

TANZANIA / JUDGMENT

# Civil Appeal 3910 of 2024 of Mwanahiba

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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. 3910 OF 2024 (Appeal from the decision of District Court of Terneke, One Stop Judicial Centre at Temeke in Civil Appeal No. 37 of 2023) MWANAHIBA ALLY ABDULRAHMAN..... APPELLANT VERSUS HABIBA SEIF NANDULE..... 1st RESPONDENT ZENA HARID RASHID..... 2nd RESPONDENT

## JUDGMENT

08th May & 19th July, 2024 BARTHY, J.: The appellant, being dissatisfied with the decision of the District Court of Temeke at the Temeke One Stop Judicial Centre in Civil Appeal No. 37 of 2023, has preferred an appeal to this court, advancing the following grounds;

1. That the 1st appellate court erred in law and fact by failure to recognize that letters of administration granted to the 1st respondent was obtained by means of untrue allegations of facts essential in point of law to justify the grant.
2. That the 1st appellate court erred in law and fact by failure to recognize that the 1st respondent has failed to exhibit in court a true inventory of the deceased estate as ordered by the trial court.
3. That the 1st trial magistrate erred in law and fact by failure to take into account that the 1st respondent has been acting in contravention of the terms of the grant by wilfully distribute larger (sic) portion of the estate to herself without any justifications.
4. That the 1st appellate court erred in law and fact by failure to recognize that the trial magistrate has failed to decide law applicable in distribution of the deceased's estate
5. That the 1st appellate court erred in law and fact by failure to recognize that the trial magistrate wrongly ordering (sic) the deceased money from PSSF and SACCOS to be deposited secretly into the 1st respondent account instead of judicial account.
6. That the appellate court erred in law and fact by failure to understand that the 1st respondent wilfully omitted to issue citation to the public despite the fact that she was ordered to do so by the court. " 2

7. That the 1st appellate court erred In law and fact by failure to recognize that the 1st respondent has not distributed other deceased properties (sic) such as houses and landed properties.
8. That the 1st appellate court erred in law and fact by failure to recognize that the 1st respondent disobeyed an order of the court that distribution of deceased estate should be referred to BAKWATA.
9. That the 1st appellate court erred in law and fact by failure to recognize that the 1st respondent has misappropriation (sic) of deceased's estate. Wherefore, the appellant prays that the appointment of the respondent as administrator of the estate of the late Mussa Hamisi Kang'wango be revoked and that the appellant be appointed in his place. He also prayed the 1st respondent should be ordered to return to the court all the monies she has misappropriated, pay the costs of this appeal, and provide any other relief deemed fit to be awarded by the court. Before delving into the hearing of this matter, it is important to highlight the genesis of this case for the determination of the present appeal. Habiba Seif Nandule, who is now the 1st respondent, was 3 granted letters of administration by the Primary Court of Mbagala vide Probate Cause No. 250 of 2021 on 4th October 2021 the matter which was later transferred to the primary court of Temeke at One Stop Judicial Centre. Dissatisfied with the manner in which the administratrix was handling the deceased's estate, Mwanahiba Ally Abdulrahman and Zena Harid Rashid prayed for the revocation of the letters of administration issued to her by the court. The Primary Court at Temeke One Stop Judicial Centre (the trial court), dismissed the application for revocation and ordered the administratrix to distribute the deceased's estate within 30 days through the offices of National Muslim Council of Tanzania (BAKWATA). Dissatisfied with the said decision, the appellant herein, acting solo, appealed to the District Court of Temeke at Temeke One Stop Judicial Centre (the first court) vide Probate Appeal No. 37 of 2023. The first appellate court partly allowed the appeal, finding the order referring the matter to BAKWATA improper, but dismissed the prayer for revocation. Once again, not satisfied with the decision of the first appellate court, the appellant has appealed to this court with nine grounds of appeal as stated above. 4 The hearing was conducted by written submission. The appellant's submission was prepared by Mr. Leslie Koini. On the first ground, Mr. Koini argued the first appellate court erred in law and fact by failing to recognize that the letters of administration granted to the 1st respondent were obtained through false allegations. The 1st respondent claimed the deceased was survived by a wife, four children, and his parents, knowing the deceased had two wives (the appellant and the 1st respondent), another child, Jaffari Mussa Khamis, and his mother, the 2nd respondent. The 1st respondent was appointed without nomination by a clan meeting and hid other beneficiaries. Mr. Koini cited Rule 9(l)(a) of the Primary Courts (Administration of Estates) Rules GN No. 49 of 1971, stating a grant obtained fraudulently must be revoked, referencing Cathberth Stanley Kipuyo & Others vs. Suzan Boniface Mdesa, Misc. Application No. 338/2021, High Court of Tanzania, at Dar es Salaam (Unreported). On the second ground, Mr. Koini stated the 1st respondent failed to exhibit a true inventory of the deceased estate within four months as required under Rule 10(1) of the

