

IN THE HIGH COURT OF THE UNITED OF TANZANIA

AT BUKOBA

PROBATE AND ADMINISTRATION APPEAL No. 14/2016.

(Arising from Probate Appeal No. 2/2015 of Ngara District Court Originating from Probate and Administration cause No. 6/2015 of Rulenge Primary Court)

MELESIANA CHRISTOPHER MIKAGA ----- APPELLANT

VERSUS

CATHERINE RUDOVICK KAMALA ----- RESPONDENT

JUDGMENT

5/3/2018 & 11/05/2018

Kairo, J.

Being aggrieved by the decision of Ngara District court in Probate appeal No. 2/2015, delivered on 16/5/2016, the Appellant decided to institute this appeal to impugn the said decision raising two grounds of appeal. However during the oral submission the Appellant abandoned one ground and remained with one as follows:-

That after having found the case that has resulted to this appeal to be amazing the appellate court misdirected itself by recognizing it and finally upholding the purported finding on grounds that it was the ruling."

Briefly the facts that can be discerned from the court records are to the effect that; following the death of one Christopher Mikaga on 8/5/2015, his clan elected his brother Pasaka Mikaga to petition and appointed to administer the estate of the deceased. The petition was opened at Rulenge Primary court as Probate and Administration cause No. 6/2015 and no one objected. However the issue in dispute was the number of children left by the deceased as the Appellant (wife of the deceased) claimed to be three while the Administrator claimed to be four, one being a child born out of wedlock by the Respondent herein (Yamungu Justine). The matter was presided over by Hon. Audax K.V. and after receiving the evidence, the court on 15/9/2015 resolved that there was no evidence or substantial evidence to prove that Yamungu Justine is a child of the deceased.

Latter, the Respondent decided to file an application in the same Probate Cause file No. 6/2015 praying the court to include her child Yamungu Justine (who was ousted) as among the heirs of the estate of the late Christopher Mikaga. The court which was now presided over by another Magistrate granted the prayer on 3/12/2015. The decision aggrieved the Appellant and decided to appeal to Ngara District court in Probate and Administration Appeal No. 2/2015 which upheld the decision to include Yamungu Justine into the heirs of the late Christopher Mikaga. This decision further aggrieved the Appellant hence this appeal basing on the above ground of appeal.

The Appellant is being represented by Advocate Lameck Erasto while the Respondent is self represented. When invited for oral submission, Advocate

Erasto argued that the 1st appellate court misdirected itself by upholding the decision of the Primary court delivered on 3/12/2015 on the ground that it was a ruling. He went on submitting that during the opening of the letters of administration in respect of the deceased's estate, the properties of the deceased were listed together with the children left by the deceased among other things. That the Appellant herein mentioned the children of the deceased but the applicant of the letters of Administration, Pasaka Mikaga told the court that during *matanga*, they received the child of the deceased one Yamungu Justine after seeing the hospital chit of the said child. The action caused controversy and the court has to resolve the issue as to whether Yamungu Justine was the deceased's child or not. The learned Advocate went further that, the court resolved that the introduction of the child was insufficient as the deceased was supposed to introduce him during his life time, which was not done. The Primary court further found that the deceased didn't even leave a will into which he would have mentioned the said child and the rest would have respected it. He referred to the decision of *Violeth Ishengoma Kahangwa and Jovin Mutabuzi vrs Violeth Ishengoma Kahangwa*[1990] TLR 72 wherein it was held that "*the father was at least to mention the child born out of wedlock to enable the child to inherit his estate*".

Advocate Erasto went on submitting that, after various days the Respondent applied to the same Primary court in the same case file No. 6/2015 praying that Yamungu Justine who was ousted be included and declared a child of

the late Christopher Mikaga and further be included among the heirs of the deceased and the matter was presided by another Magistrate. He further submitted that, the subsequent presiding Magistrate in disregard of the decision already made by the former Magistrate, went ahead to hear and determine the matter and legalized Yamungu Justine as the child of the late Christopher Mikaga basing on the presented birth certificate No. B153372 and section 10 and 35 (b) of the Law of the child 2009 admitted as “exhibit A”. The Magistrate went on and ordered the Administrator to distribute the estate including the said child. That this decision annoyed the Appellant and decided to appeal to Ngara District court in Probate Appeal No. 2/2015 whereby among others the Appellant decided to challenge the decision to re-open up the matter which was already deliberated. The Appellant raised 5 grounds of appeal at the District Court among them is that the Primary court was *functus-officio*. He went on arguing that, the District court after hearing it dismissed all of the grounds raised and on the *functus officio* ground, the District Magistrate rejected it giving a reason that the decision by the former magistrate on 15/9/2015 was a ruling. The Advocate contended that, their argument is centered on the said decision of the District court; first with regards to the status of Yamungu Justine whereby the Primary court at first found that there was no sufficient evidence to verify that he is the child of the deceased, thus the said court was *functus-officio* after so deciding. The Advocate argued that if the current Respondent wasn't satisfied by the said decision knowing that she wasn't a party to the

Probate proceedings, she was then supposed to go to the District court by way of revision and that to come back to the Primary court to contest the status of Yamungu Justine was an error, he argued. The Advocate cited the case of *Scholastica Benedict vrs Martin Benedict* [1993] TLR 1 which held that the court had no jurisdiction to overturn its own decision it already made as it become "*functus officio*" to support his argument. He went on that the case of *Bibi Kisoko Medard vrs Minister for Lands, Housing and Urban Development and Another* [1983] TLR 250 had the same stance. In conclusion he stated that it is against judicial procedure for two different decisions to be given by the same court. He thus prayed the court to quash and set aside the subsequent proceedings and its decisions thereof. He further prayed the court to quash the decision of Ngara District court in Probate Appeal No. 6/2015 and allow their appeal with cost.

