IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DISTRICT REGISTRY OF MOSHI

AT MOSHI

PC CIVIL APPEAL NO. 14 OF 2019

DICKSON JIMMY KOMBE

(Administrator of the Estate of

the late **JIMMY JACOB KOMBE) .....APPELLANT**

VERSUS

RUWAICHI JIMMY KOMBE.....RESPONDENT

JUDGEMENT

Last order:12/05/2020

Date of delivery: 17/8/2020

MWENEMPAZI, J:

The appellant is aggrieved by the whole decision of the District Court of Moshi (Hon. P. Meena-RM) in Probate Appeal No. 11 of 2019 delivered on the 4th July, 2019. He is appealing raising two grounds of appeal as follows:

1. That, the Honourable Magistrate erred in law and in fact for deciding that the Mwika Primary Court Judgement is nullity for lack of jurisdiction to entertain Probate Cause No. 7 of 2018 which

contains registered land under Land Registration Act, Cap. 334 (R. E.2002).

2. That, the Honourable Magistrate on appeal failed to understand the appeal before the court, which made the court to give an order for the parties to file new case in the court with competent Jurisdiction without occasioning reasons on which new case was to be filed.

The appellant prays that this Honourable court gives an order that, this appeal is allowed with costs; the Primary Court decision on appointment of the Appellant as the administrator of the Estates of the late Jimmy Jacob Kombe be restored, and any other relief(s) this Honourable court may deem fit and just to grant.

This matter originates in the Primary Court in Probate and Administration Cause No. 7 of 2018 in which the appellant Dickson Jimmy Kombe was granted probate to administer the estate of the late Jimmy Jacob Kombe. The appellant took office of administration of the estate and distributed the estates to the beneficiaries according to the wishes of the deceased. The Respondent was not happy with the distribution.

On the 3rd September 2018, the Respondent petitioned in the Primary Court for the revocation of the letters of administration given to the appellant giving two reasons; One, that the administrator has failed to distribute the estate of the deceased timely. Two, that the clan failed to interpret the deceased's will on the house located at Uswahilini. Upon hearing of the case, the Primary Court Magistrate decided in favor of the

appellant by overruling the two grounds of objection raised against the administrator. The Primary Court Magistrate reasoned that the administrator was within time in performing his work and also agreed that the deceased was chagga and lived according to Chagga customary traditions; therefore, his estate was to be distributed according to Chagga customs. The Primary Court Magistrate further ruled that the Respondent was the one delaying the process of administration of the deceased estates.

The respondent appealed to the District Court of Moshi at Moshi, whereby the District court nullified the decisions of the Primary Court on the reasons that the Primary Court has no jurisdiction to entertain probate cases involving registered landed property under the Land Registration Act, Cap. 334 R.E.2002. This decision aggrieved the appellant. He filed this appeal.

Parties agreed and prayed to argue the appeal by way of written submission and the Court granted leave according to the prayer. They duly complied to the schedule of filing their respective written submission. The appellant was enjoying services of Ms. Valentina Nyamanoko Bwire, learned advocate and the Respondent was enjoying the services of Mr. Alfred Sindato, learned advocate.

The counsel for the appellant in submitting on the first ground of appeal stated that in the judgement of the District Court at page 3 through to 4, the court referred to *section 18(1)(a)(i) of the Magistrate Courts Act, Cap. 11 R. E. 2002* which provide that:

"1) A primary court shall have and exercise jurisdiction–

(a) in all proceedings of a civil nature–

(i) where the law applicable is customary law or Islamic law:

Provided that no primary court shall have jurisdiction in any proceedings affecting the title to or any interest in land registered under the Land Registration Act "

The court concluded at page 4 with the following words:

"...the property in question was registered landed property No. L.O.No. 22021, Plot No. 7 Block 'P' Section III CBD. Therefore, the Primary Court has no jurisdiction in whatever manner to entertain the matter. The decision by the Mwika Primary Court is therefore not proper and cannot stand as the court had, in first place no jurisdiction to entertain the matter."

