

IN THE HIGH COURT OF TANZANIA

AT TABORA

PC. PROBATE APPEAL NO. 5 OF 2019

(Arising from Original Probate case No. 28 of 2018 of Tabora Urban Primary Court and Probate Appeal No. 7/2019 of Tabora District Court)

HAMISA SAIDI MGAYA----- 1ST APPELLANT

MIRAJI MUSTAFA KAPALAMPYA ----- 2ND APPELLANT

VERSUS

SAID MUSTAFA KAPALAMPYA ----- RESPONDENT

JUDGMENT

22/09/ & 6/11/2020

BAHATI, J.:

The appellants **HAMISA SAIDI MGAYA** and her older son **MIRAJI MUSTAFA KAPALAMPYA** appealed to this court being their second appeal challenging the decision of the Tabora District Court which decided against their favor.

Interestingly, the respondent **SAID MUSTAFA KAPALAMPYA** is a biological child of the first appellant and a brother to the second appellant. This appeal is in respect of the estate of the late **MUSTAPHA SHABANI KAPALAMPYA** who died intestate at Kitete Hospital Tabora on 23rd June 2010.

The appellants have appealed to this court on five grounds to wit:-

- 1. That the learned Resident Magistrate grossly erred in law and fact in holding that the 1st Appellant is not the wife of the late Mustafa Kapalampya without any divorce decree ever existed or either presented in court.*
- 2. That the learned Resident Magistrate erred in law and fact in holding that the 1st Appellant is not among the heirs of the late Mustafa Kapalampya.*
- 3. That the learned Resident Magistrate erred in law and fact in not observing the failure of the administrator to perform his duties and acting extravagancy.*
- 4. That, the learned Resident Magistrate grossly erred in law and fact when without any justification and evidence held that the 1st appellant had not contributed anyhow to the acquisition of matrimonial assets left by the late MUSTAFA KAPALAMPYA.*

The appellants enjoyed the service of the learned Advocate Mr. Sichilima while the respondent appeared in person, unrepresented and the appeal was disposed of by way of written submissions. I commend both parties for filing their submissions as per the scheduled orders. Having read the submissions made by the learned counsel, Mr. Sichilima but I am surprised that his submission relied much on matters that are not connected to the grounds of appeal petitioned.

I will try to pick some points that I find to have substance connected to the grounds of appeal as presented by the appellants. On page two of his submission, Mr. Sichilima argued that Hamisa Saidi Mgya was a wife of the deceased Mustafa Shabani Kapalampya through Islamic ceremony since 1972 and throughout their marital life they erected a house at Tabora which the deceased left to her and his seven children and before his demise no divorce ever existed between the deceased and 1st appellant.

Also on page 3 of his submission, he quoted rule 2 (c) of the 5th schedule to the Magistrate's Court Act, Cap. 11[R.E 2019) read together with G.N No. 49 of 1971. I found it to have some connection to ground three, he quoted

"Revoke any appoint of an administrator for a good and sufficient cause and require the surrender of any document evidencing his appointment."

He added that the rationale of the above-named rule of law was not considered by the two courts below because the application which was sent to the court of law was revocation as a subject matter but very unfortunate no court below endeavored to reach the substance of an application.

Furthermore, he submitted that the appellants are all interested in the deceased's estate and the administrator has been acting willfully or

negligently against the interest of creditors, heirs, or beneficiaries of the estate.

In reply the respondent submitted that since his appointment he has never executed any of his duties as an administrator of the estate due to difficulties and hindrances masqueraded by the 1st and 2nd appellants which include reluctance on their part to handover a piece of land situated at Baruti Street, Chemchem Ward and instituting endless cases against him.

He admitted that, the 1st appellant is his biological mother and she was once married to their late father Mustafa Shabani Kapalampya as a second wife and that during their marriage they were blessed with seven children. Further, he is not in dispute that, the 2nd appellant is his brother and the firstborn to the former marriage of his late father Shabani Kapalampya, and is among the beneficiaries of the deceased's estate.

He added that when his late father passed away he had already divorced the 1st appellant who had at different times remarried to two other men and one of them being a Christian marriage. To evidence that the respondent referred to the evidence of one Steven Kiruka who testified before the trial court that he married the first appellant and they were blessed with two children after he got assurance from her that she was divorced from her former spouse and that she was free to remarry.