In her reply, the Respondent submitted that, she was married to the late Christopher Mikaga in year 2001 as a third wife and gave birth to immature child in September 2001. She was then taken to the deceased's parents to be cared with the child ie. Yamungu Justine. She went on that when the issue was contested for the first time before the first presiding magistrate, she was sick and admitted in the hospital so prayed this court to reject this appeal.

As a rejoinder, Advocate Erasto reiterated his argument that it was wrong for the Primary court to give two conflicting decisions on the same issue and

that the court was *functus officio* when deliberated over the issue subsequently.

Having gone through the records and submissions from both parties, the issue before the court is whether the appeal is based on founded ground.

It is apparent from the Appellant's submission that the main contention to be resolved in this court is whether the Primary court of Rulenge was *functus-officio* when it subsequently gave its decision on 3/12/2015 with regards to the status of Yamungu Justine.

According to record, the issue as to whether Yamungu Justine was the child of the late Christopher Mikaga was dealt with at Rulenge Primary court when the Administrator one Pasaka Mikaga was applying to be appointed as an administrator of the late Christopher Mikaga. The court on 15/9/2015 after receiving the evidence held that, there was no sufficient evidence to prove that Yamungu Justine was the child of the late Christopher Mikaga thus ousted from the list of the heirs of the deceased. But later the Respondent applied from the same Primary court in the same case file to have her child Yamungu Justine be declared as the child of the deceased and be included among the heirs of the deceased, the application which was granted. On appeal, the District court resolved that, the subsequent decision was proper and the court was not *functus-officio* as the previous decision was just a ruling.

The District court further found that since the Administrator was yet to give the accounts of the estate of the deceased as per section 11 of the 5th scheduled of the MCA Cap 11 RE 2002 the room was still open for any person interested with the deceased's estate to bring an application to court as was done by the Respondent. I paused to ask whether the analysis was correct in the circumstance of the matter at issue. For clear understanding I wish to quote the referred section 11 of the 5th schedule of MCA Cap 11 RE 2002:

"After completing the administration of the estate, if the Primary court orders at any other stage of the administration shall account to the Primary court for his administration".

According to my judicial interpretation, the administrator's duties to administer deceased estate becomes complete on accounting of his administrative duties to the court granted him the tasks. In other words on filing of an inventory at the Primary court that granted him the task. I concede that by the time when the Respondent was filing her application to include Yamungu Justine into the heirs of the deceased, the administration work or duties was not finalized as the estate was yet to be distributed.

I further concede that interested parties were not precluded from applying through the same court on various issues concerning the estate of the deceased and its distribution. However the contention is whether the issue which was already deliberated upon can be re – opened. It should be noted

that the decision of the application under attack was to the effect that Yamungu Justine was the child of the late Christopher Mikaga while there was already a decision by the same court to the effect that there was no sufficient evidence to prove that Yamungu Justine was the child of the late Mikaga.

It is trite law that the court cannot re-open the issue or matter which it has already deliberated upon as it becomes *functus-officio* [**Refer the case of Kamundi VR [1973] EA 540 and Zakaria V Rwechungura (PC Civil Appeal No. 73/2004 High Court)**]. In my conviction the presence of two conflicting decisions by the same court (first of 15/9/2015 that Yamungu is not a child of the deceased thus not among the heirs and that of 3/12/2015 that Yamungu is the deceased's child thus entitled to inherit) and the action of the District court to uphold the 2nd decision, with due respect is not correct. If one goes by the analysis of the District court, it means a person can file another application on the same issue in the same court and the court can again vacate its former decision. To say the least, allowing such a trend amounts to causing chaos and confusion in the administration of justice, which this court is not prepared to entertain. Though the file wasn't closed but I have no doubt that re-opening and deliberating upon the same issue by the same court was not envisaged within the purview of section 11 of 5th scheduled of the MCA Cap 11 (supra) as interpreted by the District court with much respect.

Date: 11/05/2018

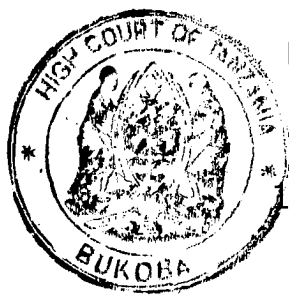
Coram: Hon. L.G. Kairo, J.

Appellant: Present in person

Respondent: Present in person

B/C: Tatu

Court: The matter is for judgment. The same is ready and is read over before both the Appellant and Respondent in person in open court today.



L.G. Kairo

Judge

11/05/2018

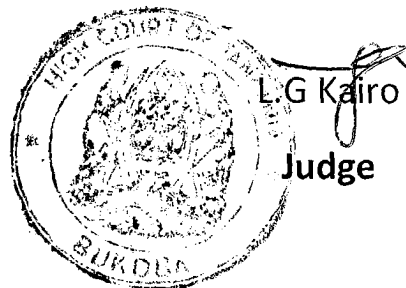
The Respondent has claimed that she was not present when the court deliberated the status of Yamungu Justine at the first instance as she was sick. However the Respondent could have used other avenues and explain the reason of her absence when the matter determined for the first time and not filing a new application as she did as rightly submitted by the learned counsel Erasto.

In the aforesaid, I allow this appeal but with no order to cost in the circumstances of this case.

I further set aside the subsequent ruling of Rulenge Primary court given on 3/12/2015 as well as that of District court. I further sustain the court's ruling made earlier on 15/9/2015. However the Respondent can still pursue what she believes to be her child's right if she still feels so.

It is so ordered.

R/A explained.



At Bukoba

11/05/2018

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Appellant: Present in person

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L.G. Kairo

Judge

11/05/2018