

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

AT DAR ES SALAAM

PC CIVIL APPEAL NO 11 OF 2017

**(From Temeke District Court, Civil Revision No. 17 of 2016 and
original Probate and Administration Cause No. 274 of 2016 at
Temeke Primary Court)**

CHRISTINA ALEXANDER NTONGE.....APPELLANT

VERSUS

LIMI MBOGO.....RESPONDENT

JUDGMENT

Date of last Order: 14/3/2018

Date of Ruling: 22/3/2018

Munisi,J

Christina Alexander Ntonge, the appellant, was the legal wife of one Mussa Humu Mbogo who passed away on 20/7/2015. Following the said death, she applied to be appointed the administrator of the estate of her husband before the Temeke Primary Court where she failed due to the objection raised by deceased children from his other wife. Dissatisfied, she filed revisional proceedings under section 22(1) of the Magistrates' Courts Act, Cap 11 RE 2002 before the District Court where she also lost. She thus filed the present appeal challenging the refusal by the district court to revise the primary court proceedings on the ground that;

1. That the learned Resident Magistrate erred in law and in fact in holding that the Appellant was to file an appeal

against the decision of the Primary Court and not revision as she did.

On the 13th and 14th of March 2018, when the appeal was called for hearing, Dr. Lamwai and Mr. Roman Lamwai, learned counsel appeared for the appellant while Mr. Othman Kalulu, learned counsel appeared for the respondent.

Submitting in support of the appeal, Dr. Lamwai contended strongly that the District Court erred in failing to revise the primary court proceedings which were tainted by illegalities and conducted without jurisdiction. Citing the provisions of Item 1(1) of the Fifth Schedule to the Magistrates' Courts Act, he argued that the jurisdiction of the Primary Court is limited to estates governed under the customary or Islamic law only. In that respect, the deceased estate which from the record it did not indicate that it falls under either of the two categories could not have fallen within the primary court's jurisdiction. He amplified that from the evidence presented, it was clear that appellant was recognized by the family members as deceased's wife and their marriage was contracted through Christian rites. Further that the record does not show that any inquiry was conducted to establish the mode of life led by the spouses nor was there any evidence to prove that spouses observed the same customary norms. In that regard, neither customary nor Islamic law was applicable to their situation which meant that the primary court exercised jurisdiction illegally.

Dr. Lamwai, argued further that in terms with the provisions of section 18(1(a)(i) of the MCA; the primary court exercised jurisdiction which it did not have in view of the fact that deceased's estate comprised of properties which included registered lands under the Land Registration Act such as the Upanga plot. He insisted that under the circumstances of this case where the estate did not fall under the customary or Islamic laws, jurisdiction of the primary court was ousted by the provisions of section 3 of the Probate and Administration of Estates Act, Cap 352. The learned counsel thus urged the court to find that the district court erred in

failing to revise the primary court proceedings under section 22(1) of the Magistrate's' Courts Act and prayed for the appeal to be allowed.

On his part, Mr. Kalulu, learned counsel modestly conceded to the position of the law advocated by Dr. Lamwai. He however argued that the decision of the Primary court should not be faulted because it was a result of what was filed before it by the parties. He insisted that from the record, it appears that the District court followed the law regarding appealable orders in reaching its decision as such its decision cannot be faulted as it states the right position of the law. He thus prayed for the appeal to be dismissed.

In his brief rejoinder, Dr. Lamwai insisted that the District court erred in failing to see the illegalities consequent of which it declined to carry out the revision sought by the appellant even if they had not been pleaded. He argued that it is settled law that issues of jurisdiction could be raised at any stage of proceedings even on appeal. He argued further that even if parties consent, that cannot provide the court with the requisite jurisdiction adding that any resulting order will be null and void. He thus urged the court to find that the trial court's proceedings are tainted by illegalities consequently invoke the provisions of section 30(1)(b)(i) of the Magistrates' Courts Act and quash both proceedings before the District and the Primary Court.

