IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: MUSSA, J.A., LILA, J.A., AND MWAMBEGELE, J.A.)

CIVIL APPEAL NO. 147 OF 2017

HAMIS SAID MKUKI ..... APPELLANT

VERSUS

FATUMA ALLY ..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Tabora)

(Mruma, J.)

Dated the 9th day of September, 2014
in
Probate and Administration Cause No. 1 of 2010

.....

JUDGMENT OF THE COURT

31st August & 19th November, 2018

MWAMBEGELE, J.A.:

The dispute between the appellant Hamis Said Mkuki and the respondent Fatuma Ally has a rather chequered story. It reminds us of the popular children's game of hide and seek. At the centre of controversy between them is the property left behind by the late Omary Said Mkuki; that is, the estate of the late Omary Said Mkuki. The appellant is the brother of the deceased. The respondent was, allegedly, the deceased's wife.

After the death of the late Omary Said Mkuki on 20.05.2008, the respondent successfully applied for letters of administration over his estate in Tabora Urban Primary Court vide Administration Cause No. 82 of 2008. The appellant, who was, somehow, an objector, was not happy with the grant of the letters to the respondent. He thus appealed to the District Court in Civil Appeal No. 15 of 2008. The District Court allowed the appeal and revoked the appointment of the respondent as administratrix of the estate of the late Omary Said Mkuki and ordered the clan members to hold a meeting to appoint an administrator in her stead.

After the decision of the District Court on appeal, the appellant and the respondent parted ways in pursuit of their rights over the administration of the estate; while the latter preferred an appeal in the High Court against that decision, the former proceeded to apply for letters of administration over the same estate in the Primary Court at Isevya. Thereafter, while the parties were appearing in the High Court in PC Civil Appeal No. 44 of 2008, they were also appearing in Probate Cause No. 1 of 2009 at Isevya Primary Court and later in Probate Appeal Case No. 6 of 2009 in the District Court on appeal. The Primary Court at Isevya granted the letters to the appellant. Aggrieved, the respondent appealed to the

District Court at Tabora. On 20.05.2009 the District Court (Burugu, DM) ordered that those proceedings be stayed pending determination of Civil Appeal No. 44 of 2008 in the High Court.

On 07.06.2010 the High Court (Mujulizi, J.), in the said PC Civil Appeal No. 44 of 2008, pronounced a judgment nullifying all the proceedings and orders of the two subordinate courts. The High Court also ordered that any interested party in the estate of the deceased was at liberty to apply to the relevant organs in accordance with the law applicable to his estate. After the order of the High Court, the respondent filed in the High Court Probate and Administration Cause No. 1 of 2010. The High Court (Mruma, J.), on 09.09.2014 pronounced the following order:

> *"... I allow this application. I order that letters of administration of the estate of the late Omari Saidi Mkuki be granted to the applicant Fatuma Ally. She shall administer the deceased's estate in accordance with the requirement of the provisions of* ***Section 107 of the Probate and Administration of Estates Act [Cap 352 R.E 2002]****, and shall exhibit in this Court (before the*

District Registrar) an inventory containing a full and true estimate of all the properties in her possession, all credits and also all debts owing by any person.

The respondent Hamis Said Mkuki shall within a period of three (3) months from the date of this order file an account (with the District Registrar) for all the money he collected as rents and other dues of the deceased estate from the time when the estate fall under his control to the date of this ruling."

The appellant was aggrieved by the foregoing order and preferred the present appeal. Through a law firm going by the name of K. K. Kayaga Advocates, lodged on 11.08.2016, a five-ground Memoranda of Appeal which for easy reference we take the liberty to reproduce as hereunder:

"1. The Honourable Trial Judge erred both in law and in fact in holding that the appellant's appointment as an administrator of the estate of his late young brother OMARI SAID MKUKI by Isevya Primary Court in Probate Cause No. 1 of 2009 was quashed by the District Court of Tabora in Civil Appeal No. 06 of 2009.

