IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

PC. CIVIL APPEAL NO. 159 OF 2019

(Arising from Probate Appeal No. 01/2019 of the Kibaha District Court, Hon. F. Kibona, RM. Dated 27th November, 2019 arising from Probate and Administration Cause No. 80 of 2014 of the Mailimoja Primary Court, Honorable Mtumuyu, S. O PCM dated 13th September, 2019)

EMMANUEL PATRICK MBWANA.....APPELLANT

VERSUS

ANNAISHA PATRICK MBWANA.....RESPONDENT

JUDGEMENT

Date of last Order: *06/10/2020*
Date of Ruling: *23/10/2020*

MLYAMBINA, J.

Briefly, the Appellant and the Respondents were duly appointed Co-Administrators of the estates of the late Patrick Semwango Mbwana vide *Probate and Administration Cause No. 80 of 2014* at Mailimoja Primary Court. The Appellant was dissatisfied with the findings thereof. Hence, he appealed to the District Court of Kibaha vide *Probate Appeal No. 1 of 2019* which is now the subject of this appeal on the following grounds:

1. That, the first appellate Court erred in law and in fact for denying the Appellant the right to be heard and a fair trial

2. That, the first appellate Court erred in law and in fact in confirming that the applicable law was Customary law despite of clear evidence to the contrary.
3. That, the first appellate Court erred in law and in fact in confirming the decision of the trial Court despite the trial Court lacking jurisdiction.
4. That, the first appellate Court erred in law and in fact for failure to find out that the trial Court was wrong to decide who has the right to inherit at the stage of appointing Administrators.

The appeal was argued by way of written submissions. The Appellant was duly represented by Counsel Frank Chundu. The Respondent was represented by Counsel C. Ndanu.

The Appellant, however, opted to drop the first ground of appeal. The second and third grounds were argued jointly by the Appellant to the effect that, the applicable law in the Administration of Estate of the late Patrick Semwango Mbwana is the statutory law under the *Probate and Administration of Estates Act, Cap 352 R. E. 2002.* The reason being that, the deceased, at the time of death, professed Christianity. The Appellant cited the case of **Ibrahim Kusaga v. Emmanuel Mweta** [1986] TLR 26, in which this Court held:

A Primary Court may hear matters relating to grant of administration of estates where it has jurisdiction, where the law applicable is Customary law or Islamic law.

The Appellant was of contention that the mode of life of the deceased depicts to had professed Christianity, despite the fact that, the deceased had many Children born out of wedlock. The deceased had a Christian Marriage vide exhibit PSM1 which is the Certificate of Marriage. It proves that the deceased professed Christian rites.

According to the Appellant, Primary Courts in Tanzania have no jurisdiction on appointing Administrators where the *Probate and Administration of Estate Act, Cap. (352 R. E. 2002) is Rule 1 (2) of Part 1 and 5th Schedule to the Magistrates Courts Act, Cap. 11 (R.E 2019).* Contrary to this provision of law, the trial Primary Court held, at page 12 and 13 of the typed Judgment that:

It had to follow the Customary law since it was established that the deceased never professed Islam.

The Appellant made reference to page 15 of the typed Judgement of the trial Primary Court where the Court categorically held that; *there is no proof whatsoever to show that the deceased contacted Customary Marriages.*

The Appellant was of submission that, the trial Court had no jurisdiction to grant the letters of administration. As such, the first appellate Court ought to have determined as it was raised by the Appellant herein. Besides the Appellant argued properly that, the question of jurisdiction can be raised at any time as it was in **Wakf and Trust Commissioner** (*as the Administrator of the estates of the late* **Zawadi Bint Said) v. Abbass Fadhili Abbas and Another** [2003] TLR 377 (CAT).

Therefore, in view of the Appellant, the first appellate Court erred in confirming the decision of the trial Primary Court, of which hold it had no jurisdiction. The Appellant insisted that the law applicable in the administration of the estate of the late Patrick Semwango Mbwana is the *Probate and Administration of Estates Act, Cap 352 2002*. Thus, the trial Primary Court had no jurisdiction.

