IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

PC CIVIL APPEAL NO.48 OF 2020

(Arising from Civil Revision No.04 of 2020 of Karatu District Court, originate g from Probate and Administration Cause No. 34 of 2019 of Karatu Urban Primary Court)

RASHIDI SAIDI MNYELEJE..... APPELANT

VERSUS

RAJABU ABDALLAH..... RESPONDENT

JUDGMENT

16th May & 10th June 2022

TIGANGA J.

In this judgment, the appellant appealed against the ruling and proceedings of Karatu District court in Civil Revision No.4 of 2020 which originates from Probate and Administration Cause No. 34 of 2019 of Karatu Urban Primary Court. Dissatisfied by the ruling of the District Court, the appellant filed eight grounds of appeal as follows;

i. That, the District Court erred in law and in fact by allowing the Parties to file a new Probate and Administration Cause No. 34 Of 2019 while there was Probate and Administration Cause No. 35 of 2019 of the

estates of the same deceased at Newala Town Primary Court, in Newala District, Mtwara region.

ii. That, the District Court erred in law and fact by not nullifying the Probate and Administration Cause No.34 of 2019 of Karatu Primary Court which involved an appointment of a minor person who is below 18 years to be first Administrator (Athumani Shaibu) of the estates of the deceased.

iii. That, the District Court erred in law and in fact for failure to nullify the Probate and Administration Cause No. 34 of 2019 which contained serious irregularities and material errors, including fraudulent, forgery and manipulation of documents with the intention of depriving the deceased properties/estates

iv. That, the District Court erred in law and fact to decide in favour of respondent while the wife of the deceased was not appointed among the two administrators and no any reasons advanced.

v. That, the District Court erred in law and in fact for failure to consider the issue of DNA tests to the children which was vital.

vi. That, the lower court erred in law and in fact for failure to take into consideration that the respondent had no good relationship with the wife of the deceased (Hawa Halfani Chibwana).

vii. That, the District Court erred in law and in fact in determining the matter in controversy instead of delivering judgment delivered a ruling.

viii. That, the District Court erred in law and in fact by deciding the matter contrary to the law hence the decision reached is null and void.

To appreciate the facts of the case which gave rise to this appeal, it is important to point out the background of the case at hand. The facts *albeit* briefly are as follows. Following the death and burial of **Shaibu Selemani Chimale,** hereinafter referred to as "the deceased, at his home village in Newala District, the current appellant petitioned and was appointed by Newala Urban Primary Court in Probate and Administration Cause No. 35 of 2019 to be the sole Administrator of the estate of the deceased. Simultaneous to his appointment as the administrator, another probate regarding the estate of the same deceased was filed before Karatu Primary Court that is Probate and Administration Cause No. 34 of 2019 in which one Athuman Shaibu who posed and identified himself as a son of the deceased, but who was by then a minor, petitioned to be appointed the administrator

of the estate of the same deceased. Following that second petition, the family members realized that the petitioner was in Probate and Administration Cause No. 34 of 2019 was a minor therefore legally incapable of doing the job. They decided to put him aside and appoint on his place, the two co administrators who are the appellant and the respondent in this appeal. This means the appellant became the administrator in both cases, that is, Probate and Administration Cause No. 35 of 2019 before Newala Urban Primary Court and Probate and Administration Cause No. 34 of 2019 before Karatu Primary Court.

From the record, in the case filed before Karatu Primary Court, it was at first agreed that although the deceased had a legal wife, Hawa Halfani Chibwana who is living at Newala and with whom he was not blessed with any issue in their marriage, he had other women with whom he had three or four issues, but there is no evidence that he had any form of marriage with them.

At first the deceased family members agreed that, the deceased told them before demise that he had three children namely Twaribu Shaibu who was by then 26 years, Omary Shaibu, and Tatu Shaibu. However, the mother of Omary and Tatu alleged that she had three children with the deceased

the eldest being Athuman Shaibu, the first petitioner who later withdrew on the ground of the minority age. The said Athuman was objected almost by all family members that the deceased had never introduced him. That was followed by the suggestion that, the said Athuman should undergo the DNA test to ascertain her parentage. However, the trial Magistrate did not order the same to be conducted, instead, he advised them to resolve the issue at the family meeting which seemingly the issue was not resolved.