2. *The Honourable trial Judge erred in law in Holding that the appropriate law applicable is the Indian succession Act and neither Islamic Law nor customary law was applicable.*

3. *That the Honourable Trial Judge erred in law and wrongly misinterpreted (sic) the import of S. 160 (1) (2) of the law of the Marriage Act, Chapter 29 R. E 2002 in holding that as the respondent and the deceased OMARI SAID MKUKI had cohabited for a long time (9 years) they were in a Civil partnership which resulted in a marriage by presumption.*

4. *That under the circumstances of this Case the Honourable trial judge erred in law and fact in appointing the respondent as the Administratrix of the estate of the late OMARI SAID MKUKI as she was a mere concubine who has no place in Islamic law and not entitled to the estate of the deceased.*

5. *That the Law of the child Act 2009 was wrongly used in the circumstances of this case."*

When the appeal was called on for hearing before us on 31.08.2018, both parties were represented. While Mr. Kamaliza Kamoga Kayaga,

learned counsel, appeared for the appellant, the respondent, who was also present, had the services of Mr. Musa Kassim, also learned counsel.

Before hearing the appeal, we allowed the parties to argue a two-point preliminary objection a notice of which had earlier been lodged by the respondent on 30.07.2018. There was a tripartite agreement; by the appellant, the respondent and the Court to the effect that, in the course of composing the judgment, should the Court find the preliminary objection meritorious, it will sustain it and that would be the end of the matter. However, should it not, the court would overrule it and proceed to compose the judgment on the merits of the appeal.

As already said, the preliminary objection had two limbs. In the first, the respondent stated that the appeal is time-barred. In the second limb, the respondent complains that the notice of appeal is incurably defective for failure to indicate the month in which it was received by the Registrar.

Arguing for the first limb, Mr. Kassim for the respondent submitted that the appeal is time-barred in that the impugned judgment was given on 09.09.2014 and the provisions of rule 83 (2) of the Tanzania Court of Appeal Rules, 2009 (hereinafter referred to as the Rules) require that a

notice of appeal must be filed thirty days of the impugned decision and rule 90 (1) of the Rules requires that a memorandum of appeal must be lodged within sixty days of the lodgment of the said notice. He went on to submit that having obtained an enlargement of time to file the notice of appeal, the appellant ought also to have filed an application for enlargement of time to file the memorandum of appeal. In the present situation, he submitted, the provisions of rule 90 (1) of the Rules would not apply because they make reference to the original notice of appeal; not the one obtained after enlargement. In the circumstances, he argued, the memorandum of appeal was filed out of time and without seeking leave of the Court by applying for extension of time thereof and therefore the appeal was rendered incompetent. For being incompetent, he prayed that the same be struck out with costs.

On the second limb, Mr. Kassim argued that the notice of appeal did not indicate the month in which it was presented to the Registrar. For that reason, he argued that the notice of appeal at pp. 210 - 211 of the record of appeal is defective thus making the appeal incompetent. For this point also, he beckoned us to strike out the appeal with costs.

Responding, Mr. Kayaga submitted that the appeal was filed within time in that after the impugned decision was handed down on 09.09.2014, Civil Appeal No. 33 of 2015 was timely lodged in the Court but that the same was struck out on 28.04.2015 by a Ruling of the Court appearing at pp. 193 – 195. After the appeal was struck out, the appellant went back to the High Court to file an application for extension of time to lodge a fresh notice of appeal which was granted on 09.06.2016 and the applicant was given fourteen days within which to lodge the same. The appellant lodged the notice of appeal on 16.06.20166 and the Memorandum of Appeal on 11.08.2016 well within sixty days of the lodgment of the notice. He argued that there was no need to seek and obtain an extension of time to lodge the memorandum of appeal as the second notice of appeal obtained after enlargement was not part of the first notice. He argued that the provisions of rule 90 (1) of the Rules were applicable and made reference to the second notice of appeal.

On the second limb, Mr. Kayaga conceded that the month on which the notice was signed by the Registrar upon lodgment was not indicated but he was quick to state that the ailment was not fatal and was cured by

an endorsement at the front page of the document by the Court indicating the date, month and year on which it was received by the Court.

He thus prayed that the preliminary objection should be overruled with costs.

In rejoinder, Mr. Kassim, rather ardently, reiterated what he stated in his submissions-in-chief insisting that the appellant ought to have sought and obtained leave to lodge the memorandum of appeal by applying for enlargement of time in that respect and that failure to indicate the month on which the Registrar received the notice of appeal was fatal and was not cured by the endorsement by the Court.