In reply, the Respondent submitted *inter alia* that the Appellant effort to oppose the Respondent appointments as his Co-Administrator badly failed before the Primary Court because the Magistrate ruled that the estate of the late Patrick Mbwana could not be administered under the *Probate and Administration of Estate Act Cap 352 (R.E 2002)* as all the 16 Children of the deceased were born out wedlock. The deceased contracted Christian Marriage in the year 1996 when all his Children were grown up and some

already had their own families. Exhibit PSM-1 was the evidence to that effect.

According to the Respondent, the deceased mode of life through out from the first time he got the first Child to the time he got the 16th Child and until all the Children are grown up and they are staying with their respective Mothers, did neither live Islamic mode of life nor a Christian mode of life. In view of the Respondent, that was the reason why the Primary Magistrate was of the opinion that the deceased lived a Customary mode of life. The same position was subscribed by the first appeal Magistrate.

The Respondent denied the argument that there was no evidence to show the deceased had many wives. The minutes of the clan members was tendered showing the clan members recognized all the Children of the deceased. Even the Appellant's Sister in the proceedings recognized his late father had many Children. However, from her Mother they were born only six of them.

It was the Respondent's submission that, it was proper for the Primary Court to determine the matter since all the Children of the deceased were born out of the wedlock and the fact that the deceased contracted Christian Marriage at the last stage of his life, cannot change the fact that the deceased lived in Customary way

of life. In view of the Respondent, it is so pity for the Appellant who was born out of the wedlock like his fellow Brothers and Sisters to think that him and his Sisters and Brothers from the same Mother have an exclusive right to inherit from the estate of their late father.

Further, the Respondent was of position that the Primary Court had jurisdiction to determine the application which was brought before it and it was proper for the District Court to confirm the said decision.

Before analyzing in details the relevant position of law, I must agree with the Appellant on four points: **One**, the question of jurisdiction of the Court can be raised at any stage including at appeal stage. There is plethora of authorities on that point including the case of **Sunshine Furniture Co. Ltd v. Maersk (China) Shipping Co. Ltd and Nyota Tanzania Limited**, Civil Appeal No. 98 of 2016, Court of Appeal of Tanzania (unreported). **Two**, the jurisdiction of the Primary Court in grant of administration of estates is limited where the law applicable is Customary or Islamic. **Three**, if it is established that the deceased professed Christian life, the applicable law is the statutory law under the *Probate and Administration of Estates Act Cap 52 R.E. 2019.* **Four**,

there is no evidence in record that the deceased Patrick Semwango Mbwana was married to many wives.

Despite of the above observation, the issue is; *whether the deceased professed Customary or Christian rites.* It is in record that the deceased Patrick Semwango Mbwana contracted Christian Marriage with Magreth Mpepo on 1996. However, the material before the Court proves nothing which would /could justify that the deceased Patrick Semwango Mbwana professed Christian life. One of basic example is presence of 16 issues of the deceased 11 of whom were born out of wedlock with different Mothers even the five issues of Magreth Mpepo were born prior Christian Marriage of the deceased and Magreth Mpepo.

It follows therefore that all the 16 issues of the deceased Patrick Mbwana were born out of wedlock. As per the evidence before the Primary Court the issues are:

1. Dorothea Parick Mbwana 1965
2. Anaisha Patrick Mbwana 1966
3. Hildahalima Parick Mbwana 1968
4. Amina Patrick mbwana 1969
5. Mariam Patrick Mbwana 1972
6. Doroth Parick Mbwana 1974

7. Suzana Patrick Mbwana 1974
8. Mariam Patrick Mbwana 1976
9. Lilian Patrick Mbwana 1976
10. Steven Patrick Mbwana 1977
11. Daniel Patrick Mbwana 1978
12. David Patrick Mbwana 1980
13. Emmanuel Patrick Mbwana 1982
14. Aisha Patrick Mbwana 1983
15. Rosweeter Patrick Mbwana 1984
16. John Patrick Mbwana 1986

It can be observed from the afore list of the issues, Dorothea Lilian Daniel, Emmanuel and Rosweeter who are born by the deceased with Magreth were all born prior their Mother contracted Christian Marriage with their father. As such, strictly all the 16 issues were born out of wedlock. The discrimination by those who purports to be the issues born in Christian Marriage has no basis both in law, reality and facts. I should not be misquoted here. The point I want to re-emphasize is the equality of all issues of the deceased when it comes to distribution of the deceased shares. Those who purports to be born within wedlock they will be entitled to share twice; the shares of their father which must be equal among all 16 heirs but also the shares of their mother on the properties acquired

jointly during Marriage with their mother. I will enlighten further on this point at the next paragraph of this Judgement.