After five months following the appointment of the two administrators, the 1st administrator became in one way or the other indisposed, he did not offer his maximum service to the office of the administrator. Following that indisposition, on 13/12/2019 the appellant came with some prayers before the Primary Court some of them were already resolved and which at first were not in dispute. Among the prayers he made were for the court to revoke the appointment of his co administrator on the ground that he was not participating the exercise of collecting the estate, he also asked for an order that, all four children including those who were earlier accepted by almost all family members as the children of the deceased after they had been introduced by the deceased, to undergo DNA test to ascertain as to whether all of them were children of the deceased.

These two prayers were refused by the trial court, consequence of which, the appellant filed an application for revision before the District Court of Karatu, in Civil Revision No. 04 of 2020 asking for the court to call for the record of the trial court to satisfy itself on the correctness and legality of the proceedings and orders of the Karatu Primary Court.

The affidavit filed in support of that application pointed out the following as the area of concern, **one,** that the legality of Probate No. 34 of 2019 of Karatu Primary Court, while there was another Probate cause filed at Newala that is Probate Cause No. 35 of 2019. **Two,** the legality of the other wife Emiliana Sanka, while the deceased had only one wife Hawa Halfani Chibwana. **Three**, that there are forged documents which are the birth certificates of the children and the death certificate of the deceased.

In its findings, the District Court dismissed the application on the ground that the children had already been accepted by the family members who included one Mfaume, the elder brother of the deceased, even the wife of the deceased. Secondly, that the appellant was present and was part of the process of the Probate No. 34 of 2019, he was expected to have raised those concerns at the earlier opportunity possible, not to raise the same almost at the closure of the probate, and lastly, that the application for

revision had no consent of the elder blood brother of the deceased one Mfaume.

It was after the appellant was dissatisfied by the order dismissing the application for revision, when he filed the above listed grounds of appeal.

At the request of the parties, the court ordered the hearing to be by way of written submissions. Parties filed their respective submissions in time. In the submission in chief, the appellant abandoned five grounds of appeal, (that is grounds number 2, 4, 5, 6, and 7) out of eight grounds of appeal, he argued only three grounds of appeal which are grounds number 1, 3 and 8.

Starting the first ground of appeal, the appellant's counsel submitted that, section 8 of the Civil Procedure Code, [Cap 33 R.E 2019] prohibits the filing of the same suit twice in either the same court or other courts with jurisdiction to entertain such matter. He further submitted that Probate Cause No. 34 of 2019 before Karatu primary court is *res sub judice* to Probate and Administration Cause No. 35 of 2019 before Newala Primary Court. He further submitted that despite the fact that he informed the Magistrate at Karatu Primary Court, but sill the request to leave away Probate and

Administration Cause No. 34 of 2019 as it is *res sub judice* was not considered.

The Counsel for the appellant further submitted that, the Probate and Administration Cause No. 34 of 2019 before Karatu Primary Court contains lots of irregularities and material errors which are fraudulent, forgery and manipulation of documents with an intention to deprive the Deceased's estates. He further stated that, the Deceased's death certificate used before Karatu Primary Court in Probate and Administration Cause No. 34 of 2019 was the forged and manipulated, as the name of the Deceased reads as **Shaibu Selemani Chimwale** while the real names of the Deceased are **Shaibu Selemani Chimale** as it appears in the marriage certificate, in the death certificate filed in Probate Cause No. 34 of 2019, also in the Deceased's alleged children birth certificates.

He also submitted that the Petitioner in Probate and Administration Cause No. 34 of 2019 before Karatu Primary Court filed the matter without clan meeting's minutes which proposed him to apply for letters of administration of the late Shaibu Selemani Chimwale. He further submitted that following that irregularity, the trial court had to strike out the Probate Cause No. 34 of 2019 and order the required procedure of submitting clan

meeting's minutes be adhered, unfortunately the trial court did not cure such anomaly.

The turn of respondent's reply submission begun in which the Respondent's Counsel submitted on ground number one that it was right for Karatu District court to subscribe to the position of Karatu Primary Court in determining Probate and Administration Cause No. 34 of 2019, since the moment the Deceased undergone life extinct Karatu was his fixed place of abode.

