IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

MISCELLANEOUS CIVIL APPEAL NO. 05 OF 2020

(Arising from Probate Appeal No.3 of 2020 before District Court of Rombo and Originating from Probate Cause No.6 of 2020 before Mengwe Primary Court)

CATHERINE PRISCUS MASSAWE ..... APPELLANT

VERSUS

KAMILI PROTI MASSAWE .....RESPONDENT

JUDGMENT

MUTUNGI .J.

In a nutshell, **Catherine Priscus Massawe** (Appellant) successful petitioned for letters of administration of the estate of the late **Priscus Proti Massawe** at Mengwe Primary Court. This was after the deceased's family had nominated her to administer her husband's estate. One **Kamili Proti Massawe** (brother in law) thereafter filed an objection on two grounds. **First**, the appellant had separated with her late husband since 2009, having left with most of the properties with her and **second**, the respondent and others in the family were not involved in

the clan meeting which appointed her. To this the respondent alleged was living with some of the deceased's children (born out of wedlock) who as beneficiaries ought to have been notified. In the end the trial court dismissed the objection and proceeded to appoint the Appellant as administrix of the estate of the late Priscus Proti Massawe who had passed on in 2014. The trial court dismissed the allegations against appellant as normal wear and tear issues in the marriage. Further the trial court had observed she had been legally appointed by the family and clan members. Furthermore, the respondent was found to be in no position to identify all the deceased's properties neither the child born out of wedlock proposed by him.

Aggrieved by such decision, the respondent herein appealed to District court of Rombo where the appeal was dismissed. As though not enough the first appellate court *suo motto* appointed the Respondent as co-administrator of the estate. Aggrieved the appellant has knocked the doors of this court on the following grounds: -

1. *The District Court erred in law and in fact by appointing the Respondent to be the co-administrator with the appellant to administer the estate of the late*

Priscus Proti Massawe since the Respondent who has ill motive (personal enrichment) to the estate together with his mother chased away the Appellant together with her children from her matrimonial home before and after the death of the Appellant's husband.

2. *The District Court erred on the point of law and fact by appointing the respondent as administrator of the estate of the late Priscus Proti Massawe while disregarding the minutes of the clan meeting which appointed the appellant to be the sole administrix of her late husband's estate; furthermore, the respondent attended the meeting and consented by signing the minutes.*
3. *The District Court erred in law and fact by appointing the respondent as administrator of the estate of which with ill motive he merely alleges some properties do not belong to the deceased estate; administering of the same estate by the respondent will result in injustice.*
4. *That the whole estate (farms, houses, cattle, spare parts shop and garage) of the deceased Priscus Proti Massawe is under possession/occupation of the respondent and he utilizes it for his personal gain without considering the beneficiaries of the estate;*

thus the respondent has been interfering with the estate without any colour of right or power so he does not qualify to be the administrator.

5. *That the properties which acquired by the Appellant and her late husband Priscus Proti Massawe are being utilized by the respondent since the death of the appellant's husband. That the respondent is indebted a lot in this estate; his presence as a co-administrator will prejudice the whole process of administering the said estate.*
6. *That the District Court erred in law and in fact by holding that the respondent should be the administrator of the said estate because of the mere allegations that there were some properties acquired by the deceased in the absence of the Appellant therefore such properties are unknown to the Appellant while in fact no any property that was acquired by the deceased in the absence of the Appellant and all the properties are known by the Appellant.*
7. *That the District Court erred in law and fact by appointing the Respondent who has never been in good terms with the Appellant and all the beneficiaries/children of the deceased.*

The parties proceed by way of written submissions of which the Appellant was represented by Mr. Richard Patrice Mosha, learned advocate, while the respondent on the other hand appeared in person/unrepresented.

Submitting on the first ground of appeal as quoted earlier, the counsel contended, the appellate court erred in appointing the Respondent as co-administrator in disregard of his ill motive. The respondent had chased away the Appellant from her matrimonial home before and after her husband's death. He added to make matters worse, there is no proof the Respondent prayed to be appointed a co administrator of the said estate. On the same point he referred the court to paragraph 2(b) of 5th Schedule to the Magistrate Courts Act, Cap 11 R. E. 2019 which empowers the court to appoint a neutral person to administer the estate upon an application and such person has to be impartial, one able to and willing to administer the estate together with the one appointed under paragraph 2(a). For any stretch of imagination, the respondent was not such kind of a person.

