

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

AT DAR ES SALAAM

PROBATE AND ADMINISTRATION CAUSE NO 50 OF 2016

**IN THE MATTER OF THE ESTATE OF THE LATE PATRICK SAUL
KYAMBA DECEASED OF DAR ES SALAAM**

AND

**IN THE MATTER OF AN APPLICATION FOR LETTERS OF
ADMINISTRATION BY**

JUDITH PATRICK KYAMBA.....PETITIONER/PLAINTIFF

AND

TUNSUME MWIMBE.....1ST CAVEATOR/DEFENDANT

UPENDO MWIMBE.....2ND CAVEATOR/DEFENDANT

DORIS L. MWANDEMANE.....3RD CAVEATOR/DEFENDANT

GASPAR PATRICK KYAMBA.....4TH CAVEATOR/DEFENDANT

JUDGEMENT

Date of last Order: 15/05/2020

Date of Judgement: 28/05/2020

MLYAMBINA, J.

This is a probate and administration cause in respect of the estate of the late Patrick Saul Kyamba, who died interstate at Kairuki Hospital, Kinondoni District Dar es Salaam City on the 19th April, 2016. The Petitioner Judith Patrick Kyamba is the first issue of the

deceased Patrick Saul Kyamba is the first issue of the deceased Patrick Saul Kyamba.

According to the petitioner the deceased left surviving him the following relatives:

- i. Lennah Bargubosa Kaliko a wife and resident of Dar es Salaam.
- ii. Judith Patrick Kyamba, a daughter and resident of Dar es Salaam.
- iii. Jessica Patrick Kyamba, a daughter and resident of Dar es Salaam.
- iv. Joycelyne Patrick Kyamba, a daughter and resident of Dar es Salaam.
- v. Olipa Ipape, a deceased's Mother and resident of Kyela, Mbeya.

It was the belief of the petitioner that the assets with estimated total value at TZs 200,000,000/= which are likely to come to her hands will be:

- i. One Storley building on Plot No. 89 Block "F" at Tegeta, Kinondoni Municipality
- ii. A four rooms house at Kyela Urban Area
- iii. A two acres farm at Rufiji

- iv. Toyota Land Cruiser T115 AMG
- v. NMB BANK Account KYELA BRANCH, No. 60902500884, in the name of Olipa Ipape/Patrick Saul Kyamba
- vi. CONVENANT BANK Account no 012990039831 in the name of Patrick Saul Kyamba
- vii. STANDARD CHARTERED BANK Account No. 0150520960600 in the name of Patrick Saul Kyamba
- viii. Employment benefits from CONVENANT BAN
- ix. Employment benefits from PPF
- x. Any other property as may be discovered in the process of administration.

The petition was lodged together with the affidavit of the petitioner as to domicile being Probate Form No. 45, Administrator's Oath being Probate Form No. 46, Administration Bond with sureties being Probate Form No. 48, certificate as to sureties' Financial Position being Probate Form No. 54 and consent being Probate Form No. 56.

The petition, however, was contested by the *Caveators* who had in common grounds of objection. **One**, that the petitioner left eight issues who are lawful children of the late Patrick Saul Kyamba including: (i) Janeth Patrick Kyamba (ii) Saulo Patrick Kyamba (iii) Gaspar Patrick Kyamba (iv) Jacqueline Patrick Kyamba. **Two**, that

the estimated value of the deceased estate was wrong. **Three**, that the clan meeting at Kyela Mbeya appointed the 1st Defendant/Caveator and the Petitioner to apply for grant of the letter but secretly the petitioner filed the present petition.

At the commencement of hearing of the suit (in terms of *Section 52 (b) of the Probate and Administration Act Cap 352 (R.E. 2002)*), the court framed three issues for determination:

1. Whether the Petitioner is competent to be appointed as administratrix of the estate.
2. Whether the Caveators have legal interests against the deceased's estate.
3. To what relief (s) are the parties entitled to.

