IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

PC. CIVIL APPEAL NO. 102 OF 2019

(arising from Probate Appeal No. 34 of 2018 in the District Court of Kinondoni District At Kinondoni)

FATUMATA DIANE BERETE.....APPELLANT

VERSUS

MARYAM YAHYA HUSSEIN.....RESPONDENT

JUDGEMENT

Date of Last Order: 18/02/2020
Date of Judgment: 28/02/2020

MLYAMBINA, J.

The appellant herein had petitioned for grant of letters of probate administration in respect of the estate of the late Ahmed Shaif Abdulghan Idarous who died *intestate*. It was Probate Cause no. 129 of 2018 before the Kinondoni Primary Court. Following a hearing, the trial Court appointed the appellant herein together with the respondent herein as co-probate administratrix.

The trial Court was further satisfied that the legal heirs of the deceased estate are Zuhura Nuru (Elder Wife), the respondent herein (Second Wife) Lujeyn Idarous (issue) and Linzemaryam Idarous (issue). The appellant was not happy with such decision. She preferred Probate Appeal No. 34 of 2018 before the Kinondoni District Court on three grounds namely:

1. *That,* the trial magistrate erred in law and in fact in admitting the respondent as a core administratrix of the estate of the late Ahmed Sheriff Abdul Idarous while is not legal wife of the late Ahmed Sheriff Abdul Idarous.
2. *That,* the trial magistrate erred in law and in facts in failing, order DNA Test for two children namely Lujeyn Idarous and Linzemaryam Idarous who alleged to be children of the late Ahmed Sheriff Abdul Idarous while had no biological capacity.
3. *That,* the trial magistrate erred in law in failing to assess and examine the evidence adduced there to by the appellant during the hearing of the matter which established clearly that the respondent is not the legal wife of the late Ahmed Sheriff Abdul Idarous.

The first appellate Court having heard the appeal came to the findings that there was a clear admission and recognition of the respondent marriage to the deceased by the appellant in the affidavit filed in Misc. Application No. 61 of 2018 before the first appellate Court between the same parties. It was the finding of the District Court at page 6 of its judgement that:

> *"The records of the trial Court file and the decision, together with the annexed affidavit of the appellant in Miscellaneous*

Civil Application No. 61 of 2018 make this Court fail to understand what appellant meant in her 1st ground of appeal;

The appellant affirmed by affidavit that the respondent is the wife of the deceased in application no. 61 of 2018, again in this appeal against the same person she is telling the very Court that, the respondent was not a wife of the deceased but a mere relative who took care of the appellant grandfather, the deceased. Here I can see the appellant is contradicting herself which make this Court convinced that the appellant has an hidden agenda..."

As regards the prayer to undergo DNA Test, the District Court found that the appellant had no *lucus* to move the Court as she was yet to be appointed the administratrix. Page 7 of the impugned judgement partly reads:

"....I understand that administrator of the deceased estate steps in the shoes of the deceased once he is appointed. It is unjustified for appellant to move the trial Court to make an order that the children undergone DNA test, this is because by the time the appellant appeared to the trial Court she was not yet appointed as administratrix of the deceased estate. This means he had

no capacity to stand and make that application leave alone the issues of the jurisdiction of the trial Court to deal with DNA applications which at length Mr. Othman argued in his submission.

The main duty of the Court in probate matters is the appointment of the administrator of the deceased estate and that duty was furnished by the trail Court to the extent that both the appellant and the respondent were co appointed as administrix...."

The appellant has been dissatisfied with the decision of the District Court. Hence, this second appeal on the following four grounds:

1. *That,* the district Court on appeal grossly erred in law and in fact in treating as evidence and acting on extraneous materials purportedly put before it through and in the respondent's counsel's submissions while such material did not form part of evidence on record received by the Court of first instance or having been taken additional evidence as required by law and as such arriving into erroneous conclusion that the respondent was married to the deceased.
2. *That,* the District Court on appeal erred in law and in fact in not properly and critically re-evaluating and analyzing a fresh

documentary evidence adduced by the respondent as allegedly proving her marriage to the deceased while such evidence was generally and wholly unreliable and unworthy of belief.