Discussing the 2nd ground of appeal, the Appellant's counsel blamed the appellate magistrate for appointing the Respondent in disregard of all the clan members wishes

and resolution which unanimously appointed the Appellant the sole administrator. The respondent was present and he dully and willingly consented to the appellant's appointment. The court should have in the circumstances had due regard to a person with interest in the estate. The counsel referred the court to the cases of **Sekunda Mbwambo vs Rose Ramadhani [2004] TLR 439** and **Naftary Petro vs Mary Protas, civil appeal No 103 of 2018 (CAT-at Tabora)** in support thereof.

On the same point Mr. Mosha was of the view, the Appellant being the deceased spouse was the fit person with interest compared to respondent who had ill motives. He cited section **25(1)(a)(b)(c) of the Law of Marriage Act, Cap 29** to emphasize the point that, the appellant had been married to the deceased which marriage was still existing in law.

In view of the 3rd ground he faulted the appellate magistrate for appointing the respondent who with ill intent alleges some of the properties are not part of the deceased's estate. Not only that, he refutes the deceased left no properties behind as seen at page 3 para 1, 5th and 6th lines, page 10 para 4, 1st and 2nd lines of the trial court's

judgement. With such a character the respondent is not fit to administer the estate.

As for the 4th ground the main complaint being, the Respondent has all along been squandering the deceased properties for his personal gains without considering the interests of the beneficiaries. These include farms, houses, cattle, spare parts shop and garage. To the contrary the appellant together with her two children have never enjoyed the fruits of the said estate.

On the 5th ground of appeal, the learned advocate contended, the Respondent is indebted with the deceased estate. He is required to repay all what he has spent in the estate from 17th February 2014 when the deceased passed. The beneficiaries have throughout that period been left out and the appellant totally separated from the estate.

Submitting on the 6th ground of appeal, the Appellant's advocate contested, the allegation some properties had been acquired in the absence of the appellant. The respondent knew this is not true and it is calculated to misappropriate the estate. Even if there are such properties, this is not a matrimonial case in which joint efforts of acquiring such properties has to be proved. This is

a probate matter of which once a wife/husband dies the remaining spouse becomes the necessary successor.

Buttressing the 7th ground of appeal, the learned advocate explained, the Appellant is not in good terms with the Respondent nor the beneficiaries. Be as it may, the respondent has never denied the properties left behind by the deceased had been in his possession all along. Neither did he deny that all the surviving deceased's children have been living with their mothers. There is no proof that the children born out of wedlock are schooling and that the respondent was paying for their school fees. On the same point he argued the respondent is not a reputable and partial person able and willing to administer the said estate.

The learned advocate commented, the trial court found the appellant was married to the deceased hence had never been divorced. In terms of the case of **Mwinyi Hamisi Kasimu vs Zainabu Bakari (1985) TLR 217** the two were still considered as wife and husband. On the same lines, the Appellant is entitled to an equitable inheritance by virtue of a valid marriage. He supported the point by referring the court to the case of **Bi Hawa Mohamed vs Ally Sefu (1983) TLR 32** and **Article 2(1),(2) of the Protocol to the African**

Charter on Human and People's Rights of Women in Africa (November, 25, 2005).

In concluding the counsel listed the Appellant's prayers to wit, quashing the appellate court's judgement, uphold the trial court judgement, costs and any other reliefs.

Before contesting the grounds of appeal, the respondent raised the issue of jurisdiction where he argued, the trial Primary Court had no jurisdiction to issue letters of administration for the estate of the late Priscus Proti Massawe. He argued, it is on record the deceased celebrated a Christian life together with his wife to the extent they contracted a Christian marriage. He cited the case of **Pendo Gray (Administrator of the estate of Gray Davison vs Serafina John a.k.a Piadari John) PC probate Civil Appeal No. 10 of 2012 High Court of Tanzania at Mwanza (unreported)** in support of his stance.