At the hearing, the Petitioner called four witnesses to wit: Thomson Kyamba (PW1) William Kyamba (PW2), Judith Kyamba (PW3), and Lennah Kaliku (PW4). To support the petition, five exhibits were tendered and admitted; Exhibit P1 was the Death Certificate of the deceased, Exhibit P2 was the Birth Certificates of Judith Patrick kyamba, Jessica Patrick Kyamba And Jocelyne Patrick Kyamba, Exhibit P3 was the Decease's Academic Certificates, Exhibit P4 was the Marriage Certificate of the deceased and PW4, Exhibit P5 was

the answers to the petition in respect to Matrimonial Petition No. 25 of 2014.

The Defence Case (Caveators) reigned six witnesses namely; Janeth Kayamba (DW1) Upendo Mwimbe (DW2) Olipa Ipape (DW3,) Tunsume Mwimbe (DW4) Gaspar Kyamba (DW5) and Doris Mwandemani (DW6).

Before addressing the issues before the court in line with the evidence and the applicable law, I have noted that the following facts are not in dispute about the Petitioner. **One**, she is an adult of sound mind and legitimate daughter (first born) of the deceased. **Two**, she is an advocate and thus conversant with the law and procedure regarding administration of the deceased's estate.

There is a fact that the Petitioner was one of the two proposed by the clan meeting to administer the estate. This later fact was denied by the Petitioner who contended that she was the sole proposed administratrix.

As regards the first issue, the Petitioner has been deemed incompetent to administer the estate of the deceased for among other reasons, excluding the other five issues allegedly born out of wedlock by the deceased. There are Gaspar Kyamba, Janeth Kyabma, Saulo Kyamba Jacline Kyamba and Julileth Kyamba.

However, in the Petitioner's case, it was maintained that during his life time, the deceased, in Matrimonial Cause No. 25 of 2014 in which he was the 1st Respondent, in his answer to the petition (Exhibit P5), he stated at paragraphs 2, 7 and 8.

2. That, the contents of paragraph 3 of the amended petition are disputed and the Petitioner is put to strict proof thereof. **I state that I live myself at my House, Plot 89 Block F at Tegeta, Kinondoni Municipality and the 2nd recipient is not my concubine as alleged by the petition.**

7. **That, the contents of paragraph 8 of the amended petition are admitted to the extent of the number of issues of marriage and their names are correct. The ages of the three issues are Judith 23 years, completed 1st degree,** Jessica 20 years old completed Form Six now at National Service, Jocelyne 18 years old in Form Six now.

8. That, the contents of paragraph 9, 10, 11 and 12 of the amended petition are strongly disputed and the Petitioner is put to strict proof thereof.....**That there are no such child's referred to as Janeth and Saul, and the alleged**

Mbutolwe is not known to the 1st respondent. Emphasis supplied.

In her testimony, the Petitioner (PW3) told the court that she don't know the existence of marriages between her late father and other women. It was the testimony of PW3 that her late father separated with her mother. That, her mother was living at Madale and her father at Ununio since 2013. PW3 told the court that her parents had a matrimonial proceeding at Kisutu and when they were to file deed of settlement her father died.

The evidence of PW3 was further amplified by PW4 who tendered exhibit P5. PW4 told the court that she sued Patrick (deceased) and Dorris Mwandemane because there was allegation that her husband had extra marital affairs with Doris and he was blessed with two issues, namely; Jackline and Julieth. But Patrick and Doris denied to have had marital relationship.

DW6 in her testimony before this court stated that she was blessed with two issues with the deceased born out of wedlock as she never married to the deceased. I have noted, however, in her affidavit, DW6 termed the two issues to be of her marriage with the deceased. DW6 tendered Birth Certificate Entry No. 1000772824 for Jacqueline Patrick Kyamba born on 4th November, 2004 and Birth

Certificate Entry No. 1002696443 for Julieth Patrick Kyamba born on 8th December, 2010. The two certificates were admitted as exhibit D3 collectively.