He further submitted while replying to third ground of appeal, that there is no irregularity and material errors contained in Probate and Administration Cause No. 34 of 2019 as alleged by the learned counsel for the appellant that, the irregularities include the forged and manipulated documents used in Probate and Administration Cause No. 34 of 2019 with the intention to deprive the deceased's properties/estates. He further submitted that, the cited sections by the appellant's counsel which are section 333 and section 335(a), (d) of the Penal code, [Cap 16 R:E 2019] to justify the allegation of forgery are distinguishable in this matter.

He further replied on the 8th ground of appeal that, the District Court did not error in law or in fact on deciding the matter, since there was compliance with the principle of the laws on determining the case by considering the laws and justice.

Following both party's submissions, this court turned to its task of deliberating upon this matter. In my view, the main issue for determination is whether this appeal is meritorious?

While laboring on the first ground of appeal, this court has been referred to section 8 of the Civil Procedure Code that Probate and Administration of the Estate No. 34 of 2019 of Karatu Primary Court was res subjudice following the existence of Probate and Administration Cause No. 35 of 2019 of Newala Urban Primary Court. In my view for the defence of res subjudice to be established it is important for the person pleading it to prove which one of the two cases was filed first, the fact which was not established. Secondly is the issue of jurisdiction, whether the courts had jurisdiction. On the second aspect, this court's foundation of reasoning based on the provision of Rule 1 of the 5th schedule to the Magistrates' Courts Act, [Cap. 11 R.E 2019] where the law provides that;

"The jurisdiction of a primary court in the administration of deceased's estates, where the law applicable to the administration or distribution of the succession to, the estate is customary law or Islamic law, may be exercised in cases where the deceased at the time of his death, had a fixed place of abode within the local limits of the court's jurisdiction."

It is upon records that, the moment the deceased undergone life extinct his fixed place of abode was Karatu town within Karatu District in Arusha region not Newala within Newala District. It is not disputable that Newala was the place of domicile for the deceased, but it should be noted that place of domicile is not necessarily a fixed place of abode for a person.

Under the Blacks Law Dictionary 9th Edition, fixed place of abode is clearly defined as a *Person's permanent place of living*. The same dictionary defines place of domicile as a *Permanent legal residence.* In line with the definitions of place of domicile and fixed place of abode it is clear that the two are different in the sense that, a person's permanent legal residence is not necessarily his fixed place of abode. That said, it is my considered view that, the deceased's permanent legal residence is Newala within Newala District in Mtwara region, but his fixed place of abode the moment he passed away was Karatu town in Karatu District within Arusha Region.

Since the probate in question is the Islamic one it falls under the ambit of rule 1 of the 5th schedule to MCA, (supra) hence Karatu Primary Court, not only that it has jurisdiction but also that parties submitted themselves to the jurisdiction of that court for the same to entertain the matter. It was further emphasized in the case of **Hyasintha Kokwijuka Felix Kamugisha vs Deusdedith Kamugisha,** Probate Appeal No. 04 of 2018, High Court of Tanzania, Bukoba, Kilekamajega, J that, in dealing with Islamic or customary probate matters the question of fixed place of abode of the deceased is crucial to be determined first.

Further more, as earlier pointed out on for the appellant to succeed, it was not enough to allege that there was another case at Newala, that is Probate and Administration No. 35 of 2019 he was supposed to go a step further and tell the court as between two cases, that is Probate and Administration No. 35 of 2019 of Newala and Probate and Administration No. 34 of 2019 of Karatu, which one was filed first, and which one had support of all other family and interested members? Inferring from the record, it goes without saying that although the two lower courts as well as this court were denied such information, the records are clear that Probate Cause No. 34 of 2019 filed at Karatu was supported by other family members. The record

shows that Hawa Halfan Chibwana, the legal wife of the deceased, travelled all along from Newala to Karatu and testified in Probate Cause No. 34 of 2019, so is Mfaume and others including the appellant and respondents, all these supported the case filed before Karatu Primary Court. That means, as held, and correctly so by the District Court, the appellant can not be heard and in fact he is estopped by the principle of issue estoppel which bars the discussion of an issue which has already been a subject of judicial decision. In this case, the case of Newala, was once subjected to judicial scrutiny by the trial Primary Court of Karatu and the appellant was directed and he actually conceded to go to Newala and withdraw the said Probate Cause No. 35 of 2019, he was not expected to raise a similar complaint at this stage.