I have given due consideration to the counsel submission which are truly appreciated. It is common between the counsel that in attending to the Probate Cause No 17 of 2016 the primary court acted without jurisdiction. While Mr. Lamwai is insistent that the pertaining illegalities renders the proceedings and the judgment thereon null and void hence calling for intervention by the district court, Mr. Kalulu appears to suggest that the latter court acted within the framework of the law. Having studied the record of the primary court which I believed was placed before the district court, I have been dismayed by the finding reached by that court in its decision. From the evidence adduced by the appellant who was

the petitioner before the primary court, deceased left properties which included registered properties such as a house situate at Upanga. In that regard under the provisions of section 18(1)(a)(i) of MCA, primary court's jurisdiction over such land is expressly ousted. The said provision provides:

- (i) Where the law applicable is customary law or Islamic law;
Provided that no primary court shall have jurisdiction in any proceedings affecting the title to or any interest in land registered under the Land Registration Act;

From the clear wording of the above provision, I am in agreement with Dr. Lamwai that, had the primary court directed itself properly to the position of the law and the facts regarding the properties involved in the deceased's estate, it ought to have found that it lacked the requisite jurisdiction to entertain the cause. It is undisputed from the wording of Item 1(1) of the 5th Schedule to the MCA that jurisdiction of the Primary Court in the administration of the deceased's estate is limited to customary and Islamic laws only, in that regard, in the instant matter where parties had different religious orientations, it is apparent that Islamic laws was not applicable. Likewise, the proceedings are silent as to whether deceased and appellant originated from or led a common customary background.

Mr. Kalulu, learned counsel, joined hand with Dr. Lamwai that the primary court acted without jurisdiction. I subscribe to the views shared by both counsel. With respect, the learned district court magistrate erred in giving a blind eye to the illegalities obtaining in the primary court's decision which attracted immediate intervention to correct them. I disagree with Mr. Kalulu's proposition that the decision is valid in law merely because it stated the correct position of the law pertaining to court's powers in entertaining revisions against appeals.

From the above analysis, deceased's estate ought to have been dealt with under the provisions of section 3 of the Probate and Administration of Estates Act Cap 352 RE 2002 which provides:

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

From the above discussion, I have no doubt the primary court acted without jurisdiction in entertaining Probate and Administration cause No 17 of 2016. It is trite law that courts are enjoined to establish their jurisdiction at the earliest in all the matters that they entertain. Deliberating of the importance of ascertaining existence of jurisdiction, the Court of Appeal in the case of **Richard Julius Rugambura V Issack Ntwa Mwakajila and Tanzania Railways Corporation, Civil Appeal No. 2 of 1998** (unreported), observed:

"The question of jurisdiction is paramount in any proceedings. It is so fundamental that in any trial even if it is not raised by the parties at the initial stages, it can be raised and entertained at any stage of the proceedings in order to ensure that the court is properly vested with jurisdiction to adjudicate the matter before it."

The above principle has been restated in many other decisions including **K.S.F. Kisombe V Tanzania Ports Authority, Civil Appeal No 2 of 2009** (unreported). Consequently, as I have found that the primary court acted without jurisdiction over the deceased's estate, the district court erred in failing to carry out revision to correct the errors. Accordingly, I find and hold the appeal with merit and I allow it.

Accordingly, exercising the revisional powers vested in this court by section 30(1)(i), of the MCA, the Temeke district and primary court's proceedings and the judgments thereof are hereby revised to the

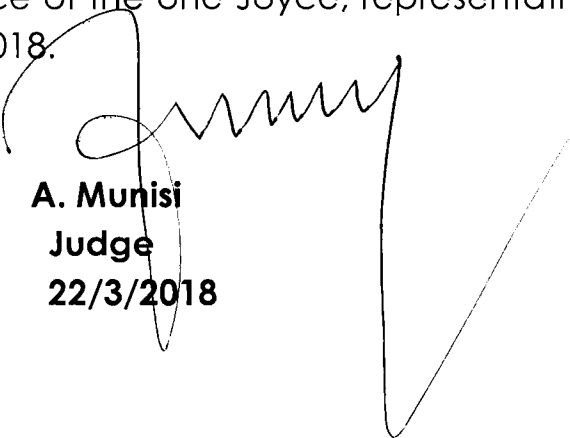
extent that they are declared null and void. Parties are thus at liberty to file fresh petitions in a court with competent jurisdiction.

In the event, the appeal is allowed. This being a probate matter, I make no order as to costs.



A. Munisi
Judge
22/3/2018

Judgment delivered in Chambers in the presence of the appellant in person and in the presence of the one Joyce, representative of the Respondent, this, 22/3/2018.



A. Munisi
Judge
22/3/2018