

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: LUANDA, J.A., MJASIRI, J.A. And MMILLA, J.A.)

CIVIL APPEAL NO. 38 OF 2009

MARIAM JUMA.....APPELLANT

VERSUS

TABEA ROBERT MAKANGE.....RESPONDENT

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

(Mruma, J.)

dated the 13th day of August, 2008

in

Probate and Administration Cause No. 36 of 2005

JUDGMENT OF THE COURT

9th June, 2015 & 29th January, 2016

MJASIRI, J.A.:

This appeal arises from the judgment of the High Court in Probate and Administration Cause No. 36 of 2005 (Mruma, J.) dated August 13, 2008, whereby the petition filed by Mariam Juma was dismissed and the caveator Tabea Makange was appointed the administratrix of the estate of the deceased, Robert Makange.

The background to this appeal is as follows: -

The appellant filed a petition in the High Court seeking to be appointed as administratrix of the estate of the late Robert Makange (the deceased). This was Probate and Administration Cause No. 36 of 2005. The respondent filed a caveat to oppose the appointment of the appellant as administrator. However the respondent also filed in the High Court Probate and Administration Cause No. 35 of 2005 seeking to be appointed as administrator of the deceased's estate. Both the appellant and the respondent claimed to have been married to the deceased. The High Court Judge stated in his judgment that the two petitions were consolidated. However the record is silent on that.

Being dissatisfied with the decision of the High Court the appellant has filed her appeal before this Court. The appellant lodged an eight point memorandum of appeal which is reproduced as under: -

- "1. The trial court erred in law in dismissing the petition.*
- 2. The trial court erred in law and in fact in holding that there was no customary marriage between the appellant and the deceased.*
- 3. In the alternative and without prejudice to ground No. 2 above, the Honourable trial Judge erred in law and in fact in not holding that there was a*

presumption of marriage between the appellant and the deceased.

4. *The trial court erred in law and in fact in holding that the paternity should be involved in determining a presumption of marriage and that the celebration/ceremony is mandatory for the said presumption to stand.*

5. *That the Honourable trial Judge erred in law and in fact in holding that the appellant had no customary marriage with the deceased.*

6. *The trial court erred in law and in fact in holding that the appellant cohabited with the deceased and the alleged four days in which the appellant used to stay with the deceased was not sufficient to constitute cohabitation.*

7. *The trial court erred in law and in fact in holding that the children were born out of wedlock and they cannot inherit for not being beneficiaries of the estate of the deceased.*

8. *That the decision of the High Court is otherwise faulty and wrong in law."*

At the hearing of the appeal, the appellant was represented by Mr. Melchizedeck Lutema, learned advocate, while the respondent had the services of Professor Leonard Shaidi, learned advocate.

Mr. Lutema centred his arguments on grounds No. 2 and 3. In relation to ground No. 2, Mr. Lutema submitted that the trial court erred in law and in fact in holding that there was no customary marriage between the appellant and the deceased. According to him it was evident from the record that the appellant was the wife of the deceased. The first marriage between the deceased and the respondent was a customary one which was potentially polygamous.

On ground No. 3, Mr. Lutema contended that the trial judge erred in law in not holding that there was a presumption of marriage between the appellant and the deceased when the two cohabited between 1982 and 1999, when the deceased passed away. He submitted that under section 60 of the Law of Marriage Act, Cap 29, R.E. 2002 (the LMA) only two (2) years of cohabitation were required for the presumption of marriage to be established. He argued that there was a presumption

of marriage and the appellant's two (2) children were legitimate heirs and were entitled to the deceased's estate.

Mr. Lutema stated that the appellant and respondent were competing for appointment as administrators. He raised his concern that the Court exceeded its jurisdictional limit.

On his part, Professor Shaidi submitted that the duty of the High Court in this case was simply to appoint an administrator in respect of the estate of the late Robert Makange. He submitted that the appellant agreed that the respondent, the first wife of the deceased should be the administrator. Professor Shaidi submitted further that there was no evidence of customary marriage between the deceased and the appellant. He contended that a marriage is an open matter, and it is not supposed to be a secret. He added that in the circumstances of this case PW2 who was the brother of the deceased was not even aware of the existence of the marriage until 2008, that is ten (10) years after the death of the deceased. The marriage was twenty years old. He submitted that presumption of marriage is provided under section 160(1) of the LMA. This presumption is rebuttable. He stated that the purpose of presumption of marriage is to confer rights.

In rejoinder Mr. Lutema reiterated that the High Court exceeded its jurisdiction. He submitted that the decision of the High Court is a nullity. The Court should therefore give proper directions in the interest of justice.

Before we go into the merits of this appeal we are of the considered view that it would be in the interest of justice to determine this critical issue as to whether or not the High Court exceeded its jurisdiction in this matter.

After a very careful analysis of the submissions made by the parties, the judgment of the High Court and the record, we are of the considered view that it is important for us to ascertain the following issues: -

- 1. What was the matter before the High Court?*
- 2. What was the decision made by the High Court?*
- 3. Was the decision made by the High Court in accordance with the requirements under the law?*

The evidence adduced during the hearing was in relation to whether or not the appellant was the lawful wife of the deceased and whether or not the appellant's children were lawful heirs. The High

Court dismissed the petition by Mariam Juma and appointed Tabea Robert Makange as the administratrix of the estate of the late Robert Makange.