The respondent further submitted that he is still insisting that the first appellant is not entitled to benefit from the estate of the late Shabani Kapalampya because even at the time of existence of marriage between her and the late Shabani Kapalampya they did not acquire any property among the existing properties. That the second appellant has been reluctant to vacate the house of the late Shabani Kapalampya the manner which hinders the respondent to execute his duties as the administrator of the estate and that the first appellant secretly entered into a contract with Vietell Tanzania Limited to construct a communication tower on deceased's land and as a result, the first and second appellants have been benefiting from that contract while the whole family remains in darkness.

After carefully reviewing the record of the lower Courts and considering the submissions made by the parties before the Court. The issue calling for the determination is whether this appeal has merits or not.

It is obvious that the matter was related to probate whereby the respondent was appointed the administrator of the estate of the late Mustafa Shabani Kapalampya and the appellants had filed an application seeking revocation of the respondent's letters of administration and recognition of the first appellant as a rightful heir of the deceased estate, the applications which ended in favor of the respondent.

Still aggrieved the appellants appealed to District court insisting on the revocation of the appointment of the same grounds but they lost their appeal hence this second appeal.

To dispose of this appeal I opted to paraphrase the four grounds of appeal leveled by the appellants into two issues as follows;

- i. *Whether the first appellant is the legal wife of the deceased hence entitled to a share to the deceased estate*
- ii. *Whether the respondent has failed to perform his duties as an administrator of the estate of the late Mustafa Kapalampya.*

I have gone through the record of the trial court and I came to the knowledge that the application for grant of letters of administration was made by the respondent Said Mustapha Kapalampya after obtaining consent from other family members including second respondent, Miraji Mustafa Kapalampya (*that is evidenced by the record of clan meeting minutes that was presented in court by the respondent when he filed the application*) and among the heirs that were listed in the application the first appellant was not one of them.

Basing on the record of the trial court alone, I found that the first appellant had once denied having been remarried by other men and converted her religion to Christianity but when one Steven Kiruka (60) was called by the trial court to testify she admitted that she got married to him after she separated with the deceased and they were blessed

with two children. On top of that on 28/05/2018 when the second appellant was called to testify before the trial Court he stated that I quote:-

“Alikuwa ameshaachana na mke”

The question that comes is whether the first appellant was still the wife of the late Mustafa Shabani Kapalampya.

There is no doubt that the first appellant had been in long separation with the deceased and got married two times by different men where she got three children with them. In ***Doto Malamla vs Lukelesha Lyaku*** [1981] TLR 29 Lugakingira, J held that,

“Separation, whether voluntary or by a court order, however long it may have continued, is not an automatic license to divorce.”

If I blend the first question to the decision cited above I agree with the appellants that there is no evidence of the existence of divorce so that one can say that the 1st appellant was not the wife of the deceased. All the allegations made by the respondent about the first appellant's divorce are mere words of mouth; there is no place on the record where the respondent produced any evidence to prove the existence of divorce.

Since there is no proof of the existence of divorce there is no way the first appellant can be excluded from benefiting the estate of her late husband Mustafa Kapalampya. The fact that she got married to other

men, converted religion from Islam to Christianity that alone cannot invalidate a legally existing marriage.

In respect to the second issue on whether the respondent has failed to perform his duties as administrator of the estate; I will refer to the record of the trial court. The record in the trial court file shows that the only property that was left by the deceased which is subject to division to his heirs is a piece of land located at Madaraka Street within the Chemchem Ward, Tabora Municipality. It is the same property that has been the inner core of clashes between the parties due to the reason disposed of in the first issue above.

It is my considered view that only cannot be a reason to order revocation of the appointment of the respondent because what the respondent had been doing was to find a legal definition of what he encountered in due course of performing his duties as an administrator.

For the foregoing, I allow the appeal and hereby order that the first appellant be included in the list of rightful heirs of the deceased estate and the respondent continues to perform his duties as an administrator according to law.

Taking into account this is a probate and administration issue this court orders for each party to bear its costs for the reasons that the parties are blood relatives and are going back to collect and distribute the estate of their late father.

It is so ordered.



A.A BAHATI

JUDGE

06/11/2020

Judgment delivered under my hand and seal of the court in the chamber, this 5th day November 2020 in the presence of Timothy Sichilima and Respondent.



A.A BAHATI

JUDGE

06/10/2020

The right of appeal is explained.



A.A BAHATI

JUDGE

06/11/2020

