IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(TEMEKE HIGH COURT SUB – REGISTRY)

(ONE STOP JUDICIAL CENTRE)

AT TEMEKE

CIVIL REVISION NO. 1 OF 2022

(Original Matrimonial Cause No. 8 of 2015 of the District Court of Kinondoni before Hon. F.S. Kiswaga - SRM)

JACQUELINE NTUYABALIWE MENGI.....1st APPLICANT

JACQUELINE NTUYABALIWE MENGI as a next friend of Jayden Kihoza Mengi (A Minor) **.....2nd APPLICANT**

JACQUELINE NTUYABALIWE MENGI as a next friend of Ryan Saashisha Mengi (A Minor) **.....3rd APPLICANT**

VERSUS

ABDIEL REGINALD MENGI AND BENJAMIN ABRAHAM MENGI (Administrators of the estate of the Late Reginard Abraham Mengi .....**1st RESPONDENT**

ABDIEL MENGI AND REGINA MENGI (Administrators of the estate of the late Mercy Anna Mengi **.....2nd RESPONDENT**

RULING

13/06/2022 & 11/08/2022

I.C. MUGETA, J

The applicants pray for three substantive reliefs:

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i. *An order quashing the consent judgment in matrimonial cause No. 8 of 2015 of the Kinondoni District Court rendered on 11/11/2021;*

ii. *A declaration that the matrimonial cause No. 8 of 2015 of the Kinondoni District Court abated either on 15/6/2015, 31/10/2018 or 2/5/2019, and*

iii. *An order expunging the proceedings of matrimonial cause No. 8 of 2025 of the Kinondoni District Court from the date of its abatement.*

The applicants are represented by Audax Kahendaguza, learned counsel. The 1st and 2nd respondents are assisted by Deogratius Ringia and Mrs. Nakazael Tenga, advocates, respectively.

Both respondents raised preliminary objections. While Mr. Ringia filed a notice of preliminary objection containing three objections, the objection by Mrs. Tenga is expressed in the counter affidavit of her client. Whether this is right is an issue for another day.

On 31/3/2022, Mr. Ringia withdrew the three objections. He substituted them with one objection that the court has no jurisdiction to entertain this matter. However, in his submissions Mr. Ringia has reintroduced them without leave of the court. Mr. Kahendaguza has complained about their

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reintroduction. On that account, I shall disregard Mr. Ringia's arguments on all other objections except those covering the question of jurisdiction. As submitted by Mr. kahendaguza, the method used to reintroduce them defies orderly conduct of the court businesses.

The case was disposed of by way of filing written submissions covering the application and the objections raised by the respondents. I shall determine the objections first.

Despite the lengthy and sometimes meandering arguments by the parties, I shall smartly navigate through them addressing all important arguments. In that regard, any matter raised but not discussed ought to be considered to have been determined either unnecessary or irrelevant for this decision.

According to Mr. Ringia, this court has no jurisdiction for three reasons. Firstly, that the matter before it has been brought by persons who were not party to the proceedings sought to be revised. Mr. Kahendaguza has responded, and I agree, that revision is a remedy for third parties.

Secondly, that the proceedings challenged involve deceased persons. Mr. kahendaguza has agreed and submitted, it is because the decision challenged was passed after the couple's death. I agree with Mr.

Kahendaguza. Thirdly, that the applicants are already litigating on a similar matter in the probate and administration cause involving the estate of the late Reginald Mengi, therefore, revision is no longer their only available remedy. Mr. Kahendaguza disputes this argument. He has submitted that the applicants have never had other proceedings for the same relief as sought here. I shall address this matter together with a similar issue raised by Mrs. Tenga.

Mrs. Tenga has submitted on jurisdiction of the court and, without leave of the court, on time limitation. On jurisdiction, the learned counsel submission is that maintenance awarded at the trial court are currently dealt with by the High Court – Main Registry (I think she meant Dar es Salaam zone as the Main Registry of the High Court has no jurisdiction over probate matters) in probate causes involving the estate of the late Mr. and Mrs. Mengi, therefore, the applicants have a remedy there.

On time limitation her argument is that this application is time barred for not being filed within 60 days from the date of the impugned decision, therefore, it ought to be dismissed under section 3 of the Law of Limitation Act [Cap. 89 R.E 2019].

Mr. Kahendaguza replied that time limitation has never been among the objections raised before hearing commenced, therefore, it has been improperly raised. On lack of jurisdiction on account of the issue of maintenance being dealt with in the probate court, he argued that the applicants are not in this court to challenge any maintenance award. While admitting that the applicants are, indeed, litigating in the probate court, he is of the view that reliefs sought here cannot be obtained in that court.

I find the complaint by Mr. Kahendaguza on how the objection about time limitation was raised unmerited. Like jurisdiction, objections based on time limitation can be raised at any time even without leave of the court. For this reason, I shall determine it despite lack of notice from the 2nd respondent.

There is no dispute that the applicants were not party to the trial court's proceedings. Therefore, time began to run against them when they became aware of the impugned proceedings. This is on 6/1/2022 per paragraph 8 of the affidavit of Jacqueline Ntuyabaliwe Mengi (the year is wrongly typed as 2021). This application was filed on 10/1/2022, therefore,

within time per item 21 of part III of the schedule of the Law of Limitation Act [Cap 89 R.E 2019].