The High Court also made a finding to this effect: -

- (i) *That the appellant was not legally married to the deceased, the late Robert Makange.*
- (ii) *The appellant and her two children were not among the legal heirs of the deceased.*

We must state at the outset that this matter has caused us a lot of anxiety. In looking at the record and judgment of the High Court one gets the impression that this is a case relating to the Law of Marriage Act, Cap 29, R.E. 2002. The High Court went into great length in hearing the parties and taking evidence as to whether the two applicants were married to the late Robert Makange, the type of marriages and whether the appellant's children were entitled to inherit from the estate of the late Robert Makange.

Section 33(1) and (2) of the Probate and Administration of Estates Act, Cap. 352 R.E. 2002 (the Act) provides as under: -

- (1) *Where the deceased has died intestate, letters of administration of his estate may be granted to any person who, according to the rules for the distribution of the estate of an intestate applicable in the case of such deceased, would be entitled to the whole or any part of such deceased's estate.*
- (2) *Where more than one person applies for letters of administration, it shall be in the discretion of the court to make a grant to anyone or more of them, and in the exercise of its discretion the court shall take into account greater and immediate interests in the deceased's estate in priority to lesser or more remote interests.*

It is evident from the record that the appellant Mariam Juma applied for a grant of letters of administration of the estate of the deceased, in Probate and Administration Cause No. 36 of 2005. A caveat was filed by Tabea Robert Makange under section 58 Rule 82 of the Act. However the respondent had also filed Probate and Administration Cause No. 35 of 2005. According to the judgment the

two applications were consolidated. However it is not indicated in the record how the two applications were dealt with. We were unable to trace any order of the High Court to that effect. Consequently the record is in disarray. Whereas the record of appeal makes reference to Probate and Administration Cause No. 36 of 2005, the memorandum of appeal makes reference to Probate and Administration Cause No. 35 of 2005. The record contains two copies of the same judgment, one on pages 67-94 of the record making reference to Probate and Administration Cause No. 35 of 2005 and page 101-126 of the record making reference to Probate and Administration Cause No. 35 and 36 of 2005. Finally the order is titled Probate and Administration Cause No. 36 of 2005.

In the course of hearing, the matter took a different turn after the appellant indicated during cross-examination that she did not have any objection for Tabea Robert Makange to be appointed as administratrix, as long as she and her two children are considered and recognized as lawful heirs of the late Makange.

In fact the trial court was supposed to determine one crucial issue, that is, to appoint an administrator who will diligently and

faithfully administer the estate of the late Robert Makange. This was to be done after making a decision on the caveat opposing the application. It is unfortunate that the High Court faltered and incorporated other issues and went ahead to adjudicate upon them.

Now coming to the questions raised by us, we will commence on issue No. 1. It is evident from the record that appellant filed a petition in the High Court to be appointed as administrator of the deceased's estate. The respondent entered a caveat and the court was supposed to proceed with the petition in accordance with paragraph (b) of section 52 of the Act. Paragraph (b) provides as follows: -

"In any case in which there is contention, the proceedings shall take, as nearly as may be the form of a suit in which the petitioner for the grant shall be plaintiff and any person who appears to oppose the proceedings shall be the defendant."

According to the record, no issues were agreed upon by the parties and approved by the High Court during the hearing. However the trial High Court framed the following issues when writing the judgment, which formed a basis of its decision: -

1. *Whether or not the Petitioner Mariam Juma was legally married to the deceased the late Robert Makange.*

2. *Whether or not the Petitioner and her two children are among the legal heirs of the deceased.*

However looking at the evidence on record, the important issue for consideration was not addressed. This was the right party to be appointed as Administrator. Instead of directing itself on that, the entire proceedings were based on who was the legal wife of the deceased; and whose children were entitled to inherit from the deceased's estate. The proceedings were focused on the appellant's and respondent's status of marriages under the LMA. Was this the right forum?

In relation to issue No. 2, during the hearing, the determination of the case was based on the two issues (supra) framed by the High Court Judge when composing the judgment which was in the first place not correct. Issues are framed before the commencement of trial. Second, even the decision arrived at went beyond the real issue to be adjudicated.

We are inclined to agree with Mr. Lutema that the High Court Judge went beyond his jurisdiction of handling a caveat filed opposing the appellant's petition for letters of administration. The findings he made that the appellant was not the legal wife of the deceased and that the appellant's children were not entitled to inherit from the deceased's estate were beyond the scope of his mandate in handling the caveat filed by the respondent. Both parties had the benefit of being represented by counsel, but this situation was not prevented.

With regard to the third issue, we are of the firm view that the decision of the High Court was not made in accordance with the requirements under the law.

The High Court Judge meandered around the status of marriage of the appellant, digressing and drifting from the central task before him. He even made a finding that the appellant's children were not entitled to inherit from the deceased's estate. The High Court Judge did not have any mandate to determine who should be a beneficiary from the deceased's estate. This role was to be played by the Administrator of the deceased's estate.

Given the circumstances we are of the considered view that the decision of the judge was not proper. In the result we find that the proceedings of the High Court are a nullity.

By the powers vested in us under section 4(2) of the Appellate Jurisdiction Act, we hereby nullify the proceedings of the High Court, quash the judgment and set aside the orders made by the High Court. The petition and the caveat filed to oppose the petition should be heard before a different Judge. In view of the nature of the proceedings, we make no orders as to costs.

Order accordingly.

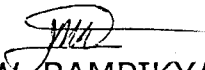
DATED at **DAR ES SALAAM** this 26th day of January, 2016.

B.M. LUANDA
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

B.M.K. MMILLA
JUSTICE OF APPEAL

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


P.W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL