IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: NDIKA, J.A., KOROSSO, J.A. And KIHWELO, J.A.)

CIVIL APPEAL NO. 51 OF 2020

GEOFREY MOSES MAPALALA ..... APPELLANT

VERSUS

FLORA NEEMA DAUD ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Mwanza)

(Gwae, J.)

dated the 28th day of May, 2019
in
PC Probate Appeal No. 1 of 2019

.....

JUDGMENT OF THE COURT

25th April & 4th May, 2023

KOROSSO, J.A.:

The appeal before us arises from the decision of the High Court of Tanzania sitting at Mwanza (Gwae, J.) in PC Probate Appeal No. 01 of 2019 where the High Court decided in favour of Flora Neema Daudi, the respondent in the instant appeal (then the appellant). In the said appeal, the High Court quashed and set aside the decision of Nyamagana District Court in Probate Appeal No. 7 of 2019. In its decision, the High Court restored the appointment of the respondent and the appellant herein as joint administrators of the estate of the late Moses Theophiel Mapalala by

Mkuyuni Primary Court in Probate and Administration Cause No. 56 of 2018.

To ease grasping of the context giving rise to the appeal, knowing the background albeit in brief is vital. After the death of Moses Theophiel Mapalala (the deceased), Peter James Malale, a relative of the deceased, and Felister Ntiry Kabizi, the mother of the appellant and a divorced wife of the deceased jointly petitioned for letters of administration of the estate of the deceased at Mkuyuni Primary Court in Probate Cause No. 56 of 2018. The respondent was displeased with the said application and on 18/9/2018 filed a caveat on the ground that the petitioners had filed the application without having obtained consent from the deceased's clan and in the process had excluded her even though she was the widow of the deceased. The Primary Court conducted objection proceedings, sustained the respondent's objection, and appointed the appellant and respondent as co-administrators of the estate of the deceased.

Being aggrieved with the decision of the Primary Court, the appellant successfully appealed to the District Court of Nyamagana in Probate Appeal No. 07 of 2018. The district court upon quashing and setting aside the decision and orders of the primary court, appointed the appellant as the sole administrator of the deceased's estate. Dissatisfied with the outcome of the first appellate court, the respondent successfully

appealed to the High Court in PC Probate Appeal No. 01 of 2019. The High Court quashed and set aside the District Court's decision and upheld the findings and orders of the primary court. The appellant was unamused by the decision and has filed the present appeal before the Court having duly obtained a certified point of law to be argued in Court in terms of Rule 5(1)(c) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2019 (the AJA) upon his application in the High Court (Mgeyekwa, J.) in Misc. Civil Application No. 78 of 2019. Nonetheless, the appellant duly lodged a memorandum of appeal that fronts three grounds of appeal, which we have decided not to reproduce for reasons to be advanced shortly.

On the day the appeal came up for hearing before us, Mr. Geoffrey Moses Mapalala, the appellant, appeared in person and was unrepresented whereas, Mr. Edwin Aaron, learned Advocate entered appearance for the respondent.

Before the hearing commenced in earnest, the Court queried the appellant on the status of the grounds of appeal found in the memorandum of appeal filed on 23/12/2019, taking into account that the High Court in Misc. Civil Application No. 78 of 2019 only certified one point of law, that is; "*whether a concubine can be granted a letter of administration of the deceased's estate*". After a brief dialogue with the

Court, the appellant sought leave to abandon the first and third grounds of appeal.

Having heard the parties and alive to the settled position that a certificate on points of law predicates the jurisdiction of the Court to hear and determine an appeal pursuant to section 5(2)(c) of the Appellate Jurisdiction Act, Cap 141 (the AJA) and thus the grounds of appeal filed must substantially conform to the points of law certified by the High Court, we granted the prayer. It is sufficient to say that this position of the law has been reiterated in various decisions of this Court including **Naftary Petro v. Mary Protas**, Civil Appeal No. 103 of 2019, **Zainab Mwinjuma v. Hussein Abdallah**, Civil Appeal No. 104 of 2009, **Shaha Salehe Mwinyihija v. Stamili Salehe**, Civil Appeal No. 25 of 2013 and **Yakobo Magoiga Gichere v. Peninah Yusuph**, Civil Appeal No. 55 of 2017 (all unreported). In **Yakobo Magoiga Gichere** (supra), addressing where a certificate on points of law is required, the Court stated:

> *"...the grounds of appeal filed in the Court must substantially conform to the points of law which the High Court has certified."*

In the instant appeal, having granted the unopposed prayer by the appellant to abandon the first and third grounds of appeal, the two

grounds were marked abandoned. In consequence, the appellant had only the second ground of appeal to pursue. The second ground state thus:

2. *That the learned judge erred in law by reasoning that one in a concubine association is entitled and/or had a recognized interest in law and as such may apply and be granted letters of administration of the deceased's estate therein.*

When given an opportunity to submit his appeal, the appellant began by adopting the written submissions to form part of his oral submission. He then implored the Court when determining the appeal to bear in mind the following: One, the fact that his father's (the deceased) marriage to his mother ended in divorce in 2013 when the deceased had a love liaison with the respondent. Two, at the time his father died, his love union with the respondent had phased, and no longer in the course. Three, the fact that the respondent had been using different names in various matters related to her relationship with the deceased made it difficult to know who she was and what her real name is, since she had a different name for each incident. Four, although the respondent had married the deceased, the marriage was annulled by the primary court and thus her status remained as the deceased's concubine throughout their relationship up to the time of his death in 2018.

In the written submission, the appellant implored us to find that the learned High Court Judge's decision of appointing the respondent as a co-administrator of the deceased estate was flawed and lacked justification, having declared the respondent to be a concubine and not a legal wife of the deceased, without any cogent evidence presented before it by the respondent to show any interest in the deceased estate. According to the appellant, in the circumstances of the case, the respondent cannot plunge into the refuge of the common law principle of "presumption of marriage" provided under section 160 (1) of the Law of Marriage Act, Cap 29 (the LMA) since the presumption was rebutted by the order of annulment of the purported marriage between the respondent and the deceased. The appellant further argued that for one to petition for letters of administration of the deceased's estate, he or she must be a fit person with interests in the named estate with the view to collect, administer, distribute, and dispose of the estate for the benefit of the lawful beneficiaries or heirs as underscored in the High Court decision in the case of **Sekunda Mbwambo v. Rose Ramadhani** [2004] T.L.R. 439.

The appellant contended further that the deceased left surviving lawful heirs duly capable and reliable to act as administrator/administratrix of his estate, thus the appointment of the respondent as a co-administrator, a stranger to the lawful heirs was

erroneous and risked jeopardizing the affairs of the deceased's estate. His argument is that the High Court Judge's decision for all intent and purpose was grounded on unjustified and unfounded summation that the respondent is more knowledgeable of the estate of the deceased person than the heirs. The appellant thus urged the Court to allow the appeal, quash the High Court decision of 28/5/2019, set aside the consequential orders therein, and restore the decision of the first appellate court of 19/11/2018 in Probate Appeal No. 7 of 2018.

On the respondent's side, Mr. Aaron kick-started his response by praying to adopt the written submissions filed. When considering his arguments, we shall draw from the respondent counsel's oral and written submissions with respect to the second ground of appeal. The respondent's counsel contended that both parties agreed on the following facts: One, that the deceased and the respondent cohabited before 2013. Two, that there was a marriage between the deceased and Felister Ntiry Kabizi who was then divorced in 2014, and three, at the time of the death of the deceased in 2018, the respondent was living with the deceased.

The learned counsel for the respondent argued that the argument that the finding of the High Court was erroneous is misconceived because while it is true it was the finding of the Court that the respondent was not the legal wife of the deceased, this was an observation made when taking

account of the finding of the Primary Court in the context of the caveat filed by the former wife of the deceased before Ilemela Primary Court in Civil Case No. 8 of 2013 and in no way disqualified the respondent from being appointed as an administratrix of the estate of the deceased Moses Mapalala.

Mr. Aaron reasoned that the evidence on record is that though the marriage between the respondent and deceased was voided by the Primary Court having found that it was occasioned when the deceased had no capacity to marry, at the time being married to Felister Ntiry Kabizi, there is evidence that the respondent continued to cohabit with the deceased even after his marriage to the appellant's mother ended in a divorce and up to the time of his death. He argued that the respondent and deceased lived as husband and wife and therefore the presumption of marriage can be invoked after the deceased capacity to marry was invoked upon divorcing Felister Ntiry Kabizi in 2014. He contended this is clearly discerned from the evidence of relatives, neighbors, and family members, who showed that they recognized the respondent as the wife of the deceased.

Mr. Aaron argued further that this shows without doubt that the respondent's interest in the deceased estate cannot be denied especially since there is evidence that the house the deceased lived in with the

respondent until his death was constructed when they were cohabiting after 2014, after divorcing Felister Ntiry Kabizi. Therefore, he argued that the respondent having an interest in the deceased's property warrants her to continue being the co-administrator as appointed by the High Court. According to the learned counsel for the respondent, the importance of the respondent to be one of the administrators of the estate of the deceased is further amplified by the obtaining challenging circumstances where the appellant has clearly shown to want to oust the respondent as a person with interest in the deceased property which should lead the Court to find that if the appellant is left to administer the estate alone, the rights of the respondent will be compromised.

The learned counsel for the respondent also challenged the argument by the appellant that the administration of the estate of the deceased cannot proceed smoothly because the appointed co-administrators (appellant and respondent) are not in good terms is not by itself a plausible reason to warrant rescinding the decision to appoint them as joint administrators. He cemented his argument citing a decision of the Court in the case of **Mohamed Hassan v. Mayasa Mzee and Mwanahawa Mzaa** [1994] T.L.R. 225, to reinforce his perspective. He argued that in the alternative, if the Court will have the view that under the circumstances, the wind of justice swings in the direction of revoking

the powers of administration granted to the appellant and respondent, then, an independent institution such as the Administrator General be appointed as the administrator instead of granting the letters of administration of the estate of the deceased to the appellant only.

On the issue of the different names used by the respondent in various matters that relate to the appeal under scrutiny, Mr. Aaron argued that the said names were, in essence, variations of the respondent's name; and they are of the same person, that is, Flora Neema Daudi, the name she uses in most of her transactions, and she is recognized thus. He finalized his submissions imploring us to dismiss the appeal.

The appellant's brief rejoinder was to reiterate his earlier submission in chief and prayers and emphasized that he was not in good terms with the respondent.

We have carefully examined the record of appeal, the rival oral and written submissions of the appellant, and the learned advocate for the respondent and cited authorities. In determining the sole ground of appeal before us, we are of the view that the main issue to delve into, is whether the High Court's dismissal of the decision of the first appellate court and restoration of the Primary Court's decision appointing the respondent as a co-administrator of the estate of the deceased was proper under the circumstances.

We find it pertinent to highlight matters which we have discerned are not controverted by the confronting parties. One, that the deceased, who died in 2018 had registered land properties situated at Buhongwa and Pasiansi areas within Mwanza Region and Ipole Geti and Zenga areas within Tabora Municipality as discerned from the evidence found in the record of appeal. Two, the deceased married Felister Ntiry Kabizi (Felister Mussa) in 1990, and that they divorced in 2014. Three children were born (including the appellant) of that marriage. Three, the deceased and respondent got married and the marriage was annulled by Ilemela Primary Court on 17/4/2013, in Civil Case No. 8 of 2013, since the marriage between the deceased and Felister Ntiry Kabizi, a Christian marriage and thus monogamous marriage had not been terminated. Four, on 17/7/2018 Moses Theophil Mapalala died as shown by testimonies of witnesses from both sides and a copy of the death certificate at page 41 of the record of appeal. Five, upon the death of Moses, Felister Ntiry Kabizi and Moses Malale applied to be appointed as administrators of his estate vide Probate Cause No. 56 of 2018 at Mkuyuni Primary Court. Six, the appointment of Felister Ntiry Kabizi as the administrator of the estate of the deceased was revoked upon sustaining the objection of the respondent. Thereafter, Mkuyuni Primary Court on 2/11/2018 appointed the appellant and the

respondent as co-administrators of the deceased estate. Seven, at the time of his death, the deceased was staying with the respondent.

Undoubtedly, the jurisdiction of the Primary Court to appoint administrators of estates is stipulated by sub-paragraphs (a) and (b) of Paragraph 2 of the Fifth Schedule to the Magistrates' Court's Act, Cap 11 (the MCA) which state:

"*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 on 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 be the administrator or administrators thereof,*** *and, in selecting any such administrator,* ***shall, unless for any reason it considers inexpedient so to do, have regard to any wishes which may have been expressed by the deceased;***

(b) Either of its own motion or an application by any person interested in the administration of the estate, where it considers that it is desirable 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 subparagraph (a)." *[emphasis added]*

The above provisions have been considered by the Court in various decisions. In the case of **Mohamed Hassan** (supra), it stated that while subparagraphs (a) empower a primary court to make a first appointment of an administrator or administrators of a deceased's estate, subparagraph (b) vests in the primary court the jurisdiction to appoint a replacement administrator. In **Naftary Petro** (supra), the Court stated that the later subparagraph also permits the appointment of an additional administrator (co-administrator) to manage the estate together with an administrator appointed under subparagraph (a) and that:

> *"subparagraph (a) above is unambiguous and thus it should be construed in its plain and ordinary meaning. In essence, it empowers a primary court, either of its own motion or upon an application to appoint one or more persons 'interested in the estate of the deceased' to be the administrator or administrators thereof. The primary consideration, therefore, is holding of an interest in the estate of the deceased."*

Having found that the word "interest" has not been defined in the statute, the Court went on to expound that the interest provided in the provision should be looked at as 'beneficial interest' as defined in the Black's Law Dictionary, Eighth Edition, at page 828, to mean "*a right or expectancy in*

something (such as a trust or an estate) as opposed to legal title to that thing."

