

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(TANGA DISTRICT REGISTRY)

AT TANGA

PROBATE APPEAL NO. 1 OF 2022

(Arising from the Probate Appeal No. 2 of 2021 of Handeni District Court at Handeni originating from Probate Case No. 42 of 2020 of Chanika Primary Court at Handeni)

SALIMU SAID KIDATO (*Administrators of the Estate*

Of the late SAID ABDALLAH KIDATO).....**1st APPELLANT**

YUSUPH SAID KIDATO (*Administrators of the Estate*

Of the late SAID ABDALLAH KIDATO).....**2nd APPELLANT**

-VERSUS-

HEMEDI SAID KIDATO.....**1st RESPONDENT**

IBRAHIM SAID KIDATO.....**2nd RESPONDENT**

JUDGMENT

Date of last order: 14/06/2022

Date of ruling: 29/06/2022

AGATHO, J.:

At Chanika Primary Court at Handeni 1st and 2nd Appellants filed a petition for the purpose of being appointed as Administrators of the Estate of the late Said Abdallah Kidato and were successfully appointed as administrators. Unfortunately, Hemedi Said Kidato and Ibrahim Saidi Kidato were excluded as sons of the deceased person because their

evidence appeared to be very weak before the trial Court. Being aggrieved by the decision of the Primary Court they appealed to Handeni District Court. When Handeni District Court exercised its appellate jurisdiction, it allowed the appeal and set aside the decision of the trial court. Since the decision of the District court was in favor of the Respondents the appellants were aggrieved hence this appeal. In this appeal parties are not disputing on the appointment of the two administrators rather the base of this appeal as second appeal is on issue of relationship of Saidi Abdallah Kidato, Hemedi Saidi Kidato and Ibrahim Saidi Kidato. Whether the Respondents are the sons of the deceased Saidi Abdallah Kidato, and whether they are entitled to the estate of the deceased?

First and second appellants presented their petition of appeal which contained three grounds as follows mention:

- (1) That, the Appellate Court erred both in law and in fact for giving its decision basing on the Appellants names while they are administrators of the estate of the late Said Abdallah Kidato
- (2) That, the Appellate court erred both in law and in fact by giving the decision in favor of the Respondents basing on insufficient and weak evidence given by the Respondents.

(3) That, the Appellate Court erred in law and in facts by giving its judgment without considering the evidence of the Appellants.

Both parties enjoyed legal services from Advocates. Appellants enjoyed legal services from Mr. George Raphael, Advocate who drew and filed submissions for the Appellants as well as rejoinder, and Respondents were represented by Mr. Justus J Ilyarugo, Advocate who drew and filed submission for Respondents. When the appeal was scheduled for hearing both parties agreed to dispose it by way of written submissions, and they adhered to the schedule set.

In their submission, starting with the first ground the appellants submitted that they are the administrators of the estate of Said Abdallah Kidato (their late father) but the decision of the Appellate court pronounced their judgment that merely contained appellant names without showing that they are the administrators of their father's estate. Therefore, that directly show that the decision is defective, and they prayed the court to quash the decision of Appellate Court and find the present appeal to have merit.

Second and third grounds of this appeal were argued together; the appellants reproduced the grounds of appeal without any clarification and cited the case of **Hemedi Saidi Vs. Mohamed Mbilu [1984] T.L.R 113.**

And they concluded by stating that the cited authority is clear the appellate court erred in law and fact for giving judgment in favour of the respondents. They prayed the court to allow the appeal and set aside the whole decision with costs.