The question of the applicants having remedy in the probate court has been raised by both counsel for the respondent. They have argued that the litigation in this case involve similar matters as in the probate court particularly the maintenance award. It is my view that while it might be true that maintenance issues decided in the matrimonial cause subject of this application has a bearing on the distribution of estates of Mr. Mengi where the applicants are beneficiaries, it is also true that remedy sought here cannot be obtained in proceedings involving the administration of the late Mercy and Mengi's estates. The applicants are aggrieved by the consent decree of the matrimonial court originating from the consent settlement filed by the 1st and 2nd respondents. Such a decree cannot be challenged in a probate court. The remedy is in the matrimonial court where the rights executed in the probate court originated.

The applicants who were not party to the proceedings at the trial court, therefore, have rightly filed the revision against the administrators of the

estates who obtained court's decree by the deed of settlement in the matrimonial court.

In the fine, I find the objections on jurisdiction and time limitation without merits. I overrule them with costs.

I move to the merits of the case. The brief facts of the case are as follows:

On 17/2/2015, the late Reginald Abraham Mengi petitioned the trial court to divorce his wife Mercy Anna Mengi. On 13/3/2015 they entered into a settlement and registered it as court's decree. On the same date, a divorce decree was passed and several properties were divided between them. The trial court, however, termed it as an order. Paragraph 6 of the recorded settlement order reads:

> *'That the parties agree that they shall resolve the outstanding issues relating to the proceedings before this court on or before the 15/6/2015. Provided that the respondent shall be entitled to not less than 35% of the matrimonial assets'*

As it turned out the case did not terminate on 15/6/2015 as the parties did not file a final settlement agreement. The case remained pending up to 21/11/2018 when it was reported that Mercy Anna Mengi has passed on. On 10/5/2019, it was reported that Reginald Abraham Mengi had passed

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on too. The 1st and 2nd respondents were appointed as administrators of the estate of Reginald Abraham Mengi and Mercy Anna Mengi respectively. On 11/11/2021, the administrators recorded another settlement in which they distributed properties believed to have not been distributed when the marriage was dissolved. It is this settlement decree which has prompted these revisional proceedings.

When the file was placed before me for composing this decision, I found a sealed envelope. In it was a book by the late Reginald Abraham Mengi titled "**I Can, I Must, I Will: The spirit of success**". The court clerk told me he doesn't know the party who filed the submissions with the envelop containing the book. However, counsel for the 2nd respondent refers to it in the submission. I presume she is the one who supplied it. I have read it and upon delivery of this judgment I shall surrender it to this court's library for public use unless the giver claims it back. Reading it was refreshingly informing.

I have given this story because at page 17 of the book the late Mr. Mengi writes:

'After my grandfather passed away, there was an ensuing bitter struggle over inheritance and as a result my father and my grandmother were forced to leave Marangu and migrate to Machame'.

Upon his death the situation is no better. This trial showcases a bitter struggle over his estate involving rights to inheritance.

The 1st, 2nd and 3rd applicants are wife and sons of the late Reginald Mengi respectively on the one hand while the 1st and 2nd respondents are son and uterine brother of the late Reginald Mengi respectively on the other hand. They are also administrators of the estate of the late Reginald and Mercy who up to 13/3/2015 were husband and wife. In the cause of executing their duties, they have allegedly acted in a manner prejudicial to the interests of the applicants. In particular, the applicants are aggrieved by the administrators' settlement deed resulting into a court decree of 11/11/2021 transferring Tshs 1,239,239/06 from the estates of Mr. Mengi to the estate of Mercy and sharing equally between the estate the remaining properties. The application is based on the following complaints.

i. *Matrimonial cause No. 8 of 2015 proceedings terminated on 15/6/2015 per the consent order of 13/3/2015. In the*

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alternative it ceased to exist on 31/10/2018 or 2/5/2019 when the respondent and the petitioner thereto respectively died.

ii. *The consent judgment transferred Tshs 1,239,239.06 from the estate of Reginald Mengi as maintenance and legal costs without proof on how the figure was arrived at and assets acquired when they were in separation or after divorce without proof of her extent of contribution including properties which by consent order of 13/3/2015 had been exclusively given to the husband which is now the applicants' home.*

I shall decide this case on the first complaint. Once it is determined that the proceedings at the trial court terminated on 15/6/2015 or on death of the parties or any one of them, there shall be no need to consider other issues as all subsequent proceedings including the impugned decree would be declared a nullity.

Submitting on the first complaint, Mr. Kahendaguza has argued that the consent order of 13/3/2015 closed the issue of divorce and costs of the case which was awarded to the wife at $100,000. That maintenance of $45,000 per month was awarded after divorce but was to last up to 15/6/2015, the period within which the parties were allowed to raise any outstanding issues relating to division of the matrimonial properties. In his

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view, Mr. Mengi could not have maintained the wife beyond the period of pendency of the case because the proviso to section 115 (1) of the Law of Marriage Act [Cap. 29 R.E 2019] bars a man to maintain a former wife after divorce except for special reasons which were not presented. Considering the foregoing, Mr. Kahendaguza has argued, maintenance payable to the wife was for three months, therefore, the Tshs 1,239,239.06 agreed upon by the respondents has no justification. The proceedings post on 15/6/2022 ought to be set aside, the learned counsel concluded.