Primary Courts (Administration of Estates Rules). He noted no court order extended the filing time, citing the case of Joseph Sumbusho vs. Mary Grace Tiquerwa and 2 others. Civil Appeal No. 183 of 2016, Court of Appeal of Tanzania, at Dar Es Salaam. On the third ground, Mr. Koini argued the 1st respondent distributed a larger portion of the estate to herself without justification, violating the terms of the grant. The administrator must collect the deceased's estate, pay debts, and distribute the remainder to heirs, requiring a trustworthy person. He referenced the case of Sekunda Mbwanbo vs. Rose Ramadhani [2004] TLR 439. Beneficiaries were unaware of the collected estate, which included funds from PSPF, SACCOS, and properties. The 1st respondent claimed to have received 36,000,000 Tsh. from PSPF, intending to give the appellant 6,000,000 Tsh in installments without disclosing total amounts received. Mr. Koini asserted the 1st respondent allegedly received 10,066,000/- Tsh (Exhibit XM4) without explanation and failed to prove the absence of funds in CRDB and NMB accounts. On the fourth ground, the trial magistrate failed to recognize the applicable law in distributing the deceased's estate. The deceased was a Muslim but had a child with the 2nd respondent outside marriage. The trial court should have determined the applicable law for estate distribution, citing Re-Innocent Mbilinyi [1969] HCD 283. Mr. Koini argued the deceased's relationship with the 2nd respondent suggested a traditional way of life, implying customary law should apply. On the fifth ground, Mr. Koini argued the 1st appellate court erred by failing to recognize that the trial magistrate wrongly ordered the deceased's money from PSSF and SACCOS to be deposited into the 1st respondent's account instead of a judiciary account. The amounts paid by PSSF and SACCOS, as well as CRDB and NMB accounts, remain unknown. On the sixth ground, Mr. Koini argued the 1st appellate court erred by failing to recognize that the 1st respondent omitted to issue a citation to the public despite court orders, referencing *Silent-in Hotels Ltd vs. Interstate Office Services Ltd*, Civil Case No. 464 of 1999, High Court of Tanzania, at Dar es Salaam. The seventh ground concerns the 1st appellate court's failure to recognize the 1st respondent has not distributed other landed properties. The appellant and the 1st respondent, both being widows, were entitled to equal shares. On the eighth ground, it was argued that the 1st appellate court erred by failing to recognize that the 1st respondent disobeyed a court order to refer the distribution of the deceased's estate to BAKWATA for advice on Islamic law until the order was revoked by the first appellate. On the ninth ground, Mr. Koini submitted that the 1st appellate court erred by failing to recognize that the 1st respondent misappropriated the deceased's estate. She gave herself a large share and sold other properties, receiving Tsh. 30,601,000 from NSSF and Tsh. 10,066,000 from SACCOS (Exhibit XM4). She distributed Tsh. 4,100,000 each to the appellant and herself, 6,000,000 each to four children, and 1,000,000 each to two parents, totaling 34,200,000, making the funds unclear. The 1st respondent failed to account for Tsh. 10,066,000 received from SACCOS and funds from NMB and CRDB accounts. Mr. Koini prayed for this appeal to be allowed with costs. Resisting the appeal, the 1st respondent, represented by Mr. Cleophas James, noted that all grounds of appeal except for the first and eighth were not raised before the first appellate court. He argued that this being the second appellate court, it cannot adjudicate new grounds not raised and determined by the first appellate court, citing *Abraham Iddi Alute vs. Republic Criminal*

