raised before, but going deep into its wording, it matches with the 4th ground of appeal which as I have already decided has no merit. I have determined all grounds of appeal. I hold that this appeal partly succeeds in that the village chairperson’s appointment is quashed. The 2nd respondent remains administratrix. I make no order as to costs. Although, by passing, the record should be remitted to the trial court where the same has do the following;

1. Call the only administratrix RETISIA VALES LIJE
2. Issue a grant in her name alone.
3. Direct her to file an inventory and accounts in the respective forms (if not filed yet)
4. Fix a hearing date, where all respective beneficiaries should be called for approval of the inventory and accounts, after taking necessary objections or comments (if any)
5. Then make sure all the properties in the accounts have passed hands to the respective beneficiaries
6. Then receive the final report and close the record. It should be noted that filing of an inventory and accounts does not depend on whether there is an appeal or not. Dated at KIGOMA this 2nd of December 2024 . Page. 5 A. K RWIZILE JUDGE OF THE HIGH COURT
Page. 6

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Prepared on 13 October 2026 · Esheria