IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

P.C. CIVIL APPEAL NO. 145 OF 2001

NAFTAL JOSEPH KALALU .....APPELLANT

VERSUS

ANJELA MASHIRIMA ..... RESPONDENT

JUDGMENT

KIMARO, J.

This appeal arises out of administration proceedings originating from the Primary Court. Angela Mashirima, the respondent in this appeal had petitioned for grant of letters of administration in respect of the estate of James Naftali Kalalu. She was duly appointed an administratrix, after hearing some of the beneficiaries and after an assessment by the court on her suitability for the appointment. According to the evidence on record, the respondent had presented herself before the court as the wife of the deceased. She testified that she had a customary marriage with the deceased. Their marriage was blessed with three children.

Naftali Joseph Kalalu is the appellant. He is the father of the deceased. He was discontented with the appointment of the respondent. He filed an objection in the District Court disputing the suitability of the respondent for the appointment. He raised two grounds:-

(i) The appointment was made in his absence.

(ii) The respondent was not a legal wife of the deceased.

The appeal was dismissed by the District Court. The District Court observed that the appellant was not a party to the administration proceedings and so he had no right of complaining that he was denied natural justice. The District Magistrate found out that a citation of 90 days was issued and published in the Daily Paper of Majira and the appellant became aware of this. However, he raised no objection. That, in addition to the citation, summons were also sent to the appellant and all other clan members. The appellant is also said to have made appearance in court but left before the trial of the case.

Regarding the second ground of objection, the District Magistrate said there was evidence of a marriage but there was no evidence of a divorce and so the respondent was a legal wife of the deceased.

The appellant was aggrieved and that is why this court has this appeal which is a second one.

The parties are represented. The appellant is represented by Mr. Kalolo, Learned Advocate, from MS M.A. ISMAIL & CO. ADVOCATES. The respondent on the other hand is a beneficiary of legal aid services rendered by the TANZANIA WOMEN LAWYERS ASSOCIATION. Ms. Vupe Ligate, learned advocate is representing her.

The petition of appeal alleges error by the District Magistrate in various areas of the law such as holding that the respondent was a wife of the deceased, that the appellant was dully served and that the fifteen years of cohabitation with the deceased entitled the respondent to the administration of the estate of the deceased. The other areas are the requirement for production of a divorce decree to prove that the respondent was no longer the wife of the deceased, misapplication of the Law of Probate and Administration and the Law of Marriage Act and for not considering the provisions of Probate Rules for the Primary Courts.

The hearing of the appeal proceeded by way of written submissions. Both advocates complied, and within the timeline set. I thank both advocates for their commitment as reflected by their submissions. Their submissions are quite useful for the disposition of this appeal.

The submission made by Mr. Kalolo in support of the first ground of appeal is that the respondent was appointed administratrix of the estate of the deceased because of staying with the deceased for fifteen years. However, there was no evidence before the Primary Court showing that the respondent was still the wife of the deceased at the time of his death. That the only evidence on record is that of cohabitation but not of a marriage. To fortfy this point, Mr. Kalolo made reference to types of marriages namely a Christian and customary marriage saying that non-production of a certificate of marriage is proof that there was no marriage. If there was a customary marriage, there should have been evidence of payment of bride price and consent from elders. Mr. Kalolo said a mere cohabitation and living in concubinage did not entitle the respondent to being a wife of the deceased. He reminded this Court that the law which is applicable in administration matters in the Primary Court is either Customary Law or Islamic Law. Since both the deceased and the

respondent are of a Chagga origin, para 20 of Laws of Inheritance GN 436 of 1963 is applicable:-

> A Chagga widow cannot inherit the estate of deceased husband unless clan members do not survive the deceased and the widow has only usufructuary rights over the deceased's properties.

To counter the two grounds of appeal, Ms. Ligate submitted that a customary marriage existed between the deceased and the respondent for 15 years. That even under the Law of Marriage Act 1971, a presumed marriage existed between the deceased and the respondent. The case of John Kirakwe vs. Iddi Siko [1989] TLR 215 was cited to augment this position. In the said case it was held that a presumed marriage exists where:-

i) Parties cohabit together for over two years

ii) Parties have acquired the reputation of husband and wife

iii) There was no formal marriage between the parties.

