IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL REVISION N0. 13 OF 2020

(Arising from Probate Appeal No. 93 of 2010, Revision No. 17 of 2017, Misc. Civil Appl. No. 186 of 2019, and Revision No. 8 of 2020 of Kinondoni District Court, Original Probate and Administration causes No. 64 of 1988 and No. 43 of 2010*)*

BEATRICE BRIGHTON KAMANGA AND AMANDA BRIGHTON KAMANGA----------APPLICANTS

VERSUS

ZIADA WILLIAM KAMANGA ---------- RESPONDENT

RULING

L. M. MLACHA, J.

This revision was opened suo mottu by the court following some complaints which were lodged by Beatrice Brighton Kamanga and Amanda Brighton Kamanga (hereinafter to be referred to as the first and second applicants or simply the applicants) against Ziada William Kamanga (herein after to be referred to as the respondent). It is a revision of its own involving a probate

matter which have remained pending for more than 30 years and which have been the subject of several other litigations, complaints to various authorities and the source of hatred between the parties and the family as a whole.

The complaints to this court were lodged orally but later reduced in writing by the applicants. The gist of the complaint was that, the respondent who is the administratrix of the estate of their father, the late Brighton William Kamanga, is misappropriating the estate for her own benefit without due regard to the interests of the applicants who are children and heirs of the deceased. It was also alleged that the respondent is using tricks at both the Primary Court of Kinondoni District at Sinza/Manzese and the District Court of Kinondoni at Kinondoni to ensure that she remains with the estate at her own benefit to the great disadvantage of the applicants. Similar complaints were lodged to the office of the Regional Commissioner for Dar es Salaam who attempted a reconciliation without success.

Following these complaints, a calling for the records was issued to the lower courts in respect of the files for inspection purposes the court on the propriety and legality of the proceedings and decisions therein. The court had a chance of getting the following records; Probate and Administration Cause No. 64/1988 (Duplicate file), Probate and Administration Cause No.

43/2010, Probate Appeal No. 93/2020 (Kinondoni District Court), Civil Revision No. 17/2017 (Kinondoni District Court), Miscellaneous Civil Application No. 186/2019 (Kinondoni District Court) and Civil Revision No. 8/2020 (Kinondoni District Court). Civil Appeal No. 34/2003 (High Court, Lugaziya, J. rtd, the late) was also brought.

The applicants appeared in person, fending for themselves, while the respondent who was also present, had the services of Mrs. William, learned Advocate. Mrs. William was given a chance to peruse the complaints and the records before addressing the court.

Submitting before the court, the applicants had this to say; that they are daughters of the late Brighton William Kamanga who died in 1988 while they were very young. The first applicant was studying in Kilimanjaro by then. She was picked and brought to Dar es Salaam to attend the burial ceremonies only to be told that he had already been buried. She was brought at her father's residence at Sinza Palestina. Her sister, the second applicant, managed to attend the burial ceremony because she was in Dar es Salaam. The first applicant moved to Morogoro and could see the place where her father had been buried. She returned to Dar es Salaam and stayed at home, at the Sinza Palestina residence. She then went back to school. She added

that, she used to stay with her aunt, the respondent at times. Giving further details of her relations with the respondent, she said that she moved to the respondent to request for school fees one day during her school days but could not be given. She was advised to see her uncles. Problems started at that time and since then, there has been no love and peaceful existence. She said that what they needed is that the assets of their late father should be handled to them now that they are grown up and adults. The second applicant supported the first applicant in all fours.

Submitting for the respondent, Mrs. William had this to say; that the Probate was opened at the time when the applicants were very young. When they grew up they came to court and filed a matter which went up to this court before Rugaziya, J who directed them to go back to the Primary Court to seek revocation of the respondent as administratrix of the estate. They opened a fresh matter and the first applicant was appointed the administrator without revoking the first appointment. The respondent went to the district court which found the matter to be irregular and set it aside. Counsel proceeded to submit that the 3 houses do exist but one does not belong to the deceased. It belongs to the parent of the respondent. She went on to submit that one house is in the hands of the applicants who have

rented it and are collecting rents. The other is occupied by the respondent. She stressed that to date there has been no revocation of the applicant who is still the administratrix of the estate.

Giving further details, the counsel said that the house which does not belong to the deceased is the house which is at Sinza kwa Remmy. She added that, the respondent cannot vacate in the house where she is staying because she was allowed to stay there by the deceased.

In rejoinder, the first applicant submitted that the house at Sinza kwa Remmy belongs to the deceased. She said that, it is registered in the name of their grandfather but it is the property of their father. She added that the respondent cannot proceed to stay in the house where she is staying without any family consensus. The second applicant while supporting the views of the first applicant, she added that the respondent should not proceed to stay in the house because she has no love with them.

I had time to examine all the files closely. The original file of Probate and Administration Cause No. 64/1988 could not be traced but I could see copies of the appointment letter, the death certificate and the burial permit from other files. I could also see a lot of other useful documents in the available

files. The available records show that there was nothing in court from 1989 when the respondent was appointed the administratrix of the estate up to 2001, basically because the applicants were still young by then, though circumstances does not show that there was a peaceful atmosphere between them.

In 2001, **Miscellaneous Civil Application No. 30/2001** was opened at the district court of Kinondoni district by the applicants seeking revocation of the respondent as the administratrix of the estate for her failure to file inventories and statements of accounts and make the division of assets to heirs. This application was heard and dismissed on 05/08/2002 (Wambura, SDM) on two grounds; that it was unsafe to disturb the probate which had been in existence from 1988 and for failure on the part of the applicants to show that they are children of the deceased. This decision was vacated and set aside by this court in **High Court, Civil Appeal No. 34/2003** (Rugazia, J., rtd, the late) on technical points. The court had the view that the district court had no jurisdiction to entertain the application for revocation. The court directed the application for revocation to be filed at the court which appointed the respondent, meaning the primary court. However, it could not be filled once for reasons which are not clear. There was a lapse of time in

between. **Probate and Administration Cause No. 43/2010** was filled by the applicants at the primary court in 2010. It was a fresh matter seeking the appointment of Amanda Brighton Kamanga as the administratrix of the estate. The court received evidence from both parties and made its decisions declaring the applicants as legal children of the deceased and appointing the second applicant, Amanda Brighton Kamanga, the administratrix of the estate of the deceased. On appeal to the district court in **Probate Appeal No. 93/2010** Mushi, RM vacated the decision arguing that it was wrong to open a fresh matter. He directed the applicants to apply for revocation of the respondent through Probate and Administration Cause No. 64/1988. As the records could not be traced, a Duplicate File of **Probate and Administration Cause No.64/1988** was opened at the primary court. The parties were summoned and heard again. The respondent rose the question of the status of the applicants again. Witnesses were summoned to give evidence. They did so. After a long hearing, H. Furutuni - Hakimu Mkazi, made a detailed ruling on 27/1/2017 and declared them lawful children of the deceased as it was done earlier in Mirathi No.43/2010 by B. Lihamwike - Hakimu. The court ordered the respondent to handle the estate to the applicants. Aggrieved by the decision, she went to the district

court and filed **Revision No. 17/2017** which was placed before I. Kuppa, RM. The Magistrate vacated the findings and decisions of the Primary Court. Aggrieved by the decisions and in total loss of faith in the legal system, the applicants went to various places to complain including the office of the Regional Commissioner for Dar es Salaam who as I have said, made an intervention without success. Sometime was spent outside the courts looking for solution without success. They returned to the district court in 2019 and filled **Miscellaneous Application No. 186/2019** seeking extension of time within which to file a petition of appeal. Like the others, this application could not be successful. It was dismissed. Currently, there is another application, **Civil Revision 8/2020** seeking to review the decision of the District Court in Miscellaneous Civil Application No. 186/2019. It is still pending.

Having gone through the records and the submissions carefully, and in the light of the foregoing, it has come to my mind that, the respondent who was appointed an administratrix of the estate in 1989 has not accounted for her administration to date. No inventory and or statement of Account has been filed since then. On top of that, despite two detailed rulings from the primary court recognizing the applicants as children of the deceased, she does not

want to recognize them as such. She was reluctant and is still reluctant to release the assets to them. She has remained with the assets for all the years and wants to convert them to her personal assèts something which is being resisted seriously by the applicants hence the dispute.

I think for purposes of future guidance to the lower courts, this being an area of repeated mistakes and complaints, I must address my mind to two key areas with some details. **One**, the Law, practice and procedure of probate and administration in primary courts and **two**, inheritance of children born out of wedlock under customary law. Thereafter the court will examine two more areas namely; the legality and propriety of the proceedings and decisions of the lower courts and the status of the respondent as an administratrix of the estate. The court will then make its orders.

The law of succession in Tanzania Mainland is contained in statutes, Customary Law, Islamic Law and Hindu Law. In statute, the relevant Law is the Indian Succession Act of 1865 which was made applicable to Tanzania by section 14 of the **Judicature and Application of Laws Act, Cap. 358 (JALA)**. This is a foreign law but is applicable in Tanzania. It is not applicable in primary courts.

Section 11 of JALA allows the application of Customary Law in Tanzania. It is the basis of application of customary law. Some customary laws are codified while others are not, but they are both recognized and have the force of law.

Islamic and Hindu Laws are contained in their respective religious books and extracts from scholars. They are applicable where the members of their religious sect are involved. There is no challenge on the applicability of Hindu law because all the Hindu people are Tanzanian of Asian origin and have no connection to any tribe or local community. The application of this law to the particular group of people has no problem though I have never come across such a case in court. It appears that the disputes of this nature are solved at family or community level.

There is a challenge in the application of Islamic Law. Muslims like Christians belong to their tribes and or local African communities. They are governed by both customary and Islamic law. The challenge has always been when does Islamic law comes in? The law is silent. In practice, Islamic Law is applicable in the event of the happening of three things; **(i)**, where there is a desire of the deceased expressed in a **WILL** or **(ii)** where there is evidence showing that the life style of the deceased was such that, if he had a chance

to be asked to give his opinion, he could have said that Islamic law should apply or **(iii)** where heirs have reached an agreement that it should apply. But in this third category, in my view, **ALL** must agree. This is not a question to be decided by majority rule. It is an area which touch the faith of individuals, a delicate area and must be handled with care. If none of the tests succeeds, the law applicable should be customary law.

The law vests jurisdiction of probate matters in the High Court and Primary Courts with little mandate given to the RM's and District Courts in what is referred to as **small estates**. Strictly so to say, in my view therefore, the legislature did not intend the RM's and District Courts to have original jurisdiction in probate and Administration matters. Original jurisdiction is vested in the High Court and Primary Courts. Jurisdiction of the RM's court is merely delegated by the Chief Justice for purposes of handling small matters under the Probate and Administration of Estates Act, cap 352 and Probate Rules GNs. 10, 107 and 369 of 1963. The current value of a small an estate is asset or assets whose total value do not exceed **TZS 300,000,000.** District courts have the same jurisdiction but it is provided by statute not by delegation. It is limited to small estates. To the contrary, jurisdiction of Primary Courts where the law applicable is customary

or Islamic Law is unlimited. The law allows any probate or administration matter to be filed in the primary court. There is no pecuniary limit though in practice it is advised that where the matter is complicated or where it involves assets outside the jurisdiction of the primary court (i.e. outside the district) the matter should be filed in the High Court. The High Court like the primary court can hear any probate or administration matter regardless of the amount of the assets involved. It can also apply any probate and administration law applicable in this country.

Jurisdiction of Primary Courts in probate and administration cases is provided under section 19 (1) (c) of the Magistrates Court Act, Cap. 11 R.E 2019. This section takes us to the **Fifth schedule** of the Act. Paragraph 1(1) of the Fifth schedule reads thus:

> *"1 – (1) the jurisdiction of a primary court in the administration of a deceased estates, where the Law applicable to the administration or distribution or the succession to the estate is* ***Customary or Islamic Law****, may be exercised in cases where the deceased at the time of his death had* ***a fixed place of abode within the local limit of the court's jurisdiction****".*
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> (Emphasis added)

Paragraph 2(a) reads: -

"2 - A Primary Court upon which jurisdiction in the administration of deceased's estates has been conferred may;"

a) *Either of its own motion or on application by any person interested in the administration of the estate* ***appoint one or more persons interested in the administration to be the administrator or administrators,*** *thereof, and in selecting such administrator, shall, unless for any reason it considers in expedient so to do, have regard to any* ***wishes which may have been expressed by the deceased;***

b) *.....**appoint an officer of the court or some reputable and impartial person** able and willing to administer the estate to be the administrator either together with or in lieu of administrator appointed under sub – paragraph (a);*

c) ***Revoke any appointment of an administrator for a good and sufficient cause*** *...."*(Emphasis added).

So, in essence, the Primary Court has jurisdiction (i) to **appoint** one or more persons to administer the estate of a deceased where the Law applicable is

Customary or Islamic Law and (ii) to **revoke** the appointment on good cause. The appointment is done by the primary court which exercise jurisdiction in the area where the deceased had a **fixed place of abode** before he died. This is basically the area of the whole district because the jurisdiction of the primary court covers the whole area of the district where it is established. So, the deceased must have a fixed place of abode within the particular district. Failure to observe the territorial jurisdiction may lead proceedings to be illegal and nullified on appeal. See **Mire Artan Ismail and Zainab Mzee v. Sofia Njati**, High Court DSM Civil Appeal No. 31 of 2006 (Mandia J. as he then was). If the deceased had two or three fixed places of abode, let's say, Dar es Salaam, Lindi and Kyela Mbeya, any of the primary courts in the respective districts can hear the matter. It will be upon the choice of the parties. But wisdom demands that the case should be opened in the district where he has the majority of his family members.

The fifth schedule of the Magistrates Courts Act is not exhaustive. It must be read with **The Primary Courts (Administration of Estates) Rules, GN 49 of 1971**. And where there is a Lacuna in both Laws the court must apply **The Magistrates' Courts (Civil Procedure) in Primary Courts**

Rules GN 310/1964 and GN 119/1983. GN 49 of 1971 prescribes six (6) forms which must be used throughout the process.

The primary function of a Primary is to hear applications for appointment of administrators, to hear objections (if any) and receive inventories and statements of Accounts (filled using forms V and VI). It can also hear applications for revocations and objections lodged to object the inventories and statements of accounts. Its other functions are contained in rule 8 of GN 49 of 1971. They are to determine: -

a) whether the deceased died testate or interstate;

b) whether any document alleged to be a will of the deceased is the valid will of the deceased or not;

c) any question as to the identity of persons named as heirs, executors or beneficiaries in the will;

d) any question as to the property, assets or liabilities of the deceased;

e) any question relating to the payment of debts of the deceased out of his estate;

f) any question relating to sale, partition, division or other disposal of the property and other assets;

g) any question relating to the investment of money forming part of the estate;

h) any question relating to the expenses to be incurred on the administration of the estate.

Two questions may arise; When should I go to court? What are the processes? There is no specific time set within which a probate or administration matter should be filled at the primary court, but where the matter is filed after a long time, let's say after 3 years, the petitioner must explain the delay. See **Mwaka Musa versus Simon Obed Simchimba** CAT Civil Appeal No.140 of 2016 followed by this court in **Musa Songo Nyekaji** Probate and Administration Cause No. 3 of 2019 H/C Musoma. If no proper explanation is offered, the court has a discretion to reject the matter. It is thus important to file the proceedings at an early stage or if delayed for a considerable period, offer explanation to the effect.

Proceedings in a Primary Court are initiated by presentation of Form No. 1 duly filled which is usually accompanied by **minutes** from the clan/family and a **death certificate**. The minutes from the clan/family are essential because they establish a proof that a person who is named therein has the support of the majority members of the clan/family. It is a process of

filtration which was developed through practice. The process is encouraged because it narrows the dispute. There is no rule prescribing for their existence but they are encouraged for that purpose. Equally, there is no rule requiring the existence of a death certificate in the primary court but it is encouraged to prove that the person named therein is really dead. It is a practice borrowed from Probate Rules which apply in the High Court, RM's Court and District Court. But if the primary court is located in a remote area so as to make it difficult to obtain a death certificate, in my view, it will not be offensive, if the court receives just a **letter** from the Village or Ward Executive Secretary informing the court that the person named therein is dead.

After the filling of the case, the petitioner will make an appearance to the court and request for orders of **citation**. This is usually done ex-parte. The court will then make an order for citation advertising that someone has petitioned for probate or for letters of administration. It is important to advertise in Newspapers which are issued daily, with a wide circulation (Magazeti ya kila siku yanayosomwa sana). Copies of the advertisement must be fixed at the court premises and on all key public places around the place of domicile of the deceased. Citation is done in form No. 2 and in my

view, there must be a gap of at least **4 weeks** in between to allow the information to circulate in the society widely. The usual practice is **90 days** but it is discretionary. Going below 4 weeks takes us to quick appointments (vodafasta). It is dangerous and must be discouraged.

The court will then sit on a date fixed in the citation to consider the matter. All interested parties must attend. The petitioner must appear in person. He will then take an oath and give evidence on matters of the probate and or administration expressing his willingness to administer the estate. He must express his relation with the deceased and why he wants to be appointed an administrator of the estate. He must declare his good intentions and commit himself to be faithful. Some people who attended the family meeting must come and give evidence in recognition of the meeting and in support of the petitioner.

If there is an objection to the appointment, the court will hear the objection first or combine the petition and the objection and hear them together. If it opts to combine them, there must be an order in the record to that effect. The objection must be filed in writing and if made orally, it must be reduced to writing by the magistrate who must record the exact words of the objector in Kiswahili. The magistrate must record the proceedings in full and precisely.

The court will then make its decision appointing the petitioner and dismissing the objection or dismissing the petition and appointing the objector. The court can appoint the petitioner or any fit person to be the administrator but, in my view, the best interests of justice are saved if he comes from the family (the spouse or children of the deceased). Where circumstances demand that a person outside the family must be appointed an administrator, there must be good reasons on record supporting the move. These reasons must be recorded properly and explained to the petitioner and any person who is present.

The administrator is appointed in form No. 4 but must file the administrator's bond (form No. 3). See rule 7 GN 49 of 19971. The bond is an undertaking that he will administer the estate faithfully at the great advantage of heirs, debtors and creditors of the deceased and not his. He is not expected to take anything other his share as an heir (where applicable) and the administration costs. The costs of administration must be presented to the heirs for approval and where there is a dispute between them, the matter must be referred to the Primary Court for taxation. It is important to note that the administrator has no power to dictate on the costs.

The administrator is an independent person. He is independent from any person including the magistrate who appointed him. He works independent of everybody through at times, where need arises, he can receive advice and guidance from court. He can also receive advice from heirs and relatives. It is an advise not a directive. The forum for advise should not be used as room to grab his powers or force him to do anything.

Acting independently and subject to the advise which I have mentioned, the administrator is charged with the following functions. **One**, collecting the assets of the deceased. This include both fixed and movables. It also involve going to the bank and collecting what might be there. He can also sue people who may refuse the requests. **Two**, to identify the heirs. It is now generally accepted that the heirs under customary law are the spouse or spouses of the deceased and his or her children. Uncles, aunts, sisters and brothers are not heirs. In the absence of a WILL, they should not be given anything save at the free will of the heirs. **Three**, to identifying and pay the debts of the deceased. **Four**, to distribute the assets to the heirs and **five**, to file inventory and statements of accounts (forms V and VII). See **Hadija Saidi Matika and Awesa Saidi Matika,** H/C Mtwara, PC Civil Appeal No. 2 of 2016.

The administrator must present his inventory and statement of Accounts (forms V and VI) within the time prescribed by the law. Rule 10 of GN 149 of 1971 reads: -

> *"10. - (1) Within* ***four months*** *of the grant of administration or within such further time as the liabilities court may allow,* ***the administrator shall submit to the court a true and complete statement, in form V, all the assets and liabilities of the deceased persons' estate*** *and at such intervals thereafter as the court may fix, he* ***shall submit to the court a periodical account of the estate in form VI showing therein all the moneys received, payments made, and property or other assets sold or otherwise transferred by him.***
>
> *(2) The statements of accounts referred to in sub rule (1) may, on application to the court,* ***be inspected by any creditor, executor, heir or beneficiary of the estate****"* (Emphasis added)

The word used is **shall** meaning that the duty to submit the statements of account within 4 months is mandatory. He is also charged of submitting

periodical accounts to the court. This is what is done by Forms Nos. V and VI in the actual practice. The law had fixed the matter on a **time table** to control the process and prevent an abuse of power. It also aims at putting the matter to **an end**. Heirs, creditors and debtors may seek to peruse the statements of accounts and inventories. If they do so the court must allow them. In practice, in a good system of administration of justice, once they are filled, the court must cause the same to be known to heirs, debtors and creditors and ask them to file objections against them, if they so wish. If there is an objection, the court will be at liberty to return them to the administrator for rectification as was said by this court in **Nuru Salum and Husna Ali Msudi Juma**, PC Probate Appeal No.10 of 2019 (Rumanyika, J.) or proceed to hear the parties and make a ruling on the matter as was said by this court in **Hadija Saidi Matika** (supra). On good reasons being established and in the great interest of justice, the court can change what was done by the administrator and substitute thereof with what it considers to be the best division or make a directive accordingly. It is however important to hear the administrator and all interested parties fully before making the decision. Otherwise the court has no power to question an act or omission of the administrator contained in the statement of accounts and

inventories. That is to say, if there is no objection to the statement of Accounts and inventories, the decision of the administrator is final and the court must make an order closing the matter (see Hàdija Matika- supra).

There is an end in probate and administration matters. The matter comes to an end on filling of Forms No. V and VI and after the order of the court closing the matter. The emphasis here is that, the administrator must present his reports to the court in time which will proceed to put the matter to an end. The position the High Court and primary court on this aspect is the same. Inventories and statement of accounts must be filled within the period stipulated under the law so that the matter may come to an end. There is no endless administration or a **Life administrator** in our laws.

My interpretation of rule 10 of GN 149 of 1971 is that if the administrator does not submit to the court a true and complete statement in form V within 4 months, containing all the assets and liabilities of the deceased persons' estate and does no submit a periodical account of the estate in form VI showing therein all the moneys received (if any), payments made(if any) and property or other assets sold or otherwise delt by him within such period as directed by the court, his existence is rendered illegal and his activities after the expiration of 4 weeks becomes null and void. And if the matter remains

pending for a longer period, let's say 3 years, without such a report or extension from the court, the appointment cease to exist by operation of the law for as I have pointed above, there is no life administrators in our schemes.

That said, I will now move to examine the second area, the legality of children born out of wedlock. It appears that this was a crucial issue in the lower courts and the concern of the respondent. I will look at it at two levels. By observing the records of the lower courts and by looking at the law particularly the law of the child and international instruments to which Tanzania is a party. The primary court had an opportunity to hear the parties on this aspect in Probate and Administration cause No. 43/2010 and Probate and Administration Cause No. 64/1988 (Duplicate file) and make decisions as seen above. In the ruling which was made by B. Lihamwike - Hakimu on 24/6/2010 in Probate and Administration Cause No. 43/2010, the court had this to say: -

> *"Hili nishauri la Mirathi No.43/2010 ambapo Bi. Amanda Brighton Kamanga anaiomba mahakama hii kuwa msimamizi wa mirathi ya marehemu Brighon William Kamanga. Akianza kutoa maelezo yake kwamba marehemu alikuwa ni baba yake mzazi ndipo*

lilipoibuka pingamizi kutoka kwa dada wa marehemu kuwa muombaji sio Watoto wa marehemu na kwamba marehemu hakuwahi kuoa au kuacha mtoto kipindi cha uhai wake. Hapo ndipo mahakama ilipositisha kusikiliza shauri la msingi na kuanza kusikiliza pingamizi ...

Aliyeleta pingamizi Bi. Ziada Williamu Kamanga aliambia mahakama hii kuwa ***marehemu Brighton Williamu Kamanga alikuwa kaka yake na kwamba ameacha nyumba tatu Sinza aiipofariki mwaka 1988****...aliieleza mahakama kuwa* ***hajawahi kufahamu kuwa marehemu aliacha Watoto.*** *Ushahidi wa mleta pingamizi uliungwa mkono na ndugu wa marehemu aitwaye Mwinyimvua Salehe...*

