THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
MBEYA DISTRICT REGISTRY
AT MBEYA
PROBATE AND ADMINISTRATION APPEAL NO. 06 OF 2019
(Arising from the decision of the District Court for Mbeya in Probate and Administration Appeal No. 01 of 2019. Original from Mwanjelwa Primary Court in Probate and Administration Cause No. 20/2018)

KRISTANTUS MSIGWA.....APPELLANT
VERSUS
MARRY ANDREW MASUBA.....RESPONDENT

JUDGMENT

Date of last Order: *01/06/2020*
Date of Judgment: *17/08/2020*

NDUNGURU, J.

This matter has a chequered history. The deceased one Patrick Andrew Masuba died intestate in Mbeya on 17/10/2017. In the Probate and Administration Cause No. 20 of 2018, Mwanjelwa Primary Court granted letters of administration to Mary Andrew Masuba, the deceased sister (the respondent in the instant appeal). The appellant filed the objection challenging grant of letters of administration to the respondent.

Following the objection, the Primary Court found that the appellant was child of the deceased and a lawful heir of the deceased estate and

further the respondent's appointment as administrator of the estate was revoked.

The respondent being irritated with the revocation and the recognizance of the appellant as among the lawful heirs of the estate appealed to the District; Probate Appeal No. 01 of 2019.

As commented by the appellate Resident Magistrate in his judgment, I have faced the same situation. The grounds of appeal presented at the District Court are not apprehended with easy. It is very difficult to understand what was the appellant appealing against.

Notwithstanding the fact that the appeal was disposed by way of written submission still, noted from the judgment of the appellate Resident Magistrate, the submission was of no help to understand what is in the minds of the disputants. Being the experienced Principle Resident Magistrate made a close check on the merits of the whole case and accordingly decided it.

In its decision, the District Court restored the respondent in the then revoked position of being administrator of the estate of the deceased and nullify the recognition of the appellant being the heir of the estate.

The court further advised the appellant to follow procedures so as to be recognized as being one of the issues of the deceased.

The appellant one Kristantus Msigwa being aggrieved with the whole decision of District Court of Mbeya is now appealing to this court. In his petition of Appeal the appellant has raised four grounds of appeal as reproduced hereunder:

1. That the District Court Magistrate failed to address his mind that, the grant of administration by Mary Masuba has been obtained fraudulently without participation and will of the appellant with other children of the deceased inspite of such concern raised to the court to the effect in their reply to the petition of appeal that she has excluded the children who are beneficiaries.
2. That the District Court Magistrate erred in law and fact by holding that, the appellant is neither beneficiary nor blood related of the deceased Patrick Andrew Masuba in utter regard of the strong evidence adduced at the lower court during the trial.
3. That, the District Court Magistrate erred in law and in fact by holding that there is no ground to revoke administration of the respondent, while the proceedings to obtain such grand were defective in substance to the effect, memorandum of the family meeting appointing the Respondent excluded the Appellant with other children of the deceased; in utter regard to the Primary Court Order that children be included.

4. That, the District Court Magistrate erred in law for entertaining issues outside from those contained in the memorandum of appeal, and biasly invoke extraneous matters hence reached to a wrong decision.

When the matter was called before me for hearing Mr. Maumba learned advocate appeared for the appellant while Mr. Paul Mashoke learned advocate represented the respondent. Upon application from the counsels, the court ordered the appeal be disposed by way of written submissions.

In submitting for the application Mr. Maumba learned counsel abandoned the 1st and 3rd grounds of appeal thus proceeded with the 2nd and 4th grounds of appeal.

On the second ground of appeal Mr. Maumba was of the submission that the evidence on record during the trial at the Primary Court established the fact that the appellant is the blood son of the deceased one Patrick Andrew Masuba, likewise his brothers Faraja Patrick Masuba and Andrew Patrick Masuba. He went on saying that PW2, PW3, PW4 and PW5 who worked with the deceased closely confirmed that the appellant was the son of the deceased and he is employed in the name of Kristantus Patrick. He also said from the evidence the PRF 14 and finger prints report which were tendered shows that the appellant is the son of the deceased.

That counsel was of the contention that had the District Court Magistrate directed his mind to the evidence on record could not have reached to the decision that there is no evidence that the appellant is the son of the deceased.

Mr. Maumba, further submitted that there is no law or customs which require a parent to introduce his children to the family members whenever they are born.

On the 4th ground Mr. Maumba was of the argument that being the first appellate court, the District Court was bound to evaluate evidence as a whole. Had the District Court Magistrate done that he could have found that the whole appeal was centred or whether the appellant with his two brothers were the children of the deceased and whether the Probate Cause No. 20 of 2018 at Mwanjelwa Primary Court which the appeal lies was res-subjudice. He said that was due to the strong evidence of PW1, PW2, PW3, PW4 and PW5 (the sister of the deceased). Further that the appellant had informed the court that he had already filed Probate Cause No. 33 of 2018 at Mbeya Urban Primary Court on the same estate.

The counsel further contended that before the District Court the appellant (respondent) never raised the issue of default in administering

the estate but the District Court Magistrate delt with it as a pertinent issue. He thus argued the appeal be allowed.

Mr. Mashoke advocate for the respondent was of the submission that the deceased during all his life time had never introduced to the clan the appellant and his family. Thus the appellate court was right to find that the appellant and his brothers Faraja and Patrick were not blood related to the deceased. The counsel fortified his argument by citing the case of **Violet Ishengoma & Jovin Mutabuzi vs. The Administrator General & Edudokia Kahangwa [1990] T.L.R 72.**

The counsel submitted further that there is no any background history of the deceased to have had married any other woman apart from Merisiana Mwingira who died without having a child. He said under G. N. No. 436 of 1963, an illegitimate child cannot inherit from the father's side upon the father dying interstate.

It was a further argument of the counsel that all witnesses who testified before the court made mere narrations and stories. No any legal document was tendered to support their evidence such as birth certificate. It is from the bare stories the appellate court advised the respondent to make proper procedures to be recognized as being the issue of the deceased. He thus urged the court to dismiss the appeal with costs.

The point of determination here is whether this appeal is meritorious. Before going to the merit of the application in the light of the grounds of appeal presented and the rival submissions made by the counsel of the parties, I wish to make it clear that, the original jurisdiction over probate matters is vested to the Primary Court and the High Court. The District Court and the Court of Resident Magistrates are vested with such jurisdiction in the small estates.

The jurisdiction of the Primary Court in the probate matters is when the law applicable is customary or Islamic. This jurisdiction is provided for under Section 19 (1) (c) of the Magistrates Courts Act, Cap 11 (Revised Edition 2019) particularly in the Fifth Schedule. Paragraph 2 of the Schedule provides for the functions of the Primary Court in the administration of the deceased estates among others is; the appointment of the administrator (s) who is interested in administration of the deceased estate, and revocation of any appointment of the administrator it did for a good and sufficient cause.

Its further functions are contained in Rule 8 of G. N. No. 49 of 1971 which are to determine whether the deceased died testate or interstate, whether the document alleged to be *"will"* of the deceased is a valid *"will"* of the deceased or not, any question as to the identity of

persons named as heirs, executors or beneficiaries in the will and many others.

In the case at hand, the Primary Court performed its role of first appointment of the administrator of the estate. In this role the court appointed the respondent the administrator. Upon objection being raised on the appointment, the Primary Court heard/entertained the objection. Being satisfied by the objection, the court revoked the appointment. In all that it did were within its powers.

As noted above, the revocation must be done upon good and sufficient cause. The question is to whether the revocation of the respondent was upon good cause. The Primary Court record reveals that the revocation was done following objection raised by the appellant. Rule 9 (1) of the Primary Court (Administration of Estates) Rules G. N. No. 49 of 1971 lists matters that can move the court revoke/annual the appointment. From the record the reason for revocation is that the appellant was not involved in clan meeting of appointing the administrator. As decided by the District Court, I also find that, that was not a good and sufficient cause to warrant revocation.