Ms. Ligate said all the three elements were proved in evidence and so if a customary marriage is disputed, there was a presumed marriage. It was

further submitted by Ms. Ligate that the respondent properly petitioned for appointment and after the statutory notice of 90 days, there was no objection and so she was appointed.

I have gone through the evidence which was adduced in the trial court thoroughly. The evidence which was tendered by the respondent was that she was married to the deceased. However, there was no evidence showing that at the time the deceased met his death, he and the respondent were divorced. The Learned Advocate for the respondent has correctly submitted that if the deceased and the respondent did not have a customary marriage, there was a presumed marriage which fits in the provision of Section 160 of the Law of Marriage Act 1971, as well as the case of John Kirikwe vs Iddi Siko (supra).

As regard the submission by Mr. Kalolo that the law on presumed marriages is not settled, the two decisions which are cited are not binding on me. For subordinate courts, they can opt to use any of the two authorities and any magistrate cannot be said to have faulted for standing by one of the authorities.

The two grounds of appeal have no merit.

The third ground of appeal regards service of summons. It appears to me that Mr. Kalolo is contending that there was no service of summons simply because there is no affidavit of the process server showing that the appellant was served and how he was served. Ms. Ligate on the other hand replied that apart from having this citation for 90 days, the appellant was duly served. Mr. Kalolo has also submitted that the citation of 90 days is not statutory requirement but a practice and so the geographical area of clan members ought to have been taken into consideration.

Regarding this ground of appeal, it must be stated that the proceedings in the Primary Court show conspicuously what happened. It was brought out in the evidence of the respondent herself and that of Anna Malisa that the appellant was aware of the administration proceedings. The respondent in particular pointed out that the appellant did appear in court on 4/9/2000 but the case was adjourned because of sickness of the trial magistrate. Similarly, Anna Malisa confirmed the evidence of the respondent that the appellant had come but left, saying he was leaving the administration proceedings to the respondent, herself and

one Anna James Naftari, daughter of the deceased. Such evidence is sufficient to prove that the appellant was aware of the proceedings. There was no need for an affidavit of the process server under the circumstances.

Ground number four is concerned with a decree of divorce which I have already touched on, when addressing the status of the respondent vis-à-vis the deceased. That there was evidence of marriage. If not a customary one, then a presumed one. Not all parties secure certificates for such marriages. It is wrong for Mr. Kalolo to assume that a decree of divorce is not required if such marriages break down and parties opt to have the marriage ended. Much as a marriage can be celebrated in various forms like religious, civil and customary by person specifically licensed to celebrate such marriages, it is only the court which can declare a marriage dissolved and issue a decree of divorce. Under such circumstances, any person who claims that a customary marriage or a presumed marriage ended, a decree of divorce must be produced for proof that the marriage ended.

As for grounds five and six which are concerned with misapplication of the law and lack of consideration of law, Mr. Kalolo's submission is that

the presumption of a marriage is rebuttable. That since the appellant was not heard, that presumption is invalid because it has not been tested. That since the customary marriage was not registered, the respondent was not entitled to be appointed the administratrix of the estate of the deceased because of paragraph 20 of GN 436 of 1963.

Mr. Kalolo said since the law which is applicable in the Primary Court is either customary or Islamic law, the trial court was bound to apply Chagga customary law related to administration, succession and inheritance because all the parties were Chaggas. Mr. Kalolo concluded that the trial magistrate erred in appointing the respondent.

The response by Ms. Ligate is that under the Fifth Schedule Part I, Section 2 of the Magistrates Courts Act 1984, a primary Court has jurisdiction to appoint a person having interest in the estate of the deceased. Likewise, the District Court has the same jurisdiction, so, it was not wrong for the Primary Court to appoint the respondent. it was equally not wrong for the District Court to confirm the decision of the Primary Court because the respondent, being the wife of the deceased was an interested party.