Ndugu Beatrice Brighton Kamanga aiiiambia mahakama hii kuwa yeye ni mtoto wa marehemu...baba yake alimtambulisha kwa mdogo wake aitwaye Amanda Bryton Kamanga...shangazi yao naye pia anafahamu kwamba wao ni Watoto wa marehemu na kwamba hata nyumbani kwa baba yao ambapo ndipo aliyewapinga

anaishi walishawahi kuishi japo kwa muda mfupi walipokuwa shule*...*

Aliendelea kueleza kuwa baba yao alifariki naye pia ***alihudhuria mazishi mpaka Morogoro alipozikwa*** *na pia alishirikishwa kwenye shughuli zote za kimila (kuweka udongo, kuzunguka kaburi). Tuliporudi tukaa Sinza Wiki moja kisha tuaruhusiwa kurudi shule...*

Shahidi mwingine Ndugu Suleimani Mbena umri miaka 58... alieleza kuwa ***marehemu ni kaka yake (mtoto wa mama mkubwa)****... alieleza kuwa* ***marehemu alifariki akiwa mikononi kwake*** *na kwa uthibitisho alionyesha mahakamani cheti cha kifo na kibali cha mazishi...zilizosainiwa na yeye kuthibitisha ukaribu na marehemu..kikao cha wana ndugu zilimteua mtoa pingamizi asimamie mali za marehemu mpaka watakapokuwa...****aiieieza kuwa marehemu aiiacha Watoto wawili, Amanda na Betrice....ukoo mzima unafahamu hivyo*** *na hata katika ugonjwa na hatimaye kifo Watoto hao walishiriki... mtoto Betrice ni baba yake copi.*

Shahidi mwingine Athumani Mbena aleleza mahakamani kuwa ***marehemu ni kaka yake...yeye pamoja na familia nzima inafahamu kuwa Beatrice na Amanda ni Watoto wa marehemu kwani walitambulishwa kwao siku nyingi na familia inawafahamu kwa muda mrefu.*** *Na kwamba Watoto hao katika vipindi tofauti walishawahi kuishi na shangazi yao....zaidi ya hayo mama yake Betrice alishawahi kuishi na mtoa pingamizi na pia Watoto hawa walikuwa wakisomeshwa na marehemu."*

The court analyzed the evidence and then made the following decision: -

"Mahakama baada ya kusema hayo pamoja na maoni ya washauri ***inatamka kuwa Amanda na Betrice ni Watoto halaii wa marehemu Brighton Wiiiiamu Kamanga"*** *(Emphasis added)*

This decision is based on the evidence of the applicants who said that they are children of the deceased who cared for them and introduced them to the whole family including the respondent. Their evidence was supported by two relatives of the deceased. The trial court which had opportunity to examine their demeanour and that of the respondent believed them. It could not

believe the evidence of the respondent and his witness. It ruled out that there was evidence showing that the applicants are children of the deceased because he cared for them. He also introduced them to the family. They were also involved in the buried ceremonies.

Basing on that, the court proceeded to receive evidence from the parties in respect of the appointment and M. S. Mlawa-Hakimu made a decision on 26.08.2010 appointing Amanda Brighton to be the administratrix of the estate.

I support fully the findings and decisions of the primary court. Where there is credible evidence showing that the deceased took a positive step to take care and or introduce his child to his relatives, the courts should not hesitate to find that he intended him to be known as such a therefore his child under customary law. I am aware of the contrary position which is in para (43) of the second schedule to the **Local Customary Law (Declaration) (No. 4) Order, GNs 436 of 1967 and 219 of 1967** (SHERIA ZA URITHI) which is coached "Watoto wasio halali hawawezi kurithi upande wa kiume katika urithi usio na wosia" but that law is no longer valid in view of the coming into force of the **Law of the Child 2009 Act**. The concept of "**illegitimate child**", children born out of wedlock, has no room in this country any more.

The Act which came in compliance with the provisions of the **United Nations Convention on the Rights of the Child 1989** to which Tanzania is a signatory, has banned that concept.

Article 2 (1) of the UN Convention requires state parties to respect and ensure rights set forth in the convention are observed in the country without **discrimination** of any kind, i.e. in respective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, ***birth*** or other status. Sub article (2) requires State parties to take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions or beliefs of the child's parents, legal guardians or family members. The Law of the Child Act, 2009 was enacted in compliance with this requirement.

