

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

PROBATE AND ADMINISTRATION CAUSE NO. 75 OF 2019

HAMIS HAMIS SELEMANI..... APPELLANT

AND

ALLY ABDU.....1ST RESPONDENT

YAHAYA HAMIS.....2ND RESPONDENT

Date of last Order: 28/08/2020

Date of Judgment: 02/09/2020

J U D G E M E N T

MGONYA, J.

The Appellant, Hamis Hamis Selemani has approached the Court with an appeal against the decision of the Ilala District Court in **Revision No. 08 of 2019**, the Appellant has filed **4 grounds** of appeal namely:

- 1. That, the Honorable Magistrate erred in law and fact for failure to appreciate unopposed evidence of Fatuma Haji Nkuru (SM2) Mother of both Appellant and the 2nd Respondent that she was remarried to their Father;**
- 2. That, the Honorable Magistrate erred in law and fact for failure to appreciate that the 2nd**

Respondent resorted to provoke their Mother on Cross Examination other than asking questions rebutting her evidence on remarriage;

3. That, the Honorable Magistrate erred in law and fact for holding that the Appellant must be time barred and ignored that he had satisfied the Primary Court as the reason for his delay including that of being in Court since 2010 seven years after the Respondent had petitioned Probate for the late Hamis Selemani;

4. That, the Honorable Magistrate erred in law and fact for holding that the Appellant must be time barred for him and his Mother failed to make follow up of what was going on in the family and failed to consider that the Respondents petitioned Probate for Hamis Selemani 13 years after his death while the Appellant and his Mother were in the Village Muheza Tanga Region and Respondents were in Dar es Salaam as could not be Compelled to inform the Appellant and his Mother the Probate Case.

During the hearing of the Appeal there was an outbreak of Corona Virus hence the Court ordered for a written submission to dispose the appeal before this Court.

To begin with the **1st and 2nd ground** of Appeal on failure to appreciate the unopposed evidence of Fatuma Haji Nkuru on matters of re marriage to their Father; It was the Appellant's submission that, the act was a grave error by the Magistrate for the Magistrate was to hold that SM2 and the deceased's marriage was not proper a fact that remained unopposed by the 2nd Respondent.

It was the Appellants contention that when SM2 got married to their Father, the later was not able to impregnate SM2. The Appellant claimed that, failing to cross examine a witness on such an important issues like that of remarriage between the deceased and SM2 is an admission to the undisputed fact. And none can raise such an issue at the Appellate Court. To cement his point, a string of cases was cited. To mention the few, the case of ***PAUL YUSUF NCHIA VS. NATIONAL EXECUTIVE SECRETARY, CHAMA CHA MAPINDUZI & ANOTHER, Civil Appeal No. 85 of 2005 and ISSA HASSAN UKI VS. Republic Criminal Appeal No. 129 of 2017, DAMIAN RUHELE***

VS. REPUBLIC, Criminal Appeal No. 501 of 2007 and CYPRIAN KIBOGOYO VS. REPUBLIC Criminal Appeal No. 88 of 1992, were tabled by the Appellant.

Moreover, with regards to the **3rd ground** of appeal the Appellant averred that the Court erred in holding that the Appellant must be time barred and ignored that the Primary Court as to the reason for his delay including that of being in Court since 2010, seven years after the Respondent had Petitioned Probate for the late Hamisi Selemani.

It is further alleged that, the Appellate Court failed to recognize that the Primary Court was satisfied with the reasons set forth of the delay. And that the matters of Probate have no specific limitation of time for petitioning for letters of Administration. The Appellant cited the Provisions of **section 19 (1), (c) of the Magistrate Courts Act Cap. 11 [R.E. 2019]** to support his contention. The Appellant also submitted that, it is very clear from the law regulating Probate matters in Primary Court that the same has no time limitation. The case of ***MAJUTO JUMA NSHAHUZI VS. ISSA JUMA NSHAHUZI, PC Civil Appeal No. 3 of 2013*** was cited to support the argument on time limitation.

With regards to the **4th ground of Appeal**, the Appellant averred that the Magistrate failed to consider the fact on records that the Appellant and his Mother lived in Muheza Tanga since the death of the deceased; 13 years later the Respondents by ill will petitioned for probate without considering the Appellant and his Mother.

