

IN THE HIGH COURT OF TANZANIA  
AT IRINGA

(PC) CIVIL APPEAL NO. 2 OF 2006

*(From Njombe District Court Civil Appeal No. 36 of 2004  
Originating from the Urban Primary Court Probate and  
Administration Cause No. 130 of 1998)*

CHRISTOPHER MWAMBENA . . . . . APPELLANT

VERSUS

VERONIKA NYIKA . . . . . RESPONDENT

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**JUDGMENT**

**F. M. WEREMA, J.**

The subject of this appeal has a chequered history. It has been the basis of acrimony and frustrations among the litigants. The appeal itself is not a tasking matter to determine and I am glad that both counsel are in one that the grounds of appeal are not on a firm ground. Counsel for the appellant concedes that the Respondent was properly appointed as an administratrix of the estate but goes further to complain that the problem is that the administratrix has failed to give an account of her distribution of the estate's property to the legally and lawful heirs of the properties.

Mr. Mbogoro, Advocate for the Respondent submitted that his client the respondent, had given that account long time ago to the Primary Court. When counsel was asked why he did not bring to the attention of the Learned District Magistrate of that fact during the appeal, Mr. Mbogoro was quick to apologize and attributed his lapse to an oversight. I have perused the records of the Primary Court. I have seen a document entitled "Taarifa ya Usimamaizi wa Mirathi ya Marehemu AUGUSTINO MABENA" which is attached to a copy of the judgment of the Urban Primary Court at Njombe, Shauri la Mirathi Na. 103/1998. It was annexed as annexure "B". Together with that there is another annexure C which is HATI YA MAKABIDHIANO YA NYUMBA between the Respondent, Veronica Nyika and the Appellant, Christopher Mwambena.

This latter document bequeaths a house, a subject of the estate to the Appellant. There is also an account by the administratrix to the clan of the deceased which is attached to a letter originating from the office of the Primary Court

Magistrate to the Chairman of Igagala Village; I think that is where the clan resides.

In spite of that account, it does not appear on the court record that there was any order finalizing the matter. This may possibly be attributed to the appellant's frustrations evidenced by appeals or making further applications on the matter thus disorienting the court.

It is unfortunate that the record on the Administratrix account has not been acted upon. The point is, if as I have determined, the Respondent was properly and legally appointed, she must and ought to have complied with the law by giving an account of how she distributed the property.

The duties of and obligations by the Administratrix is well spelt out in the law. The Fifth Schedule, to the Magistrate's Courts Act, Cap. 11 R.E. 2003 at its S. 11 requires the Administratrix to account to the Primary Court for her administration of the Estate. I agree with Mr. Mbogoro, Counsel for the Respondent that his client has

already dutifully complied with that legal requirement. I agree with him on the basis of what is in record of the Primary Court case file. But it does not appear to me that the Primary Court ever acted on that account. This has been the source of frustrations and innuendos.

I have concluded that this appeal can only be determined only on one ground of Memorandum of Appeal, which is central to other grounds. That is whether the Respondent was properly appointed as an administratrix of the deceased estate. From what I have stated above, the challenge by the appellant on the Respondent's appointment as determined by the Learned District Magistrate, is baseless. The determination will cover grounds 2, 5 and 8 of the Memorandum of Appeal. I must express my dissatisfaction and distaste for the derogatory language contained in the Memorandum of Appeal.

Mr. Onesmo, Counsel for the Appellant was quick to disassociate himself with such uncivil language. Whoever drafted the document for the appellant must strive to

understand that the legal profession is a noble one and the language of communication and the tone of professionals thereof is that of the nobility, civil and polite. Otherwise such foul language which can be equated with that of "dockers" could be a ground to reject the document at the initial stages of filing it. Litigants should avoid using impolite language in the documents to be filed in court.

I have read ground 3 of the memorandum. I do not read the complaint thereof in the judgment of the learned District Magistrate, the subject of attack. No where in the judgment did the Learned District Magistrate determine that an account by the administratrix could be dispensed with. I agree with the Respondent that the learned District Magistrate clearly and with clarity of mind explained what the duties of the administratrix were in law. The only issue here is whether that duty has been exercised and complied with the law.