Responding to the first ground of appeal he submitted, the Appellant had never been chased from the matrimonial home nor her children. She has never reported this injustice to any welfare office and for that her claim is based on mere words without proof. Further, there is no proof of the respondent's move to misappropriate the estate or

mismanage the same. In view thereof the court was justified to appoint more than one administrator suo mottu.

As to the second ground, the respondent argued, the clan meeting was not attended by all the interested parties in the estate. These include the deceased's mother, sisters, brothers and his 6 adult children who were never invited to attend the said meeting.

On the third ground of appeal, the respondent argued, not all properties were part of the deceased estate. There is evidence some including a shop and garage belonged to their late father one Proti Massawe and were administered by Protas Proti Massawe from 10/6/1997 before he passed on.

Responding to the 4th ground of appeal he reiterated what he had submitted under the first ground that, the allegations against him were mere words creating an image the respondent is utilising the deceased properties unlawful with an intention to misappropriate the same and deprive the beneficiaries of their inheritance. He added has never been indebted in any way in the estate. Moreover he was appointed on 6th October 2020, in view thereof has not had time to collect or distribute the deceased's properties.

He further contended the reason he was appointed a co-administrator is to cater for the interest of the children born out of wedlock. The same is as per the requirement of section 10 of the Law of Child Act.

On the 7th ground of appeal the respondent stated the allegations levelled against him are false which need to be proved. The estate has been idle since the death of the deceased in 2014, in that regard the properties have not been scattered.

In concluding the respondent prayed for dismissal of the appeal with costs. Further, a declaration that the primary court didn't have jurisdiction. The court should also declare the appellant's written submission is legally defective for not containing prayers and signature of a legal counsel or herself.

In rejoinder the appellant's advocate submitted, the deceased was living a traditional life in Mengwe within Rombo District. The properties were not registered and fall under the ambit of Chagga customs and practices. These properties are estimated at a value which is less than one hundred thousand within the Primary Court's jurisdiction. The advocate quoted the provisions of **para 106 to 132 of the Declaration of local Customary Law, G.N. 269 of 1963**

and **section 76 of Law of Marriage Act** in support of his argument.

Responding on the lack of prayers in the submission, the counsel explained, it is a typing error which is not fatal and can be cured by cancelling the word respondent and replacing it with the word appellant. This is in line with Article 107B (2)(e) of Constitution of United Republic of Tanzania. The court is thereof asked to consider substantive justice as in the case of **Yakobo Magoiga vs Peninnah Yusuph Civil Appeal No. 55/2017 (CAT-Mwanza)**.

Commenting on the claim that the submission is not signed, the Appellant's counsel replied, it was signed by the Appellant's counsel who is a person dully authorised as per Order VI Rule 14 of Civil Procedure Code Cap 33. However, the petition of appeal doesn't fall under the category of pleadings. In concluding the Appellant's advocate reiterated his submission in chief.

Now turning to the grounds of appeal as submitted by the Appellant's advocate. I find the points of determination are: -

1. ***Whether it was proper for the first appellate court to appoint the Respondent as co-administrator.***

2. *Whether the primary court had jurisdiction to entertain the matter.*

In answering the first issue, The Appellant's advocate is condemning the appellate magistrate for appointing the Respondent as co administrator in disregard of his ill motives, the clan meeting and its resolutions. Further the two appointed by the 1st Appellate Court were not in a good terms. The Respondent disputed these grounds and stated there is no evidence of those allegation. Further, the clan meeting lacked some important people, not all properties were owned by the deceased and that under section 33(4) of Probate and Administration of Estate Act (supra) the District Court is empowered to appoint more than one administrator.

In order to address these issues, it is important to visit the grounds of appeal at the district level vis a vis the judgement thereto. The grounds of appeal as presented before the District Court were as follows: -

1. *That the Primary Court Magistrate erred in a point of fact by dismissing the fact that, the couple were separated for a long time since 2009 and the properties which were accrued*

during that separation time the respondent doesn't have any contribution in it, and neither doesn't have any knowledge of it.

