

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

CIVIL APPEAL NO. 138 OF 2004

THECLA B. MWINGWA APPELLANT

VERSUS

STEPHEN B. MWINGWA RESPONDENT

J U D G M E N T

ORIYO, J.

The appellant, Thecla Bartholomew Mwingwa and the respondent, Stephen Bartholomew Mwingwa are related as sister and brother respectively. They were born by the late Bartholomew Mwingwa and Dorothy Mwingwa. The appeal arises from the administration of the estate of the late Bartholomew Mwingwa who died intestate on 16/5/1999 in Dar es salaam. He was survived by a wife and 8 children. Following the death, a family/clan meeting was held on 28/5/1999. It was unanimously agreed at the meeting as follows:-

- 1). That the deceased had during his lifetime distributed part of his estate to each child.

- 2). That the matrimonial house at Mbezi remains the residence of the widow.
- 3). That the deceased house at Chang'ombe was not given out to anyone by the deceased. The tenancy was to continue until an administrator of the estate was appointed.

The outbuildings on the premises at the back of the main house was to remain as it was; but for the shop frames at the front; the respondent who erected them was required to submit a copy of the permit of City authorities to the construction as well as a copy of tenancy agreement.

- 4). That the appellant was appointed the administrator of the estate of the deceased.

Armed with a copy of the minutes of the meeting and the death certificate, the appellant filed Form No.76, Application for Appointment of Small Estates; at the Resident Magistrates Court at Kisumu as Probate and Administration Cause No. 24/00. That was followed by a Caveat by the respondent objecting to the appointment of the appellant as per the application.

After hearing both parties and their witnesses, the trial court, learned Mwangi Resident Magistrate granted letters of administration over the deceased estate to the joint administration of the appellant

and the respondent; on 7/11/2003. The appellant was not happy with the appointment of the Co-administrator and preferred this appeal with 5 complaints against the trial court decision.

However before I proceed to determine the merits of the appeal I will first satisfy myself with the competency or otherwise of the appeal and the trial court proceedings. The impugned decision was made by the Resident Magistrates Court at Kisumu duly presided over by the learned Mwangi, a Resident Magistrate. Under the provisions of the Probate and Administration Ordinance, a Resident Magistrate has no jurisdiction to determine probate matters unless appointed by the Chief Justice to be a District Delegate. SECTION 5(1) of the Ordinance states:-

“ The Chief Justice may, from time to time, appoint such resident Magistrates as he thinks fit to be District Delegate.”

Who is a “District Delegate” is defined under Section 2 (1) of the Ordinance to mean:-

“ a resident magistrate appointed a District Delegate under Section 5.”

To my knowledge, the Honourable Chief Justice, has yet to make appointments of resident magistrates to be District Delegates. Until such appointments are made; resident magistrates courts have no original jurisdiction over matters relating to probate and administration of deceased estates.

On the foregoing, the learned trial magistrate, Mwandu Resident Magistrate, had no jurisdiction to determine Probate and Administration Cause No.24 of 2000. The powers were illegally exercised. Accordingly the proceedings, decisions and orders made are a nullity and are hereby quashed and set aside.

Parties are advised to petition for the Letters of Administration in the appropriate court. Meanwhile, status quo be maintained.

Considering that the appellant is a legal aid recipient from WLAC, I make no order for costs.



K.K. Oriyo

JUDGE

31/10/2005