We have considered the arguments by both learned counsel for the parties. The learned counsel are at one that the striking out of Civil Appeal No. 33 of 2015 annihilated the notice of appeal as well as the memorandum of appeal earlier filed. Indeed that is the position the Court has taken in a number of decisions - see: **William Shija v. Fortunatus Masha** [1997] TLR 213 and **National Microfinance Bank PLC v. Oddo Odilo Mbunda**, Civil Appeal No 91 of 2016 and **Dhow Mercantile (EA) Ltd & 2 Others v. Registrar of Companies 4 Others**, Civil Appeal No.

56 of 2005 (both unreported). The learned counsel are also at one that the appellant, quite appositely, sought and obtained an enlargement of time to lodge a fresh notice of appeal. The only issue on which the two learned counsel have locked horns, is whether or not the appellant ought to have sought and obtained extension of time to lodge the memorandum of appeal just like what he did in respect of the notice of appeal. We must confess that, at the hearing, we failed to grasp any substance in the argument brought to the fore by Mr. Kassim. After a deep deliberation on the matter, we are afraid, we still see no substance in the argument. In the plain and clear meaning of rule 90 (1) of the Rules, an appellant is required to lodge, *inter alia*, a memorandum and record of appeal within sixty days of the lodgment of the notice of appeal. The sub-rule reads:

> *"Subject to the provisions of Rule 128, an appeal shall be instituted by lodging in the appropriate registry,* ***within sixty days of the date when the notice of appeal was lodged*** *..."*
> [Emphasis supplied].

We seriously think logic and reason has it that the notice of appeal under reference should, in the circumstances, be the fresh notice of appeal. We do not see any reason why Mr. Kassim, rather vehemently,

thinks the expression in bold in the above excerpt makes reference to the first notice of appeal. We have stated above that the first notice of appeal died with the striking out of Civil Appeal No. 33 of 2015. The only remaining notice of appeal is therefore the fresh one which was lodged after seeking enlargement of time. As such, the provision cannot refer to a nonexistent notice of appeal. We respectfully think Mr. Kassim's argument cannot be granted. We state that once an intending appellant obtains enlargement of time to lodge a notice of appeal, no leave to lodge a memorandum of appeal will be required provided that the relevant memorandum of appeal is filed within sixty days of the lodgment of the said notice. The new notice of appeal acquires the status of the notice of appeal envisaged by rule 83 (1) of the Rules and the sequence of events and timeframes for subsequent events set out by the Rules follow suit. Put differently, if an appellant does not file the memorandum of appeal within sixty days of the lodgment of the notice of appeal obtained after enlargement of time, he will certainly require extension of time within which to file the same.

In the case at hand, the appellant lodged the memorandum of appeal within the sixty days prescribed; that is, within sixty days of the lodgment

of the notice of appeal prepared after enlargement of time. The appellant therefore did not require any leave of the Court to file the same. The memorandum of appeal was therefore timely filed. The first limb of the preliminary objection is therefore without merit. It is accordingly overruled.

The complaint in the second limb is on the omission to insert at an appropriate place in the notice of appeal the month on which the Registrar signed the notice of appeal upon lodgment. We have seen the notice of appeal as appearing at pp. 210 and 211 of the record of appeal. It shows that it was signed by counsel for the appellant on 13.06.2016. The place at which the date could be inserted was duly filled. However, indeed, it does not show the month on which it was signed by the Registrar. The month or the space on which the month could be inserted was not shown. It simply indicates: "Lodged in the High Court of Tanzania at Tabora this 16th day of 2016" and the signature of the Registrar appears after that. Having considered the notice of appeal in context; that is, not considering the "Lodged in the High Court of Tanzania at Tabora this 16th day of 2016" complained of in isolation, we think the ailment, if any, is an excusable keyboard mistake and was cured by an endorsement on top of it indicating

that the same was lodged in the Court on 16.06.2016 and the same signature of the Registrar appears on the relevant space in the rubber stamp impression of the Court. We think such an omission is so trivial to warrant the appeal being struck out as prayed by Mr. Kassim. We find no merit in the second limb of the preliminary objection and overrule it as well.

Having overruled the preliminary objection filed by the respondent, the way to the determination of the appeal is now paved. We, therefore, now advert to the determination of the appeal.