The Respondents on their side, they filed their written submission as directed by this court. In their submission they submitted that the appellants contend the decision of the Appellate Court on the first ground of this appeal. They submitted that appellants argued that it was wrong for the court to rely on names of parties and pronounce judgment in favour of the respondents. They advanced their contention that the similarities of names are just baseless with due respect. There is no logic for this argument as the contested issue before the trial Appellate Court was whether the Appellants are legal heirs of the late Said Abdallah Kidato and their (the respondents herein). The arguments were to the effect that the late Said Abdallah Kidato was their biological father so there is nowhere to inherit than to their father which on other hand were opposed by the Appellants. Thus, among other evidence the Respondents tendered in court to prove the same are birth certificates, schoolbooks which all reflect the name of their father to be Said Abdallah Kidato and their aunt one Mbuhe Abdallah Kidato testified to their favour that she knew them

as among the children of the late brother Said Abdallah Kidato and that is way their fathers' names are Said Kidato. To justify his submission, he cited the case of **Mwajuma Mbegu Vs. Kitwana Amani [2004] TLR. 410** where the Court of Appeal stated that:

"... first appellate court has power to re-evaluate the evidence adduced at the trial and make factual findings therefrom..."

The Respondents continued to submit that, trial court said that both birth certificates and their correspondence names reflect their father to be Said Kidato which his estates are subject matter in this court. In that meaning to remove the Respondents from list of legal heirs of the deceased's estate was wrong as real one Said Abdallah Kidato was their biological father as the respondents alleged.

They went further to state that the first ground of appeal proves reality that the Respondents had justifiable grounds in the lower appellate court which made the court to decide in on their favour.

Turning to the second and third ground of this appeal were argued together by the counsel for the respondents and stated as follows, vehemently dispute this contention has things are obvious from its root, the Appellants are Salimu Said Kidato and Yusuph Said Kidato while

Respondents are Hemedi Said Kidato and Ibrahim Said Kidato which collaborated by the testimonies of their aunt one Mbuhe Abdallah Kidato.

The Respondents' counsel proceeded to submit that in this circumstance which kind of evidence the Appellants wanted to be tendered in Court to prove that the Respondents are legal heirs of the late Said Abdallah Kidato. He cited item 1 of the Second Schedule of the Local Customary Law (Declaration) Order, G.N Number 201 of 1967 listing all districts contained in Tanga region that in case of inheritance, one should inherit on his father clan provided in the cited law. He argued that the mentioned law is applicable in primary court, which entertained this matter for the first time so appellate court rightly and justly founded on the Respondents' favour as they deserve inheritance from the late father and not otherwise. He concluded by stating that second and third ground lack merit and this mater qualifies to be dismissed with costs.

In rejoinder the Appellants managed to state that, first ground of appeal on paragraph number one on the reply submission is of no merits. Since it clearly shows that the judgement was pronounced in favor of the Respondents relying on names of the Appellant without showing that are the Administrator of the estates of their father.

About the second and third grounds of this appeal Appellants rejoined them together, the evidence which proved in Appellate Court by the Respondents was weak and not enough to prove that the late Said Abdallah Kidato are their biological father but at least they were supposed to produce DNA test to prove the allegations cemented his case by the case of **Faturnata Diane Berete v Maryam Yahya Hussein PC. Civil Appeal No. 102/2019 High Court of Tanzania at Dar es Salaam**, where the court inter alia discuss the issue of biological father of the parties and somehow elaborate evidence to prove the biological status of the issue of the deceased and quoted that:

"Second there were sufficient proofs in record that the issued were of the deceased. Such proof included but not limited to the birth certificates of the issue."

In examining what has been presented by the parties in their submission to support the appeal and opposing the appeal, there is no need of dealing with first ground of the appeal. Which is about the names Appellate Court to give it decision in the names of the appellants while are the administrators of the late Said Abdallah Kidato. In the appeal before Handeni District Court Appellants were respondents and its clear as shown in the Judgment of the Appellate Court respondents their names were

written without indicating their capacity as Administrator of the estate of the late Said Abdallah Kidato.

Whether mentioning the name of the administrator in the judgment in his personal capacity or without showing his capacity as the administrator has any effect? Is that prejudicial?

It is the principle of the law that appointment of the administrator of the estate of the deceased person is giving that person the capacity to step in the shoes of the deceased person in the meaning that each and every action done by the administrator on must be in his capacity.

