

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA SUB REGISTRY

AT MUSOMA

PC. CIVIL APPEAL NO. 24 OF 2021

(Arising from the judgment of the Musoma District Court at Musoma in Civil Appeal No. 06 of 2021, Original Probate case No. 84 of 1994 of Musoma Urban Primary Court)

ESTER GEORGE NYEREMBE APPELLANT

VERSUS

PHINEHAS G. NYEREMBE1ST RESPONDENT

MARY G. NYEREMBE 2ND RESPONDENT

MUGABO AUCTION MART CO. LTD 3RD RESPONDENT

JUDGMENT

1st October and 1st November, 2021.

F. H. MAHIMBALL, J.:

The appellant in this matter is the widow of the late George Kesi Nyerembe who died intestate in 1994. The first and second respondents are biological children of the appellant. The third respondent is the court broker who was appointed by then appointed by the trial court to assist administration of the estate of the deceased upon family misunderstandings.

The background facts of the case can be summarized this way. Upon the death of the deceased, his sibling one Stephen Makacha was

on 23rd March 1995 appointed by Musoma Primary Court to be an administrator of the deceased's estate. It has been unfortunate that by 2020, the said probate cause was not closed and on 13th August, 2020 the said administrator applied to the trial court of Musoma Urban Primary Court that due to his old age and that he is sick, the administration duties of the said estate of the George Kesi Nyerembe be done by some one else; and he proposed the appellant to assume the said duties she being the widow of the deceased. The said proposal was endorsed by the trial court on 13th August, 2020.

Soon after the said endorsement by the trial court, the quarrels amongst the family members: the appellant and her own children commenced. The children claimed not to understand what their mother as administratrix of the said estate is doing so far as its administration is concerned. As to that misunderstanding, the trial court then revoked the appointment of the appellant as administratrix and in her place appointed the third respondent as administrator as court officer. It is this appointment which didn't amuse the appellant where she unsuccessfully challenged it before Musoma District Court and now is before this court raising a total of three grounds of appeal for this court's determination:

1. That the honourable magistrate erred in law and facts by basing its decision on the false, inconsistency and insufficient evidence of the respondents as the result failed to revoke the grant of the administrator who was appointed by the trial court.
2. That the trial magistrate erred in law and fact by entering judgment in favour of the respondents without taking consideration that the appellant herein is the legal wife of the late G.Nyerembe and he is capable of handling and administering the properties of the deceased G. Nyerembe.
3. That the trial magistrate erred in law and facts when entered a judgment without giving reasons as to how the appellant herein failed the deceased estate.

Basing on these, the appellant prays that the appeal be allowed with costs, the decision of the trial magistrate be nullified by this honourable court.

During the hearing of the appeal, the parties appeared in persons. When invited to argue the appeal, the parties had nothing useful to argue.

The appellant on her side submitted that her grounds of appeal be considered as her appeal's submission, thus her appeal be allowed.

On the side of the 1st Respondent, he submitted that he doesn't oppose the appeal, as the appellant is the legal wife of the deceased. Thus, capable of admitting the estate as per law.

The 2nd Respondent who is the daughter of the appellant and also of the deceased opposes this appeal submitting that her mother forged the minutes of the clan meeting so as to be appointed as administrator. The deceased died on 26th February, 1994. From then, their mother has not been faithful, honest and transparent in the administration of the said estate.

The 3rd Respondent who is the administrator appointed by the trial court had nothing to oppose. He submitted that, he just being appointed as administrator of the said estate by the court, he had no any vested interests. It is upon the family to decide either to proceed themselves or corporate with him in the discharge of his duties as administrator.

The appellant re-joined her submission that, she being the widow, is legally capable and mandated to administer the estate of her husband. Considering the jurisdictional issue of the trial court in handling probate matters, this court wanted to establish whether the deceased professed Christianity, Islamic or customary mode of life during his life time. I

summoned parties to address me on this mode of life of the deceased during their life time.

What I gathered from the appellant and second respondent, the deceased was a Christian and professed Christianity in his life. Thus, the issue here is whether the trial court had jurisdiction in adjudicating the probate matter of deceased Christian.

As per section **18 (1) a.i** of MCA, Cap 11 R. E. 2019 gives primary court jurisdiction on Islamic and customary matters only. However, under section 18 (2), the Hon Chief Justice is mandated promulgate rules on the powers of Primary Courts in the administration causes or probate matters. In compliance to this important legal requirement, via GN 320 of 1964 the Hon Chief Justice promulgated rules on jurisdiction of primary court on probate issues. Rule 2 of GN 320 of 1964 (on the powers of primary court over probate matters) provides that Primary Courts shall have jurisdiction only on Islamic and customary Probate only. This position is well explained in the case of **Scolastica Benedict VS Martine Benedict** (1993) TLR1, on jurisdiction of primary court over probate matters.

Thus, with this position of the law, the primary court entertained the matter without being clothed with the jurisdiction. Reference is

made to this court in PC Civil Appeal No. 11 of 2017 (**Christian Alexander Ntonge Vs Limi Mbogo**, where Munis, J restated while quoting the case of **Richard Julius Rugambura VS Isaack Ntua Mwakajila and Tanzania Railways Corporation**, Civil Appeal no. 2 of 2018 (unreported) observed that;

"The question of jurisdiction is paramount in any proceedings. It is so fundamental that in any trial even if it is not raised by the parties at the initial stages, it can be raised and entertained at any stage of the proceedings in order to ensure that court is properly vested within jurisdiction to adjudicate the matter before it"

As per the order of the Chief Justice published as Government Notice No. 320 of 1964 which conferred jurisdiction on primary courts in matters of administration of estates regardless of whether the subject-matter is land registered under the Land Registration Ordinance, provided the applicable law is customary or Islamic law. This position of the law was echoed by the Court of Appeal of Tanzania in the case of **Scolastica Benedict VS Martine Benedict** (1993) TLR1. This is the correct position of the law in respect of the jurisdiction of primary courts over probate matters in Tanzania. Thus, as both lower courts below

entertained the matter unlawfully, all that was done is a nullity in the eyes of the law and thus subject nullification by the court. By virtue of section 31(2) of the Magistrates' Courts Act, Cap 11 R.E 2019, I do hereby nullify all proceedings of the Primary Court and District court in respect of proceedings in Probate cause no.84 of 1994 of Musoma Urban Primary Court and Probate Appeal no. 06 of 2021 of Musoma District Court and set aside all orders, directives and judgment resulting from those proceedings as the same are resulted from nullity proceedings. Subject to the law of limitation, Parties are advised to file appropriate probate cause/ administration cause before a competent court for it to be dealt with according to law.

That said, appeal is allowed in the manner explained in this judgment. Each party shall bear its own costs as the issue determining this appeal has been raised by the court.

DATED at MUSOMA this 22nd day of October, 2021.




F. H. Mahimbali

JUDGE

1/11/2021

Court: Judgment delivered this 1st day of November, 2021. in the present in person for the appellant and present in person for the 2nd respondent.

Right of appeal is explained.



F. H. Mahimbali

JUDGE

01/11/2021