Under third ground of appeal, the appellant alleged that there are forgeries contrary to sections 333 and 335(a), (d) of the Penal Code, [Cap 16 R.E 2019]. According to the appellant, the alleged forgeries are on the documents used in the Probate Case No. 34 of 2019 before Karatu Primary Court, that the death certificate used had different name of the deceased compared to that used before Newala Primary Court, also, the name in that death certificate differs with the name of the deceased in his marriage certificate as well as the birth certificates of the Deceased's children. It is the

view of this court that, the alleged difference is a minor one and it appears on the third name of the Deceased which is *CHIMALE* as it appears on the death certificate used in Probate and Administration Cause No. 35 of 2019 before Newala District Court which is proper one while it appears as *CHIMWALE* in the death certificate used in Probate and Administration Cause Number 34 of 2019 before Karatu Primary Court. On that issue, section 90 of the Tanzanian law of Evidence Act, [cap 6 R.E 2019], may come to our rescue as it provides that;

> *"90.-(1) A court shall presume the genuineness of every document, purporting to be the Government Gazette of the United Republic or of the Revolutionary Government of Zanzibar, or to be a newspaper or a journal, or to be a copy of a private Act of the National Assembly printed by the Government Printer, and of every document purporting to be a document directed by any law to be kept by any person, if the document is kept substantially in the form required by law and is produced from proper custody.*
>
> *(2) For the purposes of subsection (1), documents are said to be in proper custody if they are in the place in which, and under the care of the person with whom, they would naturally be, but no custody is improper if it is proved to have had a legitimate origin*

or if the circumstances of the particular case are such as to render such an origin probable."

This court presumes that, the death certificate alleged to have been forged have been made by the government authority which is the *Registration Insolvency and Trusteeship Agency (**RITA**)* hence presumed genuine by this court unless the presumption is rebutted by the appellant. In line with this argument, alleging the respondent to have forged the death certificate holds no water as he is not the author of the document.

Apart from that, the alleged forgery is a criminal offence and law is very clear that the standard of proof in criminal cases is *beyond reasonable doubt*, it is undoubtful that the appellant made a mere allegation which is unjustifiable since there is no evidence that he reported such forgery allegation to the respective authority, there is nowhere it is shown that the allegation was investigated, also there is no court's decision that there were such forgeries. That being the state of affairs, this allegation as contained in the ground of appeal is baseless, it consequently fails.

In finalizing to the last ground of appeal which is the 8th ground concerning the minutes of the clan meeting, this court resorted to cite rule

2 of the 5th schedule to the Magistrates Court Act, [Cap 11 R.E 2019] which provides as follows;

> *"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 to be the administrator or administrators thereof, and, in selecting any such administrator, shall, unless for any reason it considers inexpedient so to do, have regard to any wishes which may have been expressed by the deceased"*

This court subscribes to the above position that, for one to apply for appointment of being an administrator or administratrix of the deceased estates, one should have an interest in particular deceased's estates. This court gets the logic of such position in the sense that, it is obvious other people have no relatives, so in such circumstance justice should not prevail on the ground that one lacks the minutes of the clan meeting? The Court joins hands with this position, hence for one to apply for probate, minutes of the clan meeting is not a mandatory requirement but rather the matter of practice. In the case of **Oliver Bernard vs. Kornel**

Bernard, Pc civil appeal No. 06 of 2020, MASARA. J. cited the case of **Angela Philemon Nguge vs. Philemon Nguge,** Probate and Administration Appeal No. 45 of 2009, H.C (unreported), in which Chocha J. had this to say:

> *"Therefore, the need to have the clan minutes as supportive documents to the application for appointment of an administrator, is a matter of practice and not law. This is why clan minutes, will only propose a candidate. The appointment is court's duty. A candidate therefore cannot rely on the clan meeting's minutes legally none. The relevancy or rationale to me is merely to involve the deceased's relatives in the process of appointment"*

That said, this ground also fails, it is consequently dismissed. That being the case, the entire appeal, lacks merit it is thus dismissed for want of merit. Due to consanguinity nature of the parties, no order as to cost is made.

It is accordingly ordered.

DATED at **ARUSHA**, this 15th day of June, 2022

J.C. TIGANGA

JUDGE