Having determined compliance issue, complaints about misuse of the estate property cannot be a ground of Appeal

if the account had been given but not acted upon by the Primary Court which is the court with jurisdiction to receive that account. It may occur that the Appellant is not satisfied with the account given by the Respondent. If that would be the case, his complaint should be addressed to the Urban Primary Court of Njombe. It should include the particulars of the complaint that are clear enough to enable the court to determine it. The court has power to deal with misapplication of the deceased's estate under section 8 of the Fifth Schedule to the Magistrates' Courts Act which provides that:-

***"An administrator who misapplies the estate of the deceased or subjects it to loss or damage shall be liable to make good such loss or damage, an administrator who occasions loss to the estate by neglecting to get in any part of the property of the deceased shall be liable to make good the amount".***

The District Court has no jurisdiction to determine on appeal a matter which is within the jurisdiction of the Primary Court and which matter has not been determined

by the latter. It cannot be attacked for not determining a matter it has no jurisdiction to determine under the law.

The appellant has challenged other children as lawful heirs of the deceased's property on ground of illegitimacy. This is a serious allegation. There is a presumption that every person is legitimate. But there is no presumption, as far as I know, that a person is the legitimate issue of a person. Under our law, section 160 of the Law of Marriage Act [Cap. 29, R.E. 2002]; there is a presumption of marriage between a woman and a man who have acquired the reputation of being husband and wife. The Appellant has not established the grounds of invalidity of marriage between the Respondent and the deceased. He has not laid the foundation for his claim that the relationship was in a state of concubinage. In my view, this ought to have been brought at the earliest opportunity as a ground of objection to the appointment of Respondent as an administrator. There is evidence on record which is referred to by the Learned District Magistrate to the effect that the Appellant

did not raise any objection to the appointment. The Appellant should therefore be estopped now to object. There is evidence of the clan's sanction to the appointment. This gives credence to the reputation of relationship between the Respondent and the deceased as wife and husband. I do not think the Appellant will be in a credible position to negative the fact of sexual intercourse between the Respondent and the deceased which could have resulted into creation of the children. To argue in his way will rebut the presumption of marriage under a very old principal established by the House of Lords in Morris V. Daries, 5 cL & E [cited in Principles and Digest of the Law of Evidence being a commentary on the Indian Evidence Act, 1872 10<sup>th</sup> Edn. vol.2 at p. 1093].

I am not satisfied that this is a valid ground. It is baseless, an afterthought and derogatory to the Respondent.

Lastly, I am now aware that there is a civil case pending in the District Court of Njombe at Njombe between the Respondent and the Appellant (Civil Case No. 16/2003).



The subject matter of that case is a landed property on plot No. 25 Block G for which the Respondent is praying for a declaration of the court that the continued occupation by the Appellant of that house is unlawful and seeks an order against the Appellant for vacant possession of the premises.

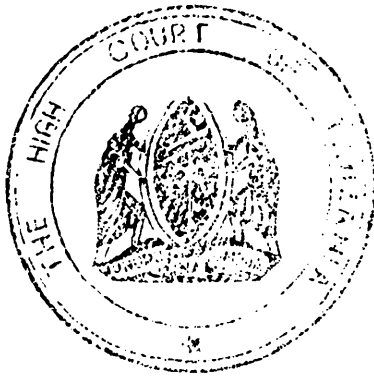
The property referred above is a subject of the documents referred herein, Taarifa ya Usimamizi wa Mirathi ya Marehemu AUGUSTINO MABENA and another one HATI YA MAKABIDHIANO YA NYUMBA. These are subject to the jurisdiction of the Primary Court under S.11 of the Fifth Schedule of the Magistrate's Courts Act, [Cap. 11 R.E 2002].

As I have stated above, the Primary Court has not acted on the account given by the Respondent. For consistency and in order to avoid confusion on the subject, matters which are the subject of the account of the Respondent should first be determined by the Urban Court of Njombe. All other cases between the parties on the property should be withdrawn or struck out to allow the determination by the Urban Primary Court of Njombe

Township. Whoever shall not be satisfied with the account should make his or her presentation of the grounds of dissatisfaction. For the sake of clarity, the issue should not be competence or legality of the appointment of administratrix but whether her account of the properties is accurate or not. The Primary Court will have jurisdiction to determine that issue. This should be done expeditiously. In any event, on or by 31 March, 2008 provided that parties should be heard by the court on the account and or any presentation against the accounting.

I therefore order that the record be returned to the Urban Primary Court of Njombe to deal with it on the account of the Administratrix and determine the accuracy of that account in accordance with the law.

In the upshoot the appeal is dismissed entirely and given the circumstances in this case, and a decision to revert to the Primary Court, there is no order as to costs.



*F. M. Werema*  
F. M. WEREMA

**JUDGE**

4/12/2007