On our part, we follow the above definition as held by the Court in **Naftary Petro** (supra), that essentially alludes that, any person, within the confines of the law entitled to a share of the deceased's person's estate, qualifies to be recognized as an interested person, which includes, heirs, a spouse, a devisee or even a creditor of the deceased. (See also, **Seif Marare v. Mwadawa Salum** [1985] T.L.R. 253 and **Sekunda Mbwambo** (supra).

To be noted is the fact that apart from the established conditions in appointing an administrator, a court must consider any wishes which may have been expressed by the deceased unless it considers, for any reason, inexpedient so to do. Indeed, a court when granting letters of administration, in exercising its discretion, apart from the wishes of the deceased, its paramount consideration should be on whether the applicant has an interest in the estate of the deceased, that is, beneficial interest in the estate. In the instant appeal, the appellant's argument in challenging the respondent's attributes to be an administratrix of the estate of the deceased is that she was a mere concubine of the deceased their marriage having been annulled by the Primary Court. He thus argued

that the High Court erred in appointing a mere concubine, who thus cannot be said to have a beneficial interest in the deceased estate.

When appointing the respondent as a co-administrator of the estate of the deceased, the Primary Court at page 79 of the record of appeal stated:

> *"Kwa kuwa mpingaji (respondent) alifunga na marehemu ndoa ya kimila, na kubariki ndoa yao pia watu wanaomzunguka kuwatambua mpingaji na marehemu ni mke na mume kiasi cha kumuita mjane na waombaji kumtambua kiasi cha kumshirikisha kwenye kikao na kumuandikia hajahudhuria hivyo walimtambua ni mke na walipaswa kumshirikisha."*

The loose translation of the above passage is that, since the respondent contracted a customary marriage with the deceased which was blessed and recognized by people who surrounded them as husband and wife to the extent of calling her the widow and also listing her name in the minutes of the clan meeting recording her as absent it means they recognized her as the wife of the deceased and should have thus involved her in the relevant processes. The findings by the High Court on page 117 of the record of appeal is that:

> *"... I am of the established view that the appellant (respondent herein) is also a right person to be*

appointed an administratrix as was rightly done by the trial court since she has an interest to serve and in the circumstances of this case she likely knows some of the assets of the deceased which might have not been known by the respondent or any other person or deceased|s heirs. The appellant's interest must therefore be protected by herself bearing in mind she has been living with the deceased for a long period. Hence she might have engaged in economic developments of which she is entitled to something tangible in the deceased's estate."

On the issue of the respondent being a mere concubine and thus without any interest in the estate of the deceased, the High Court Judge at page 118 of the record of appeal stated:

"To hold that the appellant was a mere concubine as attempted to be established by some of the witnesses who appeared on behalf of the respondent and his mother is clearly unfounded as the former applicants for grant of letters of administration of the deceased's estate indicated that the appellant is the deceased's widow. More so she might have an interest to protect in the estate as intimated earlier."

The issue that has stretched our minds is whether one can say that the respondent had an interest in the estate of the deceased to qualify to be appointed as an administrator as held in the impugned decision of the

High Court. As stated earlier, from the record, and not disputed by the parties is that the deceased and the respondent had a relationship prior to 2014 when Felister Ntiry Kabizi and the deceased were still married. According to the respondent, she got married to the deceased in 2006, which was annulled as stated hereinabove for lack of capacity to marry on the part of the deceased in Matrimonial Cause No. 08 of 2013, Ilemela Primary Court.

On the other hand, the marriage between Felister Ntiry Kabizi and the deceased was dissolved vide Matrimonial Cause No. 51 of 2013, Ilemela Primary Court. It is evident that despite the annulment of the marriage between the deceased and the respondent, they continued to cohabit. This fact is supported by the evidence of the respondent herself, Flora Neema Daudi as PW1, Anna Samson Chungu (PW2), the deceased's sister, who stated that she had lived with the deceased until he married his first wife who bore three children, they separated and married the second wife named Flora. Alex Joseph Mtwale (PW3), who introduced himself as the deceased uncle also testified that the deceased had married his first wife, and then later the deceased introduced to him another wife by the name of Frola and informed him that he had divorced his first wife. Carlos Mgasa (PW4), the leader of the Disaster Committee of Bulale Street where the deceased lived at the time of his death, stated that, on being

