IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

PROBATE APPEAL NO. 11 OF 2021

(C/f Probate Appeal No.13 of 2020 of Moshi District Court at Moshi originating from Probate Cause No.3 of 2020 of Marangu Primary Court.)

DAWSON SAMSON MOSHI .....1ST APPELLANT

WILSON SAMSON MOSHI .....2ND APPELLANT

VERSUS

FESTO SAMSON MOSHI .....1ST RESPONDENT

FRANK K. MASSAE .....2ND RESPONDENT

JOSEPH MLINGI .....3RD RESPONDENT

JUDGMENT

15/3/2022 & 6/5/2022

SIMFUKWE, J

This Appeal emanates from Probate Appeal No.13 of 2020 of Moshi District Court. The historical background of the matter as captured from the records is to the effect that the appellants and the 1st respondent are siblings from the same father but different mothers. The 1st respondent applied for letters of administration in respect of the estate of his deceased father Samson Paulo Moshi. He was dully appointed administrator of the estate of his late father before Marangu primary Court (the trial court) in Probate Cause No. 3 of 2020 on 14/2/2020. The trial court ordered him to file an inventory on 14/6/2020. However, believing that he would not be able to file the inventory by that date, on 28/5/2020 he applied before the same court for extension of time to file an inventory.

On 8/6/2020 Dawson Samson Moshi, Wilson Samson Moshi, Frank K. Massae and Joseph Mlingi filed an application for revocation of the 1st respondent on the grounds that; one, the 1st respondent deceived the court, second, the 1st respondent had a criminal case related to the deceased's farm, third, that the 1st respondent did not issue citation (Form No. II) and that he forged the clan meeting minutes. The applicants also applied for temporary injunction to restrain the administrator from administering the estate of the deceased pending determination of their application.

They also added the issue of jurisdiction that the primary court had no jurisdiction to entertain probate matters.

In reply to such application, the administrator (the 1st respondent herein) raised the preliminary objections that, the application to restrain him from administering the deceased's estate was res judicata and second, that the 3rd and 4th applicants were not beneficiaries nor creditors of the deceased's estate thus they were not eligible to file the said application.

The trial court entertained the raised Preliminary Objections and upheld the same. In its ruling the trial court found that, the 3rd and 4th respondents had no locus standi to file the said application. Further, the remaining applicants (the appellants herein) were ordered to re-file their application within two weeks.

Dissatisfied, the appellants herein unsuccessfully filed an appeal before the District Court (1st appellate court) against the 1st respondent (administrator) and 2nd and 3rd respondents whom previously they were objecting together in the trial court. The 1st respondent (administrator) unsuccessfully raised a preliminary objection against the said appeal on

the ground that the appeal was time barred and bad in law. Hence, the present appeal.

The appellants after being aggrieved by the decision of the District Court of Moshi (1st appellate Court) preferred the instant appeal on the following grounds:

1. *That the appellate court (District Court) erred in law and in facts for upholding the decisions (sic) and orders of the trial Court while the trial court entertained the matter without having jurisdiction.*
2. *That the appellate court (District Court) erred in law and in fact to uphold the decisions (sic) of the trial court, while the trial court failed to evaluate evidence tendered before it.*
3. *That the appellate court erred in law and in facts to uphold the decisions (sic) of the trial court while it combined the main application for appointment of administrator and application for objecting the same, as a result confusion occurred and appellant did not heard (sic) in fully in one applications (sic).*

During the hearing of the appeal, both parties were unrepresented, thus, the court ordered the appeal to be argued by way of written submissions.

In support of the 1st ground of appeal in respect of jurisdiction, the appellants argued that the jurisdiction of the primary court is governed by the **Magistrate Court Act, Cap 11 R.E 2019** and **The Primary Courts (Administration of Estates) Rules GN No. 49 of 1971**. The appellants cited **section 19(1)(c)** and **section 18(1)(a)(i) of the Magistrate Court Act** (supra), and argued that such provisions govern

the jurisdiction of the primary court in administration of estates to the effect that primary courts are conferred with jurisdiction to entertain probate matters when the law applicable is Islamic and Customary law. Thus, the primary court had no jurisdiction to entertain the matter of the Late Samson Paulo Moshi. The appellants argued further that jurisdiction is the creature of statute and the same cannot be decided by the parties as it was stated by the East Africa Court of Appeal in the case of **Shyam Thanki and Others vs New Palace Hotel [1971] 1 EA 199** at page 202 where it was held that:

> *"The courts in Tanzania are created by statute and their jurisdiction is purely statutory. It is an elementary principle of the law that parties cannot by consent give a court jurisdiction which it does not possess."*

It was appellants' contention that in determining the issue of jurisdiction in administration of estates in Tanzania, among the important things to be ascertained is the law applicable. In determination of the applicable law, the court is guided by two tests; that is mode of life of the deceased and intention of the deceased person as stated in the case of **Benson Benjamin Mengi and 3 Others vs Abdiel Reginald Mengi and Another, Probate and Administration Cause No.39 of 2019,** High Court of Tanzania at Dar es Salaam (unreported) at page 16, the court when determining the law applicable it stated that:

> *"In determining the applicable law, the Court is enjoined by judicial precedents to be guided by the two legal tests as it is reflected by a myriad of case law including the famous cases of **Re Innocent Mbilinyi (1969) HCD No. 283** and the*

case of the ***Re Estate of the Late Suleiman Kusundwa [1965] EA 247*** *among others. The said legal tests are as listed hereunder: -*

1. ***Intention of Test.***
2. ***Mode of life Test.***

"This court is inclined to be guided by Mode of Life Test simply because the intention of the deceased on which law should govern his estate can be inferred from his mode of life where the deceased dies without stating expressly this fact."

The appellant argued further that, in the instant matter, considering the two tests that is mode of life and intention, the law applicable in the administration of the estate of the Late Samson Paulo Moshi is statutory law and not Customary law, since the deceased professed Christian religion and also lived his life under Christian rites and even his burial was done in Christianity way.

Regarding the allegation that the deceased had a child with another woman, it was the appellants' opinion that the same is not enough to conclude that the deceased had abandoned Christian religion. The appellants argued that there was another evidence that was adduced before the primary court to show that the deceased was Christian and good worshipper under Lutheran Church. Also, his church wrote letters to prove the same and the same were tendered before the trial court but the first appellate court failed to analyse such evidence clearly.

The appellants contended further that, each religion has its own way of dealing with its believers or worshippers and when the believers commit

sin, there are procedures that guide religious leaders so as to keep the worshippers in a good way. In that respect, the appellants stated that in Christian religion there is the procedure called CONFESSION that is normally used by the sinners when they want to seek forgiveness from GOD, and that procedure tends to be taken so as to please God to forgive his believers for the sins they have committed. The appellants made reference to the case of **Rev. Florian Katunzi vs Goodluck Kulola's case, PC Probate Appeal No. 02 of 2014,** HC at Mwanza, at page 13 Hon. Makaramba J held inter alia that:

> *"It is however without dispute that the deceased Moses Samwel Maguha Kulola who was an Archbishop, not only professed the Christian religion, but also practiced Christianity. It cannot by any stretch of imagination be expected that by the manner of the life of the deceased he intended that his estate should be administered, either wholly or in part, according to any other law than the law applicable in Tanzania to the administration of the estates of persons professing the Christian religion. This being the case, therefore the Primary Court had no jurisdiction."*

The appellants also cited the case of **Ibrahim Kusaga vs Emmanuel Mweta [1986] TLR 26** in which the Court held that:

> *"Having gone through the two submissions, the court finds indeed the deceased did prophecy (sic) the Christian faith as per the evidence in the Primary Court. In view thereof, his mode of life was regulated by the Christian norms hence his estate was to be administered according to his faith."*

The appellants thus commented that, the allegations that the deceased had a child with another woman does not suffice to find that the deceased abandoned his Christian religion. The appellants condemned the first appellate court for upholding the trial court decision while the primary court had no jurisdiction to entertain the matter at hand. The appellants distinguished the case of **Pelesi Moshi Masoud vs Yusta Kinuda Lukanga, PC Probate Appeal No. 4 of 2020** which was cited by the first appellate court, since in that case the deceased married a second wife in general public while in the matter at hand the Late Samson Paulo Moshi had one wife only. Thus, the first appellate court misdirected itself as it can be seen at page 6 of its judgment by alleging that the Late Samson Paulo Moshi had more than one wife while it is not true as there was no marriage certificate or any proof tendered before the primary court to show that the late Samson Paulo Moshi had more than one wife.

Submitting on the 2nd ground of appeal the appellants condemned the first appellate court for upholding the trial court decision while the same failed to analyse all the documents tendered before it as seen at page 2 of the judgment. They argued that, among the documents tendered there was a will which was admitted and marked as annexure A. which was not taken into consideration as to its effect in the administration of estate.

The appellants went on to state that before the trial court, the 1st respondent applied for the letters of administration of the estate of the late Samson Paul Moshi and tendered a will as evidence that proved that he was appointed and qualified to be the administrator. The said Will was marked as Annexure A. However, nowhere in the record discussed about the purported Will that was admitted before the trial court. The trial court remained silent in respect of the Will of the deceased whether the

properties of the deceased were to be administered by following the will or not or whether the will was valid or not. And the administration of the estate of the deceased was governed by the intestate rules as if the deceased died intestate while there is a will.

The appellants also noted the procedural irregularity regarding the appointment of the 1st respondent as administrator in the trial court while he was supposed to apply for probate and not letters of administration. This is proved at page 1 paragraph 2 of the judgment of the first appellate court that the first respondent applied for letters of administration not probate.

The appellants thus argued that the distribution of the estate of the late Samson Paul Moshi was done under intestate rules while the deceased died testate. The appellants added that the 1st respondent was supposed to apply for probate. Also, there is evidence that the 1st respondent fabricated some documents in order to be administrator of the estate of the deceased. Thus, the 1st appellate court erred by upholding the decision of the trial court while the same was tainted with irregularities.

On the 3rd ground of appeal, the appellants blamed the 1st appellate court for upholding the decision of the trial court that combined the two decisions of the primary court and marked the same as Probate Cause No. 3 of 2020 while they were two different applications that related to the administration of the estate of the late Samson Paulo Moshi. Probate Cause No.3 of 2020 is the application for appointment of an administrator of the estate of the late Samson Paulo Moshi. There was another case which was filed by the 2nd and 3rd respondent for revocation of the appointment of the 1st respondent in administering the estates of the late

Samson Paulo Moshi. Thus, there is confusion in the two decisions since it is not clear which one is Probate Cause No. 3 of 2020 as both decisions bear the same number. Thus, the 1st appellate court erred in upholding the said decision while it contains many irregularities and hence confusion occurred.

In conclusion, it was the appellants' prayer that this court should set aside the decision of the first appellate court and the trial court in respect of appointment of the 1st respondent as administrator and the matter to start afresh in respect of the appointment of administrator.

Responding the 1st ground of appeal in respect of jurisdiction, the 1st respondent concurred with the cited provision of **section 18(1)(a)(i)** and **section 19(1) (c) of the Magistrate Courts Act** (supra) which provide for jurisdiction of primary courts in matters relating to Islamic and customary law. The 1st respondent also concurred with the cited case of **Benson Benjamin Mengi and 3 others** (supra) in which among other things the issues of mode of life and intention of the deceased were applied to determine the choice of applicable law. The 1st respondent added **section 1(1) of the 5th Schedule to the Magistrate Court Act** (supra) as another provision which deals with jurisdiction of primary courts in probate matters where the law applicable is either Islamic or customary law and where the deceased at the time of death had fixed place of abode within the jurisdiction of the primary court.

The 1st respondent thus argued that the question is whether the deceased lived a Christian way of life for the statutory law to apply. The 1st respondent challenged the appellants' submissions that the deceased was a Christian and that he was buried in Christianity way and that there was

evidence tendered at the Primary court to prove that the deceased was a good worshiper of Lutheran church and relied on the letters wrote by the said church to prove the same. He quoted the first appellate court and the trial court where the appellants submitted that:

> *"Marehemu SAMSON PAULO MOSHI alikuwa na mke /mmoja wa ndoa na alijaliwa Watoto wanne(4) ambao ni DAWSON SAMSON MOSHI, WILSON DAWSON MOSHI, ROSEMARY SAMSON MOSHI na AMANI SAMSON MOSHI lakini pia alipata Watoto wengine nje ya ndoa ambao ni FESTO SAMSON MOSHI, ELIZABETH SAMSON MOSHI NA DORA SAMSON MOSHI."*

The 1st respondent submitted further that no further evidence was adduced by the appellants to prove that the deceased contracted Christian marriage with the 1st wife or lived in accordance with the Christian rites. Instead, they relied on the deceased's early childhood baptism and burial ceremony which does not depict the deceased's mode of life.

It was the 1st respondent's further argument that the deceased's mode of life was customary one and the fact that the deceased was baptised in his early childhood and burial ceremony does not describe his mode of life he lived. Thus, the act of the deceased to abandon his first wife and live with the second wife revealed that he abandoned the Christian way of life in favour of customary one. The 1st respondent made reference to the case of **Peles Moshi Masoud v Yusta Kinuda Lukanga, Pc Probate Appeal No.4 of 2020** where the High Court at page 10 and 11 held that:

> *"...in the like manner, the facts (sic) that the deceased in this case married the appellant as the second wife and make 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 (sic) 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."

Basing on this authority, the 1st respondent's argument was that relying on the deceased baptism which was done in his early childhood, his death certificate or burial ceremony after death is like dressing the deceased the mode of life which he himself contravened.

It was further submitted that the deceased left seven children from different mothers. The 1st respondent thus commented that, that alone is enough to establish that the deceased preferred a customary way of life. The respondent cemented his argument by referring to the case of **Emmanuel Patrick Mbwana vs Annaisha Patrick Mbwana, PC Civil Appeal No. 159 of 2019** at page 9 the High Court of Tanzania held that:

"...indeed, I hold that the Primary Court has jurisdiction to determine the cause, the deceased though contracted Christian Marriage, he largely professed customary rites."

He also made reference to the case of **Albert Estomih Kimonge v. Frank J. Kimonge and 2 Others, Probate Appeal No.2 of 2019** to buttress his argument.

The 1st respondent challenged the appellants contention that the case of **Peles Moshi** (supra) is not applicable as the deceased had only one wife and that there was no proof of marriage certificate tendered to prove that the deceased had two wives. The 1st respondent submitted that even the appellants failed to tender marriage certificate to prove that the deceased contracted a Christian marriage with the first woman. It was argued that the fact that the deceased had 4 children with the first woman and three children with the second woman describe that, despite being a Christian he lived customary way of life. He referred to the cited case of **Albert Estomih Kimonge** (supra)

The 1st respondent was of the view that the alleged confessions established by the appellants are mere afterthoughts and in no way the same reverse the mode of life of the deceased. The law is settled that all the children being born in or out of wedlock have the same right to inherit their father's property without any discrimination. He made reference to **section 10 of the Law of the Child Act, 2009** to support his argument.

Responding to the 2nd ground of appeal, the 1st respondent submitted that the issue of the Will as raised by the appellants was a new matter which was not raised at the first appellate court.