In reply the Respondents in their submission stated that in accordance to the 1st ground of appeal, it is their submission that marriage, divorce and re-marriage are proved by documents. Hence they are purely matters of documentary evidence and not matters of words of the mouth. They said, the Appellant's Mother was married by the Appellant's Father and later divorced and was re-married to a Christian Husband. Further, there is no evidence of the Appellant's Mother being divorced by the Christian Husband so as to prove legality of the re-marriage spoken of by the Appellant.

Respondents submitted that, it was the duty of the Appellant and his witness to prove the existence of the Divorce with the Christian Husband as well as the re-marriage with the deceased. It was also the duty of the Appellant to prove that his Mother returned to Islamic religion before the alleged re-marriage. In that case, it was insisted by the Respondents that the Appellant

and his witness had the duty to build their case during examination in chief and not during cross examination.

Moreover, there is a point to prove that there was no re-marriage if at all there was re-marriage, the Appellant's Mother ought to have claimed for her share from the Deceased estate but the same does not appear in their submission. Respondents questioned, if the Appellant's Mother was re-married to the deceased, she then is a widow and deserves a share but the same has not been claimed, something which proves that there was no re-marriage. Respondents referred the Court to the requirement of the Law under **section 112 of The Evidence Act [Cap. 6 R.E 2019]** which states that, whoever alleges must prove the facts alleged. Out of that, lack of documentary evidence upon the facts alleged, there is no any opposed evidence as alleged by the Appellant.

Respondents submitted further that, the Birth Certificate of the Appellant tendered was also not trust worth, as the Appellant applied for it with intention to use it as a weapon to claim that he is the Child of the deceased. It is clear since the Appellant applied for it in the year **2008** which was **32** years later and immediately after obtaining the same is when the Appellant started filing cases against the Respondents claiming to be one of the Children of the

deceased. It is the Respondents' view that, from the incident, one can say that the Appellant had bad intension by recognizing the deceased as his Father after his death.

Respondent informed the court that, it was SM2 who testified to have been divorced by the deceased and later on got a child with another Man, and after that is when she got remarried to the Deceased and gave birth to the Appellant. They said, all these were not supported with any evidence at the trial Court.

Submitting on the third ground of Appeal, it was the Respondents' contention that, the Primary Court did not deal with the issue of delay therefore it is improper to allege that the Primary Court was satisfied with the reasons for delay. It is observed that the Appellant filed his claim **13** years later from when the administrators were appointed in April **2003** and there is no record that the Appellant has been in Court since **2010**.

However, while the Respondents were appointed in **2003** the Appellant never claimed a share of the deceased estate until sometimes in **2016** that is **13** years after and **25** years after the death of the deceased. The delay stated in the submission is not on petition but rather on claim to have a share in the estate of the deceased. Further that since the Appellant is claiming share in

the landed property the limitation period is **12** years since the death of the deceased.

Submitting on the last ground of Appeal, the Respondents' were of the view that the Administrators applied for grant of letters of Administration of the deceased estate in **2003** and the Appellant came claiming his share in the year **2016** on complaint that he has been excluded from his Father's estate. It was the Appellants submission that the delay to claim his share was because he and his Mother lived in Tanga. It is the Respondents' submission that living in Tanga a Region within the Country has never been a reason to extend time.

Moreover, the law provides that whoever requires to object that grant of Administration to appear and state their objection. The Appellant came to do so **13** years after the Administrators have been appointed. The Appellant to date resided at Muheza and has come to object before the Court **13** years later. The question been what barred the Appellant to have done the same in the years back? At this juncture, let me determine the Appeal as below.

However, I wish to point out at this stage that the Appellant in this Appeal consolidated the 1st and 2nd grounds and I in the same form, will determine the grounds as consolidated.

The Appellant in the **1st and 2nd** ground states the facts of his Mother to have been re-married by the deceased and that the Court not having considered such evidence then erred to have reached its decision. He said, it was the Respondents' concern that having stated such fact it was the duty of the Appellant and the Mother to have proved their claim before the Court. It is however stated that, the Appellant's Mother who is **Fatuma Haji Nkuru** was married to the deceased, then divorced and married to another Man a Christian; and later re-married to the deceased.