Arguing for the appeal, Mr. Kayaga first adopted the memorandum of appeal as well as the written submissions earlier filed in its support. In support of the first ground of appeal, he submitted that at pp. 42 – 47 of the record of appeal, there is the Judgment of the District Court of Tabora in Probate Appeal Case No. 6 of 2009 wherein it is shown that the proceedings in that appeal were stayed. The appointment, and the granting, of the letters of administration of the estate of the late Omary Said Mkuki to the appellant vide Probate and Administration Cause No. 1 of 2009 by the Primary Court at Isevya was not revoked by the District Court

in Probate Appeal Case No. 6 of 2009 as stated by the High Court as appearing in its judgment in Probate and Administration Cause No. 1 of 2010 at pp. 119 – 120 of the record of appeal. The High Court therefore erred in so holding, he argued. As an extension to the argument, Mr. Kayaga argued that the High Court ought not to have appointed the respondent in the same probate. To buttress this proposition, the learned counsel cited **Fatima Fatehali Nazarally Jinah v. Mohamed Alibhai Kassam**, Civil Appeal No. 85 of 2014 (unreported).

On the second ground, Mr. Kayaga submitted that the High Court erred is holding that the law applicable would be the Indian Succession Act, No. X of 1865 while section 331 of the Act provides that the Act is not applicable to a Mohamedan. He cited **Shallo v. Maryam** [1967] EA 409 to bolster this point. He argued that the late Omary Said Mkuki was a Moslem lived under Moslem Laws, cohabited with a Moslem woman who is the respondent. Their children are Moslems. The deceased was buried in accordance with Islamic law, his relatives also are moslems, therefore the applicable law for the distribution of the estate of the late Omary Said Mkuki should not be the Indian Succession Act. To support the point that the law applicable would be Islamic law, Mr. Kayaga cited **Re: Salum**

[1973] EA 522 and **Amina Taratibu Mbonde v. Selemani Ahmedi Mtalika** [2002] TLR 56. In the same token, he submitted, the High Court erred in holding that there was a presumption of marriage in that the principle is not applicable to Islamic law.

On the third ground, Mr. Kayaga submitted that the High Court erred in law and misinterpreted the import of section 160 (1) (2) of the law of Marriage Act, Cap. 29 of the Revised Edition, 2002 (hereinafter referred to as the Law of Marriage Act) in holding that as the respondent and the deceased Omary Said Mkuki had cohabited for a long time; nine years, they were in a civil partnership which resulted in a marriage by presumption. He argued that that relationship was not marriage by presumption in that it was rebutted by the respondent herself who at p. 69 of the record of Appeal "clearly stated that they did not celebrate any formal marriage but only lived as husband and wife. That was sufficient to rebut the presumption." To reinforce this proposition, Mr. Kayaga cited **Francis Leo v. Paschal Simon Maganga** 1978 LRT n. 22 and **Hemed Tamim v. Renata Mashayo** [1994] TLR 197.

In respect of the fourth ground of appeal, Mr. Kayaga submitted that under the circumstances of this Case the High Court erred in law and fact in appointing the respondent as the Administratrix of the estate of the late Omary Said Mkuki as she was a mere concubine who has no place in Islamic law and not entitled to the estate of the deceased. He argued that the persons who, primarily, are entitled to apply for letters of administration of the late Omary Said Mkuki are his heirs. A concubine is not among the heirs, he argued citing **Mulla's Principles of Mohamedan Law** at p. 24 thereof.

On the fifth ground, Mr. Kayaga submitted that the Law of the child Act 2009 was wrongly used in the circumstances of this case. He argued that the issue at hand was the administration of the estate of the deceased and who was the right person entitled to the grant of the letters of administration, not the custody of children.

Responding, Mr. Kassim, having adopted the Reply Written Submissions earlier filed, started his onslaught by submitting, in respect of the first ground, that it was true that the High Court erred in stating that the appointment of the appellant was revoked on appeal to the District

Court but the learned counsel was quick to submit that that was not the basis of the appointment of the respondent as administratrix of the estate of the late Omary Said Mkuki. After all, he argued, the appointment of the appellant by the Primary Court at Isevya cannot stand in that it was made out of the nullified proceedings by the High Court.

