

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(BUKOKA DISTRICT REGISTRY)
AT BUKOKA**

PROBATE AND ADMINISTRATION APPEAL No. 1 OF 2018

(Arising from the District Court of Bukoba in Probate and Administration Appeal Cause No. 2 of 2013 & Original Bukoba Urban Primary Court in Probate and Administration Cause No. 9 of 2013)

FIDELIS KAIZA ----- APPELLANT

Versus

IMELDA KAIZA

EMMANUEL KAIZA

}

----- **RESPONDENTS**

JUDGMENT

11/05/2020 & 13/05/2020

Mtulya, J.:

Mr. Fidelis Kaiza (the Appellant) on 16th day of November 2017 approached this court contesting the decision of the District Court of Bukoba (the court) in Probate and Administration Appeal Cause No. 2 of 2013 (the cause), stating, in brief, that:

- 1. The learned magistrate gravely erred in law by nullifying the proceedings and appointment of the administration of the estates of the deceased person made by the trial court on the ground of lack of jurisdiction in entertaining the probate matter relating to the person who had contracted the Christian marriage; and*

2. The learned magistrate misconstrued the applicability of the cited precedents with the exception of jurisdiction vested to the primary court in appointing administrators.

In reply of the appeal, the Respondents supported the first ground, but with different reasoning and protested the second ground of appeal. To the Respondents:

...ground one of the appeal is strongly disputed ... the matter deprives the jurisdiction of the primary court ... as the properties involved located in various geographical location or regions...and deceased had polygamous marriage involved three wives...governed by customary law.

When the appeal was scheduled for hearing, the parties appeared themselves without any legal representation. The Appellant briefly argued for the first ground, but abandoned the second. In his submission he stated that the deceased contracted Christian marriage with Goziberitha Kokubanzi on the 8th day of December 1978 with certificate numbered LD 3904 issued in Itahwa Catholic Parish and hence the court in the cause was wrong to state that the Bukoba Urban Primary Court (the Primary Court) in Probate and

Administration Cause No. 9 of 2013 lacked jurisdiction to hear and entertain the cause. The Appellant argued further that the Respondents were present during family meeting and signed their presence in the family minutes emanated from the meeting, and did not protest his appointment.

To the Appellant, the deceased had three wives, but only the second wife and his son who are protesting his appointment on the administration and distribution of the deceased's estates, and in any case no any processes which has been initiated towards acquisition and distribution of the properties. Finally, the Appellant stated that there is no any evidence his appointment will prejudice the Respondents in any way and therefore this court may appoint him as an administrator of the estates of his deceased father.

Protesting submission made by the Appellant, the First Respondent stated that she has stayed with the deceased person since 1987 to his demise on her hands on 2012 and were blessed with three issues. The First Respondent argued further that the Appellant is colluding with the third wife Georgia and her daughter Lilian to administer the deceased estates in detriment of the Respondents. With regard to signing of the family minutes, the First

Respondent argued that she initially signed thinking the Appellant would have done justice as she has been with him since he was standard one in primary school, but he changed his behavior to their detriment.

On his part the Second Respondent submitted that he does not trust the Appellant as he was quoted to have stated that the children of the First Respondent are bastardy, illegitimate and are not emanated from the deceased's blood. To his opinion, the Appellant will not do justice to the First Respondent's children emanated from the deceased.

In a brief rejoinder, the Appellant submitted that all that have been stated by the Respondents are allegations and rumors without any vivid evidence. To his opinion, the Primary Court decided based on evidence and appointed him as an administrator of the deceased estates and therefore he will administer according to the law.

I have heard submissions made by parties during the hearing of this appeal. I also had a cursory glance of the record both in Primary Court and the court.

With regard, to the first ground of appeal in this case, the court in the cause had its opinion and for purposes of clarity, I will quote

page 10 of the typed judgment, where after hearing of the parties on the matter, the court held that:

Since Bukoba Urban Primary Court misdirected itself to entertain the matter in which it has no jurisdiction. This court therefore nullifies all the proceedings before the primary court and declares the appointment of the respondent as an administrator of the deceased estate null and void.

This holding is emanated from the analysis of the court in page 8 to 10 of the typed judgment with regard to jurisdiction of the Primary Court after it had found out that the deceased contracted Christian marriage which is regulated by Indian Succession Act, 1865. To the court, the mandate of Primary Court with regard to civil cases of probate and administration nature ends with customary and Islamic matters.

The source of contention in the court in the cause is depicted at page 2 and 3 of the typed judgment of the Primary Court. In those pages, the Primary Court stated that:

Mahakama hii haikupokea hati yeyote ya talaka na hivyo kuona ndoa ya kikristo kati ya marehemu na Gosbertha

Kokubanza...marehemu alifunga ndoa ya kikristo na mpaka mauti yanamkuta hakukuwa na talaka...na kwa vile marehemu alifunga ndo ya kikristo inayoruhusu mke mmoja na hakukuwa na talaka kwa mujibu wa sheria. Mpingaji No. 1 (the First Respondent) hatambuliki kama kama mke wa marehemu.

To justify its argument the Primary Court cited the authorities in section 89 of the Indian Succession Act and section 15(1) and 38 (1) (c) of the Law of Marriage Act [Cap. 29 R. E 2019] and proceeded to appoint the Appellant as administrator of the deceased estates.