Appeal No. 347 of 2017 and Juma Manjano vs. D.P.P, Criminal Appeal No. 211/2009, Court of Appeal of Tanzania. Addressing the first ground of appeal, Mr. James argued that the appellant failed to prove that the letters of administration granted to the 1st respondent were obtained through false allegations. He stated that 8 all procedures were followed in accordance to Rule 9 of the Primary Courts (Administration of Estates) Rules, as confirmed by the trial court. The 1st respondent was duly appointed as the administratrix of the estate of the late Mussa Hamis Kang'wange, making the first ground meritless. On the second ground, regarding the failure to file an inventory, Mr. James submitted that the 1st respondent filed the inventory, which the appellant objected to, stating she only needed money from PSSF and signed the proceedings. The 1st respondent attempted to file the inventory, but the court directed her to distribute the estate according to the law. For the third ground, Mr. James noted it was not raised before this court. However, he stated the 1st respondent informed the court she received Tsh. 36,108,576.35 from PSSF, and the court ordered her to distribute it to the beneficiaries, including the appellant. The appellant later informed the court she only needed Tsh. 4,100,000 from the PSSF contribution and signed to affirm it. Regarding the fourth ground, Mr. James stated the deceased was Muslim, and thus Islamic Law applied in the administration of his estate, which the appellant did not dispute. 9 On the fifth ground, concerning the allegation that the magistrate ordered the deceased's money from PSSF and SACCOS to be deposited into the 1st respondent's account instead of a judiciary account, Mr. James stated this was untrue and not raised in this court; therefore, it should be dismissed. For the sixth and seventh grounds, Mr. James noted they were not raised before the lower court and insisted that the procedures for the appointment were followed. On the eighth ground, Mr. James argued that the 1st appellate court correctly nullified the trial court's order to refer the matter to BAKWATA, as BAKWATA has no jurisdiction over probate matters, making this ground meritless. Regarding the ninth ground, Mr. James stated it was not raised in the first appellate court. He argued the appellant failed to prove the 1st respondent misappropriated the estate. He prayed for the dismissal of the appeal for lack of merit. The 2nd respondent supported the grounds of appeal. She stated with respect to the first ground that the 1st respondent obtained letters of administration through false allegations by concealing some beneficiaries and not being nominated by the clan meeting. She cited Rule 9(l)(a) of the Primary Courts (Administration of Estates) Rules io G.N. No. 49 of 1971, stating a fraudulent grant must be revoked, referencing the case of Mwanahawa Muya vs, Mwanaidi Maro [1992] TLR

79. Additionally, she argued that the trial magistrate erred in ignoring evidence of the parentage of Jaffari Mussa Khamis, referring to Section 35 of The Law of Marriage Act Cap. 29 of 2019. The 2nd respondent on the third ground she recounted that the 1st respondent distributed a substantial portion of the deceased's estate to herself without justification, reaffirming the duties of the administratrix as stated by Mr. Koini. She added that the amount received by the 1st respondent was not distributed to her son, a rightful heir. The response on the fourth ground by the 2nd respondent was such that the trial magistrate failed to apply the correct law in the administration of the deceased's estate, aligning with Mr. Koini's view that the