DW1 was Janeth Patrick Kyamba. She testified that she was born on 23RD June, 2020. She tendered exhibit D1 being her Birth Certificate indicating that her father is the late Patrick Saul Kyamba and her mother is the late Mbotolwe Njagala Mwandigala. DW1 testified that, to her knowledge, her late father was blessed with eight issues namely; Gaspar Patrick Kyamba, Saul Patrick Kyamba, Jacqueline Patrick Kymba, Judith Patrick Kyamba, Jessica Patrick Kyamba. Jocelyne Patrick Kymba, Keneth Patrick Kyamba and Julieth Patrick Kyamba.

DW2 testified that the Petitioner is incapable of handling the estate as she left other issues of the deceased. DW2 told the court that the clan meeting proposed the Petitioner and Tunsume Mwimbe (1st Caveator) to administer the estate.

DW3 was the mother of the deceased. She testified that her late son Patrick Saul Kyamba left eight issues. She joined hand with other Defence Witnesses that the clan meeting proposed two people to administer the estate. These are the Petitioner and the 1st Caveator.

DW4 was the sister of the late Patrick Kyamba. She recognized the issues born out of wedlock including Jacqueline and Julieth whose mother one Doris was living with the deceased since 2011 after the deceased separated with the mother of the Petitioner.

DW5 told the court that he is one of the deceased issues. He was born on 16th June, 1984. He tendered his birth certificate as exhibit D2.

In her final written submissions, the petitioner told the court that, even if it is true that the deceased left behind other issues, the said issues must have been born out of wedlock and hence illegitimate children as there is no proof that their mother were legally married to the deceased. That, there is no child or witness who produced any marriage certificate except the Petitioner's mother (PW4) whose marriage because a Christian marriage excludes any other form of marriage post its existence.

It was the contention of the Petitioner that, under the law, illegitimate children have no right to inherit the deceased's estate and therefore cannot have any legal interest over the deceased's estate. To back up such view, the petitioner cited the case of **Violet Ishengoma Kahangwa and Jovin Mutabuzi v. the**

Administrator General and Mrs. Eudokia Hakangwa (1990)

TLR 72 in which the court of appeal stated:

The problem arose, though not directly, in the English case of *in re-Harrington (1908) Ch. 687* which we find to be persuasive. *There it was held that a putative father's obligation under a bastardy or affiliation order ends with his death, that such obligation is personal and the arrears under such an order are not recoverable against his estate. So that even if the word "children" in Section 129 (1) of the Law of Marriage Act were to be enlarged to include illegitimate children and hence to say that the deceased in the instant case had a duty under the law to maintain his two illegitimate children then on the strength of Harrington's case duty or obligation being only personal, would not service him would have ended with his death. Emphasis applied)*

The Defendants (Caveators) on their part, filed final written submissions contending that the Petitioner is not suitable for appointment because she is not impartial and fit to administer the estate of the deceased. To that effect, they cited the case of **Sekunda Mbambo v. Rose Ramadhani (2004) TLR 439**. They also cited *inter alia* section 9 (1) and 10 of the Law of the Child Act,

2009 which requires no body to deprive the rights of any child to inherit the estate of their parent.

The defendants went further to state that the Petitioner has proved failure before the assignment; to collect, administer and distribute the estate of the deceased because she denied the lawful issues of the deceased as lawful heirs. They therefore cited the case of **Elizabeth Mohamed v. Adolf John Magesa** (2016) TLS LR 114 in which the High Court held:

Although there are decisions of the court to the effect that a putative father's obligation to his illegitimate children is personal and ends with his death and that it does not survive him and cannot attach to his estate, however, with the enactment of *Sections 9 and 10 of the Law of Child Act*, such cases are no longer good law.

The other two authorities relied by the defendants were; *one*, a book by W.M.Musyoka titled: **A case book on the Law of Succession, law Africa Publishing (T) Ltd, 2010** at page 264 where he stated:

The law of succession act seeks to protect and provide for all the biological children of the interstate, regardless of whether they are born within or outside wedlock.

