

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
TEMEKE SUB-REGISTRY
(ONE STOP JUDICIAL CENTRE)
AT TEMEKE**

CIVIL APPEAL NO. 18 OF 2021

*(Arising from the decision of District Court of Temeke at One-Stop Judicial Centre in
Probate and Administration Cause No. 40 of 2021)*

QUEENESTHER HEZRON KIGONDO.....1ST APPELLANT

MERCEL HERZRON KIGONDO.....2ND APPELLANT

VERSUS

JAMES HEZRON KIGONDO.....1ST RESPONDENT

JULIUS LUHANYA KIGONDO.....2ND RESPONDENT

JUDGMENT

Date of last order: - 06/05/2022
Date of judgment: - 10/06/2022

OPIYO, J.

The above-named appellants being aggrieved by the order of District Court of Temeke at One Stop Judicial Centre in Probate and Administration Cause No. 40 of 2021 before Hon, A.E Mpesa, SRM dated on 30th November 2021 appeals to this court based on the following grounds;



1. That, the District Court erred in law and fact when it dismissed the Probate and Administration Cause No. 40 of 2021 on the ground that it lacked jurisdiction to entertain the matter on the ground that the late Hezron Luhanya Kigongo lived customary mode of life.
2. That, the District Court erred in law and fact to consider that the late Hezron Luhanya Kigondo lived a Christian mode of life and he was buried in a Christian way as he was a believer of African Inland Church (AIC)
3. That, the district court erred in law and in facts, for failure to consider that the late Hezron Luhanya Kigondo lived Christian mode of life that's why she had Monogamous marriage with her only one lovely wife Queenesther Hezron Kigondo (1st APPELLANT) (*Sic*)
4. That the district court erred in law and in facts for failure to consider 1st and 2nd Appellant caveat that;
 - i. There is forgery of signature of the 2nd appellant in the petition.
 - ii. There is additional of unknown heirs who are not biological children of the late Hezron Luhanya Kigondo.
 - iii. The respondent stated that the deceased had two wives.
 - iv. The respondent gave word information about the death of late Hezron Luhanya Kigondo.



5. That the district court erred in law and in facts for violating the rules of natural justice when it failed to allow the appellants to exercise the right to be heard.

Wherefore, the appellant prays for the appeal to be allowed, costs for the suit, and any other relief this court deems fit to grant.

This appeal was disposed of by oral submission whereby the appellants were present in person and the respondent enjoyed the service of Method Ezekiel, Learned counsel.

Arguing for the appeal, the appellants stated that, Honourable Mpesa did not give them the chance to hear their case. She heard only one side and reached a decision. There were only two adjournments and on the third, the matter was dismissed. They argued that, the court had jurisdiction to entertain the matter as the deceased did not live the customary way of life as the court held. If they were given a chance to be heard they would have proved so, but they were never heard on that. That, even the petitioners themselves confirmed in the petition that, the deceased lived a Christian way of life. The deceased was buried in a Christian way, led by the petitioners. No proof of the deceased living under customary rites and that was the reason he had Monogamous marriage under a civil marriage.

He continued to argue that, the 1st Respondent, being a police officer, forged their signatures on the documents he filed in court and the



matter has already been reported at the DPP's office. It is their contention that the deceased had only one wife. They had never seen the other woman who claimed to be the wife of the deceased. They only saw her once during odd hours in the vicinity of the court, suggesting corrupt practices. They also claimed that the deceased did not die on 22/6/2021, rather on 20/6/2021, at his home in presence of the the first defendant. The reason for change of date of death of a deceased is not known to them.

The appellants alleged that the deceased properties were not properly accounted for as they listed 8 houses instead of 10 houses and 4 motor vehicles instead of 5 motor vehicles. They also did not list the shares he owned as he was a Managing Director of Chim Risk Management. They also asserted that there is deceit in relation to heirs. Some listed are not legal heirs of the deceased as they are not his biological children. If they were heard. they would have set everything right.

In response to the appeal, Method Ezekiel learned counsel for the respondents, submitted the appellant claim that they were not heard is baseless as Temeke District Court had no jurisdiction to entertain the matter, how could it have had them. For that, he prayed for the appeal to be dismissed for the lack of merits.

The second ground was on the jurisdiction of the District Court. This is in accordance with Magistrate Courts Act, S.19 (1)(c). He argued that the matter which was before the court was a probate matter, this law gives the Primary Courts chance to determine all matters in which the



law applicable in regard to the estate is Customary and Islamic law. The Law of Marriage Act Cap 29, S.25, stipulates the types of marriages. From the above types, the deceased had a Civil marriage and not religious marriage. So, even if he had only one wife, it does not change it to Christian marriage. And even if he professed Christianity, and was buried in the same manner, the nature of marriage remains the same. Thus, according to the law, the District Court had no jurisdiction to entertain such matter. The jurisdiction falls to the primary court Which under section 18(a) has jurisdiction to hear all the matters of civil nature. He therefore submitted that the appellants have failed to prove that the deceased had a Christian marriage, and for that reason, their evidence is discrepant to proving the nature of the marriage.

He continued to argue that, the Law of Evidence, CAP 6, Section 110 requires that one who alleges must prove. The appellants have failed to discharge that obligation by failure to prove the nature of the marriage of the deceased to be that of Christian nature. That, they have also failed to determine whether the District Court had jurisdiction to entertain this matter. This ground therefore has no merits. He urged for its dismissal with costs.

