

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

P.C CIVIL APPEAL NO 42 OF 2019

(Arising from Civil Revision No. 5 of 2016 the District Court of Kibaha original case:
Mirathi No. 35 of 2016 Mlandizi Primary Court)

MARY LUPATU..... APPELLANT

VERSUS

MAGDALENA KULWA ITUMBAGIJA.....RESPONDENT

JUDGMENT

MASABO, J.:-

Before me is an appeal brought under Section 25(1) and (3) of the Magistrate Courts Act. Mary Lupatu, the Appellant being aggrieved by the decision of District Court of Kibaha in Civil Case No. 5 of 2016 the District Court of Kibaha has filed this appeal praying that the judgment and decree of the court be nullified on the following grounds; -

1. That, the learned Magistrate gravely misdirected herself in holding that the deceased used both Kulwa Itumbagija Nyiga na Joseph Kulwa Nyiga interchangeably as his names with no justification at all.
2. That, the learned magistrate erred in law and in fact for her failure to nullify the proceedings after admitting that Joseph Kulwa Nyiga is name of the deceased.

3. That, the learned magistrate erred in law for purposely omitting to consider in her ruling the applicant argument that she was summarily denied to be supplied with copy of ruling to enable her to appeal against the order of the trial court.

For a better grasp of this matter, the facts discernable from the records are that the Appellant being a widow and sister, respectively, to one Kulwa Itumbahija Nyiga who died interstate on 4th May 2016 were on appointed by Mlandizi Primary Court (Probate cause No.35 of 2016) as joint adminatrix of the estate of the late Kulwa Itumbagija Nyiga. Dissatisfied, the Appellant made two unsuccessful attempted to have the appointment annulled through an application for revision (Civil Revision No. 5 of 2018 in the District Court of Kibaha. She has thus filed this appeal challenging the decision of the district Court of Kibaha in Civil Revision No. 5 of 2018.

The appeal was argued in writing. In support of the appeal, the appellant submitted that the probate proceedings were marred by irregularity in that it was instituted without the deceased death certificates and that although the Respondent who was the petitioner was ordered to produce the death certificate, she defied the orders of court. Consequently, the trial court proceeded with a certificate death bearing the name of **Joseph Kulwa Nyiga** while the name of the deceased person in respect of the probate matter was **Kulwa Itumbagija Nyiga**. She submitted further that, she raised this issue during Revision case at Kibaha District Court but the Respondent in her counter affidavit stated that the deceased used the names

of Joseph Kulwa Nyiga and Kulwa Itumbagija Nyiga interchangeably. She reasoned that the petition for letters of administration should be accompanied by a certificate of death of the deceased signed by a competent authority but in the instant case this requirement was not complied with by the respondent when she instituted the petition for letters of administration at Mlandizi Primary court. It was argued further that this omission is fatal and renders the proceedings a nullity. The Applicant further submitted that the learned magistrate misdirected herself in holding that the deceased used the names of Kulwa Itumbagija Nyiga and Joseph Kulwa Nyiga interchangeably as there was no deed poll on record to show that indeed the deceased used both names interchangeably. She further submitted that no one can rectify the name of a deceased person. Therefore, the status of Kulwa Itumbagija Nyiga is not identified or verified. Citing Section 17 and 18(2) of Birth and Death Registrations Act she argued that information relating to the deceased should not be taken lightly. In support she cited the case of **Christina Mrimi vs Coca Cola kwanza Bottlers Ltd**; Civil Appeal No. 112/2008(unreported) which dealt specifically with the fundamentalism of registered names and held that the registered name is fundamental to the whole case. On the third ground of appeal she submitted upon the grant of letters of administration she requested to be supplied with the ruling so that she can appeal against the ruling but the court summarily rejected her request and she was informed that she would only be supplied with a copy. The appellant further submitted that by denying her the ruling the court contravened the principles of natural justice.

The Respondent resisted the appellant's grounds of appeal by submitting that the respondent has lived with the deceased for 25 years and she knows that the deceased used both names of Kulwa Itumbagija Nyiga and Joseph Kulwa Nyiga interchangeably. He used the name Kulwa Itumbagija Nyiga in his various official documents such as Tax Identification Number, Voters Identification Card and many of his certificate in his landed properties of which the same were accepted court. As regard the 3rd ground she submitted that the appellant did not make follow up to get a copy of the ruling which ordered that the deceased properties be distributed pursuant to customary rules. Hence, there was no miscarriage of justice.

I have carefully considered the rival submission by the parties. Considering that the 1st and 2nd grounds are closely related I will consolidate them and determine them jointly. Upon scrutiny of the records, I have observed that the petition before Mlandizi Primary Court was for letters of adminstartion of the estate of the late Kulwa Itumbagija Nyiga. The Petioner Magdalena Kulwa Itumbagija Nyiga appended to her petition a certificate of death of one Joseph Kulwa Nyiga with C.No. 1000037429. It would appear from the record that the issue of discrepancy of names was neither raised nor determinant by the probate court as the court is silent on this issue. However, when the matter went for revision the appellant herein raised the issue whereby the Respondent simply replied that the deceased used the name of Kulwa Itumbagija Nyiga in many official activities and that the Appellant having cohabited with the deceased for over 25 years she ought to known that the deceased (her husband) used the names of Joseph Kulwa

Nyiga and Kulwa Itumbagija Nyiga interchangeably. Having heard both parties the court made the following finding:

"after passing through the record of Mlandizi Primary court, it is revealed that the death certificate C.No. 1000037429 dated 13.7.2006 reads the names of the deceased as JOSEPH KULWA NYIGA

On the other hand, the deceased VOTER'S Registration card No. 4958197 dated 02.03.10 reads KULWA ITUMBAGIJA NYIGA as the name of the deceased. Also, Certificate for registration for Tax Payer Identification Number (TIN) No. 100-423-693 dated 19.10.2010 of the deceased reads Mr. KULWA ITUMBAGIJA NYIGA as shown in annexure 2 of the respondent counter affidavit and Business License of the deceased No. B No. 00906426 names of the deceased as KULWA ITUMBAGIJA NYIGA as shown under annexure 2 of the respondent's counter affidavit.