trial court needed to determine the applicable law based on the deceased's lifestyle. She claimed to have a romantic relationship with the deceased, including having a child with him, citing the case of *Re^ Innocent Mbilinyi* [1969] HCD 283 and Rule 2(d) of the Fifth Schedule to The Magistrates Courts Act Cap. 11 RE 2019. The 2nd respondent tackling the fifth ground she stated that the trial magistrate erroneously ordered that the deceased's funds be deposited into the 1st respondent's personal account instead of a judicial account. Responding to the sixth ground, she recounted that the 1st respondent did not issue a citation to the general public, despite the legal requirement to publish it so creditors and interested parties are informed, as provided under Rule 2(d) of the Fifth Schedule to the Magistrates Courts Act. In the seventh ground it was argued that the first appellate court erred by failing to recognize that the 1st respondent had not distributed other properties such as houses and land, including money from SACCOSS, three houses in Charambe, a three-acre farm in Mkuranga, a plot in Kilosa-Manzese-B, and an unfinished house in Kilosa-Manzese-A. This indicates that the administrator failed to perform their duty. For the eighth ground he submitted that the first appellate court erred by failing to recognize that the 1st respondent disobeyed the court's order directing the distribution of the deceased's estate to be referred to BAKWATA, constituting contempt of court. As for the ninth ground, the 2nd respondent submitted that the 1st respondent misappropriated the deceased's estate by distributing only part of the money she had received and keeping a large portion of the land for herself. She prayed for the appeal to be allowed. — 12 In the rejoinder submission, Mr. Koini agreed with Mr. James that generally, grounds not raised in the first appellate court cannot be raised in the second appellate court. However, he stated that matters of law can be raised at any stage of the appeal. He conceded that grounds 2, 3, 4, 5, 6, 7, and 9 were not raised in the first appellate court but stated that grounds 2, 3, 4, 6, and 9 are points of law and can be raised at any time. He reiterated his earlier submission, which he found no reason to reproduce. That concludes the arguments of both sides. Having considered the arguments of both sides regarding this appeal, this court must now determine whether the grounds of appeal have merit. As stated by both sides, this court, being the second appellate court, is required to address matters that were raised and determined before the first appellate court. Mr. James referenced this principle in the case of *Abraham Iddi Alute vs. Republic* (supra). The principle was also emphasized in the case of *Gaius Kitaya vs. Republic* (Criminal Appeal No. 196 of 2015) Court of Appeal at Mbeya [2016] TZCA 30, where the Court held that it will not consider matters that were neither raised nor decided by the trial court or the first appellate court. See also *Godfrey Wilson vs. Republic*, Criminal Appeal No. 168 of 2018, Court of Appeal of Tanzania, at Bukoba. 13 Mr. Koini admitted that seven grounds of appeal were not raised before the first appellate court but claimed that grounds 2, 3, 4, 6, and 9 were points of law worth being raising at any stage. It is settled law that points of law can be raised at any stage and must be considered. See *Mukisa Biscuit Manufacturing Co, Ltd vs. West End Distributors Ltd* [1969] EA 696. However, the grounds mentioned by Mr. Koini as points of law require ascertaining evidence and thus cannot be considered pure points of law. Going through the trial court records reveals that the appellant through his amended memorandum of appeal had raised about four grounds before the first appellate