He further argued that, as the appellants did not submit on the 3rd and 5th grounds; they should therefore be expunged. He claimed that the appellants brought new facts in arguing their appeal. These include the issue of the company that was not raised at the trial as well as the issue of forgery. This was more of a Criminal case, hence there was no need to bring it up to a Probate case. On the issue of variation of dates of



death of the deceased, the learned Counsel for the Respondent argued that there might have been a mistake, and he would have to crosscheck its validity, but if in contrary, then, this was an issue that had not been discussed in the trial. The matter was not heard yet on its merits. This includes the issue of the heirs who were included prior. This should wait for determination on merits. He prayed for the ground to be dismissed with costs.

In rejoinder, the appellant retaliated that the District Court did not hear their case. The matter was adjourned twice, and on the third day, the matter was dismissed. He admitted that that the marriage was Civil marriage, but all the same it was a monogamous marriage. In the marriage certificate there are basically three choices; Monogamous, potentially Polygamous, and polygamous. The deceased had stated in his marriage certificate that it was monogamous and that he could have made other choices if he had felt the need to do so, but he did not. They reiterated that deceased professed Christianity, and that is certified as verification in their petition. There was no indication that the deceased lived a customary way of life, nor does it show that he changed to it. Henceforth, the District Court has the jurisdiction to hear the matter.

After going through the submission of the parties I will consolidate grounds 1, 2, and 3 as they both aim to answer the mode of life of the deceased which will eventually determine the jurisdiction of the trial court, and grounds 4 and 5 will be dealt separately.



Perusing the trial court file, I have come to notice the following which is worth considering in determining the course of this appeal. On 30th November 2021 in the course of hearing the caveat, the trial magistrate noticed the two wives mentioned in the petition and invited the petitioners for the letters of administration herein the respondents to address it. Both stated that the deceased was a Christian but lived a customary mode of life as he had two wives. And the 2nd respondent stated that the deceased abandoned the Christian mode of life for the customary mode of life.

Upon perusing the lower court file, it is evidently seen that in the petition for the letter of administration by James Hezron Kigondo and Julius Luhanya Kigongo in **paragraph 1 items (xi) and (xii)** mentioned **Leticia Marcel Mufuruki** and **Fatuma Abdallah Chimsala** as the wives of the deceased and one of the heirs. The same was also manifested in the **family minutes** on **item (ix)** whereby again **Leticia Marcel Mufuruki** and **Fatuma Abdallah Chimsala** were mentioned as the wives of the deceased one Hezron Luhanya Kigondo. There is also an affidavit as to the verification of names filed by **Queenesther Hezron Kigondo** where she claimed the name of **Leticia Marcel Celestine** also refers to her and the two names refer to one person. The same petition also under paragraph 5 stated that he professed Christianity.

In the present appeal, it is obvious there was an issue of conflict of law as it is hard to decide whether the law to be applied is statute law or



customary or Islamic law, and to cure this on several occasions' courts have adopted the mode of life test.

Further perusal of the records, I find no place where the mode of life of the deceased was discussed, apart from the respondents who stated that the mode of life was customary, caveators were heard on this. As they were also parties, they were supposed to be given a chance to reply and the trial magistrate to enter her ruling after hearing both sides. This is important on determining the choice of laws, the parties have to explain how the deceased lived his life to assist the court in reaching the appropriate law to be applied, as it was held in the case of **Sikujua Model Mwasoni v Sikudhani Hansi Mwakyoma, Probate Appeal No. 10 of 2020, at Mwanza (unreported)**.

The above discussion made me sail on the 5th ground, whereby the proceedings of **30th November 2021**, as it is manifested from the Coram all parties were present and the trial magistrate only posed a question before the petitioners and failed to entertain the caveators on the reply. This is what gave rise to this appeal on violation of principles of natural justice of the right to be heard. In the case of **Hussein Khanbhai v Kodi Ralph Siara, Civil Revision No. 25 of 2014, Court of Appeal at Arusha (unreported)** referred to the case of **Mbeya - Rukwa Auto Parts & Transport Limited v. Jestina Mwakyoma, Civil Appeal No. 45 of 2000 (unreported)**, this Court in considering the principles of natural justice had this to say:

"In this country natural justice is not merely a principle of

common law; it has become a fundamental constitutional right. Article 13 (6) (a) includes the right to be heard amongst the attributes of equality before the law. "

Also, in the case of **Ausdrill Tanzania Limited v Mussa Joseph Kumili & Another, Civil Appeal No. 78 of 2014, Court of Appeal at Mwanza, (unreported)** it was held that:-

*"...It must be emphasized at this point in time that the right to be heard (**audi alteram partem**) is a fundamental principle which the courts of law jealously guard against"*

As this ground alone is sufficient to vitiate the proceedings, I shall not delve into the remaining grounds of this appeal, I hereby quash and set aside the decision of the District Court in respect of Probate and Administration Cause No. 40 of 2021 and direct the District Court to rehear the matter in accordance with the law by considering all the evidence and makes its judgment accordingly. For avoidance of unnecessary biasness let the matter be presided over by a different Magistrate. I make no order as to costs

It is so ordered.



A handwritten signature in blue ink, appearing to read "M. P. Opiyo", is written over a horizontal line.

M. P. OPIYO,

JUDGE

10/06/2022