The counsel has submitted that the District Court erred in law by reaching at the conclusion by disregarding proper interpretations already made on the provisions of section 18(1)(a)(i) of the Magistrates Courts Act, Cap. 11 R.E 2002 by the Court of Appeal of Tanzania in the case of ***Scolastica Benedict V Martin Benedict [1993] TLR 1 (CA)*** *where it was held that:*

"all primary courts have been given jurisdiction in matters of administration of estates regardless of whether the subject matter is

land registered under the Land Registration Ordinance provided the applicable law is customary law or Islamic law"

The counsel submitted that the case is relevant to the situation at hand. In the referred case, the Court of Appeal approached the issue of jurisdiction of the Primary Court by stating that the **Magistrates Court's Act, Cap. 11 R.E.2002** did not specify the particulars of jurisdiction of Primary Court in administration of estate. But the law empowered the Chief Justice to specify such jurisdiction. The Chief Justice did specify such jurisdiction by order published in **G. N. No. 320 of 1964**. Rule 2 of the Order provides that:

"Every primary court shall have jurisdiction in the administration of the estate of a deceased person, if -

(a) the deceased, at the time of his death, had a fixed place of abode within the area of jurisdiction of the court; and

(b) the law applicable to the administration or distribution of, or the succession to, the estate is customary law or Islamic and the estate is not one to which the provisions of the ***Marriage, Divorce and Succession (Non-Christian Asiatics) Ordinance*** *apply."*

According to the provisions of rule 2 the jurisdiction of the Primary Court is limited by applicable law (customary or Islamic law) and that the place of abode of the deceased must be within the local jurisdiction of the court.

The counsel has also referred this court to the book by ***NNN Nditi Jr., (Succession and Trusts in Tanzania: Theory, Law and Practice)***

at page 195-196. The author has confirmed the history of the position of law in the case of ***Scolastica Benedict v Martin Benedict [1993] TLR 1*** *to be the position of law since year 1993.*

> *"section 18(1) (c) of the Magistrate's Courts Act does not limit the jurisdiction of Primary Courts to entertain matters of registered land because subsection (2)a is the relevant provision which does not house any limit. Hence, Primary Courts have jurisdiction in administration of estates involving registered land."*

As to whether the case at hand fell within the four squares of the customary or Islamic law the counsel referred this court to the judgement of the Primary Court at page 5 of where the Magistrate recorded that:

> *"…. hapakuwa na ubishi kuwa marehemu alikuwa ni mchaga, na Maisha yake aliyaendesha kwa mujibu wa mila na desturi za kichaga."*

The counsel submitted that the finding of the District Court Magistrate that there is no record which show the deceased's estate is either in customary or Islamic is unfounded. The Primary court sitting with assessors determined ways of life/life style of the deceased and found that he lived according to chagga customary laws and it was an undisputed fact in Primary Court.

The interpretation given to the will had to follow customs of chagga and it was right to refer the first *grandson at home* to be Gift who is the son of the last son of the homestead according to chagga customs. The counsel

concluded that Mwika Primary Court properly determined the applicable law to be customary law.

The counsel for the Respondent has submitted that they dispute the whole appellant's submission. In his submission, I have gathered in summary that the District Court Magistrate was right in his holding that the Primary court has no jurisdiction to entertain the Probate cause because it involved a Matrimonial Property and that the deceased died testate (left the Will). Those factors make the case not to fall under the jurisdiction of the Primary Court. According to the counsel for the respondent, the provisions of the Marriage Act apply to the property in question. In his view, the two conditions in Rule 2(a) and (b) of **G.N. No. 320 of 1964** must be construed conjunctively and not disjunctively as erroneously construed in the appellant's submission. The counsel has also submitted that the case of ***Scolastica Benedict v. Martin Benedict***(supra) has been wrongly relied upon as the property at Uswahilini referred in the Will is a Matrimonial Property not subject to customary law. Therefore, the trial Primary court has no jurisdiction to entertain the matter before it. Again, in Scolastica case, the appellant died intestate while in this case the deceased died testate. For testacy deaths the law bestows that the deceased's Will be respected to the letters. He has cited the case of ***Celestina Paulo versus Hussein Mohamed*** [***1983] TLR 291*** and argued that the Will cannot be altered by the Clan's decision or whoever to suit the customs and or the Chagga traditions. His argument is that the deceased's Will was wrongly interpreted by the trial Primary Court and it was wrongly opined by

