

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

PC. CIVIL APPEAL NO. 110 OF 2017

BENJAMIN BENEDICTO MWAKAGENDAAPPELANT

VERSUS

EMMANUEL BENEDICTO MWAKAGENDARESPONDENT

6/6/2018& 19/6/2018

JUDGMENT

I.P.KITUSI,J

One Benedicto Mwakagenda died intestate on 17th June 2009 leaving behind some landed property and a number of children.

Before the Primary Court of Kawe Emmanuel Benedicto Mwakagenda, one of the children was appointed to be administrator of the estate of the deceased. The appellant Benjamin Benedicto Mwakagenda, another surviving child unsuccessfully challenged the appointment by a Revision at Kinondoni District Court.

At the District Court the appellant had raised the issue of the jurisdiction of the Primary Court arguing that although the deceased had children with another woman, the respondent's mother, he was a Christian and had a Christian marriage with one Edna Mbwiga who was sidelined during the proceedings at the trial. Instead the record shows that Rose Mwakagenda the appellant's mother was the only surviving widow.

The appellant's argument at the District Court and before this court is that the jurisdiction of the Primary Court in probate and administration cases is limited to matters under either Islamic law or customary law. It was submitted and it is still the appellant's submission that the deceased's estate falls in neither.

On the other hand the respondent maintained that the deceased no longer professed christianity as he had married another woman under customary rites and had several other children in that marriage including him.

The District court overruled the appellant's contention regarding the jurisdiction of the Primary Court and that forms the major complaint in this Petition of Appeal. During the hearing of this appeal Mr. Isihaka Ibrahim learned advocate represented the appellant while the respondent stood in person. Mr Ibrahim submitted briefly to the effect that the fact that the deceased had abandoned christianity does not make his estate to fall under Islamic or customary law. He cited the case of **Ibrahim Kusaga V. Emmanuel Mweta** [1986] TLR 26 and submitted that the deceased fell under civil jurisdiction.

It is true that the powers of the Primary Courts in the Administration of Estates is governed by Section 18 of the Magistrates Courts Act cap 11 and that it is limited to matters failing under either Islamic law or customary law. This is also the position that was taken by this court in the case of **Ibrahim Kiswaga** (supra). Unlike in this case, in Ibrahim Kiswaga there was no question of whether or not the

deceased had changed his way of life, and what were the consequences.

In this case there is no dispute that the deceased had abandoned christianity but the parties hold opposing views as to the consequences.

It seems to me that the appellant's current position that his father's estate does not fall under customary law is a departure from the position he held during trial. During trial not only did he acknowledge the fact that there were two widows but he had no objection to the respondent, born of the woman married under customary rites, to be given letters of administration. I think the appellant's conduct was a demonstration that his father's estate fall under customary law and since he did not object to the respondent's appointment, he could not in my view rightly appeal against the uncontested grant of letters.

What appears to have triggered off the first and this appeal is the alleged unequal and therefore unfair distribution of the assets. However the role of the court in Administration of Estate cases as stated in the case of **Ibrahim Kusaga** is to appoint an administrator, and this is what the court did without the appellant's objection. If aggrieved by the administrator's discharge of his duties, the appellant or other beneficiaries could sue or proceed under the Magistrates' Courts Act.

The above view finds support in the decision of the Court of Appeal in **Richard Somba V. Maria Somba** Civil Appeal No. 120 of 2006, CAT (unreported). In that case the Court of Appeal held;

"once parties have submitted probate matters for administration by the Primary Courts under the Magistrates Courts Act, Cap II, they must as a consequence thereof follow through the remedies provided by the Primary Courts concerned".

The above principle is, I think, in harmony with the settled law that issues not decided upon at the trial cannot form subject of decision on appeal. See the cases of **Diha Matofali V. Republic**, Criminal Appeal No. 245 of 2015, CAT at Mbeya (unreported) cited in **Latifa Samwel Ngowi V. Amani Idd Kowelo**, Civil Appeal No. 27 of 2017 High Court Dar es Dar Salaam District Registry (unreported)

For the reason that the appellant did not challenge the respondent's appointment but has issues with the way he distributes the assets and since the issues of distribution of assets could be raised before the trial court, I find no merits in this appeal. I dismiss it with costs.



I.P. Kitusi
I.P. KITUSI

JUDGE

19.6.201

19/6/2018

Coram : Hon I.P.Kitusi, J.

For the Appellant : Mr. Isihaka Ibrahim

For the Respondent : Present in person

Cc : Masasi

Court - Judgment delivered in Court in the presence of the parties.

I.P.KITUSI

JUDGE

19/6/2018