

IN THE HIGH COURT OF TANZANIA

**AT TABORA**

PC. CIVIL APPEAL NO. 31 OF 2013

(Arising from SHINYANGA District Court Civil Appeal No. 3 of 2013  
and Original Civil Case No. 01 of 2013 URBAN Primary Court)

ELISHA MULYILA .....APPELLANT

VERSUS

1. FREDDY MAGANGA

2. GENNI MAGANGA .....RESPONDENT

**JUDGMENT**

10<sup>th</sup> & 15<sup>th</sup> April, 2014

**S.M.RUMANYIKA, J**

Elisha Mulyila, herein after (the Appellant), appeals against the decision in probate appeal No. 3/2013 of Shinyanga district court dated 12/8/2013. Whereby the latter upholding the decision of Shinyanga Urban primary court (Probate cause No. 1 of 2013), granting the letters of administration of the estate of the deceased Magreth P. Mulyila, to Freddy Maganga and Geni Maganga (the 1<sup>st</sup> and 2<sup>nd</sup> respondents) respectively.

Mr. N. Bedder learned advocate represents the appellant, while the respondents appear in person.

The appellant faults the 1<sup>st</sup> appeal court on four (4) grounds:

1. Failure by the district court to determined the issue whether the trial court had jurisdiction.
2. Wrong taking judicial notice of its former decision in probate cause No.1 of 2013.
3. Failure by the 1<sup>st</sup> appeal court to decide on the death certificate forged by the respondents.
4. The 1<sup>st</sup> appeal court having bound by the decision ever made by it per incurium.

Mr. Bedder, having dropped the 4<sup>th</sup> and on 2<sup>nd</sup> thought, the 3<sup>rd</sup> grounds, submits on 1<sup>st</sup> ground, that only this court was vested with jurisdiction (S. 3 of the Probate and Administration of the Estates Act cap 352 RE 2002) "the Act". As the primary courts had jurisdiction only in so far as customary or Islamic laws were applicable (Section 1 of the 1<sup>st</sup> schedule to the Magistrate's court Act, cap 11 RE 2002. But in this case, the deceased, whose estate was at issue died professing, and was of Christian faith. Leave alone burial celemonies.

That whereas a district court had jurisdiction only on some small estates not exceeding to shs. 10,000,000/= value (section 6 of the Act).

On the 2<sup>nd</sup> ground, Mr. Bedder submitted that judgment, ruling or orders of a court of law were none of the things for which under section 59 of the Evidence Act Cap. 6 RE 2002, should have taken a judicial notice.

We will, in the end ask this court nullify with costs, the lower courts' proceedings and direct any interested party to institute the cause in this court. Submitted the learned counsel.

The respondents were at one like submitting that there was nothing to fault the district court. That the trial court had jurisdiction. Having accepted and adjudicated upon the matter. Leave alone several similar matters that had been ever determined by it before.

In his rejoinder, Mr. Bedder contends that the jurisdiction of a court was conferred only by the law. Not by individual customs and practice.

Here the pivotal issues are two:

- (1) Whether the trial court had jurisdiction to entertain probate cause No. 1 of 2013.
- (2) Whether a court of law is entitled to take judicial notice of a court judgment/decision.

It is not disputed that the deceased Magreth P. Mulyila died in a christian faith. And the estate at issue is estimated at the value of shs.

150m plus. Ten times by far, in reference to the pecuniary jurisdiction of a Resident Magistrate's Court in probate matters.

The powers of a primary court are, according to the Magistrates' court Act Cap 11 RE 2002 not far fetched!:-

S. 18 (1) A primary court shall have and exercise jurisdiction -

(a) in all proceedings of a civil nature –

(i) where the law applicable is customary law or Islamic law.....(emphasis added)

For the case at hand, applicable was such laws other than Islamic and customary laws: section 3 of the Act reads:-

The High court shall have jurisdiction in all matters relating to probate and the administration of deceased's estates, with power to grant probates of wills and letters of administration to the estates of deceased persons and to alter or revoke such grants.

Moreover, given the said estimated value of the estate, even the District court had no jurisdiction. On this one, the Act reads:-

S. 6 – (1) "A district court presided over by a district

magistrate shall have jurisdiction in the administration of small estates, with power to appoint administrators of small estates .....where the deceased died within the jurisdiction of the court.

S.2 – (1) of the Act defines small estate as “an estate the gross value of which a court of other authority having jurisdiction in probate or administration is satisfied does not exceed ten thousand shillings”.

Of the most interesting effect was the unusual trial court’s misdirection that the Indian succession Act was applicable only between the Hindus.

It follows therefore that only the High court had jurisdiction.

Very unfortunately the 1<sup>st</sup> appeal court took no troubles to give reasons how then was the trial court vested with the jurisdiction. The learned magistrate simply held though silently, like saying that the issue was resjudicata “..... there is a ruling of Shinyanga District court.....marked as probate and Administration cause No. 01/2013 in which that the court resolved the question of jurisdiction.....” The learned magistrate was bound by the decision. It was respectfully erroneous. After all the reason for refusal of the appellant’s objection by the trial court was, with greatest respect not tenable at law;

.....cha msingi zaidi pingamizi hili .....

liliwasilishwa katika Muda ambao si muafaka

(shauri limeshaanza kusikilizwa.....).

Literally means that the point of objection on the jurisdiction of the court was bad for being raised late. But respectfully also, it is settled law that the question of jurisdiction of a court can be raised any time even at appeal stage.

Ground No. 1 of the appeal is allowed.

On the issue whether a judicial notice was properly taken by the 1<sup>st</sup> appellate court, this point needs not to detain me. The provisions of section 59 of the evidence Act cap. 6 RE 2002 provide for a long list of the facts of which judicial notice shall be taken. A court judgment, ruling and order to mention few as argued by Mr. Bedder was not one of them. Ground two of the appeal also succeeds.

Just to add a word or two, ordinarily, the trial court might have been admitting also adjudicating on numerous similar matters. Whereby very clearly assuming jurisdiction yes! But it is settled law that the jurisdiction of a court of law is the function of law. It cannot be conferred simply by the wishes of individuals just by long standing breach of the law.

In the result I am inclined to allow the appeal as hereby do.

For avoidance of doubts, I will nullify the proceedings of the two courts bellow and direct that the probate cause be instituted in the High court of Tanzania. As the parties are the in – laws, each party will bear their own costs.

R/A explained.

**S.M.RUMANYIKA**

**JUDGE**

**13/04/2014**

Delivered under my hand and seal of the court in chambers. This 15/04/2014. In the presence of the appellant and 2<sup>nd</sup> respondent.

**S.M.RUMANYIKA**

**JUDGE**

**15/04/2014**

