IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF KIGOMA)

AT KIGOMA

APPELLATE JURISDICTION

(PC) PROBATE APPEAL NO. 4 OF 2020

(Arising from Probate Appeal No. 2/2020 of Kasulu District Court Before: Hon. C.A. Mushi – RM and Originating from Probate No.47/2019 from Kasulu Primary Court Before: Hon. R.F. Mtuli - PCM)

PELES MOSHI MASOUD.....APPELLANT

VERSUS

YUSTA KINUNDA LUKANGA..... RESPONDENT

JUDGMENT

13th Nov. & 13th Nov. 2020

A. MATUMA, J

In the Primary Court of Kasulu Urban, the appellant petitioned for letters of administration of the estate of the late Fredrick Ntibibona Mahobe allegedly her husband who passed away on the 12th September,2016 at Murubona Ward within Kasulu District.

The respondent entered objection against the petition. The trial Court heard the objection and at the end the objection was overruled and the appellant was then appointed administratrix of the estate in question.

The Respondent became aggrieved with the decision of the trial Primary Court hence appealed to the District Court of Kasulu which reversed the decision of the trial Court on the ground that the same was tainted with

serious illegality for failure to determine the deceased's mode of life to ascertain the Law applicable in the administration of the estate in question.

The Appellate District Court ordered the parties to start afresh by convening the clan/family meeting to make a fresh appointment of the would-be administrator who shall thereafter petition in the same primary court.

It is such decision of the District Court which aggrieved the Appellant hence this appeal with five grounds of appeal whose essence is to the effect that;

i. *The District Court erred in Law to issue a contradicting decision.*
ii. *The District Court erred in Law to have not found that the Appellant was suitable to administer the estate in question as it was found by the trial Primary Court.*
iii. *That the District Court erred in law for not finding that the deceased changed his mode of life from Christianity into customary when he married the appellant as the second wife in 1989, the fact which was determined by the trial Court hence uncalled order for trial denovo.*
iv. *That revocation of the appointment of the Appellant in the administration of the estate in question by the District Court was uncalled for.*
v. *That the District Court erred in law to reverse the decision of the trial Primary Court without considering the fact that it is the appellant who solely took care the deceased Fredrick Ntibinona Mahobe up to the time of his death.*

At the hearing of this appeal, the Appellant was present in person and had the service of Mr. Silvester Damas Sogomba while the Respondent was represented by Mr. Kamigwe Fredrick Mahobe under special power of Attorney which was dully registered by the Registrar of documents and filed in this court for the purpose.

Mr. Sogomba argued the first, second and third grounds of appeal together. He argued that the District Court issued a contradictory decision when on one hand it decided that the trial Court had no jurisdiction on the matter while on the other hand it ordered a retrial by the same Court before another Magistrate and new set of assessors.

The learned advocate further submitted that in reaching to its decision the Appellate District Court considered the fact which was not in dispute between the parties at the trial court i.e failure of the trial court to ascertain the law applicable in the administration of the estate in question. He was of the view that the deceased had automatically changed his mode of life from Christianity into Customary when he married the Appellant as the second wife in 1989. That such fact was not in dispute between the parties at the trial and even the objection was not raised on the ground that the Appellant was not the deceased's wife but on different grounds altogether; that she was a junior wife and had misused some of the estate.

Then the learned advocate argued the 4th and 5th grounds together in which he submitted that the Appellant was the one suitable in the administration of the estate in question as she used to take care the deceased from when she was married to the time of his death contrary to the respondent who resided in a different place. That the Appellant is also interested in the estate as she jointly acquired it with the deceased. The learned advocate cited to me the case of **Stephen *Maliyatabu & Another versus Consolata Kahulananga, Probate and Administration Cause no. 1 of 2016,*** High Court at Tabora in which my learned brother Mugeta, Judge appointed the Caveator to administer the estate as he found her to have been taking care the deceased and the estate altogether. He thus called this court to quash the decision of the District Court and restore that of the primary court for the Appellant to continue with the administration of the estate in question.

The Attorney of the Respondent Mr. Kamigwe Fredrick Mahobe replied to the grounds of Appeal generally. He submitted that all what the Appellant's advocated submitted is nothing but blatant lies. That the Appellant at no time was the deceased's wife as the deceased had only one wife the respondent under Christian rights. That the Appellant has no any document to back up her that she was once married to the deceased. Mr. Kamigwe further submitted that they only recognize the Appellant's son one Method Fredrick Mahobe as their young sibling because their father brought him to them from the Appellant whom they quarreled somewhere they had rented, and that the relation between the deceased and the Appellant was merely concubinage (*Mahawara tu*).

