

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

AT DAR ES SALAAM.

CIVIL APPEAL NO. 101 OF 2017

DOROTH & MBAWALAAPPELLANT

VERSUS

NEEMA DEBLAND NYINGA.....RESPONDENT

3/7/2018 & 17/7/2018

JUDGMENT

I.P.KITUSI,J.

The respondent Neema Debland Myinga approached the District Court of Ilala with an application for a declaration that a child known as Kalunde be declared a biological child of one Peter E.K. Damson, who is deceased, and for a further declaration that the said deceased father had a duty to maintain the said child so she is entitled to reasonable enjoyment of her father's estate.

The application was instituted under section 34(2) (b), 42 (1), 43(1) (c), 10, 36 (4) of the Law of the child Act, 2009.

The application was supported by an affidavit of the respondent which stated the ground on which the said application was based. She stated in the affidavit that the child was a result of an affair between her and the deceased who then got her to quit her employment in order to bring up the child he named Kalunde. He rented a room for

her and was providing for both the child and the respondent. She attached a birth certificate to her affidavit.

The appellant raised a counter affidavit in which she disputed the respondent's allegations and stated that her husband a party to a Christian marriage with her could not have had another wife. She then disputed the assertion that Kalunde was sired by her late husband because, she said, the deceased had never mentioned that fact to her nor was child introduced to the members of her husband's clan.

The appellant further took the view that the respondent deserved to be sued for adultery rather than benefit from the deceased's estate her to work in order to fend for herself and her child.

The learned Senior Resident Magistrate granted the application holding that nowhere under the Law of Child Act, 2009 is there a requirement for a father of a child to inform his wife about the existence of a child to be entitled to benefit from that father's estate.

The appellant impugns the decision on two grounds that is;

- (i) The trial court erred in including the name of Kalunde of wedlock, in the list of legal heirs.
- (ii) That the trial court erred in failing to record, analyze and consider the appellant's evidence and consequently reached at a wrong decision.

At the hearing of this appeal the appellant was represented by Mr. Samson Joseph Nko learned advocate represented the respondent. Mr. Malya raised the issue of the jurisdiction of the District Court though it was not raised both at the trial and in the Memorandum of Appeal.

Arguing the issue of jurisdiction as the first ground of appeal Mr Malya submitted that the Law of the Child Act, 2009 defines 'Court' as Primary Court, District Court, Resident Magistrates Court and High Court. He submitted further that under Section 3 (c) of the Act, "Court" for the purpose of parentage means a Juvenile Court, the same as it is under section 97 (1) of the same Act. So the learned counsel submitted, since the District Court the proceedings before it should be nullified on the strength of the decision in the case of **Meliko Sindiko V. Julius Kaaya** [1977] TLR 18.

Next to argue was the contention that the court erred in including Kalunde's name in the list of heirs. The learned counsel submitted that the law does not discriminate children but there should be proof that the deceased was maintaining the said child so as to conclude that the deceased was maintaining the said child so as to conclude that she is entitled to benefit from his estate. In effect Mr Malya was submitting that the trial court's decision based on the birth certificate was wrong because that did not prove anything other than parenthood.

The third ground to argue was a complaint that the defence case was not considered. In this regard it was Mr Malya's contention that the appellant's evidence that she contributed to the requisition of all assets ought to have made the court conclude that the child Kalunde in anything, was only entitled in exclusion of her share. He cited the case of Elizabeth Mohamed V. Adolf John Magesa Administration Appeal No. 14 of 2011, High Court Mwanza District Registry(unreported).

In response Mr. Nko for the respondent submitted that the distinction between the court as defined under section 3 (a) of the Act to include Primary court, District Court, Resident Magistrate' Court and High Court on the one hand, and the Juvenile Court as defined under section 97(1) of the Act on the other is that the latter applies to criminal law to children who are in conflict with the law. The powers of the Juvenile court in Criminal law are provided for under section 98 (1) (a) & (b) of the Act.

Mr Nko pointed out that the matter at hand was a Probate cause filed under section 34(2) of the Act which applies when the father dies.

On the second ground Mr. Nko submitted that there is no requirement under the law for the child to have been known before her father's death. The learned counsel submitted that under section 35(b) of the Act proof of parent hood includes

appearance of the father is name in the Register and once that is established, the child has the right to inherit from her father's estate under section 36(4) of the Act.

On the third and last ground Mr. Nko submitted that the impugned order says exactly what Mr. Malya submitted on, that is, the child should inherit from what is due to her father.

In a short rejoinder Mr Malya repeated his argument in relation to what is meant by court under section 34(2) (b) saying that it means the Juvenil court whose composition would have enabled it to make a proper investigation on the matter.

Conveniently and as a rule my starting point will be on the issue of jurisdiction. It is a long settled law that the issue of jurisdiction may be raised at any time. In the case of **John Agriclola V. Rashidi Juma** [1990] TLR 1 the issue of the jurisdiction of the District court was successfully raised at the High court in the course of determining an application for leave to appeal to the Court of Appeal.

So this case turns on the determination of what is the court for purpose of parentage under the Law of the Child Act, 2009.

Section 3 of that Act defines Court as in these terms;

" Court means-

- (a) A Primary court, the District ... court, the Resident Magistrates court or the High court

- (b) For purpose of adoption, the High Court, and
- (c) For purpose of parentage, a Juvenile Court; ”)

The above provision of S. 3 (a) unambiguously shows that generally the Primary Court, District Court, Resident Magistrate court and High Court have jurisdictions on same aspects under the Law of the Child Act, 2009. However that generality is excluded by paragraphs (b) and (c) which expressly mention the High Court and Juvenile Court respectively but omit the District Court and Resident Magistrate Court, I associate myself with the position court. I associate myself with the position taken by the Court of Appeal in **Nasser E. Mwakabonja V. Athur Alfred Mambeta & Mohamed Jaffer Sheikh** Civil Appeal No. 47 of 2008 CAT at Dar es Salaam (unreported). The Court of Appeal held in part;

*" Since the order is not expressly mentioned,
it has been excluded - **expressio unius,
exclusio alterius est**".*

Similarly I hold the District Court to have been excluded by the express mention of the Juvenile Court in parentage matters. Accordingly I uphold the point of objection raised by the appellant and conclude that the District court which is not a Juvenile Court under section 97 of the Law of the Law of the Child Act, 2009 had no jurisdiction over this matter.

This conclusion spares me from pronouncing myself on the rest of the grounds of appeal. I declare the proceedings before Ilala District Court to have been a nullity and quash them.

Any interested person may instate the application before a court of competent jurisdiction according to law. This appeal is allowed with costs.



I.P.KITUSI

JUDGE

17/7/2018