assessors to suit the customary law which was contrary to the wishes of the deceased.

I had to go back to the decision of ***Scolastica Benedict v. Martin Benedict*(supra).** The holding is as follows:

> *"By order published in the Gazette as Government Notice No 320 of 1964, the Chief Justice did just that. Under rule 2 of that Order it was stated that:*
>
> *Every primary court shall have jurisdiction in the administration of the estate of a deceased person, if -*
>
> *(a) the deceased, at the time of his death, had a fixed place of abode within the area of jurisdiction of the court; and*
>
> *(b) the law applicable to the administration or distribution of, or the succession to, the estate is customary law or Islamic and the estate is not one to which the provisions of the Marriage, Divorce and Succession (Non-Christian Asiatics) Ordinance apply.*
>
> *It is evident from this order of the Chief Justice that all primary courts have been given jurisdiction in matters of administration of estates regardless of whether the subject matter is land registered under the Land Registration Ordinance provided the applicable law is customary law or Islamic law, other than matters falling under the Marriage, Divorce and Succession (Non-Christian Asiatics) Ordinance."*

I have a view that the court in the case of ***Scolastica Benedict and Martin Benedict***(supra) is straight forward. We have a case where there is not matrimonial dispute here as to make the law of Marriage Act apply. This is the probate case involving administration of the estate of the late Jimmy Jacob Kombe not a matrimonial case.

In the argument that the deceased in this case died testate, he is right. However, even dying testate does not deprive the Primary Court of its jurisdiction in the probate and administration of estates. Petitioning for administration of estate in the primary court is made under Rule 3 of ***The Primary Courts (Administration of Estates) Rules, G.N. 49 of 1971*** provides as follows:

> *"3. An application for the appointment of administrator under paragraph 2(a) or 2(b) of the Fifth Schedule to the Act shall be made in Form I.*
>
> *"4(1). If, in any application under rule 3, it is averred that a will made by the deceased person subsisted at time of his death, the officer of the court shall require the applicant to produce the will or, if the will is not in his custody, to state in writing the name and address of the person for the time being holding the will or, in the case of the will being alleged to have been lost, destroyed or mislaid to submit a written version of the terms of the will together with an affidavit testifying to the correctness thereof.*

(2). Where the applicant fails to comply with the requirements of sub rule (1), the court may presume that no will be subsisted at the time of the death of the deceased person or, if the circumstances of the case so warrant, that the will had been lost, destroyed or mislaid.

(3). If the applicant delivers to the officer of the court a document which he claims to be the will of the deceased person, or to be the terms of such will, the officer shall forthwith make a copy thereof and shall place the original document in safe custody.

Rule 8 of the **G.N. 49 of 1971** deals with other matters to be decided by the court. the same provides as follows:

"*subject to the provisions of any other law for the time being applicable the court may, in the exercise of the jurisdiction conferred on it by the provisions of the Fifth Schedule to the Act, but nor in derogation thereof, hear and decide any of the following matters, namely: -*

(a) Whether a person died testate or intestate;

(b) Whether any document alleged to be a will was or was not a valid or subsisting will;

(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 which vested in or lay on the deceased person at the time of his death;

(e) Any question relating to the payment of debts of the deceased person out of his estate.