notified of the death of the deceased, he went to the deceased's house where he met the deceased wife (the respondent). Clearly, what we can gather from the evidence on record is that some relatives and neighbours of the deceased accepted and recognized the respondent as the wife of the deceased. The fact that in the minutes of the clan meeting found on pages 5-9 of the record of appeal, which were also attached to the application for letters of administration of the estate of the deceased in Probate Cause No. 56 of 2018, the respondent's name is listed as a person who was absent, undoubtedly infers that even the family recognized her as part of the deceased's family clan. This fact negates the assertion by the appellant that the respondent's status in the family was that of a concubine and not recognized by the family as a wife/partner of the deceased especially after he divorced his first wife.

The other relevant fact discerned from the record before us is that, after the divorce of the deceased and Felister Ntiry Kabizi, the respondent continued to live with the deceased. Therefore, as held by the High Court Judge, the fact that the respondent had an interest in the deceased property can be drawn from having lived with the deceased from 2014 after his divorce until his death in 2018. Even, if the evidence presented by the respondent that her marriage to the deceased got a blessing in February 2018 at Moravian church is not considered, the fact that they

lived together from 2014 after the divorce to 2018 when he died, can draw a presumption of marriage. This is because as shown above, some relatives and neighbours took them to be husband and wife. During the vigil and funeral processes of the deceased, PW4 stated the street leadership worked with the respondent, identifying her as the widow of the deceased.

Suffice it to say, without doubt, during the period of living together with the deceased, the respondent must have acquired some interest in the deceased's property. Thus, as correctly argued by the respondent's counsel and found by the High Court Judge, the respondent had an interest in the deceased estate.

On the issue of the different names referring the respondent, we find that under the circumstances this is not a matter which should take much time, because undoubtedly, the respondent before the Court, Flora Neema Daudi, is the same person who lived with the deceased and later her marriage to the deceased was annulled. The evidence on record shows that it is Frola David Yohana who objected to the grant of letters of administration to Felister Ntiry Kabizi in Probate Cause No. 56 of 2018 in the name of Frola Neema Daudi. Furthermore, in the reply to the objection in Probate Cause No. 56 of 2018 at page 18, the petitioner stated: "*Kwamba ndugu Frola Neema Daud ambaye pia anatambulika kwa*

majina Flora David Yohana...". In Civil Case No. 8 of 2013, Ilemela Primary Court, Felister sued the respondent in the name of Frola David Yohana. This essentially shows that the respondent was known by different names by the opposing party. In addition, when testifying in the trial court, when questioned by the second applicant found on page 47 of the record of appeal, the respondent stated: "*majina yote Neema, Frola Mapalala yote ni majina yangu.*" Thus, certainly, there was no time when it can be said that the different names used by the respondent limited the appellant's understanding that the concerned party was indeed the respondent. Therefore, we find this issue does not in any way affect the fact that Flora Neema Daudi, was the person who lived with the deceased as of 2006 up to the time of his death in 2018.

For the foregoing, we are of the view that in the present appeal, the High Court did consider the interests of all parties involved, took into account greater and immediate interests in the deceased's estate by appointing administrators who will invariably embrace all the surrounding interests in the estate of the deceased, without doubt, exercised its discretion properly.

Furthermore, we are convinced that when appointing the co-administrators to administer the estate of the deceased, the High Court was governed by the dictates of applicable law and guided by established

criteria on the suitability of those to be appointed as the administrator and did not consider remote or extraneous factors. (See **Mariam Juma v Tabea Robert Makange,** Civil Appeal No. 38 of 2009 (unreported)). Therefore, the ground of appeal fails.

In the final analysis, we dismiss the appeal and order each party to bear its own costs.

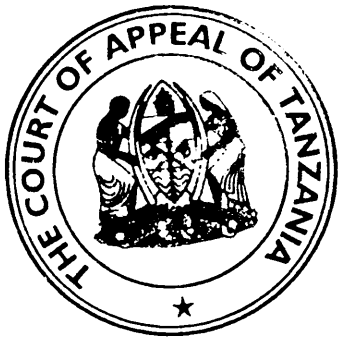
DATED at **MWANZA** this 3rd day of May, 2023.

G. A. M. NDIKA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The Judgment delivered this 4th day of May, 2023 in the presence of the Appellant and Respondent in person and in the absence of Mr. Edwin Aaron, learned Counsel for the Respondent who is duly notified is hereby certified as a true copy of the original.



A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL