IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: RAMADHANI, J.A, KAJI, J.A and KILEO, J.A)
CIVIL APPEAL NO. 51 OF 1999

WAZIRI MANENO CHOKA.....APPELLANT

AND

ABASI CHOKA.....RESPONDENT

(Appeal from Decision of the High Court of Tanzania at Dar es Salaam)

(Mwita J.)

Dated the 23rd September 1998
In
PC Civil Appeal No. 9 of 1998

JUDGMENT OF THE COURT

16th October & 16th Nov. 2006

KILEO J,A.

This is an appeal from the decision of the High Court of Tanzania at Dar es Salaam, Mwita J. in High Court (PC) Civil Appeal No. 9 of 1998. A brief background of the facts leading to this appeal may be useful. The respondent, Abas Choka, applied for letters of administration of the estate of the late Maneno Choka in the Primary

Court of Bagamoyo. The late Maneno Choka was his elder brother. Waziri Maneno Choka, the present appellant, resisted the application. Waziri is the son of the late Maneno Choka. Waziri's mother is Salma Mbaraka. The facts show that there was no marriage solemnized between the late Maneno and Salma Mbaraka. Maneno was a Moslem and so is Salma.

The late Maneno Choka left a will bequeathing all his property to the appellant. The Primary Court found the appellant to be entitled to be appointed administrator of the estate of his father instead of the respondent. The Primary Court also found that he was entitled to inherit his father's estate. He was appointed administrator of the estate. Being aggrieved, Abas Choka appealed to the District Court. The District Court while holding that the Primary Court was justified in appointing Waziri Maneno administrator of his father's estate, it however found him to be a stranger to the estate. The District Magistrate, making reference to GUPTA and SARKAR, **Overview of Muslim Law**, went on to state that under Islamic law if a person makes a will in favor of a stranger the bequest to the stranger should

not exceed one third of the testator's estate. Waziri was dissatisfied with the decision of the District Court. He appealed to the High Court on the following grounds: -

1. That the learned magistrate erred in law and on the facts in holding that the Appellant was not entitled to inherit his father's estate when the said deceased father by a properly executed will appointed the Appellant as his heir of the estate.
2. That the learned magistrate erred in law and on the facts in placing great reliance on Indian law of Inheritance whose local conditions are different from local conditions obtaining in Tanzania.

In the High Court, Judge Mwita, dealt at length on circumstances under which a Moslem can acknowledge another as his legitimate child. He observed, after making reference to various authorities on Mohamedan law that it permits a man to acknowledge another as his legitimate child. He observed however that the

acknowledgment proceeds upon the assumption that there is a lawful union between the parents of the acknowledged child.

The learned Judge found that since the deceased was not married to the mother of the appellant then the acknowledgment of the appellant by the deceased as his son did not have a legitimating effect to entitle the appellant to share as an heir in the estate of the deceased.

The learned judge while making reference to "Mulla's Principles of Mahomedan Law" 18TH Edition found that the appellant could only be entitled to one third of the estate of the deceased according to Islamic Law.

The appellant was not satisfied by Judge Mwita's decision and he has come to this Court. His memorandum of appeal contains only one ground and that is:

"That having regard to the fact that the appellant was acknowledged by his deceased father as a son for all intents and purposes and having so acknowledged him in his will, and the

deceased father having lived and cohabited with the Appellant's mother under the same roof over thirty years, the court below erred in law in failing to hold that the appellant was entitled to inherit the deceased's whole property in the absence of other issues of the deceased father under Islamic law."

Both the appellant and the respondent appeared before us in person. We must confess that we had a lot of difficulty in hearing what the appellant was trying to say. Most of the time he was talking in a hardly audible voice though it became apparent to us that he was very much capable of raising his voice for us to hear. At the end what we could gather from him is his argument that the High Court erred to award two thirds of the property to the respondent and that he (appellant) should have been awarded the whole estate.

The respondent on the other hand argued that the appeal has no merit, as the matter had already been determined in accordance with Islamic law.