(f)** Any question relating to the sale, partition, division or other disposal of the property and other assets comprised in the estate of the deceased person for the purpose of paying off the creditors or **distributing the property and assets among the heirs or beneficiaries.

(g) Any question relating to investment of money forming part of the estate; or

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

A close look at the case at hand, shows that **Rule 8(c) and (f)** are relevant. According to Rule 4 as quoted above procedure has been regulated to accommodate the petition for the estate whose deceased has left a Will. The question which was dealt by the Primary Court of Mwika was who is the named beneficiary according to part C-1 and the propriety of the distribution done by the administrator in this case. Even in the petitioning process, Form 1 give an option to attach a written Will by virtue of item 2.1(2) and or state oral directives(will) stated in the affidavit by the petitioner.

It is unfortunate, the counsel for the Respondent has cited a number of decisions to assist the court but they are not attached to substantiate his position. From the record it is clear that the property at Uswahilini is registered landed property.

As to the interpretation of the Will in question, I have read the judgment of the Primary court and I am satisfied with the translation which was made. It was the right one given the circumstances at hand. As to the question whether the deceased wanted to be understood that he was not following chagga traditional customs or not, we need to read the whole will and not just Part C-1. I believe, if you read the whole Will, the deceased maintained the chagga customs; even the decisions he made and wrote in the document clearly depict him as a traditional man accustomed to Chagga traditions. If the whole part C is read it clearly shows the observation I have just made.

The paragraph is written ***"NINA Nyumba*****.....** *Nairidhisha mjukuu wangu wa kwanza hapa nyumbani bila kupokonywa haki yake hiyo na mtu yeyote"*. That cannot anyhow be said it meant to be matrimonial property. It was personal singular. In the judgment of the Primary court it is written:

> *"marehemu alieleza kuwa....Namridhisha Mjukuu wa Kwanza hapa nyumbani... kauli hiyo ingeleta utata kama maneno haya yangekuwa.... namridhisha mjukuu wangu wa kwanza. Lakini maneno 'hapa nyumbani' kama ukoo ulivyofafanua alimaanisha pale nyumbani kwake anapoishi"*

Under the circumstances it cannot be said the Primary Court lacks jurisdiction to deal with administration of estates where the deceased has a place of abode within the local jurisdiction of the court and the applicable law is customary law or Islamic law even if the deceased died testate.

I find the court had jurisdiction to entertain the probate case between parties in accordance to the law as it stands. The ground of appeal is therefore allowed.

The second ground of appeal deals with the order of the District Court Magistrate who ordered the parties to file their case on the court or competent jurisdiction. The counsel for the appellant has submitted that the decision leaves confusion to the parties. That whether the letters of administration were revoked so that the new case should be instituted for appointing and administrator to deal with the estate or the new case should be opened to interpret the 'Will' of the deceased which made the distribution of the deceased's estates. Parties are in conflict. According to the appellant the primary Court dealt with the matter in the right way.

The respondent has argued that the District Court is empowered to revoke and annul the grant of probate and letters of administration under section 49(1) of Cap 352 and rule 29(1) of Probate Rules provide for the manner of application for revocation. The counsel has submitted that failure to interpret the said Will and the law was a crucial tenet to annul the probate. Thus, the trial Primary court's decision is a nullity. This Honourable court cannot entertain a nullity. The trial magistrate was correct to order that

parties had to file their probate case in the court of competent jurisdiction, not in the Primary court. In his opinion it should be the High court.

I think, that ground should not detain us more. That order was made in error basing on the finding that the court had on issue of jurisdiction. Since I have just concluded that the Primary court had jurisdiction, that order has to be set aside for being baseless.

For the reasons stated above, this appeal has merit and the same is allowed. Given the nature of the case, I think it will be fair if each party will bear his or her own cost.

T. MWENEMPAZI

JUDGE

Judgement delivered in Court in the presence of the appellant and his advocate and the respondent and her advocate this 17th August, 2020

T. MWENEMPAZI

JUDGE.