Mr. Kamigwe then attacked the allegation that the Appellant jointly acquired the estate with the deceased. He argued that the deceased acquired such estate with his family alone, the appellant not inclusive. He then argued that the meeting the Appellant convened on 22/09/2019 for appointment of the would be administrator did not involve them (Respondent) as by that time they were to attend funeral of the deceased's sister (the Aunt of Mr. Kamigwe). They sought the meeting to be adjourned but the appellant forcefully conducted it in their absence.

Mr. Kamigwe then called this court to dismiss this appeal and uphold the decision of the District Court so that they can go to start afresh the process.

I will therefore determine the grounds in the manner they were argued before me. In the first set of the grounds of appeal which comprised the 1st, 2nd, and 3rd grounds, It is true that the District Court at page 5 of its judgment held that so long as the deceased was said to have celebrated his marriage with the respondent under Christian rights, the trial Court had no jurisdiction over the Petition as its jurisdiction is confined to matters whose

applicable law is customary or Islamic law. The learned appellate Magistrate thus observed;

> *"Therefore, it was mandatory to determine deceased's mode of life and ascertain whether it had jurisdiction over this matter or not".*

That was the basic of the District Court to reverse the decision of the trial Court as it considered the same to be fatal illegality;

> *"As stated above, the trial Court's proceedings were tainted with serious illegality for failure to determine deceased's mode of life and therefore, ascertain the law which shall be applied to the Distribution of his estate.*
>
> *I therefore, nullify the proceedings of the trial Court, I quash the judgment and set aside the order therein".*

Thereafter the learned appellate Magistrate directed the parties to start afresh by convening a fresh family meeting to suggest the would-be administrator and; ***"Thereafter, the matter to be filed before the Primary Court and tried with another competent Magistrate with new set of assessors".***

From the herein reflection it is obvious that the complaint by the appellant is grounded. The decision of the District Court is contradictory. If at all the appellate Magistrate felt that the trial Court had no jurisdiction, it was awkward in one hand to quash the decision of the trial Court and in the other hand direct the parties to go back in the same Court which has been considered to have no jurisdiction. The decision contradicting itself is not a decision at all capable of being executed. It deserved to be quashed. In the case of ***Charles Richard Kombe t/a Building versus Evarani Mtungi and 2 others, Civil Appeal No. 38 of 2012,*** the Court of Appeal observed

that the High Court judge had delivered a contradictory judgment when on one had held that the Plaintiff did not prove the case **beyond reasonable doubt** while on the other hand held that the plaintiff failed to prove his case **on a balance of Probabilities**. The appellant in that Appeal was complaining before the Court of appeal that the High Court Judge delivered a contradictory judgment in regard to the standard of proof in which the case ought to have been established.

The Court of appeal in determining that such a decision cannot stand held;

> *"From the above extract it is clear that the learned judge applied the standard of proof applicable in Civil as well as Criminal matters. We need not cite any provision of Law because this being a Civil matter, it is elementary that the standard of proof is always on a balance of probabilities and not beyond reasonable doubt.*
>
> *Further;* ***the two could neither co-existed nor applied interchangeably as was done in this case****. The application of the afore stated standard of proof of both Criminal and Civil in this case is to say the least is novel and indeed puzzled us.* ***We do not think the decision arrived at in the circumstances. Ill sound in Lew".***

The Court of appeal then allowed the complaint and quashed the contradictory judgment of the High Court.

In the like manner, the Appellate Magistrate could have not ruled out that the Primary Court had no jurisdiction on the matter on one hand, and on the other hand direct the parties to go back in the same Court to seek the same relief.

The learned Appellate Magistrate might have had in mind that the trial Primary Court should have first determined the deceased's mode of life to ascertain whether he lived as a Christin to the time of his death or he had changed the mode of life into either customary or Islamic rights for the trial Court to have jurisdiction on the matter. If that is; Mr. Sogomba learned advocate argued that that was not an issue at the trial as the evidence on record depicts clear that he had change his mode of life since 1989 when married the Appellant as his second wife the fact which was open to his family.

The respondent's attorney Mr. Kamigwe on his party maintained that the deceased had only one wife and died a Christian.