That being my position, I thus agree with the holding of the District Court, that the revocation was not proper, restoration of the

respondent to that position is the only remedy as done by the first appellate court.

Having so done, I proceed now to test the second ground of appeal on the legality of the appellant to inherit the estate of Patrick Andrew Masuba, the deceased.

The objection raised by the appellant was to the effect that, the respondent had excluded him with his two brothers from the estate of the deceased while they are blood children of the deceased. From the objector's side, five witnesses testified and some documentary evidence were tendered to prove that the appellant and his two brothers Patrick and Faraja are blood children of the deceased.

The respondent's side had three witnesses who denied to recognize the appellant and his brothers to be the sons of the deceased. The basis of their denial was that the deceased had never introduced them to the family and clan members. That to the best of their understanding, their relative (deceased) had no issue left alive. It was their assertions the deceased married wife who was not blessed with any issue passed away earlier before the deceased.

The court having scrutinized the evidence tendered by both sides was satisfied that the appellant and his brothers are lawful children of the deceased, the court held:

"Kwa sababu tulizotoa hapo juu ikiwemo maelezo ya mleta maombi pamoja na mashahidi wake, Mahakama hii imekubaliana na ushahidi huo kwa kuona kuwa mleta maombi ni mtoto halali wa marehemu na wanastahili kuteua Msimamizi wa Mirathi ya mali ya Baba yao."

The respondent being dissatisfied with that decision preferred the appeal to the District Court. As stated earlier, that the grounds are not easily understood due to the grammatical composition. But the second grounds reads:

2 "The honourable Primary Court erred both in law and fact when it entertained the respondent evidence with no law record concerning him/her being the son/daughter of one Patrick Masuba."

To my opinion, the above was the centre of the appeal before the District Court, which has also brought about the appeal at hand.

Dealing with the above ground which actually intended to test as to whether the appellant was the issue/child of the deceased Patrick Andrew Masuba, the first appellate court, at page 3 last paragraph of the typed judgment said:

"PW2 P. 4310 ASP Mganga Mhando, PW3 B.691 Sgt. Adam, PW4 Rodrick Kasilati Mwang'onda and PW5 Ireen Masuba, tried to convince the court that the respondent was one of the issues of the late Patrick Andrew Masuba. The court believed as such that the respondent is one of the issues of

the late Patrick but it did not give reasons as to why it had arrived at that conclusion."

On the same issue at page 5, third paragraph the said first appellate court judgment reads:

"The appellant and other family members of the decease estate had not, at any point, recognized the respondent being one of the issues, whether legal or illegal, of the Patrick Andrew Masuba. The Primary Court, either was not certain on this, but it allowed the application. The court below erred for as the respondent was not a creditor of the deceased's estate or any heir or beneficiary thereof for there was no concrete evidence that the respondent was from the blood relationship or any part thereof, of the deceased Patrick Andrew Masuba."

At the conclusion, it's the appellate court Magistrate, said *"the respondent is advised to make proper procedure to be recognized as being the issue of the late Patrick Andrew Masuba by following the proper procedure ...."*

Basically, it is this holding which prompted this second appeal as it can be depicted in the second ground of appeal. At the outset, let me point it out that it is a settled law that the duty of the first appellate court is to reconsider and re-evaluate the evidence and come to its own conclusion bearing in mind that it never saw the witnesses as they testified (See **Pandya vs. Republic (1957) EA 336**. From the

judgment of the first appellate court is very clear, the appellate Magistrate failed to properly do the task. Thus, even the conclusion reached at has no legal foundation. I will try to re-evaluate in the next few lines.