Two, Concise law dictionary 7th edition at page 164 which defines the word heir to mean; *he who succeeded by right of blood to the real property of an ancestor on intestacy.*

The defendants, therefore, were of submission that the Caveators have a lawful interest of the deceased estate as they are collateral heirs of the estate.

I have deliberately considered the entire evidence and main arguments of the parties in their final written submissions. With profound respect, I don't agree with the argument of the Petitioner that children born out of wedlock are illegitimate and they have no right to inherit the deceased estate. I find the Petitioner's arguments to be far away and out of touch of justice and realities. In fact, such argument is barbaric and discriminative in nature. The Constitution of the United Republic of Tanzania, 1977 guarantees equality of all human being under its Article 12 (1) and equality before the law under its Article 13 (1) and (2). For reference, Article 12 (1) and 13 (1) and (2) of the Constitution of the United Republic of Tanzania provides:

12.-(1) *All human beings are born free, and are all equal.*

13.-(1) *All persons are equal before the law and are entitled,*

without any discrimination, to protection and equality before the law.

(2) No law enacted by any authority in the United Republic shall make any provision that is discriminatory either of itself or in its effect. (Emphasis applied)

Further, *Section 5 (i) of the Law of the Child Act, 2009* prohibits discrimination to the child. It provides:

A child shall have a right to live free from discrimination (nondiscrimination).

Equally, section 10 of the law of the child guarantees a child a right to property of the parent. It provides child has the right to enjoy the right of parental property.

Needless the above position, Tanzania has ratified International Human Rights Instruments that guarantee the rights of the child. These includes the United Nations Convention of the Rights of the Child of 1989 and the African Charter on the Rights and Welfare of the Child of 1990. The substantive part of the conventions has been domesticated through *the Law of the Child Act, 2009*.

Again, Tanzania has ratified without any reservation to the International Covenant on Civil And Political Rights (ICCPR) of 1966, the International Covenant on Economic, Social And Cultural

Rights (ICESCR) of 1966, the Convention on Elimination of All forms of Discrimination Against Women of 1979 (CEDAW) and the African Charter on Human and People's Rights of 1981 (Banjul charter).

Article 27 of the Convention of the Right of the Child recognize the principle that both parents have common responsibility for the upbringing and development of a child. The preamble of CEDAW reaffirms that:

.... upbringing of children requires a sharing of responsibility between men and women.....

Again Article 16 (d) of CEDAW calls upon state parties to establish measures to eliminate discrimination against women and ensure equality of men and women and the same rights irrespective of their marital status, in caring and maintaining their children.

With the afore development of national and international law, children born out of wedlock are no more referred to as "*bastards*". They are equal children like those born in wedlock sharing equal rights including inheritance rights.

Even if it is argued that the alleged children born out of wedlock are of majority age, and so are not protected by the cited law of the Child Act which under its Section 4 (1) defines a child to be a person below 18 years, it is the found view of the court that the

Tanzania Indian Succession Act, 1865 aims at protecting for all the biological children of the interstate whether born within or out of wedlock.

The court is of further profound view that exhibit P5 alone is not a conclusive proof that the issues born out of wedlock are not of the deceased. After all, exhibit P5 was not established in court by way of proof at a hearing or by way of consent decree.

The law of evidence is very clear on standard of proof and who alleges must prove as per *Section 110 (1) and 112 of the evidence Act, Cap 6 (R.E. 2019)*. The Petitioner in this case did not prove that the issues born out of wedlock were not of the deceased. Worse, the petitioner was not even ready to undergo DNA Test.