The issue at my hand is mentioning the names of the administrator without showing their capacity as administrators of the estate of the late Said Abdallah Kidato. In my view the issue of writing the names of the respondents (in this matter appeared as appellants) is not maintainable simply because the failure to mention their capacity as administrators do not exonerate their capacity to step in the shoes of Said Abdallah Kidato (Deceased). To cement my position, I would like to apply the principle of overriding objective. **Under Article 107A (2) (e) of the Constitution of the United Republic of Tanzania** requires courts or the system of justice to be dispensed without being tied up with different kinds of technicality. The Article provides that

"(2) In delivering decisions in matters of civil and criminal nature in accordance with the laws, the court shall observe the following principles, that is to say -- (e) to dispense justice without being tied up with technicalities provisions which may obstruct dispensation of justice."

Before invoking the principle of overriding objective there is the need of looking as to whether irregularity sought to be looked can cause injustice as stated in the case of **Njake Enterprises Limited v. Blue Rock Limited & Another, Civil Appeal No. 69/2017 CAT (unreported)** was stated that:

"Also the overriding objective principle cannot be applied blindly on mandatory provisions of the procedural law which goes to the very foundation of the case"

The issue mentioned by the appellant does not affect their justice. For that reason, I dismiss the first ground of this appeal. this is human error which did not lead to miscarriage of justice.

As for a second and third grounds appeal being related they will be determined jointly because they deal with same issue of evaluation of evidence of parties. The purpose of this appeal is to challenge the validity of the respondents to mention them Hemedi Saidi Kidato and Ibrahim Said

Kidato not to be legal heirs of the late Said Abdallah Kidato. The Appellants alleged that Respondents are not biological children of their father.

Before going further, I would like to take the parties of this matter some years back were under 13 years as Children as far as the Child Act, 2009 is concerned. **Section 6(1) of the Law of the Child Act, 2009** which provides that: "*A child shall have a right to a **name**, nationality and to know **his biological parents** and extended family.*"

This court in the case of **Elizabeth Mohamed v Adolf John Magesa, Administration Appeal No. 14 of 2011, High Court of Tanzania, Mwanza District Registry** (unreported) encountered somehow similar scenario like the present case where children were discriminated for being born out of wedlock. Though in the case at hand they are discriminated by the children of the deceased father. That they are not the children of the late deceased because they were unknown to siblings, or they were not introduced some paternal relatives. In **Elizabeth Mohamed's case** the Court rightly referred to Article 2(1) of the United Nations Convention on the Rights of a Child requiring state parties to protect within their jurisdictions the rights of the child stated on the Convention without discrimination. Tanzania has ratified the said convention. In its implementation the Law of the Child Act was enacted in 2009.

Section 5(2) of the Law of the Child Act, [Cap. 13 R.E 2019] prohibits discrimination of any type against a child. This includes a child born out of wedlock. Again Section 10 of the same Act provides that:

"A person shall not deprive a child a reasonable enjoyment out of the estate of a parent."

Section 3 of the Law of the Child Act, [Cap. 13 R.E 2019] defines the term "parent" to mean *"a biological father or mother, the adoptive father or mother and any other person under whose care a child has been committed."*

As for the appeal at hand, deceased person left a number of children and all of them are entitled with the name and the share of the estate of their father despite of the status of that child. Some of them are born in wedlock and others are born out of the wedlock. the dispute at my hand is about two children to mention them **HEMEDI SAIDI KIDATO** and **IBRAHIM SAID KIDATO** for the purpose of this case referred as Respondents who alleged by Appellants not to have relationship with **SAID ABDALLAH KIDATO** as their biological parent. The biological relationship of a child and his parent may be proved by through various ways: production of birth certificate, testimony of relatives, testimony of either parent, production of maternal clinic card, DNA test results, etc.

At the Chanika Primary Court respondents appeared and to introduce them self as biological sons of the deceased person and for the purpose of proving their biological relationship with the deceased person presented following documents from different authorities.