On the second ground, Mr. Kassim submitted that the mode of life led by the respondent and the late Omary Sadi Mkuki for all nine years they lived together was such that Islamic law cannot be invoked in the administration of his estate. He argued that if Islamic law is to be applied in the circumstance of the present case, then that shall amount to violation of article 13 (1) and (2) of the Constitution of the United Republic of Tanzania, 1977 Cap. 2 of the Revised Edition, 2002 (hereinafter referred to as the Constitution) as well as international treaties as cited and discussed in the trial court judgment at pp. 135 – 136 which promote equality and prohibit discrimination.

On the third ground, Mr. Kassim submitted that there is no dispute that the respondent and the late Omary Said mkuki lived under one roof as husband and wife for nine years from 1999 to 20.05.2008 when the latter

died during which they were blessed with two issues. During that period, the learned counsel argued, they managed to acquire some properties including a house standing on Plot No. 278 Block "M" Sikonge Road in Ng'ambo area within Tabora municipality which evidence was led by the respondent herself and corroborated by Mpenda Ally Ponda (PW1) and was not challenged. With the evidence, Mr. Kassim argued, this is a pure marriage by presumption envisaged under Section 160 (1) and (2) of the Law of Marriage Act.

On the fourth ground, Mr. Kassim for the respondent submitted that the evidence on record speaks loudly that immediately after the passing away of the late Omary Said Mkuki, the appellant chased away the respondent and the children from the house in which the deceased used to live with the respondent and children. That the appellant is collecting rent on the landed properties acquired by the deceased and the Respondent jointly since 2008 and nothing is given to the respondent and children. The appellant admitted that he never paid for the school fees of the children, he submitted. He went on to argue that in the circumstances, it is the respondent who is to administer the estate of the deceased so that the best interest of the children are protected as well as the share of the

respondent in properties jointly acquired during the subsistence of the said relationship as husband and wife for nine years. He added that the appellant is mismanaging the estate of the late Omary Said Mkuki since 2008 to date to the detriment of the respondent and the deceased's children.

On the fifth ground; regarding the applicability of the Law of the Child, 2009 (hereinafter referred to as the Law of the Child), Mr. Kassim submitted that it was properly applied to safeguard the best interest of the children of the deceased. The learned counsel referred us to the submissions at the trial at pp. 95 – 99 wherein he articulated the principle relating to the best interest of the child as enshrined in the Law of the Child.

On the above, Mr. Kassim prayed that the appeal be struck out with costs.

Rejoining, the appellant's counsel submitted that the decision of the High Court in PC Civil Appeal No. 44 of 2008 was rendered on 07.06.2010 while the appellant was appointed as administrator by the Primary Court at

Isevya on 09.02.2009. In the premises, he argued, the appointment of the appellant was not illegal as it preceded the order of the High Court.

At our prompting, Mr. Kayaga submitted that the Court has power under section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 of the Revised Edition, 2002 (hereinafter referred to as the AJA) to make an appropriate order in respect of the stay order by the District Court in Probate Appeal Case No. 6 of 2009 in the District Court.

Having summarized the submissions by the learned counsel for the parties, we are now in a position to confront the grounds of appeal for determination as enumerated hereinabove.

The first ground of appeal is pegged on the finding of the High Court to the effect that the appellant's appointment as an administrator of the estate of his late young brother Omary Said Mkuki by the Primary Court at Isevya in Probate Cause No. 1 of 2009 was quashed by the District Court of Tabora in Civil Appeal No. 06 of 2009. Mr. Kassim conceded that there was an error on the part of the High Court on that finding. However, as already intimated, the learned counsel was quick to state that that was not the basis on which the respondent was appointed as administratrix of the

estate of the late Omary Said Mkuki. We must state, at the outset, that we are in agreement with both learned counsel for the parties. Indeed, it is crystal clear in the record of appeal that at p. 46, Burugu, DM, *inter alia*, ordered:

> *"... it is ordered that the administration of the Probate Cause No. 01/2009 [of the Primary Court at Isevya] should be stayed pending the determination of Civil Appeal No. 44/2008 before the High Court Tabora."*

Thus the finding by the judge as appearing at pp. 119 – 120 of the record of appeal to the effect that the appointment of the appellant by the Primary Court at Isevya was quashed by the District Court was erroneous. As seen above, those proceedings were stayed and that order is alive to the present date.