Alternatively, Ms. Ligate submitted, that the respondent filed the petition after failure by her brother in law fulfilling his responsibilities thus making the deceased's children suffer for non-payment of fees and other necessities.

It is my strong feeling that it is very important for me to mention what guides the court in performing its duty of dispensing justice. Article 107 B of the Constitution of the United Republic of Tanzania requires the Court to put into consideration the Constitution and the law in determining issue brought before the Court.

Part II of Chapter I of the Constitution of the United Republic of Tanzania embodies the Fundamental Objectives and Directive Principles of State Policy. One of the objectives contained in article 9 is facilitation of building of the United Republic of Tanzania as a nation of equal and free individuals enjoying freedom, justice, fraternity and concord. In particular the State authority and all its agencies are obliged to direct their policies and programmes towards ensuring among other things that human dignity is preserved and upheld in accordance with the spirit of the Universal Declaration of Human Rights. This is what is contained in Article 9(f) of

the Constitution. The Universal Declaration of Human Rights is a foundation of International Human Rights Law. The Universal Declaration of Human Rights lays down the minimum standards of Human rights to be observed by the nations.

The Constitution of the United Republic of Tanzania 1977 recognises and incorporates the Bill of Rights under article 12-29. Among such rights is equality of all human beings and equality before the law – (Article 12 and 13 of the Constitution). In other words discrimination is barred by the Constitution. This means customary practices which discriminate women have to be discouraged completely.

The Chagga customary practice contained in paragraph20 of the Law of Inheritance in GN 436 of 1963 which does not allow a widow of the deceased to manage the estate of her deceased husband and instead requires male clan members surviving the deceased to do so is discriminatory.

Tanzania is a party to the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW). It ratified the convention on

17th July, 1980. The convention requires state parties to abolish discrimination against women by embodying the principle of equality between men and women in the National Constitution and this has been done by Tanzania.

The term discrimination against women is defined in Article 1 of the Convention. It is:-

> Any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women irrespective of their marital status, on the basis of equality of men and women of human rights and fundamental freedoms in political, economic, social, cultural, civil or any other field.

Under Article 15(2) state parties are required to accord to women, in civil matters a legal capacity identical to that of men and same opportunities to exercise that capacity. In particular state parties are required to give women equal rights to conclude contracts and to

administer property and to treat women equally in all states of procedure in courts and tribunal.

If a husband is allowed to administer the estate of his deceased wife without any conditions whatsoever, there is no good reason why a surviving wife should be denied such a right. It is gender discrimination which is barred by the Constitution of the United Republic of Tanzania.

The evidence which was given by the respondent in the trial court shows that the man who was proposed by the clan member to take the responsibility of administering the estate of the deceased did not perform his duties. Much as the deceased left behind properties, the properties have not been used for the benefit of the beneficiaries of the deceased. School fees and other necessities were not being supplied to the children of the deceased.

The Primary Court did point out quite correctly that duty of the administrator is to make a collection of the deceased's property and distribute it to the heirs. An administrator is not appointed for converting the properties of the deceased into his/her own. The court should never

allow the death of the deceased to be used as an opportunity for people other than the beneficiaries of the estate of the deceased to benefit from such estate, under pretext of discriminatory customary practices. Customary practices which create such opportunity should be completely discarded. If the deceased never disowned his wife during his lifetime by taking the proper procedure allowed by the law, the court can not sanction his death to be used as an opportunity by other people for doing so, for the sole purpose of benefiting from the estate of the deceased at the expense of the real beneficiaries suffering.

Following the observation made in respect of the grounds of appeal, the record of the District and the trial court as well as the Constitution of the United Republic of Tanzania and International Human Rights Instruments ratified by Tanzania, this appeal must and has to fail. It is accordingly dismissed with costs.

N.P. KIMARO
JUDGE

24/07/2002

26/7/2002

Coram:	N.P. Kimaro, J.
Miss Mguto/Mr. Kalolo:	For the Appellant
Miss Ligate:	For the Respondent
Court Clerk:	Stephen

Court Order: Judgment delivered today
The appeal is dismissed

N.P. KIMARO
JUDGE

24/07/2002