3. *That,* the District Court on appeal erred in law and in fact in not finding that the Court of first instance having made a finding that the issue of DNA test as regards the respondents children to wit Lujein Idarous and Linzemaryan Idarous was within the powers of the administrator (s) to decide to cause its carrying out or otherwise had wrongly and improperly concluded that such children were among the heirs of the deceased while such conclusion was prematurely made and in usurpation of the powers of the said administrator (s).
4. *That,* the District Court having properly observed that the main duty of the Court of first instance was appointed of the administrator (s) of the estate of the deceased erred in law in not finding that the said Court of first instance had usurped into performing duties which are reserved to administrator(s)

Wherefore the appellant prayed this appeal be allowed:

i) The appointment of the respondent as co administrator of the estate of the deceased be revoked.

ii) The order by the Court of first instance (Primary Court) recognizing the respondent's children to wit Lujein Idarous And Linzemaryam Idarous as heirs of the estate of the deceased be set aside;

iii) The order by the Court of first instance (Primary Court) recognizing the respondent (Maryam Yahya Hussein) as among the heirs of the deceased be set aside;

iv) Costs be provided for;

v) Any other or further relief which the Court may deem fit and just to grant.

The appellant has been represented by senior counsel Dennis Michael Msafiri the respondent was represented by counsel Flora Jacob. By consent the appeal was argued by way of written submission.

The first ground of appeal calls upon this Court to determine whether the district Court entertained extraneous materials which did not form part of evidence on record received by the Primary Court.

The appellant argued inter alia that the proceeding and decision of the Kinondoni District Court in Miscellaneous Civil Application No. 61 of 2018 which was referred to by the District Court on appeal

as it appears at page 3 and 6 of its judgement were not tendered in evidence in the trial Primary Court to form part of record evidence of that Court. Thus, the District Court heavily relied on such extraneous matters and proceeded to decide the appeal substantially on the same contrary to the requirements of the law and established principles.

In reply, the respondent was of correct submission that the appellants affidavit in support of Misc. Application No. 61 of 2018 was not a new document. Rather, it was a document which was part of the Primary Court records tendered by the respondent before the Primary Court, when objecting the respondent to be appointed as the administratrix of the deceased estate.

The respondent was of further reply that, even if the appellants affidavit is expunged there was still sufficient evidence showing that the respondent is the deceased's wife which includes the appellant's own testimony before the Primary Court which can be seen from un-numbered page 2-3 of the Primary Court judgement where the appellant testified as SMI that:

> *"SMI aliendelea kusema marehemu ameacha mali zisizoondosheka, ameacha wake wawili wa kwanza Zahara Nuru, wa pili Mariam Yahya Hussein..."*

I have gone through the entire records of the Primary Court and of the District Court. I noted the appellant has not denied the existence of her affidavit dated 9th April, 2018 which was filed in Misc. Application No. 61 of 2018 before the Kinondoni District Court. Under paragraph 2 of that affidavit, the appellant recognized the respondent as the second wife of the deceased though Misc. Application No. 61 of 2018 was about granting an order of DNA Test of the late Ahmed Sharif Abdulghani and the two children of the deceased. The Court cannot be estopped from taking reference on such affidavit evidence as it concerned the same party over the same matter of appointment of probate administrator and recognizing lawful heirs.

As correctly stated by the respondent even if this Court is to disregard the impugned affidavit, the evidence of the appellant herein while before the Primary Court brings into a finding that she knew and is aware the respondent was the second wife of the deceased.

On the second ground of appeal, the appellant argued inter alia that a closer look at "Kielelezo "A" which the Primary Court referred to and acted upon as evidence of marriage between the respondent herein and the deceased falls for short of having any authenticity required under the provisions of *Section 33 of the law of Marriage*

Act, Cap 29 of the laws. In view of the appellant, in order for certificate of marriage to be valid it must be in a prescribed form and should be signed not only by the District Registrar, Kadhi or minister of religion but also must be signed by the parties to the marriage and by two witnesses. The Certificate of Marriage B No. 03389460 was not signed by any of the persons named there in including the Kadhi himself. More so, all the particulars therein conspicuously show that they were filled by one person as the hand writing looks to be of one some person.

The appellant argued further that the certificate states the marriage was celebrated at Arusha Mjini perplexingly however the rubber stamp of the Kadhi one Sheikh Mwaita Mohamed bears a Dar es Salaam address. The marriage seems to have been celebrated on 9th March 2005 when the parties were aged 55 and 32 years respectively and their residence was Magomeni. It was contracted under Islamic rites (SUNNI SECT).

More perplexingly, according to the appellant, the other certificate of marriage said to have been issued by Bakwata shows the marriage was contracted on 10th March 2012 at Levorosi in Arusha and the parties were aged 60 years by 30 years thus it is strange that from 2005 to 2012 only five years had passed while simple arithmetic is 7 year difference. In view of the appellant it is a

product of forgery and that the respondent was legally required to prove authenticity of the marriage certificate.

