IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

PC CIVIL APPEAL NO. 109 OF 2019

(Originating from Civil Appeal No. 118 of 2018 at Ilala District Court at Samora)

BETWEEN

RODNEY BARAKA.....1ST APPELLANT

AND

LAURIAN NGAIZA.....2ND APPELLANT

VERSUS

DANIEL MARCUS NTANGA.....RESPONDENT

JUDGMENT

Last order date: 22/04/2020
Date of Judgement: 06/07/2020

MLYAMBINA, J.

Through Mirathi No. 198 of 2018 the Ukonga Primary Court appointed the herein petitioners as the probate administrators of the estate of the late Felista Ngaiza. The respondent who alleged to be the legal husband was not happy with the appointment after noting that he was not listed among the heirs entitled to inherent the estate. Aggrieved with such decision, the respondent herein lodged Civil Appeal No. 118 of 2018 before the Ilala District Court at Samora. Upon trial, the 1st appellate Court upheld the order of the trial Court in respect of appointment of the herein appellants as the administrators of the deceased estate and nullified the order

which denied the respondent herein to inherent the estate of his late wife, Felista Ngaiza. The 1st appellate Court ordered the respondent herein, Daniel Marcus Ntanga and all the children of the deceased that are entitled to the share of the deceased. The appellants were not happy with such order. Hence this appeal on three grounds, namely:

1. That, the learned honorable Magistrate in appeal erred in law and in fact in reinstating the respondent to be one of the beneficiaries of the estate of the late Felista Ngaiza, deceased, without considering and giving weight to evidence and the law in so far as the respondent had for over two decades deserted the deceased, did not provide her medical care while in Dar es Salaam following the deceased subsequent death, he did not as well accord and attend her burial ceremonies.
2. That, the learned Honorable Magistrate misconstrued and misapplied the evidence and the law in particular exhibit DMN as marriage certificate of the respondent to the deceased there by wrongly holding that the respondent had right to inherit the deceased's properties contrary to the law and evidences disentitling him to the same; and

3. That, without prejudice to ground no. 2 of the appeal above, the Learned honorable Magistrate erred in law and in fact in failing to find and hold that the respondent had disqualified himself to be among the beneficiaries of the deceased's estate bestowed by the trial Primary Court exclusively upon her children only.

For the afore grounds thereof, the appellants prayed this appeal be allowed with costs by vacating the respondent from being among the beneficiaries of the deceased estate and restore the Ukonga Primary Court's decision vesting the deceased estate exclusively upon her children.

The appeal was argued by way of written submission. The appellants were represented by Disckson Venance Mtogesewa, Advocate from Diskson Consulting (Advocates). The respondent was represented by Sylvester Eusebi Shayo, Advocate from Sylvester Shayo and Co- Advocates.

From the afore grounds of appeal, there is one central issued to be determined in this appeal:

Whether the respondent is eligible or entitled to be part of the inheritors of the deceased estate.

When arguing the 1st and 2nd grounds of appeal jointly, the appellants advanced nine points: ***One,*** it is on evidence that the respondent did not prove that he was lawfully married to Felista Ngaiza deceased by producing in evidence his claimed marriage certificate as it is required by *Section 55 (a) or 55 (b) of the Law of Marriage Act No. 5 of 1971* in clear proof thereof.

Two, in any event, the respondent could not have proved that he was lawfully married to the deceased whose prior life had matrimonial relationship with one Tamilwai Ngovi with whom deceased was blessed with and fathered to five children. The respondent subsequently had two more children with the deceased.

Three, it was an error for the lower Court to treat the respondent's exhibit DMN – as marriage certificate while it was not so in law thereby wrongly deciding the respondent to be part and eligible to be among the estate beneficiaries.

Four, even if the respondent could claim and stand to be the husband to the deceased, following his over two decades desertion far away to Ruvuma region, in absolute denial of maintenance, medical services as marriage being a joinder till death separates

the dual, in clear violation of noble duty and sanctity of marriage to maintain a spouse, under Section 63 of the Law of Marriage Act.

Five, a right to inherit the deceased's estate is also well founded on and equals coming to equity with clean hands principle. Thus, for his conduct or acts of not maintaining and deserting the deceased for over two decades, not offering her medical care, upon the deceased's death, not arranging and attending for her burial ceremonies in Dar es Salaam, yet seeking her inheritance estate, made and makes the respondent coming to equity without clean hands while wishing to benefit from his own wrongs. Thus, the law is "*he that has committed inequity shall not have equity.*" The underlying principle is that a Court of equity acts only when as conscience commands...(sic) the defendant must satisfy that he has clean hands clear of any participation in fraud or similar inequitable conduct.

Six, if his conduct be offensive to the dictates of natural justice, then whatsoever, may be the rights he possess and whatever use he may make of them in a Court of law, he will have no remedy in equity...*the plaintiff not only must be prepared now to do what is right and fair but also must show that his past records in the transaction is clean [Per G.P. SINGH: Equity, Trust, Mortgage and*

Fiduciary Relationship, 2001, Central Law Agency, page 63. [Emphasis applied]

Seven, allowing the respondent to be part of the estate beneficiaries, would be granting him benefits from his inequities which was akin to denying the deceased her life, that is via denials of maintenance, his over two decades desertion without medical and palliative care and even more without and not attending her ultimate and eternal decent burial to Felista Ngaiza.

Eight, if our family law jurisprudence does not allow any share of property to be distributed to party who squanders and misconducts against family assets, this would be even more to a party, like the respondent, who deserts, in effect denies the very life to the estate owner, Felista Ngaiza, deceased. On this point, the appellants cited two case Law. In **Bi Hawa Mohamed v. Ally Sefu** (1983) TLR 32 the Court of Appeal of Tanzania, *albeit* a marriage properties distribution dispute held:

> *Squandering money of family-first, can be regarded as an advance made by the respondent towards the future needs. Secondly, the squandering of money by the appellant when weighed against her contribution can be regarded as a matrimonial misconduct which reduced to nothing her*

contribution towards the welfare of the family and the consequential acquisition of matrimonial or family assets.

The other cited case in an **English case of Martin v. Martin** *[1967] 3 all ER 629 by cairsns LP* in which it was stated:

Such conducts must be taken into account because a spouse cannot be allowed to fritter away the assets by extravagant living or reckless speculation and then to claim as great a share of what is left as he would have been entitled to if he had behaved well.....We are satisfied that on this basis also, the appellant is not entitled to claim any share in the available matrimonial of family assets.

Nine, as per *Section 60 of the Law of Marriage Act, 1971,* the deceased acquired her own property in her exclusive name and there is no dispute that the property absolutely belongs to that person, in this case Felista Ngaiza, deceased.

On the third ground, the appellants argued that the learned appellate Magistrate ought to have found that, even if the respondent was the deceased husband, by his adverse acts and conducts, he had disqualified himself to inherit. Thus, it would be detrimental to public policy to protect families and marriage institutions by condoning, in a way illegality, of denying life to a

property holder, the deceased herein, like a testator and claim to inherit her property upon her death.

It was the appellants analogy that an intended beneficiary under will if he conducts himself in a manner denying life to the testator so as to readily inherit the property, the law would not allow and immunize such beneficiary to benefit from his own wrongs. To back up the position, the appellants cited **Section 201 of the Indian Succession Act, 1865** which disqualifies to be an administrator of the deceased estate. Also, *Section 205 of the Indian Succession Act* (*supra*) provides:

> If the deceased has left a widow, administration shall be granted to the window *unless the Court see cause to exclude her, either on some of personal disqualifications, or because she has no interest in the estate of the deceased* [emphasis added.]

In general response to the three grounds of appeal, the respondent told the Court that the primary Court made the following finding:

> *Marehemu aliacha mume halali wa ndoa ambaye ni Daniel Ntanga.*

It was the respondent's submission that since the appellant did not appeal the findings of fact, they are precluded from appealing it in

this second appeal. Moreso, because the first appellate Court did not reverse but confirmed that finding of fact. Above all, the findings that the respondent is the husband surviving his wife was backed up by the certificate of marriage.

The respondent contended that the narrative of desertion for two deceased is not backed by any cogent evidence. It was not raised by the deceased who alone had the *locus standi* to complain. Thus, the appellants failed to fault the first appellate Court that "*there was no formal records in respect of dissolution of their marriage, no divorce granted in any Court of law or separation...the appellant has the right to inherit the deceased's properties so far as he was still her husband.*"

Contrary to the appellants submission, the respondent stated that the right to inherit is a legal right as correctly decided by the first appellate Court which felt bound to follow and apply *Section 43 of the Indian Succession Act,* 1855. It is an equitable remedy, hence the jurisprudence quoted by the appellant is inapplicable as equity follows the law.

The respondent submitted that *Section 201 of the Indian Succession Act,* 1865 that deals with administration is irrelevant because the first appellate Court did not interfere with the grant of

letters of administration. And the principles disentitling a person to the grant of letters of administration are different from those disentitling a person from inheriting.

I have evaluated the arguments of both parties at length. I have even gone through the entire records of the two Court below. I will start the analysis by quoting paragraph 3 at page 14 of the impugned judgement of the District Court:

> *It was proved before the trial Court, that the marriage certificate [DMN-1] shows that the appellant and the deceased were husband and wife and until her demise, there was no formal records in respect marriage, no divorce was granted in any Court of law or separation. In that brief the appellant has right to inherit the deceased's properties so that he was still her husband. The trial Court to hold that only the deceased children have the right to inherit the deceased property that the house located at Tabata was very wrong. Let me say that all the properties which proved to be owned by the deceased, her surviving husband, the appellant and children have right to inherit and their rights are protected by the law.*

From the afore quoted part of the impugned decision and in the light of the entire evidence. ***One*** there is nothing to the contrary to disprove that the deceased and the respondent contracted a monogamous marriage. ***Two,*** there is nothing in evidence to prove that the marriage between the deceased and the respondent had ever been dissolved legally. **Three**, there is ample evidence that the respondent had deserted the deceased for over two decades (20 years). **Four,** there is no dispute that the only property surviving the deceased is the house located at Tabata area, Ilala Municipality. ***Five,*** the issue whether the respondent is eligible for inheritance of the house at Tabata area depends on the proper land Court decision on two issues:

1. *Whether the suit property is the joint property (matrimonial) between the deceased and the respondent.*
2. *Whether the suit property belonged to the deceased separately.*

If the first issued herein above will be answered in the affirmative, the respondent herein will be entitled to the share in the property according to his contribution. If the second issue will be answered in the affirmative, the relevant issue will remain; whether the respondent being a surviving husband is automatically entitled to the inheritance of his deceased wife along with the issues.

As a general rule, the rights of inheritance of the surviving spouse can be construed through the application of *Section 27 and 43 of the Indian Succession Act*, 1865 which reads:

> *27. Where the interstate has left a widow, if he has also left any lineal descendants, one third of his property shall belong to his widow and the remaining two thirds shall go to his lineal descendants, according to the rules herein contained...*
>
> *43. The husband surviving his wife has the same right in respect of her property if she dies interstate, as the widow has in respect of her husband's property, if he dies intestate.*

The above being the general position of las, has the exception which are neither specifically stated in the Indian Succession Act, 1865 not in the Local Customary Law (Declaration) Order, 1963. However, by analogy I agree with the appellants advanced point number four, five, six, seven and eight being the proper exception.

It is the further view of this Court that any mechanical and literal applicability of *Section 27 and 43 of the Indian Succession Act, 1865* would lead to incongruity and absurdity because a spouse should not be left to benefit from his /her own wrongs.

The wrongs that are likely to exclude the husband from inheritance of his wife vice versa inludes; **one**, deserting the wife for intolerable period of time [in this case it was over twenty years). **Two**, nonperformance of marriage legal duty for unreasonable period of time (in this case it was more than two decades). **Three**, nonattendance of burial ceremony of the deceased wife/husband for no good reason as it applied to the respondent herein. **Four**, cruelty of the husband to his wife or vice versa leading to death. **Five**, squandering of matrimonial asset for no good cause or for material personal gain.

In the circumstances of the above findings and having considered the cause from all necessary perspective, I 'm of the final view that the District Court of Ilala at Samora clearly fell into an error by listing the respondent from being the beneficiaries of the deceased estate. I restore the Ukonga Primary Court decision. The land matter be referred to the competent Court. In case the suit property will be found a joint matrimonial property, the respondent will be entitled to his contributed share.

This appeal being a probate case, I award no costs. Order accordingly.

Y. J. MLYAMBINA

JUDGE

06/07/2020

Judgement pronounced and dated 06th July, 2020 in the presence of the 1st and 2nd Appellant in person and in the presence of the Sylivester Shayo Advocate for the Respondent.

Y. J. MLYAMBINA

JUDGE

06/07/2020