court. Only two of these grounds are the subject of this appeal which are: the trial court erred in confirming the 1st respondent as administratrix of the deceased's estate without faithfully exhibiting the estate, and referring the distribution of the estate to BAKWATA was an abdication of her duties. Thus, the grounds for determination by this court are grounds 8 and 9. I will begin with ground 8, which faults the 1st respondent for not obeying the trial court's order to refer the distribution of the estate to BAKWATA. This court must determine whether the first appellate court erred in not recognizing the 1st respondent's disobedience of the court 14 order to refer the distribution to BAKWATA and whether such disobedience amounts to contempt of court. Mr. Koini argued that the 1st respondent was required to abide by the court's order, which was the content of the court's ruling. Conversely, Mr. James stated that referring the matter to BAKWATA would undermine the powers of the administratrix, and thus the first appellate court was correct in nullifying that decision. In probate and estate administration matters, once an administrator or administratrix is appointed, the court entrusts them with the duty of serving as the personal representative of the deceased. This role involves critical responsibilities, including collecting assets, identifying heirs, and distributing the deceased's estate according to the will or the law of intestate succession. This duty should not be interfered with by any other person. However, when necessary, the court may intervene to provide direction or guidance to ensure the proper administration of the estate. This principle aligns with the decision in *Monica Nyamakare Jigamba vs. Muqeta Bwire Bhakome & Another* (Civil Application No. 199 of 2019) Court of Appeal at Dar es Salaam [2020] TZCA 1820 (16 October 2020) where the court observed that; 15 "... The probate or letters of the administration court has no powers to determine the beneficiaries and heirs of the deceased. Similarly, it has no power to distribute the estate of the deceased. Law has vested that power to the grantee of probate or letters of administration". The first appellate court found that the duty to distribute the deceased's estate lies with the administratrix, and the trial court was wrong to order her to refer the distribution to BAKWATA. The court may issue directives regarding the administration of the deceased's estate only when necessary. In this case, the trial court's order for the distribution of the deceased's estate to be carried out by BAKWATA was not intended to replace the administratrix's responsibilities. Instead, the reference to BAKWATA was likely meant to provide guidance on Islamic principles related to the division of the estate among the heirs according to Islamic law, should the estate fall under such distribution. This view is supported by the case of *Ibrahim Hassan Hanzuruni vs. Ashura Selemani Fa raj a* (PC Civil Appeal 164 of

2020) High Court at Dar es Salaam [2021] TZHC 5346, where Judge Banzi stated; It is obvious from the record that, the distribution was made by the BAKWA TA and not the Appellant as required by 16 law. The Appellant admitted so when he was questioned by the trial court. Although he is not restricted to consult religious authority, but by letting the distribution to be made by the BAKWATA rather than himself, is a dear indication that he has failed to fulfil his duties as administrator of the estate of the deceased. [Emphasis is supplied]. In concluding this ground, it can be safely stated that the distribution of the deceased's estate

by BAKWATA is illegal and essentially removes the powers of the administratrix. I, therefore, find no reason to fault the decision of the first appellate court. This ground is devoid of merit and is dismissed. Regarding ground 9, Mr. Koini argued that the 1st respondent misappropriated the deceased's estate by giving herself a larger share and selling other properties. These allegations were contested by the 1st respondent, who stated that the claims were not substantiated. Having reviewed the records of the first appellate court regarding this ground, it is evident that the 1st respondent was found to have misappropriated the estate of the deceased. The first appellate court noted that the administratrix had not properly filed Form No. V and Form No. VI to show what assets she had collected and how they would be distributed to the respective heirs. Therefore, the court ruled that the issue was raised prematurely. On this ground, I concur with the findings of the trial court, as decided in the case of Joseph Shumbusho vs, Mary Grace Tigrwa & Others (supra). The filing of an inventory and accounts of the estate is crucial, as it notifies the creditors and heirs of how the estate will be distributed. Upon inspection of these forms, they may raise their concerns with the court in accordance with Rule 10(2) of the Primary Court (Administration of Estate) Rules provided in the Fifth Schedule to the Magistrates Courts' Act Cap 11 R.E. 2019. Having said this, I find the appeal lacking merit and it is hereby dismissed. I also order the 1st respondent to properly file Forms No. V and VI before the trial court for determination within 45 days from this decision. It is so ordered. at Temeke this 19th July, 2024. G. N. BAR JUDGE Delivered in ce of the appellant, RMA Ms. Bernadina and in the absence of both respondents. 18

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