Respondents averred that, all the above were part of the evidence adduced by the Appellant and his witness who is his Mother in expectation of proving what they allege. It is my firm opinion that litigations before the Court of law are to be taken seriously. The law has set clearly that whoever alleges a fact must prove that what is alleged exists as clearly provided in the provisions of **section 110 (1) and (2) of the Evidence Act Cap. 6 [R.E. 2019]**. The marriages and divorces spoken of in the evidence by the Appellant and his witness were required to go beyond mere word **since a marriage or a divorce are witnessed by an issuance of a marriage certificate or an order of the Court for a divorce.**

Far from the above, the Appellant and his witness also had room to have called witnesses that witnessed the marriage, the divorce or the re-marriage since in civil matter proof is on balance of probabilities.

However, regarding the fact upon cross examination, the Appellant claims that the Respondent did not Cross examine the Appellants witness on matters of marriage. The same is in the negative since I have glanced at the records of the Trial Court and find that the Respondents did contest of the Appellant's witness to have been re-married and the witness stated to have been re-married and one Rashidi Tondo was a witness to the second wedding. It is here I still emphasis that the Appellant's witness had room to call witnesses to support the fact especially that she mentioned to have had a witness who witnessed the second marriage but did not call that witness to testify. It is from the above explanation that **I find the 1st and 2nd grounds of appeal lacking merits and hence dismissed.**

In the **3rd ground** of appeal and from the contending submissions of the Appellant contention is that the Court erred to have stated that the Appellant was time barred. Having gone through the records before me I have not come across the matter

of time limitation in the trial Court where the Appellant had filed a Complaint to claim being the beneficiary to the deceased Estate.

I agree with the 1st Respondent that in their submission where on the assertion that the Primary Court has not dealt in any manner with an issue of limitation of time/delay and therefore it was wrong to allege that the Primary Court was satisfied with the reasons set forth by the Appellant upon his delay in claiming his share as a beneficiary of the deceased Estate. The Appellate Court determining the matter of time limitation was a misconception for the same had never been a concern at the trial Court. For the reasons stated above **I dismiss this ground of appeal for lack of merits.**

With regards to the **4th ground** of Appeal the Appellant states that the Court erred to have disregarded that the Appellant and his Mother resides in Muheza Tanga since the deceased death. And that Respondents at the time of Petitioning for Administration of the Estates did not consider them. It was then the Respondent's concern that the Appellant came to claim of the share 13 years later after they had already been appointed and that residing at Muheza Tanga is not sufficient reason for the delay.

I am of the view that the Appellant and his Mother after having knowledge of the death of the deceased were **duty bound** to make follow up of what would transpire of the estate left by the deceased since they believe to be legal beneficiaries to the deceased Estate. Living at Muheza was not a bar to make follow-ups of their interest if at all they had interest of the estate or that interest accrued **13** years later as an afterthought.

It is evident from the records that the Appellant and the Mother well knew of where the deceased was residing and therefore being reasonable persons they also had a chance to visit those left behind at the residence of the deceased to question at what was going to be done of the estate of the deceased but the same was not done for **13 years**.

The actions of the Appellant and the Mother triggers the question as to what has disrupted their harmony for **13** years since the Respondents were appointed and **25** years since the death of the deceased; and what has changed or reminded them of an interest that was disregarded for over **13** years? It remains anonymous and well known to them.

It is my firm view as to why should the Court disturb the Family stratum? The explanation of the Appellant gives an opportunity to a Court to gauge the geniuses of the Appellant for

being quiet for **13** years of not pushing his interest. In the upshot, **I find that this ground of appeal is insufficient and therefore dismissed.**

In the event therefore and having said all of the above in respect to each ground of appeal, **this appeal is hereby DISMISSED with costs; and I accordingly uphold the decision of the Ilala District Court.**

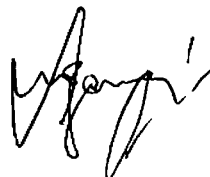
It is so ordered.

Right of Appeal Explained.



L. E. MGONYA
JUDGE
02/09/2020

Court: Judgment delivered before Hon. D. J. Msoffe, Acting Deputy Registrar in chamber in the presence of Mr. Joseph Mabula, Advocate for the Appellant, Mr. Mosama Eliasi, Advocate for the 1st Respondent and Mr. Mabugo RMA, this 02nd day of September, 2020.



L. E. MGONYA
JUDGE
02/09/2020