

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

AT DAR ES SALAAM.

CIVIL APPEAL No. 170 OF 2019

(An Appeal arising from the decision of Temeke District Court, Application
No. 216 of 2018 which originated from Probate and Administration of
Cause No. 15/2014 of Temeke District court)

MARY MICHAEL TEMU @ MARY THADEUS MCHOMVU

@MARIA MICHAEL TEMU.....APPELLANT

Versus

JULIUS THADEUS MCHOMVU.....RESPONDENT

JUDGMENT

24.10.2019 -21.2.2020

J. A. DE-MELLO

The Appellant, herein applied before **Ilala District Court** for, among others, Annulment of Inventory filled by the Administrator of the Estate of the late **Thadeus Joseph Mchomvu** for being illegal, and, the Court to give directions as to the **Administration Cause No. 15 of 2014**. However, this did not impress the Trial Court, which dismissed the same for lack of merit.

Being aggrieved, he has ~~now~~ approached this Court by way of Appeal with the following grounds;

- 1. That, the District Court erred in law and, in fact for accepting the inventory filled in Court for closing probate matter while there are still unsolved disputes among the legal heirs of the estates of the deceased.**
- 2. That, the District Court erred in law and in fact for accepting the inventory filled in Court which includes properties which are not forming part of the deceased's estates.**
- 3. That, the District Court erred in law and in fact for accepting the inventory which exclude some legal children and legal heirs of deceased from inheriting the properties of their late father.**
- 4. That, the District Court erred in law and, in fact for accepting the inventory which does not recognize the Appellant herein above as a wife of the deceased and beneficiary of estates of her deceased husband.**
- 5. That, the District Court erred in law and, in fact for not considering the evidence of adduced by the Appellant herein above during hearing of the case.**

The appeal was argued by way of written submissions pursuant to the order of this Court and record indicates compliance by both.

As for the first ground of Appeal, the Appellant submitted, that, the distribution as per inventory, is biased, as only the children of **Lydia Collins Murray** were given Plot farm of the deceased located at **Kibaha** and four children of Appellant were given small pieces of plots in a swampy area.

The Respondent, reacting to this, submitted that the Appellant has not pointed out which are those unsolved issues as, no evidence that the District Court admitted the inventory but, proceeded to dismiss the Application to nullify the inventory for being illegal, of which the Appellant failed to establish the alleged illegality.

It is a mandatory procedure required by law under **section 107 (1)** of **Probate Act** that the filing inventory in Court is a mandatory procedure following accomplishment by the Administrator in collecting, administered, distributed and disposed the Estate on behalf of and for the benefit of the heirs, whose time span is that of six months. Record exhibits that the deceased had in his life time, lived with more than one woman and in different periods, bearing issues with two women, **Lydia Murray** and, the Appellant. In all that period they acquired properties which are now subject of this matter. What further transpired from the records, is that, and, to avoid hostility among the heirs, they were grouped according to their mothers and, similarly the estates were distributed in the same way. I find it to be the best way for the interests of estates and to do justice to heirs. The Appellant has not showing those unsolved issues to warrant annulment of inventory filled in Court this Appeal. Since the Court has to be moved accordingly and, in the absence I see no merit on this ground of Appeal. Arguing the second ground of Appeal, it is alleged that the house with residential **License No. TMK013401** located at **Mbagala Mgeni** which was distributed to **Mary Michael Temu**, the Appellant herself together with all her children disregarding the fact it was her personal and opposed to the Estates of the deceased subject for distribution. The house

she had possessed and owned long before meeting the deceased. The Appeal is with merit as she prayed for allowing. However, the Respondent told this Court that there is a pending case which is **Land Application No. 285 of 2019** before **Temeke District Land and Housing Tribunal**, where the Appellant is seeking the declaration by the Tribunal that, she is the owner of the land at **Mbagala Vikunai and Mbagala Mgeninani**.

If true then there is no doubt that, this Court has no jurisdiction when it comes to the matter of ownership of the Land, once the Reliefs sought by the Appellant, seeks the Court to for declare right ownership, and as such not able to answer the issue raised in the second ground of Appeal as it is subject to the question which is out of jurisdiction of this Court. The Appellant further submitted on the third ground of appeal that, the inventory filled is biased because it favors the Respondent, the said **Lydia Collins Murray** and her children let alone two other houses in Sinza and six acres of farm at Kibaha. Unfairly she reckons. her children were marginalized by giving them just a small portion of empty Plots which are located in swampy area and only three acres at Kibaha. On a critical note is the Appellant's son one **Joseph Thadeus Mchomvu** who got nothing out of deceased estates.

While opposing all the Respondent rejected the third ground of Appeal, branding it an afterthought having been not part of the issues dealt with before the Trial Court and prayed this Court to dismiss the same. He cited a case of **Shaaban Senge vs. DPP, Criminal Appeal No. 23 of 2008, Court of Appeal of Tanzania**, to stress the point.

In the rejoinder, the Appellant insisted that the Probate which the Respondent lodged had excluded other legal heirs, which the Appellant and other legal heirs came to learn very late as gathered from **Temeke District Court**.

I have carefully examined what transpired at **Temeke District Court** was an Application for Annulment of Inventory filled by the Administrator with prayer by the Applicant for direction as to the **Administrator of the Estates** of the late **Thadeus Joseph Mchomvu**. Neither the issue of exclusion of legal heir nor bias in distribution of Estates was traversed. On this, the case of **Elisa Moses Msaki vs. Yesaya Ngateu Matee [1990] TZCA 17; (4 August, 1990); 1990 TLR 90 (TZCA** the Court of Appeal ruled;

“This Court will only look into matters which came up in the lower Court and decided; not on which were not raised nor decided by neither the trial Court nor the High Court on Appeal.”

In one with the observation by the Respondent this Court is barred to neither proceed nor entertain the third ground of Appeal as the same is newly raised in this stage. It is alleged that **Lydia Murray** one included in the Estates of the deceased, notwithstanding she legally was divorced by deceased at **Kawe Primary Court in 1st October 1998** was improper as she formed not part of the deceased estate. The Appellant claims to be legally married under Christian rites. Evidence were presented to that effect but, not taken into consideration by the Trial Court.

The respondent's appointment as the **Administrator in Probate and Administration Cause No. 15 of 2014**, whose appeal in **Civil Appeal No. 14 of 2016** was withdrawn. The fact that, the Appellant decided to withdraw the Appeal which could define her status, condoned the declaration by the Court. The same cannot find its way in this Court and at Appellate stage rendering it incompetent here. I find this ground with no merit. The question of marriage is clearly defined by the law under the law of **Marriage Act** which provides for relationships rather situations that amounts to marriage. As for the fifth ground of Appeal and considering the cardinal principle of law that Courts do determine matters according to the facts and evidence brought before it and nothing else. That is, who he asserts must prove under **section 110 of Cap. 6**.

Basing on the foregoing, I find the Appeal with no merits, and, it is hereby dismissed with no costs it originating from a Probate matter.

It is so ordered.


J. A. DE-MELLO

JUDGE

21/02/2020