Though the issues born by Doris leaves much to be desired as were born with the deceased while she had not divorced/ terminated her first marriage, there are plenty of evidence that all the five issues left out by the Petitioner are issues of the deceased Patrick Soul Kyamba. **First**, PW3 in her evidence told the court that she was aware that her husband had extra marital status with Doris whom were blessed with two issues. **Second**, all the five issues born out of wedlock used the surname of the deceased in their life including at school and none did question on it. **Third**, it was evident from

all Defence Case Witness that when the deceased was alive, he was responsible for the education and welfare of all the eight issues including the five issues born out of wedlock. **Fourth**, the issues born out of wedlock were introduced to the mother and relatives of the deceased in the home village. **Fifth**, all the issues born out of wedlock have tendered birth certificates containing the date and their birth. It is my found view, that the contents of the tendered birth certificates remain unchallenged in absence of evidence to the contrary, the records therein are true. The same were issued by the person (RITA) who is entrusted to do so. It therefore, follows that the tendered birth certificates of the issues of the deceased are conclusive proof that the person named therein were born on the date stated and the parents are those spelt out in the certificate. That fact alone is decisive in settling the issue.

Sixth, it is true that none of the witness produced marriage certificate with the deceased except PW4 who had Christian marriage with the deceased, however, that is not a conclusive proof that the deceased has no illegitimate issues. **Seven**, the issues born out of wedlock are innocent creatures. There is a Swahili phraseology "*kitanda hakizai haramu*" which literally means there are no bastard children. But there are bastard parents. The child is not culpable for its parents' shortcomings nor can he or choose the

situation they are born into. Thus, it is not a child's fault being born in the situation. Children born out of wedlock are the biological children just like those born within the matrimonial home. They are entitled to equal shares of their common father with fellow siblings.

It is the findings of this court that the legal heirs of the deceased Patrick Soul Kyamba are:

1. Lennah Bargabosa Kaliko (legal wife)
2. Judith Patrick Kymba (issue)
3. Jessica Patrick Kyamba (issue)
4. Jocelyne Patrick Kyamba (issue)
5. Gaspa Patrick Kyamba (issued)
6. Janeth Patrick Kyamba (issue)
7. Saul Patrick Kyamba (issues)
8. Julieth Patarick Kyamba (issue)
9. Olipa Ipape (Mother of the deceased).

There is another argument that the Petitioner under estimated the value of the property or left out some of the estate. I must observe that the Caveators have not advanced good evidence to counter the estimation. Rather the Caveators came up with a mere gossip that the value of the property at Ununio is higher. This court cannot

act on a mere estimation or gossip. Indeed, it will be the duty of the administrator to collect all the properties of the deceased.

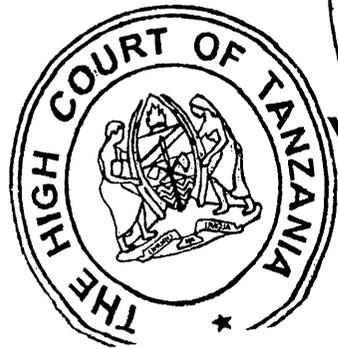
The point that the 1st Caveator was one of the two proposed administrators remained unproved as she did not exhibit the family meeting counter book which is in their home village at Katumba Songwe. There was further no proof on the allegation that the Petitioner forged the family meeting minutes.

To answer the second issues, the interests of the Caveators are through the five issues born out of wedlock only. It is clear from the evidence that the deceased had celebrated Christian Marriage which was not annulled till his death. Therefore, a bastard parent cannot claim interest over the deceased estate.

As to what reliefs are the parties entitled, I find there is a misunderstanding of the heirs in this case. For the best interest of the heirs, of the beneficiaries and estate itself, the court doeth hereby appoint the Administrator General to administer the estate of the late Patrick Saul Kyamba in terms *of Section 5 (1) (e) of the Administrator General (Powers and Function) Act Cap 27.*

In the end, this court require the Administrator General to collect, distribute and pay of debt of the deceased (if any) and file inventory before this court within six (6) month from the grant of

the letter of probate administration as per *Section 107 Of Cap 352*
(*supra*).



Y. J. MLYAMBINA
JUDGE

28/05/2020

A handwritten signature in black ink, appearing to be "Y. J. Mlyambina", written over a circular stamp or mark.

...in person and Counsel Eliamani Daniel
for the defendants. Right of appeal explained.



MLYAMBINA
JUDGE

28/05/2020

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