

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

(APPELLATE JURISDICTION)

CIVIL APPEAL NO.40 OF 2019

(Arising from the decision of the District Court of Temeke in Civil Appeal No. 66/2018 before Hon. Kihawa – SRM, Original Probate and Administration Cause No.388/2015 of Mbagala Primary Court before Hon. Tamambele – RM)

MARY ALLY LWENA.....APPELLANT

VERSUS

ESTER UNDAYO (As the administratrix of the estate

of the late AMANDUS DAUDI LWENA) RESPONDENT

JUDGMENT

21/10/2021 & 15/11/2021

I.C. MUGETA, J.

Hereunder are the facts of this case. On 30/11/2002 the deceased, Amandus Lwena, married to Maria Mpambe who is the appellant. Their holy matrimony was solemnized at Chang'ombe Catholic Church before Padre Andreas Komba. According to the appellant they separated in 2009 without a divorce. On 22/11/2014, the deceased married to Ester Undayo at St. Alban's Anglican Church, Dar es Salaam and on 2/10/2015 he passed on. The evidence on how the deceased converted from Roman Catholic to

Anglican Church faith is unavailable on record. After his death and upon application, on 7/1/2016, the Primary Court of Temeke District at Mbagala appointed Ester Undayo (the second wife) to administer his estate. In the application, the appellant was not listed among the heirs. Those listed are four children, namely, Ado Amandus, Oscar Amandus, Flora Amandus and Amanda Amandus. Ester Undayo was listed as wife of the deceased. The properties listed to form part of the deceased's estate are three motor vehicles, four plots at Vijibweni, Kigamboni and his employment benefits from PSPF.

On 22/2/2017, the administrator filed the account of her administration in the presence of all beneficiaries. Upon receipt of the accounts the learned presiding magistrate passed this order: -

"Kwa vile wahusika wote wapo na wamekubaliana na wamesaini hati ya mgawo hivyo mgogoro wao umeisha. Hivyo cheki ya Mtoto Amanda Amandus Lwena akabidhiwe na barua ya mgawo itolewe kopi wote wakabidhiwe kuthibitisha mirathi yao imefungwa"

Six months later, on 21/8/2017, the appellant surfaced with an objection that she has rights in the deceased's estate as a wife. The objection was overruled for being time barred as the probate and administration cause had been closed upon filing of the accounts in terms of paragraph 11 of

the fifth schedule of the Magistrates' Courts Act [Cap. 11 R.E 2019] which provides: -

'After completing the administration of the estate and, if the primary court orders, at any other stage of the administration an administrator shall account to the primary court for his administration'.

The appellant appealed to the district court on two grounds of appeal and two substantive prayers. Firstly, that the trial court erred not to consider reasons supporting her caveat and that the magistrate erred not to find that the respondent was not a lawful wife. She prayed the decision of the trial court to be quashed and that she be recognized as the legal wife.

In a somewhat unclear judgment, the first appellate court allowed the appeal partly. I have failed to understand which ground of the appeal or prayer was allowed or disallowed. This is because the final order of the first appellate court reads: -

'I proceed to quash the proceedings and the decision of the Mirathi No. 388 of 2015 as from 21.8.2017 to 17.5.2018 proceeded at Mbagala primary court'

The quashed proceedings cover the period the objection was filed to its determination. If they were quashed, there is nothing upon which the appeal can be partly allowed. Be as it may, the appellant has appealed to this court on two grounds of appeal. That the trial court erred not to declare the second marriage as void and to appoint the respondent as lawful administratrix of the deceased's estate. She prosecuted the appeal in person and on the hearing date she said she had nothing to add on the grounds of appeal. She prayed the appeal to be allowed to enable her to be paid what is due to her from the deceased's estate.

The first issue for my determination is whether the trial court erred to appoint the respondent to administer the estate. This is a straight forward issue as the petition for her appointment was unopposed. From the evidence on record it is my view that the trial court cannot be blamed for appointing the respondent to administer the deceased estate where there was no caveat filed. The second ground of appeal has no merits.

The second issue concerns whether the trial court had powers to declare the marriage between the deceased and the respondent void. While I admit the trial court had jurisdiction to so determine, I am settled in my

mind that considering the circumstances of this case, it could not have done so because legality of that marriage was not an issue before it until when the appellant surfaced. The issue before the court was appointment of the administrator who carried out her functions and filed account of the estate. The belated objection was determined on time limitation and not on merits and it is my view that the trial court was right to hold that the objection by the appellant was time barred for the reason that the Probate file had been closed. Therefore, the first appellate court erred to quash the proceedings involving the objection filed after final accounts have been filed. I find the first ground of appeal without merits too. The whole appeal, therefore, has no merits. However, the decision of the District Court cannot be allowed to stand so far as it quashed the objection proceedings at the trial court. It is quashed and the decision of the trial court is restored.

As *orbita dictum*, what would have the appellant done under this situation? The administrator had completed the administration and the administration bond has been discharged. She had, therefore, no further liability as far as the administration is concerned in line with the provision of paragraph 10 of the fifth schedule of the MCA which states: -

'An administrator who distributes the assets in discharge of such lawful claims as he knows of and, after not less than three months after the death of the deceased, distributes the remaining assets among the persons or for the purposes entitled thereto, and who gives effect or complies with the directions of the court (if any), shall not be liable for those assets to any person of whose claim he had no notice at the time of such distribution:

Provided that nothing in this paragraph shall prejudice the right of any creditor to assets in the hands of the persons receiving the same'.

The respondent (administrator) had no notice of the appellant's claim to the asset ^{asset} ~~as~~ she distributed. It follows, therefore, that the only remedy available to a person claiming title to the estate administered at the Primary Court after accounts have been filed is to identify the properties he/she has interest in and sue the person or persons, not the administrator, to whom they have been bequeathed.

In the final analysis this appeal is dismissed without costs as the respondent never appeared despite being served by publication for being untraceable.



Mugeta
I.C. MUGETA

JUDGE

15/11/2021

COURT: Judgement delivered in chambers in the presence of appellant, respondent is absent.

Sgd: I.C. MUGETA

JUDGE

15/11/2021