My determination on this, is that; before the trial Court it is obvious that whether or not the appellant was the deceased's second married wife was not a contentious issue as rightly argued by Mr. Sogomba learned advocate.

The appellant herself stated in Court to be the widow of the decease so does the respondent. Such declaration started from the outset of the matter at the trial in her pleading Form I titled "**MAOMBI YA KUMTEUA MSIMAMIZI WA MIRATHI MBELE YA MAHAKAMA YA MWANZO YA KASULU MJINI".**

Paragraph 3 of such pleading it is clearly that the appellant identified herself as the widow of the deceased;

> *"Marehemu huyo aliwaacha ndugu zake walio hai (taja majina kwa kirefu na anwani).*
>
> *1. PELES MOSHI MJANE*
>
> *2. YUSTA KIVUNDA MJANE..."*

When the Respondent entered objection against the appellant in the trial Court she did not raise any objection that the appellant was not a legally

married wife to the deceased. Instead she herself and her witnesses supported the appellant that she was her co-wife to the deceased.

In her objection evidence at page 8 of the proceedings in the trial Court the Respondent had these to say;

> *"Mimi napinga sababu yeye hana vigezo vya kuwa msimamizi wa mirathi,* ***maana yeye mke mdogo*** *hawezi kusimamia mirathi, na hiyo mirathi alishapeleka nguruwe, sina zaidi ya hayo".*

In that evidence, it is clear that the respondent recognized the appellant as a co-wife to the deceased. It was thus not a question of whether the deceased had a single wife under Christian rights.

Not only that but when she was cross examined by the appellant she was clear that the appellant was married to the deceased and she was in fact the one leaving with the deceased at Mwenge while she personally lived **"Mashambani"** for agricultural activities, and she further acknowledged the contribution of the appellant in her acquisition of the properties contrary to the submission made before me by her attorney Mr. Kamigwe. She stated under oath;

> *"Nguruwe zilikuwa za* ***mume wetu,*** *zilifugwa kwenye* ***mji wetu, wakati unaolewa*** *nilikuwa naishi kijijini,* ***mlikuwa mnaishi Mwenge, mlipanga, mlijenga, tulijenga wote...tulinunua mimi na wewe, na wewe na mume wangu".***

With all these evidence from the respondent herself, there was no issue for determination before the trial Court whether or not the appellant was the second deceased's wife nor that the Appellant was not entitled to the estate in question.

Even **SU2 Uhai Lucas Mahobe** during cross examination by the Appellant at page 10 of the Proceedings of the trial Court confirmed that the appellant was married to the deceased;

> *"**Umeoloewa mikaka ya 1980's** mlikuwa mnapanga, mmepanga miaka mingi tu, alinunua kiwanja maeneo ya Lightness, akauuza akanunua nyumba".*

With that evidence it is clear that even SU2 recognized the appellant as the deceased's wife.

Not only that even the deceased's daughter SU4 Neema Fredrick testified during cross examination at page 15 to the effect that the deceased had more than one wife when she stated;

> *"Aliyeanza kutaja mali za marehemu ni **mke mkubwa**... biashara za mitumba sikumbuki zilikuwa ni baloo ngapi, **kwako** zilitoka baloo mbili kwa **Bi. Mkubwa** ni baloo tano, ziliandikwa kwenye muhtasari, **chumbani kwako** waliingiza wajumbe kutoa baloo za mitumba".*

That evidence of the Respondent's witness also shows that there was no dispute that the appellant was the deceased's wife and had in fact some properties of the deceased in her custody which was collected from her room for distribution to the heirs.

The last respondent's witness was **SU5 Jackson s/o Kasambaganya** who was initially appointed by the family members including the parties herein to administer the estate but later withdrew himself. He gave evidence to the effect that the appellant was the second wife to the decease. This was during cross examination by the Appellant at page 18 of the proceedings;

> ***"Kabla hajahamia pale ulikuwa unakaa wewe, pale mlinunua 1998".***

Again, when he was asked by the Court about marriage of the Appellant to the deceased, this witness who is the uncle of the deceased at page 19 replied;

"Huyu alimuoa kati ya 1998/1999 hivi..."

All what I have reflected herein above is the evidence of the Respondent herself to the effect that the respondent, her children who also are children of the deceased, and the relatives of the deceased all recognized the appellant as the dully wife of the deceased since 1980's to the time of his death, and in fact she was the one who lived with the deceased while the respondent was a visiting wife as she lived in the village.