Section 5(2) of the Law of Child Act prohibits any type of discrimination against a child. It provides thus: -

> *"**A person shall not discriminate against a child** on the grounds of gender, race, age, religion, language, political*

*opinion, disability, health status, customs ethnic origin .... **birth**....".*

The word **birth** there represent the status of the child at the time of birth. Whether he was born with or without a valid marriage is covered there. He is not expected to be discriminated on that basis. All children are equal so to say and must enjoy equal rights.

In this reasoning therefore, it is wrong to deny a child his rights to inherit from his father's estate simply because he was born out of wedlock, the act which he had no control himself. This is specifically provided under section 10 of the Act which reads: -

*"A person shall not deprive a child of reasonable enjoyment out of the **estate of parent**". (Emphasis added)*

The word **"Parent"** is defined by Section 3 of the Act, to mean **"a biological father or mother"**, the adoptive father or mother and any other person under whose care a child has been committed". It follows that the applicants have a right to inherit from the deceased despite the fact that there was no official marriage between their father and their mothers.

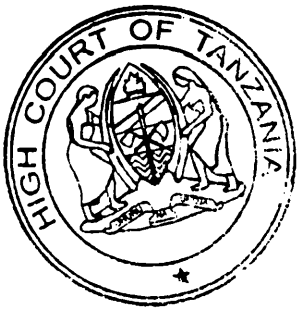
Now what about the legality of the proceedings and decisions of the lower court? Looking at the above discussions one will note that the proceedings and the decision of the district court in Miscellaneous Civil Application No. 30 of 2001 was correctly vacated by this court because the district court had no jurisdiction to revoke the appointment of the respondent. That was in the domain of the court which appointed her meaning the primary court. The proceedings and decisions of the primary court in Probate and Administration Cause No.43 of 2010 were, in my view, wrongly vacated by the district court in Probate Appeal No.93 of 2010 because the administrator had lost his mandate by the time, which was 21 years by then, for failure to account for her administration as required by rule 10 of GN 149 of 1971.

As observed above, where the administrator has failed to file his inventory and statement of account for a period exceeding four months and he remains so for a long time without extension from the court which appointed him, his appointment becomes invalid and comes to an end by operation of the law. The applicants were therefore correct in the circumstances, and particularly after missing the record of the earlier file, to open a fresh file altogether to deal with the matter. It was therefore proper to open Probate and Administration Cause No. 43/2010. That being the case, the duplicate file of

Probate and Administration Cause No. 64 of 1988 must have been opened wrongly. If that is the case, the proceedings and decisions of this case and those of the District Court in Revision No. 17 of 2017 which were based on them, were equally misconceive. That also apply to Miscellaneous Application No.186 of 2019 and Revision No.8 of 2020 which is still pending.

All said, what is the end of justice in this matter? Having considered the matter carefully, I exercise the revision jurisdiction of this court contained in section 44 (1) (b) of the Magistrates Courts Act, Cap. 11 R.E 2019 to revise and vacate the proceedings and decisions of the District Court of Kinondoni in Probate Appeal No. 93 of 2019, Revision No. 17 of 2017, Miscellaneous Application No. 186 of 2019 and Revision No. 8 of 2020. Proceedings and the decision of the Primary Court in Probate and Administration Cause No. 64/1988 (Duplicate file) are also revised and vacated. I uphold the proceedings and decisions of the Primary Court in Probate and Administration Cause No. 43 of 2010. I reinforce the appointment of Amanda Brighton Kamanga as the administratrix of the estate of the late Brighton William Kamanga which include the three (3) houses in Sinza Dar es Salaam. The respondent is directed to handle the estate to Amanda Brighton Kamanga who should administer the estate and file her inventory and

statement of Account to the Primary Court within 4 months from today, in the manner explained above. The Primary Court Magistrate Incharge of Sinza/Manzese is directed to ensure that these orders are complied with. I order so. No order for costs.



L. M. Mlacha

JUDGE

10.07.2020

Read this day 10th July, 2020 in presence of 1st and 2nd Applicants in person and Mrs William, Advocate for the Respondent who was also present.

L. M. Mlacha

JUDGE

10.07.2020