In the second ground of appeal, it is complained that the trial Judge erred in law in holding that the appropriate law applicable was the Indian succession Act and neither Islamic law nor customary law was applicable. The High Court addressed this issue at some considerable length and in our view, with sufficient lucidity. It addressed itself to the manner the

deceased led his life; living with the respondent for nine years with two issues of the relationship without solemnizing the civil relationship in accordance with the Islamic law which according to the appellant and Rashid Salim (DW3) was forbidden and was tantamount to "not living in Islam". The High Court also addressed its mind to the allegation by the appellant that the deceased lived a lavish life not within the tenets of Islam. The High Court considered all the above as well as the provisions of section 88 (1) (a) of the Probate and Administration Estates Act, Cap. 352 of the Revised Edition, 2002 (hereinafter referred to as the Probate Act) and arrived at the conclusion that despite the fact that the deceased was a moslem, he did not profess the religion and thus arrived at the conclusion that the proper law applicable to the administration of his estate was neither Islamic nor Customary but the Indian Succession Act. We do not find anywhere to fault the High Court in his superb articulation of the issue. We agree that given the way the deceased led his life; exhibited by living with the respondent for nine years and having two children with her as well as living a lavish life in a manner that was not in line with Islam, the proper law applicable should be the Indian Succession Act.

We pause here to think. Having so done, we feel pressed to state here that we are surprised to dismay at the appellant's insistence that the late Omary Said Mkuki was a moslem, died a moslem and buried according to Islamic law. At the same time, the appellant alleges that the deceased lived a lavish life, did not marry according to Islamic law; lived with the respondent as a concubine and left behind two issues out of the "illegal relationship" and yet wants the estate administered according to Islamic law; a religion he never professed. Much worse, he wants the estate to be administered to the deprival of the respondent and kids under the pretext that the respondent was a mere concubine and the kids are illegitimate not entitled to the estate of their father.

The third ground is about the presumption of marriage. The complaint is that the High Court misinterpreted the import of section 160 (1) (2) of the law of the Marriage Act, in holding that as the respondent and the deceased had cohabited for a long time and that they were in a Civil partnership which resulted in a marriage by presumption. To Mr. Kayaga, there was no such a presumption and if there was one, it was rebutted by the respondent herself. The principle of presumption of marriage is a common law principle and, as rightly stated by both learned

counsel for the parties, is provided for under section 160 (1) of the Law of Marriage Act. For easy reference, we take the liberty to reproduce the subsection as under:

> *"160. Presumption of marriage*
>
> *(1) Where it is proved that a man and woman have lived together for two years or more, in such circumstances as to have acquired the reputation of being husband and wife, there shall be a rebuttable presumption that they were duly married.*
>
> *(2) ...."*

The provision has been subject to interpretation in our courts in a number of decisions. For the presumption of marriage to exist, within the clear and plain meaning of the subsection, there must be, first, proof that the man and woman have lived together for two years or more and secondly, that living together must be in such circumstances as to have acquired the reputation of being husband and wife – see: **Ally Mfaume Issa v. Fatuma Mohamedi Alkamu** 1974 LRT n. 67, **Raphael Dibogo v. Frabianus Wambura** 1975 LRT n. 42, **Elizabeth Salwiba v. Peter**

Obara 1975 LRT n. 52 and **Salum Itandala v. Ngusa Sonda** [1982] TLR 333, to mention but a few.

In **Alkamu** (supra), for instance, the High Court speaking through Kisanga, J. (as he then was – he later became Justice of Appeal) it was held:

> *"Where the parties to a marriage have lived together as husband and wife for such a long time, the courts should as far as possible construe the position in favour of the union and there should be very good reasons for disturbing it."*

In **Dibogo** (supra), the High Court speaking through Lugakingira, J. (as he then was – he later became Justice of Appeal) it was held:

> *"Where a man and a woman have lived together in circumstances that lead the outside word to believe they are husband and wife, the party denying that status has to tilt the balance with weightier evidence."*

In **Dibogo** (supra) the court referred to an old decision of the Governor's Appeal Board of **Nyamakaburo Makabwa v. Makera**

Watiku, Appeal No. 7 of 1944 (unreported) and quoted the following excerpt form that decision:

> *"When persons are living together as man and wife over a long period, and especially where there are children of the union, the Board would require the strongest possible evidence to rebut the presumption that the marriage was valid...."*

In **Salwiba** (supra), for instance, the High Court speaking through Nyalali, J. (as he then was – he later became Justice of Appeal and Chief Justice of Tanzania) held at p. 223:

> *"it is clear from this section [section 160 of the Law of Marriage Act] that unmarried woman or unmarried man is entitled to apply for the same reliefs for which a marries woman or unmarried mean is entitled to apply when the court makes an order of dissolution of marriage or an order of separation in marriage provided the following conditions are fulfilled:*
>
> *(a) It must be proved that the man and woman have been living together for two years or more; and*

(b) It must be proved that the man and woman acquired the reputation of being husband and wife; and

(c) It must be proved that the man and woman were in fact and law not married".

And in **Itandala** (supra), the High Court speaking through Chipeta, J., it was held:

"The parties lived together as husband and wife for five years, and their union has been blessed with three children. From the conduct of the woman after her infidelity which led to their separation, it is apparent that the parties conducted themselves in a manner which made the outside world to believe that they were husband and wife. Although payment of bridewealth or part thereof is not a prerequisite for the validity of a marriage, where there has been evidence of such payment, it should be interpreted to reinforce the view that such a union was not intended to be a concubinage but a lawful marriage. These factors raise a very strong presumption that the appellant and the respondent's daughter were lawfully married. In

those circumstances, the respondent needed to adduce the strongest possible evidence to rebut that presumption."

In the instant case, the respondent and the late Omary Said Mkuki lived together as husband and wife for nine years, and their union was blessed with two issues; Khanifa and Ibrahim. According to Mpenda Ally Ponda (PW2), the respondent and the said Omary Said Mkuki conducted themselves in a manner which made the outside world believe they were husband and wife. As far as we are concerned, that raises a rebuttable presumption that they were duly married. In line with the above authorities which we are decidedly of the view that they enunciate a correct principle of law, this Court must decide in favour of the union and whoever wants to rebut that presumption must bring weightier evidence to succeed.

The issue which pops up at this juncture is whether or not the presumption referred to above has been rebutted. That presumption, we are satisfied, has not been rebutted. The appellant seems to argue that the question of presumption of marriage is strange to Islamic law. Now that we have already found and held that Islamic law is not applicable to

the present case, the appellant's argument becomes superfluous. However, Mr. Kayaga argued also that the presumption was rebutted by the respondent herself when she testified that they did not go through a formal marriage. We would let Mr. Kayaga's words appearing at p. 5 of his written submissions in support of the appeal speak for themselves:

> "The learned trial Judge wrongly interpreted the provisions of S. 160 (1) of the Law of Marriage Act, Chapter 29 RE 2002. This section only raises a rebuttable presumption *that* can be rebutted by evidence even from the parties themselves. In this case the respondent in cross-examination at page 69 of the record of Appeal **clearly stated that they did not celebrate any formal marriage but only lived as husband and wife. That was sufficient to rebut the presumption.**"
>
> [Emphasis supplied].

With unfeigned respect to the learned advocate for the appellant, we are not prepared to go along with his reasoning. For our part, we think, by the respondent testifying in cross-examination that she and the late Omary Said Mkuki "did not celebrate any formal marriage but only lived as

husband and wife" she meant to bring into play the principle of presumption of marriage and to our minds these words fit well within the scope and purview of the provisions of section 160 (1) of the Law of Marriage Act.

For the avoidance of doubt, we have read **Francis Leo v. Paschal Simon Maganga** and **Hemed Tamim v. Renata Mashayo**; the cases referred to us by Mr. Kayaga. In **Francis Leo v. Paschal Simon Maganga**, the High Court held that the provisions of section 160 (1) of the Law of Marriage Act do not automatically convert concubines into wives at the end of two years of cohabitation. It added that the provision merely provides for a rebuttable presumption that a man and a woman were duly married. In that case the presumption was rebutted by the fact that the parties had no capacity to marry. Likewise, in **Hemed Tamim v. Renata Mashayo**, this Court dealt with the same point and observed that the presumption therein was rebutted. The cases are distinguishable from the instant one. In the instant case, unlike in the two cases above, the presumption of marriage between the respondent and the late Omary Said Mkuki has not been rebutted.