Regarding the 3rd ground of appeal on the issue of procedural irregularities, that the trial court combined the main application with the application for revocation, the 1st respondent argued that the law does not provide for procedures to separate applications in primary courts. Thus,

main applications and miscellaneous applications. The 1st respondent cited **Rule 8 of the Primary Court (Administration of the Estates) Rules, GN No.49 of 1971** which provides for the matters which can be heard and determined by primary court to include:

a. *Whether the deceased died testate or interstate*
b. *Whether any document alleged to be a will of the deceased is the valid will of the deceased or not;*
c. *Any question as to the identity of the persons named as heirs, executors or beneficiaries in the will;*
d. *Any question as to the property, assets or liabilities of the deceased;*
e. *Any question relating to the payment of debts of the deceased out of his estate;*
f. *Any question relating to sale, partition, division or other disposal of the property and assets;*
g. *Any question relating to the investment of money forming part of the estate;*
h. *Any question relating to the expenses to be incurred on the administration of estate.*

The 1st respondent also referred to **Rule 9 of the Primary Court (Administration of Estates) Rules** (supra) which provides for the revocation of the grants.

The 1st respondent averred that the law is silence and does not provide for separate applications upon hearing of the above matters. It is the practice of the court that such matters are heard and determined in the same case file, bearing the same number. The 1st respondent supported

his submission with the case of **Hadija Said Matika** (supra) at page 20 where it was held that:

> *"...But where there is an objection, the court will receive evidence from both parties and make a ruling accordingly..."*

The 1st respondent finalised his submission by praying that this appeal should be dismissed with costs.

In rejoinder, in respect of the first ground of appeal, the appellants reiterated the facts that the trial court had no jurisdiction. They added that the names of the alleged second wife was not mentioned but rather there was marriage certificate tendered to prove that the deceased had only one wife. He referred to annexure A1 to that effect.

The appellants insisted that, the case of **Peles Moshi Massoud** (supra) cited by the 1st respondent is distinguishable to the present case. They also distinguished the case of **Emmanuel Patrick Mbwana** (supra) cited by the 1st respondent on the ground that its facts are different with the instant matter.

Also, the appellants distinguished the cited case of **Albert Estomih Kimonge** (supra) on the ground that in that case the deceased was married once and separated/ divorced. Then, he lived with another woman and separated again. He also had eleven children from different mothers. While in the instant matter, the deceased contracted marriage with only one wife, and there was no divorce up to his death. The appellants kept reiterating that the issue of having children out of wedlock is not sufficient to prove that the deceased person abandoned Christian religion.

Re-joining on the 2nd ground of appeal that the issue of the Will is new which was not raised in the first appellate court, the appellants submitted that it is trite law that the second appellate court has jurisdiction to deal only with matters that have been discussed in the first appellate court. That, the second appellate court can only deal with new matters when the issue of law is involved. They supported their argument by referring to the case of **Ally Ngozi vs Republic, Criminal Appeal No. 216 of 2018** where the Court of Appeal of Tanzania at page 8 held that:

> *"It is thus a settled position of the law that, this court will only look into matters which came up in the lower court and were decided; not on matters which were not raised nor decided by neither the trial court nor the High Court on appeal unless they are points of law..."*

The appellants also referred to the case of **Butera Isaya vs Faustine Simeon, Misc. Land Appeal No. 39 of 2020** (HC) to buttress such position.

The appellants guided by the above decision, submitted that the issue of Exhibit A which is the Will of the deceased though not considered, is purely a point of law. The appellants reiterated what has been submitted in chief in respect of the alleged Will.

Responding to the 3rd ground of appeal that it is the practice of the primary court to combine main and miscellaneous application in the same case file, the appellants commented that such contention has no legal basis since these are two different applications. They added that the same created hardship for them to understand.

Lastly, the appellants reiterated their prayer of dismissing the decision of the first appellate court.

I have keenly gone through the grounds of appeal, submissions of both parties and records of the two courts below. As I have stated from the outset, this appeal originates from the ruling of the primary court when it was determining Preliminary objections which were raised by 1st respondent. It is on record that the appellants and the 2nd and 3rd respondents herein filed their application for revocation of the administrator of the estate of the deceased. Their objection is yet to be determined by the trial court. What was determined was the preliminary objection in respect of locus standi of the 2nd and 3rd respondents herein.