In that respect therefore, the trial Court was wrongly adjudged by the appellate District Court that it had no jurisdiction merely because the deceased had a Christian marriage with the respondent.

The deceased married the 2nd wife and made it public to the extent that it was well known by not only the respondent but all other family and clan members as herein above reflected.

In the case of ***John Ngomoi v. Mohamed Ally Bofu (1988) TLR 63*** the court considered the life style of the deceased as a clear indication that upon his death her estate be administered in accordance to her life style. In that case the fact that the deceased donated her house as a Waqf was considered to be a clear expression that the deceased had an intention to have her personal matters governed by Islamic Law.

In the like manner, the fact that the deceased in this case married the appellant as a second wife and made it known to the general public as herein above reflected, it was a clear expression from him that he wanted his personal matters governed customarily despite the fact that he was a Christian.

His surviving beneficiaries are estopped from denying that fact interms of section 123 of the evidence Act, Cap. 6 R. E 2019. If at all they felt the deceased was offending Christianity, they owed a duty to fight him back into full compliance to the christian norms when he was still alive. They however did not. Let his conducts expressed in his adopted mode of life speak by itself. Neither the respondent nor her Attorney herein can be allowed to purport dressing the deceased into the mode of life he himself contravened.

I thus allow the first set of the grounds of appeal and rule out that determination of the mode of life by the Primary Court was uncalled for as it was not contentious between the parties.

In the last set of the grounds of appeal as herein above reflected, the Appellant is arguing that she is the only one who qualifies to administer the estate in question as she cared the deceased to the time of his death and also the children of the deceased without discrimination. That was the only issue before the trial Court as to whether the appellant qualified to be appointed administratrix. The trial Court found that she qualified. The respondent's objection against the appellant as rightly submitted by the learned advocate was only that the appellant was a junior wife and had taken some properties (nguruwe). Being a junior wife does not disqualify one from being appointed administrator. On allegations that the Appellant took some pigs, it is a matter of evidence which is wanting.

The respondent seems to be moved by greediness (tamaa) to isolate the appellant after the death of their husband. She should have done so when the deceased was alive for him to take necessary action to make good his welfare. On the other hand, I find as rightly argued by Mr. Sogomba that the Appellant is befitting to administer the estate in question on the obvious reasons that she lived with the deceased to the time of his death while the

respondent was only a visiting wife as she personally stated in evidenced on the 8th page of the proceedings of the trial court;

> *"... nilikuwa naishi mashambani ....*
> *nilikuwa nakuja nalala siku mbili narudi ...*
> *nilikuja kuuguza mgonjwa mwaka 2015"*

In that respect it was the appellant who was close to the deceased than the Respondent. That fact cannot be ignored.

Not only that but also the Appellant has listed the heirs of the deceased including the respondent and her children while the respondent and her children on their party kicks her out of inheritance. That being the case, while the respondent is discriminatory, the Appellant is not. In the case of ***Julieth Shedrack Daud versus Abel Laurent Lukimbili, (PC) Probate Appeal no. 1 of 2020*** in the High Court at Kigoma I held that a discriminatory administrator of the estate can justifiably be revoked letters of administration as; ***"an administrator who is discriminatory does not befit any appointment as the estate of the deceased should fairly be distributed to all heirs without discrimination"***.

All being said, I find that the appellate District Court diverted into irrelevant issues thereby nullifying the proceedings of the trial Court and re-route the parties in the same channel.

The judgment of the District Court is hereby quashed and the decree thereof is set aside. The decision of the Primary Court appointing the appellant to the administration of the estate in question is hereby restored. She should go back to the Primary Court to fill in the relevant documents to stat her job of administration of the estate in question.

I however direct the Appellant to include one Zuwena Fredrick Mahobe in the inheritance as she is as well recognized by the Respondent as the

deceased's child she brought home during his lifehood. She is currently maintained by the Respondent and she should not be left homeless and property-less. The faults of the deceased should not be taken to injure innocent child. I therefore allow this appeal in its entirety as herein above stated. This being a family issue, I order no costs to either party.

It is so ordered.

A. Matuma

Judge

13/11/2020

Court: Judgment delivered in Chambers in the presence of the Appellant in person and her Advocate Mr. Silvester Damas Sogomba and in the presence of Mr. Kamigwe Fredrick Mahobe the legal Attorney of the Respondent. Right of Appeal to the Court of Appeal subject to the relevant Laws is fully explained to the parties.

Sgd: A. Matuma

Judge

13/11/2020