Flowing from the above, we are of the well-considered view that the presumption of marriage between the respondent and the late Omary Said Mkuki has not been rebutted. We therefore, like the High Court, find and hold that the respondent and the late Omary Said Mkuki had, under the provisions of section 160 (1) of the Law of Marriage Act, acquired the status of a husband and wife. The third ground is therefore answered in the affirmative; that is, the trial High Court interpreted well the import of section 160 (1) of the Law of Marriage Act and rightly held that the respondent and the late Omary Said Mkuki cohabited for nine years in a civil relationship which resulted into a marriage by presumption.

Next for determination is the fourth ground which, having discussed the third ground in the manner appearing above, we think, becomes simple to answer. The ground seeks to fault the High Court Judge for appointing the respondent as appointing the respondent as the administratrix of the estate of the late Omary Said Mkuki as she was a mere concubine who has no place in Islamic law and not entitled to the estate of the deceased. We have already decided above on the status of the respondent. Our discussion and determination have shown that the respondent was not "a mere concubine", that Islamic law is not applicable in the case at hand and

that the respondent was entitled to be granted the letters of administration of her late husband by presumption under section 160 of the Law of Marriage Act. This issue is therefore answered in the negative; that is, the High Court did not err in law and in fact in appointing the respondent as an administratrix of the estate of the late Omary Said Mkuki.

The last ground is about the applicability of the Law of the child Act 2009; that it was wrongly used in the circumstances of this case. Mr. Kayaga has argued that the issue at stake was not the welfare of the child but one of who was entitled to administer the estate of the late Omary Said Mkuki. Mr. Kassim strenuously objected. We, for our part, despite Mr. Kassim's vehement objection to Mr. Kayaga's argument, respectfully think the latter is right. The issue was one of administration of the estate of the deceased. Bringing into play the law of the child was uncalled for and was a mere digression which, we think, did not occasion any injustice in the case.

Despite allowing some of the ground of complaint as appearing hereinabove, the sum total of our determination is to find no merit in the appeal.

But the foregoing will not be the end of the matter, for, it became apparent in the course of hearing the appeal, more especially, on the first ground of appeal that there is a stay order made by the District Court of Tabora with respect to the same estate which appointed the appellant as administrator of the estate of the late Omary Said Mkuki. That order is still in place. It is very unfortunate that the parties to this matter have been riding two horses at the same time. That amounted to an abuse of the court process. After an appeal against the decision of the District Court in Civil Appeal No. 15 of 2008 was preferred to the High Court vide PC Civil Appeal No. 44 of 2008, the appellant ought not to have filed an application in the Primary Court at Isevya in Probate Cause No. 1 of 2009 seeking to be appointed administrator of the estate which was subject to appeal in PC Civil Appeal No. 44 of 2008.

For that reason, we invoke our revisional powers bestowed upon us by the provisions of section 4.(2) of the AJA to revise those proceedings by quashing them and setting aside all the orders made in the Primary Court of Isevya in Probate Cause No. 1 of 2009 and its consequent appeal to the District Court in Probate Appeal No. 6 of 2009.

In the upshot, this appeal is dismissed to the extent shown above with costs. For the avoidance of doubts, the order of the High Court reproduced at pp. 3 - 4 of this judgment remains undisturbed.

Order accordingly.

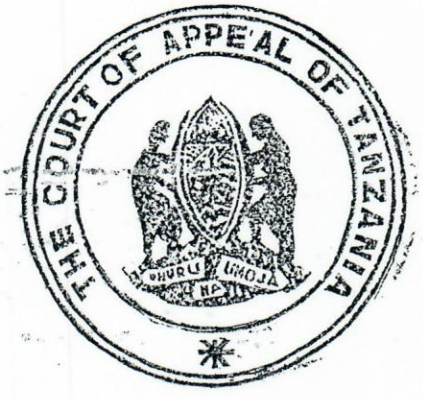
DATED at **DAR ES SALAAM** this 9th day of October, 2018.

K. M. MUSSA
JUSTICE OF APPEAL

S. A. LILA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

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



H.S. MUSHI
DEPUTY REGISTRAR
COURT OF APPEAL