From the record above, the court is of the view that KULWA ITUMBAGIJA NYIGA and JOSEPH KULWA NYIGA are names of the deceased which were used interchangeably and if the applicant wants to rectify any error regarding the names of the deceased should follow the prescribed procedure to effect that for between administration of deceased estate.

It is a trite law under Section 110 (1), (2) of the Evidence Act Cap 341 RE 2002 that whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. When a person alleges the existence of certain

fact/right the burden to prove the existence the fact alleged lies on that person (**Anthony M. Masanga v. Penina(mama Mgesi) and Lucia (mama Anna) Civil Appeal No 118 of 2014,CAT (Unreported)**)

In the instant case, the onus of proving the deceased used the names **Joseph Kulwa Nyiga** and **Kulwa Itumbagija Nyiga** lied upon the respondent who alleged that the deceased used both names interchangeably. This being a civil case, the standard of proof is on the balance of probability as per Section 115 Evidence Act. The question therefore is, did the Respondent discharge her burden? The perusal of the documents on record suggests that she did not. All the documents submitted in support ie, the deceased Voter's Registration card, TIN Certificate, and Business License had the name of KULWA ITUMBAGIJA NYIGA. Thus the name of JOSEPH KULWA NYIGA appears only in the certificate of death which does support the respondent's claim. In my view all these evidence above supports the Appellant's case because the death certificate is prepared after ones death hence the deceased had no command of the details written in the certificate.

Rule 30 of the Probate Rules is specifically on cases where the deceased, as claimed in this application, has more than one name and used the names interchangeably. It states that:

30. Where it is necessary in a grant to describe the deceased by some name in addition to his true name, the petitioner shall together with his petition file an

affidavit giving the true name of the deceased and the reason for the inclusion of the other name in the grant

As there was evidence to indicate that the deceased used the two names interchangeably, it is my considered view that the court erred grossly in holding in favour of the Respondent who, as alluded to earlier, failed miserably to discharge his burden of proof. This being a probate matter the identity of the deceased is a fundamental matter hence incapable of being lightly disposed of. In the absence of any tangible evidence to prove that the deceased used the two names interchangeably, it was very unsafe for the court to agree with the sweeping averments made by the Respondent.

Although the 5th Schedule to the Magistrate Courts' Act which regulates administration matters in primary courts is silent on this issue, **Rule 30 of the Probate Rules**, provides guidance of what to be done under the circumstances. It provides as follows:

30. Where it is necessary in a grant to describe the deceased by some name in addition to his true name, the petitioner shall together with his petition file an affidavit giving the true name of the deceased and the reason for the inclusion of the other name in the grant.

Moreover, Section 24 of the Births and Deaths Registration Act, Cap 108 RE 2002 provides for procedures for rectification of wrong entries entered in the Death Register. It states as follows:

24. (1) Where it is shown to the satisfaction of any district registrar or the Registrar-General that any error has been made in any register, copy of a register, or index in his custody, he may correct the error.

(2) Every correction of an error shall be so made that the original entry remains legible, and shall be dated and signed by the officer making the correction.

(3) Before making any correction, the district registrar or Registrar-General may, if he considers it necessary, require the true facts to be proved by evidence on oath (which he is hereby authorised to administer) or by statutory declaration.

In my considered opinion, the Applicant ought to have borrowed a leaf from these two provisions to rectify the anomaly instead of giving sweeping statement as to interchangeable use of name. Under the premises, I find merit on the appellants 1st and 2nd ground of appeal in the court misdirected itself to grant letters of administration based on the notion that Joseph Kulwa Nyiga is the same person as Kulwa Itumbagija Nyiga.

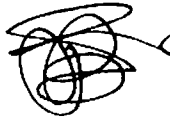
The third ground, is with respect, void of merit as the judgment or a copy thereto is not a prerequisite document for instituting an appeal in the district court. Section 20(3) of the Magistrate Courts Act, Cap 11 RE which regulates appeals from primary courts provides as follows:

(3) Every appeal to a district court shall be by way of petition and shall be filed in the district court within thirty days after the date of the decision or order against which the appeal is brought.

As it could be vividly seen from this provision, the law does not require the appellant to append to his/her petition of appeal copy of the decision/order of the primary court let alone, the original decision or order. In this premise, the complaints that she could not appeal as she was not supplied with ruling is entirely baseless.

Having held the first and 2nd ground in the affirmative, I allow the appeal, nullify the proceeding of the 1st Appeal court and that of the probate court for being a nullity.

DATED at DAR ES SALAAM this 17th day of October 2019.



J.L. MASABO
JUDGE

Judgment delivered this this 17th day of October 2019 the Appellant and the Respondent, both present in person.



J.L. MASABO
JUDGE