May be we should start by putting the record straight for the benefit of all concerned. We are given the impression that the appellant thinks that the High Court and District Court awarded two thirds of the estate to the respondent. The true position however, is that the District Court and the High Court did not award the respondent two thirds of the estate. What the High Court and the District Court said is that the appellant could only be entitled to one third of the estate in consideration of the fact that there was a will left by the late Maneno Choka. To our understanding the remaining two thirds was to be distributed amongst lawful heirs of the estate of Maneno Choka. Conversely the appointment of the appellant as administrator of his late father's estate has not yet been revoked. It is the appellant who was entrusted with the responsibility of distributing the estate, in other words he is the one who is to decide how much each one who is entitled to a share in the estate is to be apportioned.

The question before us, as was the question in the lower courts is whether the appellant should be entitled to the whole estate in accordance to the will of the late Maneno Choka.

There is no doubt that the deceased Maneno Choka was a Moslem. There was no marriage solemnized between him and the appellant's mother. The appellant was born out of wedlock. The appellant's mother admitted that much at the trial – she said, "Marehemu pamoja na kuishi muda wote huo lakini hatukuwahi kufunga ndoa yoyote ile si ya Kiislamu wala kimila ila tulielewana na tukaishi hadi umauti ulimpomkuta tukiwa wote kwa upenzi tuu. ".

The appellant's mother in her own words as quoted above informed the trial court that she neither contracted an Islamic marriage nor a customary one but merely lived with the deceased Maneno Choka as a concubine throughout the time they lived together.

We have had occasion to study the works of various authors on Mohamedan Law. Those, whom we have studied, all agree that

testamentary disposition may not exceed a third of the estate. This applies irrespective of whether the disposition is to an heir recognized under Mohamedan law or a stranger.

In **MINHAJ ET TALIBIN**

A Manual of Mohamedan Law According to the School of Shafii by Nawawi (1914) as translated by E.C. Howard it is stated at page 260 – 261 that;

> *"Testamentary disposition may not exceed a third of the estate; and those made in contravention of this precept of the law, may be reduced to the portion which may be disposed of, upon the application of the legitimate heir. If the heir declares his approval of the disposition, it is effective, whatever it amounts may be; but according to one jurist it is then considered as a mere donation upon the part of the heir, and the legacy itself remains void for as much as exceeds the third"*

The above principle is also spelled out in **Principles & Precedents of Moohummudan Law –A selection of legal opinions involving those points, delivered in the several**

courts of Judicature by W. H. Macnaghten and William Sloan The authors in their preliminary remarks at page xxi observe that;

> *"The disposition of a testator is legally restricted to one third of his estate but little uncertainty can exist on the doctrine of wills and testaments. If the legacy exceed the amount above specified, the will is considered inofficious, and its provisions will be carried into effect pro tanto only".*

Again, **M. Hidayatullah and Arshad Hidayatullah on Mullas' Principles of Mohamedan Law** (18th Edition) at pg. 140 making reference to the limit of testamentary power state:

> *"A Mohamedan cannot by will dispose of more than a third of the surplus of his estate after payment of funeral expenses and debts. Bequeaths in excess of the legal third cannot take effect, unless the heirs consent thereto after the death of the testator."*

In view of the principles of Mohamedan law underlying legitimacy of children and testamentary disposition as discussed above we find no reason to fault the decision of the High Court.

In the circumstances we find no merit in this appeal and we accordingly dismiss it with costs.

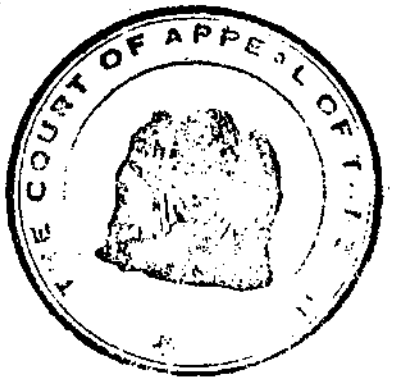
DATED at DAR ES SALAAM this 30th day of October, 2006

A. S. L. RAMADHANI
JUSTICE OF APPEAL

S. N. KAJI
JUSTICE OF APPEAL

E. A. KILEO
JUSTICE OF APPEAL

I certify that this is a true copy of the original.



N. P. Z. CHOCHA
DEPUTY REGISTRAR