I had to examine the ruling of the trial court in respect of the raised Preliminary objections, I came to learn that on part of the two appellants herein, such ruling did not finalise their case. Meaning that their application for objection is yet to be determined. The appellants were ordered to refile their application within 14 days. For ease reference I wish to quote page 7 of the Ruling/ ***'Uamuzi'*** of the trial court ruling. The trial magistrate had this to say:

> *"Na kwakuwa **SU3 na SU4** wao wanadai ni wanunuzi halali wa maeneo hayo,hivyo wanapaswa kuwasilisha ushahidi wao baraza la ardhi ili mahakama iweze kutatua mgogoro huo lakini si sahihi kuja kumsimamisha msimamizi wa Mirathi kwani wao si sehemu ya wenye mamlaka kisheria ya kufanya hivyo.*
>
> *Hivyo basi kwa mantiki hii ni dhahiri kuwa maombi haya mbele ya Mahakama hii yamewasilishwa kimakosa kwani*

kuna wahusika (parties) ambao hawakupaswa kujumuishwa katika maombi haya..."

At the end, the trial magistrate ordered that;

AMRI: Wahusika wanatakiwa kuandaa upya maombi yao na kuyawasilisha mahakamani ndani ya wiki mbili.

Also, it is on record at page 25 of the trial court typed proceedings that the applicants (objectors) in their application for revocation, raised the issue of jurisdiction which is yet to be determined by the trial court.

From the above findings, I do not hesitate to conclude that the impugned ruling of the trial court is interlocutory, since it emanates from the ruling in respect of the preliminary objection on the issue of locus standi of the 2nd and 3rd respondents. The appellants were required to amend their objection application as ordered by the trial magistrate. The law is very clear on the issue of appeal against interlocutory orders. See the cases of **Tunu Mwapachu and 3 others vs National Development Cooperation, Civil Appeal No. 155 of 2018; Tanzania Motor Services Ltd & Another vs Mehar Singh t/a Thaker Singh, Civil Appeal No. 115 of 2006; Murtaza Ally Mangungu vs The Returning Officer of Kilwa & 2 Others, Civil Application No. 80 of 2018**, just to mention few. In the cited cases, the courts emphasised that an interlocutory order is not appealable unless it has the effect of finalising the case, which was not the case in this matter.

Therefore, the act of the two appellants herein to appeal against the ruling of the trial magistrate which did not finalise their application for objection was wrong and the same renders the appeal before the 1st appellate Court premature. Things could have been different if it was the 2nd and 3rd

respondents herein who appealed, since they were precluded from refiling the application before the trial court. Possibly that's why the 2nd and 3rd respondents herein had nothing to submit in respect of the instant appeal. The appellants weirdly made their fellow objectors the respondents on appeal. This is totally misconceived and unfounded under the law.

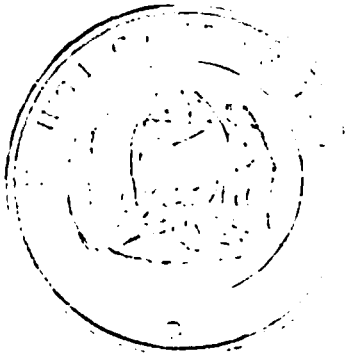
Worse enough on appeal, the appellants raised the issue of jurisdiction which they had already raised before the trial court and it is yet to be determined. I am aware with the principle that the issue of jurisdiction can be raised at any stage even on appeal. However, in the circumstances of this case, the same has been raised and is part of the grounds of objection before the trial court. I am of considered view that the trial court is in a better position to receive evidence especially on the mode of life of the deceased since the parties will present their evidence on that aspect.

Therefore, the appeal before the first appellate court was preferred prematurely. The same applies to the instant appeal before this court.

In the upshot, I hereby nullify the entire proceedings and decision of the 1st appellate Court and order the file to be remitted to the trial court for determination of the raised Objection before it in compliance with the trial court order dated 8/10/2020. Appeal dismissed with costs.

It is so ordered.

Dated and delivered at Moshi this 6th day of May, 2022.



S. H. SIMFUKWE

JUDGE

6/5/2022