I prefer to start with the defence evidence. Basically DW1 and DW2 are the young brothers of the deceased, their evidence is to the effect that in the life time of the deceased, he had never introduced the appellant to be his son. That the deceased married one Merisiana Mwingila who was not blessed with any issue up to her death. DW2 specifically said the deceased had married one Merisiana Mwingila but they were not blessed with the issue. Further he said the deceased had three children Patrick Merisiana and Linda who all died.

While the objector's side had five witnesses. OW1, (Objector witness), OW2 and OW3 were to workers (Prisons Officers) of the deceased, while OW4 was the Cell (Mtaa) leader where the deceased lived. PW5 was the young sister of the deceased. OW2 and OW3 testified on how they came to know the appellant to be the deceased son. OW2 who was a representative of the Prison Officer In charge where the appellant is also working told the court the appellant is the son of the deceased according to the official records present that was PRF 14, his letter of employment and Finger print report all have the

name of Masuba as the father's name, he also said the condolence issued by the prison authority on the death of Patrick Andrew Masuba were given to the appellant.

OW3 who was also the Prison Officer told the court that he was guarding the deceased on job and at home. That the deceased told him that the appellant was his son, and sometime he (OW3) was sent to receive him also the deceased told him that he had other children Lenda and Sehela who died and others were Andrew and Faraja. OW3 who was the close friend of the deceased also told him that the appellant is his son. But of most important witness is OW5 who was the young sister who testified to the effect that the appellant is the son of his late brother (the deceased). This witness is against the defence witnesses who in fact are relatives. The question is what is the interest she wanted to serve if she was not credible and if credible what interests her relatives DW1, DW2 and DW3 want to serve.

From the evidence of both sides it is not in dispute that the deceased married one Merisiana Mwingila who died childless, but also that the deceased had other children leave alone those in dispute. Again employment records are also credible evidence to that effect. The appellant could not have written the names of the deceased in his employment records if he had no relation with him particularly being his

father as it appears in those records which the trial court took judicial notice. On the same footing the appellant requested DNA be tested and the court took initiative by writing to the Government Chemist the later dated 03/12/2018 requesting for the test, but it is the respondent and DW2 one Rogate Andrew Masuba who were required to undergo the test but all denied in court. As if not enough they wrote a letter to the court dated 02/01/2019 to that effect. The inference can be drawn why they denied DNA test.

On the above premises, I am inclined to the findings of the trial Primary Court findings that the applicant is the legal child/son of the deceased. I am of this view because I do not find any reason stated by the first appellate court to deny this fact, taking into account the Primary Court being the court of first instance had an opportunity to assess the credibility and reliability of the witnesses and their deminour. To negate its findings one must have cogent and plausible reasons. I am satisfied there is non. I fully support the findings of the Primary Court Magistrate on that aspect.

The above being my findings, of equal important, is the fact that the marriage of the deceased ended with no blessing of the issue, it is obvious then all the children referred above were born out of wedlock.

The issue irritating my mind at this juncture is whether the child born out of wedlock has the right to inherit from the estate of their deceased father. We have the law in place on this aspect. **The Local Customary Law (Declarition) (No. 4) Order, G. N No. 219 of 1963**. In this piece of legislation, the position is *"illegitimate children shall not inherit in the patriliniar side unless there is a will. Whether the law is valid or not at the contemporary times; the fact that it is still in place, is a legitimate law".*

To my view which is subject to criticism, the intention of this law was to protect the *"sanctity of marriage".* Again my question is who is now derogating that sanctity of marriage which the law is there to protect? The answer is simple, it is the spouses who the legislature intended to protect. It is either by giving birth to the children before marriage or by giving birth out of marriage during the existence of the marriage.

The question at hand now is should the child born out of the wedlock suffer the consequences of the fault made by the parents? If I could be answering the above question from theological context I could say it is possible. This is due to the fact that the theological teaching is saying *"we are suffering hardships in this world as a result of the sin committed by our parents Adam and Eve".* But for the purpose of this

case it is not. I agree with my learned brother Hon. Mlacha, J who is of the position that the Local Customary Law (Declaration) (No. 4) Order G.N No. 436 and 214 of 1963 is no longer valid with the coming in force of the Law of the Child Act of 2009 (See **Beatrice Brighton Kamanga and Another vs. Ziada William Kamanga**, Civil Revision No. 13 of 2020 High Court (Unreported).