As pointed by the respondent, after I went through the records, it appears all what has been raised by the appellant in the second ground were not pointed out in Appeal No 34 of 2018. In the case *of Remigrous Muganga v. Barrack Bulyanhulu Gold Mine,* Civil Appeal No. 47 of 2017 (unreported), the Court was of settled principle that the higher Court will only look into matters which came up in the lower Court and were decided; and not new matters which were neither raised nor decided by neither the trial Court nor the high Court on appeal.

Even if I may agree with the appellant that the authenticity of the marriage was into question, I subscribe with the respondent on four points;

One, there is no any provision of law which requires that a certificate of marriage be filled by different hand writing provided the requirement of law under Section 33 (1) (*supra*) is complied with.

Two, there is no any arm for the signatures of the sheikh, parties to marriage and witnesses to be interested in form of names.

Three, there is no any provision of law requiring the parties to marriage to celebrate their marriage at a particular place or at their residential home.

Four, it is the appellant who questioned the authenticity of the marriage certificate in terms of Section of the law of evidence act.

As regards the 3rd ground of appeal, the appellant argued that in order for a child to inherit the estate of the deceased, there must always be proof that the child is truly an issue and survivor of the deceased that, under Islamic law there is no right of inheritance arising from mere foster parentage to an alleged father.

It was the appellant's argument that even though the Court had noted that during the lifetime of the deceased no DNA Test was carried out the Court had decided or rather observed that such issue could be pursued by the persons (s) who will be appointed administrator (s) of the estate of the deceased. Thus, it was a gross contradiction and misdirection on the part of the trial Court to jump and conclude outright that the children were proved to be heirs of the estate of the deceased while paternity of the deceased was yet to be resolved.

As replied by the respondent, the respondent established before the Primary Court that the two issues Lujein Idarous and

Linzemaryam Idarous were parented by the deceased as their father. The question whether the deceased was a biological father has no merits at all. There is no any evidence in record showing that for all the time from the birth of the two issues up to the death of the deceased ever disowned them or claimed for DNA Test. That modality of life entitled the Primary Court to reject the DNA test even if it had jurisdiction.

Above all, the question of inheritance does not strictly depend from being biological issue. Others get inheritance through parentage, adoption or guardianship. Had the deceased raised the issue of DNA test, before his death, that could be a good point. Entertaining DNA Test at this stage would not help the deceased estate.

As to the fourth ground of appeal, the appellant argued *inter alia* that the district Court properly held that the duty of the Primary Court was to appoint administrators and thereafter leave them to perform their duties subject to giving directions as and when required as permitted under paragraph 5 of the fifth schedule to Magistrates Courts Act.

The appellant went on to argue that powers by the administrator (s) can effectively and properly be performed after their

appointment without the Court interfering by giving orders right during the stage of appointment.

In response, the respondent submitted that the power vested to the Primary Court under fifth schedule of the magistrate Court's act and rule 8 of the Primary Court (Administrate of Estate) Rules do not end up on appointing administrator (s) only rather it goes further to make such other orders necessary for the distribution of estates of the deceased paragraph 2 (d) and (h) of the fifth schedule (supra) provides:

> 2. *A Primary Court upon which jurisdiction in the administration of deceased's estates has conferred may (d) make orders as to the administration of the estate..."*
>
> *(h) make any order which has power to make under this act in cases of a civil nature"*

From the afore quoted provision, I do agree with the respondent that the Primary Court was correct in making additional orders of identifying the lawful heirs. I have three reasons to buttress such position.

First, there was a resistance of the appellant herein in accepting the issues as biological issues of the deceased and their mother as the second wife of the deceased in the appeal though the same

appellant had accepted the same wife in *Misc. Application No. 61 of 2018.*

Second, there were sufficient proof in record that the issues were of the deceased. Such proof included but not limited to the birth certificates of the issues.

Third, following the caveat of appointing the respondent as the co-administratrix and resolving of the DNA Test application, there was no other better time for the Primary Court to resolve the issue of legal heirs than during the trial.

In the light of the foregoing, I find this appeal is lacking merits. The two lower Court decisions are upheld. Costs be shared.

Y. J. MLYAMBINA
JUDGE
28/02/2020

Judgement pronounced and dated this 28th day of February, 2020 in the presence of the appellant in person and Counsel Flora Jacob for the respondent.

Y. J. MLYAMBINA
JUDGE
28/02/2020