2. *That the Primary Court Magistrate erred in a point of law and fact admitting evidence of pictures which shows that, the respondent and her late husband were given a piece of land by one Mzee Maningo without taking into consideration the rules and procedures which are in the village land Act of 1999 as to how the land should be given.*
3. *That the Primary Court Magistrate erred in a point of fact by admitting the properties as part of the deceased properties without evaluating and analysing that not all of the properties belonged to the deceased and his wife.*
4. *That the Primary Court Magistrate erred in a point of fact by admitting that the value of the garage shop was worth 17mil Tsh, which was a mere evidence from the respondent without corroborating it with a detailed evaluation report from the government valuer as the procedure dictates.*

5. *That the trial Court Magistrate erred in a point of fact by admitting that the shop was legally owned by the late respondent's husband without corroborating it with any tangible legal evidential documents like Tax clearance certificate of TRA*

Scrolling down through the petition of appeal, it is true as submitted by the Appellant's advocate, there was never a time the Respondent prayed to be appointed a co-administrator. The same picture is reflected in the trial court where the Respondent was only objecting the appointment of the Appellant and not applying to be appointed the administrator. From this observation, I am of considered view that the District Court was wrong to go an extra mile to appoint the Respondent as co administrator in absence of such prayer from the respondent.

The Appellant advocate argued that the court was empowered to do what it did and he cited **section 33(4) of the Probate and Administration of Estate Act, Cap 352 R.E. 2002**. With due respect I differ with Mr. Mosha's view on the ground, the Probate and Administration of Estate Act is not applicable in matters which originate from the Primary Court. The law applicable in probate matters before

Primary Courts among others is the **5th Schedule to the Magistrate Court Act, Cap 11 R.E. 2019**. Even though, the District Magistrate usurped the powers vested with Primary Courts where the court upon an application by the interested party is empowered as the first appointing court to appoint the administrator. This is provided for under rule 2 to the 5th Schedule of the Magistrate Court Act (supra) which I wish to quote: -

> *2. A primary court upon which jurisdiction in the administration of deceased's estates has been conferred may-*
>
> > *(a)* ***either of its own motion*** *or an application by any person interested in the administration of the estate appoint one or more persons interested in the estate of the deceased The Magistrates' Courts Act [CAP. 11 R.E. 2019] 90 to the administrator or administrators, thereof, and, in selecting any such administrator, shall, unless for any reason it considers in expedient so to do, have regard to any wishes which may have been expressed by the deceased;*

(b) either of its own motion or on application by any person interested in the administration of the estate, where it considers that it is desirable so to do for the protection of the estate and the proper administration thereof, appoint an officer of the court or some reputable and ***impartial person able and willing to administer the estate to be administrator either together with or in lieu of an administrator appointed under sub-paragraph (a);"*** [Emphasis added]

This court when dealing with a similar matter in the case **Eckson Mtafya vs Maiko Mtafya, Probate Appeal No. 06 of 2020** (a persuasive authority) had this to say: -

"The duty to appoint who will be the co-administrator is actually the duty of the first appointing court when there is formal application made or if there is complaint filed and the court may appoint co-administrator after being fully satisfied that there is need to do so."

Guided by the above provisions of the law, it follows **first**, the District Court was not the appointing court to the extent of appointing the co-administrator. The said court had no sufficient material upon which it court proceed to appoint the respondent. **Second**, the respondent had not applied or prayed in the District Court to be appointed the administrator of the said estate. **Third** the respondent did not show if at all he was willing to administrator the same together with the appellant as stipulated under Rule 2(2)(b) of 5th Schedule (supra).

From the above, it suffices to conclude the first issue in the negative i.e., it was not proper for the first appellate court to appoint the Respondent as co-administrator on its own motion. It would seem the District Court was carried away by sympathy when it states at page 9 that: -

> *"This court think it is not wise to keep her away from the estate as the deceased left her children and also not good to let her stand on her own in dealing with the estate."*

The foregoing notwithstanding, the court has further scrutinized the trial court's record and noted, the respondent was present in the clan meeting. He was in fact the vice chairman of the clan meeting that appointed the

appellant. He dully participated in the process and accordingly endorsed her the administrator of her late husband's estate. All that time he did not show any interest to administer the estate. One wonders as to why he turned around and started objecting the appointment, his move is definitely suspicious.