This court is therefore invited to determine whether the statement and holding of the court in the cause was correct. This dispute will not consume much time of this court. The jurisdiction of the Primary Court with regard to probate and administration causes is very plain. It cannot stretch to Christian marriage regulated by the Indian Succession Act. The general mandate of Primary Court is with regard to probate and administration of estates is enacted in section 18 and 19 of the Magistrates' Court Act [Cap. 11 R.E. 2019] (the Act) and specifically in the Fifth Schedule to the Act.

It is fortunate that these provisions have already received interpretation and precedents are abundant (see: **Robert Mwangoka v. Gurd Amon (1987) TLR 165, Zacharia Milalo v. Onesmo Mbona [1983] TLR 743** and **Khadija Said Matika v. Awesa Said Matika, Civil Appeal no. 2 of 2016**). For instance in, Zacharia Milalo (supra), at page 243 and 244, his Lordship Lugakingira, J. (as he then was) stated:

*The issue of jurisdiction is equally interesting...I think there is need for some general observations on the civil jurisdiction of Primary Courts... In so far as I know, there are three situations in which a Primary Court would not have or would be deprived of jurisdiction. These are **where the law applicable is neither customary law nor Islamic law; where jurisdiction is expressly taken away by statute; and where the dispute is of such legal and technical complexity as to be considered beyond the competence of such court.** In all other respects a Primary Court has and may exercise jurisdiction (emphasis supplied).*

In the present appeal, record shows that the three highlighted situations in the precedent of **Zacharia Milalo** (supra) do not exist and in any case, it can be said the present dispute is of such legal and technical complexity to be considered beyond the competence of the Primary Court. However, that may not be so as the facts are straight forward.

In brief, in the present case record shows that the deceased, Faustine Kagaruki (the deceased) deserted Gosbertha Kagauruki in 1987 for the First Respondent and Georgia Kaiza. On the 10th December 2012 the deceased passed away. Clan meeting was called and held on 24th November 2012. The meeting settled that the Appellant, as he acquired majority vote of eight (8) out of fifteen (15) members who were present, to be proposed in the Primary Court as administrator of the deceased estate.

However, the record of this appeal shows that it was only nine (9) members who signed the clan meeting minutes. No reasons were recorded in the minutes, in the Primary Court during the hearing of the Application for letter of administration, during first appeal in the court and even in second appeal in this court. Record also shows that during the Application hearing on 17th April 2013, the First

Respondent protested the clan minutes stating that they were forged, but no inquiry was initiated to determine its validity. Above all, the secretary of the meeting did not register his signature in the clan minutes.

On 17th January 2013, the Appellant applied for letter of administration in the Primary Court and was protested by the Respondents. However, on 17th May 2013 the Primary Court granted the letter of administration. Record show that sometimes in between 17th January and 17th May 2013, and to be specific on 28th March 2013, during reply of the submission in the Primary Court, the Appellant attached photocopy of a letter from Itahwa Catholic Parish dated 20th March 2013 stating that the deceased had contracted Christian marriage with Gosbertha Kokubanza on 8th December 1973.

During the hearing of the Application on 17th April 2013, neither Gosibertha Kokubanza nor padre of Itahwa Catholic Parish was marshalled to testify on the photocopied letter. On the other hand, the First Respondent claimed that deceased wife, Gosibertha Kokubanza deserted her husband hence on 25th March 1987 she married the deceased under customary rites. However, there was no any proof on record save for the pictures showing they were together

and general statement that they lived together as husband and wife since 1987 to the expiry of the deceased in 2012.

In my opinion, I think, in an appeal like the present one, it is very difficult to state whether the deceased had contracted Christian marriage with Gosbertha Kokubanza or customary marriage with the First Appellant. In absence of evidence to substantiate the same, this court's hands are restrained to record anything.

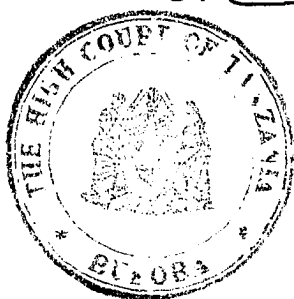
Having said so and for the reasons stated above, I set aside the judgment and quash proceedings and orders emanated from the decisions in District Court of Bukoba at Bukoba in Probate Appeal Cause No. 2 of 2013 and original decision of Bukoba Urban Primary Court in Probate and Administration Cause No. 9 of 2013.

I do so because of the learned magistrates in lower courts failed to labour their time and efforts to detect the mentioned defects which in any case is gross mishandling of cases that cause unnecessary delays and suffering to the parties. This is one of the most unfortunate cases which is to be filed, heard and determined afresh. I understand there are widows and heirs in this appeal

awaiting their rights, but rights are substantiated by evidences. However, there are no such evidences in the present appeal.

This appeal is accordingly dismissed. I award no costs. Each party must bear his/her costs. The reasons are straight forward. In first place, the record of the appeal is not inviting as there are several faults, and second all parties in this appeal are relatives. Above all, they have to go back either to initiate another Application or settle amicably.

It is accordingly ordered.

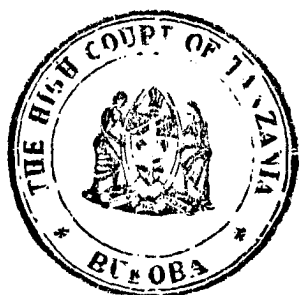



F. H. Mtulya

Judge

13/05/2020

This judgment was delivered in Chambers under the seal of this court in the presence of the Appellant, Mr. Fidelis Kaiza and in the presence of the Respondents Ms. Imelda Kaiza and Emmanuel Kaiza.




F. H. Mtulya

Judge

13/05/2020