- (1) Birth certificate of IBRAHIM SAID KIDATO numbered 00597643 which is dated 8th May 2004 and signed by District Registrar for Tanga and paid 2,000/= as the fees by then.
- (2) Citizen Identification Card which numbered 19800305-21102-00001-21.
- (3) Birth certificate of HEMEDI SAIDI KIDATO with C No; 1002 2394374 dated 9th August 2019 which certified under the Birth and Death Registration Act (Cap 108 R.E 2002) and signed on behalf of the Registrar General.
- (4) Kadi ya kliniki ya mtoto of HEMED SAIDI KIDATO.
- (5) Primary School Certificate of HEMEDI SAIDI KIDATO with number 5204992 and certified by the Afisa elimu wa wilaya ya Handeni on 27/11/2017
- (6) Certificate of Secondary Education of HEMEDI SAIDI KIDATO with Index No. s1167-0049.

(7)Certificate of HEMEDI SAIDI KIDATO from Jeshi la Kujenga Taifa with number 367016 and shows his namba ya kikosi to be 825 KJ which signed by Mkuu wa Jeshi la Kujenga Taifa.

(8)Citizen Identity Card from NIDA with number 19961003-21809-00003-20.

Apart from that also Mbuche Kidato who is not disputed to be their aunt testified before the trial court she knew Respondents as the son of her brother (Said Abdallah Kidato) and therefore entitled to benefit from the estate of the deceased person.

In perusing the trial court file there is the presence of death certificate od SAIDI ABDALLAH KIDATOO which numbered as Certificate No. 1003407718. Which shows the date of the death of the deceased to be 27th April 2020. The **Convention on the Rights of Child** which come into force on 2/09/1990. Article 7 provides that:

*"The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and as far as possible, **the right to know and be cared for by his or her parents, (emphasis added).**"*

As Appellants knew their father and cared by their father the same happened to Respondents. There was not any reason for the Respondents mothers' to uncover the identity of the child's biological father due to different reasons mentioned in the case of **Kuruthum Omary Kahimba, Rehema Omary Kahimba Vs. Mwajuma Omary Kahimba, Misc Civil Cause No. 04 of 2018, High Court of Tanzania at Mbeya.**

"A mother may have authentic reason not to unveil the identity of the child's biological father. First where she may not know the distinctiveness of the child's biological father because she engaged in sexual intercourse with numerous partners near the time of the child's conception. Second, she does not remember who she had sexual intercourse with at the time of the child's conception. Third, the child could have been conceived through anonymous donor insemination and the mother may not have access to sperm donor records. Fourth, the child may be the product of rape a mother wants to remain in private. Sometimes it may appear that a mother is a victim of domestic violence, may fear abuse from her husband, from her child's biological father, or from another abuser if she discloses the identity of her child's biological

father. Fifth, the child could be a product an extra marital affair that the mother does not want to unveil. Reading from the foreign context, the argument is between a child and mother. Adults are not mentioned."

Basing on what has been presented before trial court I have no doubt that respondents are biological sons of SAIDI ABDALLAH KIDATO. Since all documents are not forged, not contradict from each other and the good position is the death certificate which shows the date of death of the deceased person. Looking at the issued documents are clear to be issued before the death of the deceased person. Apart from the authenticity of the issued documents, I think it's not easy for any party to forge document for the purpose of showing his wanting the estate of the person who is not known when he will pass away. Under section under **Section 110 of the Evidence Act, [Cap 6 R.E 2019]** it has been provided that:

"(a)Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(b)When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."