Needless to say, the District Court had in essence dismissed all the grounds of appeal raised by the respondent for lack of merits, the same way the trial court had done. It is surprisingly how the District Court jumped to a decision of appointing the respondent a co-administrator in the said estate. These cannot be birds of the same feather to be able to flock together. The District Court was to warn itself of the danger of appointing such a person. As already observed the District Court had no such material to order the appointment suo mottu.

Coming down to the second issue on jurisdiction, the Respondent raised the same while replying to the submission made by the Appellant's advocate. He submitted the deceased was a Christian and had contracted a Christian Marriage with the Appellant hence the Primary Court had no jurisdiction to entertain the

probate. The appellant's advocate did reply in his re-joinder on this aspect.

I am alive with the principle that jurisdiction can be raised at any stage even at the appeal stage, though it is not one of the grounds of appeal. Further I am also alive that the Jurisdiction of the Primary Court in probate matters is limited to Islamic and customary probates (see **Rule 1(1)** to **5th Schedule of the Magistrate Court Act (supra)**

Much as I am aware of the above, in determining the choice of law to be applied in any probate matter, two tests have to be established. That is, the 'mode of life' the deceased lived and 'the intention of the deceased before his/her death.

It is apparent on record Form No. 1 before the trial court at para 7 states: -

> *"Marehemu alikuwa (eleza kabila lake) MCHAGA na alikuwa mfuasi wa dini ya MKRISTO ALIEISHI KITAMADUNI NA KUFUATA MILA ZA KICHAGA"*

The only reason given by Respondent to oust the jurisdiction of the primary court is, the Christian marriage which the deceased contracted with the Appellant. As

stated earlier the court has to establish the mode of life of the deceased to ascertain whether the deceased had abandoned the customary norms despite the Christian marriage.

In dealing with this issue, I am persuaded by the reasoning of **Matuma .J.** in the case of **Peles Moshi Masoud vs. Yusta Kinuda Lukanga, Pc. Probate Appeal No. 4 of 2020 at page 10 and 11** which held: -

> *"...in the like manner, the facts that the deceased in this case married the appellant as the 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 in terms of section 123 of the Evidence Act Cap 6 R.E 2019. If at all they felt the deceased are 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***

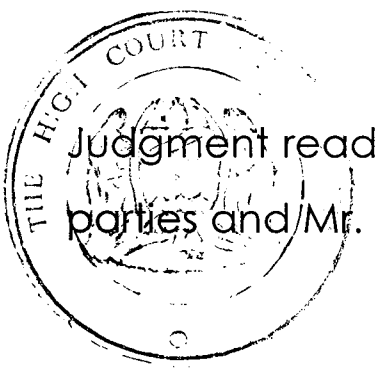
the respondent nor her Attorney herein can be allowed to purport dressing the deceased into the mode of life he himself contravened."*(Emphasis mine)*.

In the present situation, there are indicators which presuppose, though the late Priscus Proti Massawe contracted a Christian Marriage, he largely acknowledged the customary way of life. These indicators are; ***one,*** he had children out of wedlock and the public knew including his wife (the appellant) and ***two***, he was given soil at his wedding as evidenced by the pictures (Kielelezo A na B) which were tendered by the Appellant's witness one Benedict Yakubu before the trial court. ***Three,*** they conducted the so called "*kikao matanga*" after the burial. ***Fourth***, much more the Respondent did not prove in any way that the deceased lived and prophesied the Christian values. Considering the four glaring factors, it is apparently crystal clear, the Primary Court had the requisite jurisdiction to entertain the instant probate.

In the upshot, the appeal is allowed and the order by the District court of appointing the Respondent as co-administrator is quashed and set aside. The appellant is to proceed with the administration of the estate as ordered

by the trial court in terms of Rule 7(1)(2) of the Primary Courts (Administration of Estates) Rules of the MCA (supra). Considering that this is a probate matter and parties closely related, I make no orders for costs.

B. R. MUTUNGI
JUDGE
12/8/2021



Judgment read this day of 12/8/2021 in presence of both parties and Mr. Richard Mosha for the Appellant.

B. R. MUTUNGI
JUDGE
12/8/2021

RIGHT OF APPEAL EXPLAINED.

B. R. MUTUNGI
JUDGE
12/8/2021