The Law of the Child Act, 2009 and the United Nations Convention on the Right of the Child 1989 to which our Country is a signatory have shaded light towards the protection of the rights of the Children born out of the wedlock. Article 2 (1) of the Convention which is in pari-matinal with Section 5 (2) of the Law of the Child Act, 2009 prohibits discrimination of any kind against a child on the grounds of gender, race, age, religion, language, political opinion, sex, disability, health status customs ethnic origin ... birth. This entails that all children are equal, they must enjoy equal rights.

The Law of the Child Act, 2009 goes beyond. Section 10 of the Act provides:

> *"A person shall not deprive a child of reasonable enjoyment out of the estate of the parent."*

If keenly looking at the two; International and Local instruments referred above, both of them refer to the child not otherwise. The word

"Child" has different meaning in different jurisdictions. The Law of the Child Act, 2009, refers to the child below the age of eighteen years.

From the meaning of the child provided in the Act, was it the intention of the legislation that when the child attains the age of majority (18 years) the right of enjoyment out of the estate of parent ceases? Definitely not. To my opinion the meaning is that when the child attains the age of majority, the dependence of his parents estate diminishes, but the right is still there. If it were that, then even inheritance after death of the parent would not be.

Again as provided by Section 10 of the Act, the question is that does enjoyment out of the estate of parent go to the extent of inheritance of the estate after the death of the parent? My answer is yes. If the child enjoyed the estate during the life time of the parent why after death of the parent while the estate is there existing cannot take part of it and keep on enjoying the same rights enjoyed before.

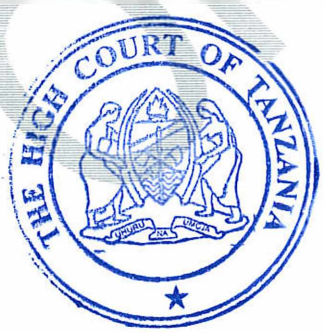
If the word *"birth"* stated in the referred Article 2 (1) of the Convention and Section 5 (2) of the Act represent the status of the child at the time of birth, whether was born with or without a valid marriage is covered, (See **Beatrice Brighton Kamanga's case supra)**. The question is whether having attained the age of majority the birth status changes. To my view the birth status remains the same. In the premises

even his rights of enjoying the parents estate after the death will remain intact including inheriting. Because the law prohibits discrimination based on birth status.

In this reasoning therefore, I hold that it is injustice to deny the child or a person the right to inherit from his father's estate simply on the fact that he born out of the wedlock, the act which was of no choice to him or her. It is high time now for the law makers to see if the Local Customary Law (Declaration) (No. 4) Order, G.N No. 436 and 219 of 1963 enacted 57 years age is still relevant todate.

All said and done, to the end of justice in this matter I hold that the appellant has the right to inherit from the estate of his late father Patrick Andrew Masuba. The decision of the District Court in this aspect is quashed. This being a probate matter no order as to costs is made.

It is so ordered.



D. B. NDUNGURU
JUDGE
17/08/2020

Date: 17/08/2020

Coram: D. B. Ndunguru, J

Appellant: Present

For the Appellant: Mr. Maumba – Advocate

Respondent: Present

For the Respondent: Mr. Mashoke – Advocate

B/C: M. Mihayo

Mr. Maumba – Advocate:

The case is for judgment, we are ready.

Mr. Mashoke – Advocate:

We are ready for judgment.

Court: Judgment delivered in the presence of Mr. Maumba advocate for the appellant and the appellant and Mr. Mashoke advocate for respondent and the respondent himself.

THE HIGH COURT OF TANZANIA

D. B. NDUNGURU
JUDGE
17/08/2020

Right of Appeal explained.