Basing on the decision of this Court in **Judith Patrick Kyamba v. Tunsume Mwimbe and 3 others**, Probate and Administration Cause No. 50 of 2016, I hold that all issues have the right to inherit the estate of their father. The sole point to be observed by the Administrators is to make sure only the properties or shares of their father which is to be apportioned among all 16 heirs. The 50 percent share of the wife married through Christian rites should be subtracted and be shared by her issues only. That means, it is the Appellant and his fellow Brothers and Sisters who have an exclusive right to inherit from the shares of their late mother.

Indeed, I hold that the Primary Court has jurisdiction to determine the cause, is the deceased through contracted Christian Marriage, he largely professed Customary rites.

> *As regards the fourth ground; that, the first appellate Court erred in law and in fact for failure to find out that the trial Court was wrong to decide who has the right to inherit at the stage of appointing Administrators, the Appellant submitted that.*

According to the Appellant, this is yet another ground of appeal which was also raised at the first appellate Court but never considered. The trial Primary Court at page 21 of the typed Judgment, held as to who had the right to inherit the deceased's properties. In view of the Appellant, this was not the task of the trial Primary Court at the stage of appointing Administrators. Its duty was to appoint the Administrator only and leave other tasks to the Administrator. Going further to determine who has the right to inherit was going beyond its mandate. The appellant cited **Ibrahim Kusaga v. Emanuel Mweta** (*supra*), in which this Court held among other things that; the duty of the Primary Court at that stage is to appoint the Administrator and not to step in the shoes of the Administrator and determine who is to inherit.

It was the Appellant's submission that, the first appellate Court would have properly analyzed the records, it would have come out with the different findings.

In response to the fourth ground, the Respondent discredited it for being misconceived and completely misplaced. In view of the Respondent, if one reads the proceedings as well as the Judgment of the Primary Court, there is nowhere the Magistrate has interfered or disturbed the estate of the deceased. In the cited case of **Ibrahim Kusaga v. Emmanuel Mweta**, no one of its holdings

2. Barua ziende kwenye ofisi husika zenye haki za marehemu kwa ufuatiliaji.
3. Wasimamizi wagawe mali zote kwa warithi halali na wakimaliza kugawa walete Mahakamani kuonyesha namna walivyogawa ili jalada hili lifungwe baada ya miezi minne (4)
4. Shauri hadi tarehe 12/01/2021 wasimamizi wafike kufunga mirathi.
5. Haki ya rufaa imeelezwa ni siku 30 kwa yeyote asiyeridhika kwenda Mahakama ya Wilaya.

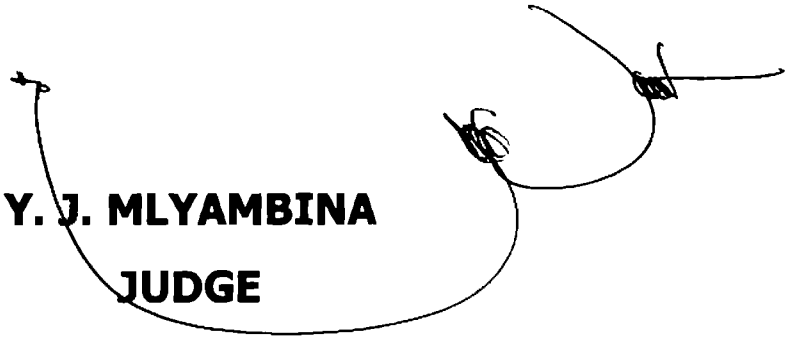
In the premises of the above, although I agree with the findings in **Ibrahim Kusanga's Case** (*supra*), I find the instant appeal is distinguishable to the effect that the Primary Court in this appeal has not interfered or distributed the estate of the deceased. I therefore dismiss the appeal with no order as to costs for lack of merits.

Y. J. MLYAMBINA

JUDGE

23/10/2020

Judgement pronounced and dated 23rd October, in the presence of Counsel Frank Chundu for the Appellant and in the presence of the Respondent in person.



Y. J. MLYAMBINA

JUDGE

23/10/2020