This provision requires any party to prove on the existence of that issue to prove it. Speaking of the matter at hand appellants was required to prove non-existence of the biological relationship between Said Abdallah Kidato and Respondents. Basing on what presented by the respondent before trial court in my view the complied with the requirement of the mention provision hereabove. **In the Matter of the Estate of the late Hussein Ole Laizer and in the Matter of the Petition for Appointment as joint Administrators by Yeremia Leshilalo Laizer and Benjuda Hussein Lemoyani, Probate and Administration Cause No. 08 Of 2019, High Court of Tanzania at Arusha,** where Tiganga, J. considered Section 110 of the Evidence Act, [Cap 6 R.E 2019]

"In question of biological relationship and I quote as follows, That said, I find Noela also to be the lawful daughter of the deceased, had there been any evidence to the contrary, then the defendants were duty bound under section 110 of the Evidence Act, [Cap 6 R.E 2019] to prove the same something which they did not do. Therefore, that said, basing on the reasoning herein above, it is safe to conclude that the lawful heirs of the deceased are four, namely Benjuda, Lenana, Josephine and Noela."

As per Section 110 of the Evidence Act if the Respondents did discharge their burden of proof by producing their birth certificate among other documents. These were not faulted by the Appellants. The Appellants though failed to counter or discredit the evidence adduced by the Respondents. If the Appellants wanted to convince the trial Court to decide in their favour they should have produced heavier evidence than that of the Respondents. The claim that the Respondents are not biological children because no DNA was conducted is without substance. In fact, if they wanted DNA to be conducted it was up to the Appellants to so ask the Court for such order and exhume the deceased father's body so that DNA test could have been done. This is their burden of proof and not of the Respondents. It is not the law that blood ties or biological relationship can only be proved by DNA only. Even a valid birth certificate suffices.

Since I see no doubt on the issue of the biological relationship between Said Abdallah Kidato and respondents. For that purpose, the respondents are entitled to all rights as Children of the other deceased person despite the issue of being born out of the wedlock. Basing on the different legal provisions such as **Article 12 of the United Republic of Tanzania of 1977 as amended from time to time:**

"(1) All human beings are born free and are all equal.

(2) Every person is entitled to recognition and respect for his dignity."

In the case of **Judith Patrick Kyamba Vs. Tunsume Mwimbe and 3 others, Probate Cause No. 50 of 2016 High Court of Tanzania at Dar es Salaam** stated that:

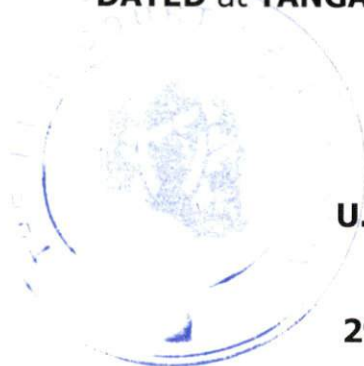
"With profound, I don't agree with the argument of the petitioner that children born out of wedlock are illegitimate and they have right to inherit the deceased estate. In fact, that argument is barbaric and discriminative in nature... Children born out of the wedlock are the biological children just like those born within matrimonial home and they are entitled to equal share of their common father with fellow siblings."

I should state that, although the Respondents are adults but in terms of the law, they are children of a particular parents (that is the deceased, and their mothers). And in terms of Section 3 and Section 10 of the Law of the Child Act, 2009 as correctly held in **Elizabeth Mohamed's case** I find that the Respondents are biological children of the deceased, and they are entitled to inherit from their late father's estate. Thus, the second and

third grounds of this appeal are without merit, and I proceed to dismiss them.

In the end this appeal lacks merit and I find no fault in the decision of the Handeni District Court. It was correct to hold that the Respondents are biological sons of the deceased person (Said Abdallah Kidato) and they are entitled to inherit from the estate of their late father. The appeal is consequently dismissed. And this being a case involving siblings no order for costs is given.

DATED at **TANGA** this 29th Day of June 2022.




U. J. AGATHO
JUDGE
29/06/2022

Date: 29/06/2022

Coram: Hon. Agatho, J

1st Appellant: Present

2nd Respondent: Present



B/C: Zayumba

JA: Ms. Husna Mwiula

Court: Judgment delivered on this 29th day of June, 2022 in the presence of the 1st Appellant and the 2nd Respondent.


U. J. AGATHO
JUDGE
29/06/2022

Court: Right of Appeal fully explained.



U. J. AGATHO
JUDGE
29/06/2022