Regarding the division of matrimonial assets Mr. Kahendaguza submitted that the same was to be settled by 15/6/2015 for the undivided properties by any party proving his/her shares in properties registered in another's name. In his view, since no other properties were agreed as forming part of the matrimonial assets, there was nothing to divide after 15/6/2015 and the court ought to have closed the proceedings on that date. Therefore, he argued, the transmission of 50% share of the estate of Mengi to the estate of Mercy in the disguise of division of matrimonial assets by a consent order of 11/11/2021 is unacceptable and unlawful.

In reply, Mr. Ringia has submitted that the prayer to quash the proceedings past 15/6/2015 is misconceived and uncalled for as it shall force the administrators to enter into a contest to divide the assets. The learned counsel wonders the type of order this court shall pass in the "unlikely event of allowing this application". In his view, instead of these revisional proceedings, the applicants have a right to complain about the administrators' misdeed in probate cause No. 39 of 2019, High Court – Dar es Salaam zone.

Mrs. Tenga's reply has it that after the consent decree of 13/3/2015, its clause 6 did not take away the jurisdiction of the court if no settlement was reached by 15/6/2015. The learned counsel interpretation of the settlement decree is that the limitation in the order covered the parties' negotiation period and if they failed to amicably settle within the prescribed period, the court would pick up the matter and deal with it by the ordinary court processes. That is why, the learned counsel further submitted, on 25/4/2016 Mercy filed an application for interrogatories and discoveries against Mengi and lost which decision was overturned by the High Court – Dar es salaam Registry on 6/7/2018 vide civil appeal No. 91 of 2017.

On abatement of the proceedings, the learned counsel is of the view that the matrimonial cause did not abate on 15/6/2015 or on subsequent death of the parties because the issues that had not been decided constituted an action in rem and Tshs 1,239,239.06 is maintenance calculated from March 2015 to the demise of Mercy.

In rejoinder, Mr. Kahendaguza argued that awarding costs to the wife in the settlement deed meant the case had been concluded and 15/6/2015 was a deadline for having all pending matters determined.

I am called upon to examine the legality of the proceedings post 15/6/2015.

Mrs. Tenga submitted that the 15/6/2015 consent order limited the parties' negotiation period not the court's jurisdiction over the dispute on unresolved matters. Therefore, in her views, the proceedings post 15/6/2022 are regular and valid. It is my view that the important part of the order for purposes of its interpretation are paragraphs 5, 6 and 7 which reads:

'5. The petitioner shall pay a sum of Tshs 100,000 to the respondent in order to cover her legal costs as per the installments in the memorandum of settlement.

6. The court order that the parties shall resolve the outstanding issues in relation to the proceedings before the court on or before the 15th June 2015. Provided that the respondent shall be entitled to not less than 35 percent of the matrimonial assets.

7. The court orders that the settlement shall be limited to only the issues which they have specifically referred to and it shall not prejudice any right or obligation which either party may have concerning outstanding matrimonial assets, maintenance and or other outstanding issues.

By practice, when parties to a case file a settlement deed the court converts it to its decree/order. The deed is a contract with full legal rights and obligation and the terms and conditions must be as clear as possible. In the case of **Oysterbay Properties Limited & Another v. the Hon. A.G & Another and Patrick Rutabanzibwa & Others**, Civil Revision No. 4 of 2011, Court of Appeal – Dar es salaam (unreported) it was held that a court decree or order extracted from a deed of settlement must be definitive not dependent on future action of the parties with the usual

default clauses to avoid making it incapable of execution. The consent order in this case might fail the test set in this case. However, since the parties to the contract are dead, I shall try, as possible, to interpreter it progressively giving its terms effect that removes ambiguity in line with the law.

The interpretation of clause 6 by Mrs. Tenga suggests that the agreement filed by the parties constituted part settlement of the whole dispute and the court retain jurisdiction post 15/06/2015. I agree as far as the division of matrimonial assets is concerned. However, I do not agree that the trial court had to resume its jurisdiction after 15/06/2015 upon the parties' failure to reach an amicable settlement. I see nothing in the order suggesting that conclusion. In my view, clause 6 impliedly made it mandatory for the parties to settle "the outstanding issues relating to the proceedings" by 15/6/2015. Failure to meet the deadline meant there was nothing to deal with regarding the allegedly outstanding issues. This is the interpretation which removes absurdity in the settlement order making it finite per the decision in **Oysterbay Properties Limited case** (supra). It is inconceivable that the court intended to subject its jurisdiction on future

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actions of the parties without consequences. Had that been the case, clause 6 would have been followed by the usual default clause.

The consent order did not deal with all properties listed in the petition as matrimonial assets. In my view, the "*unresolved outstanding issues relating to the proceedings before the court*" referred to in clause 6 covered the matrimonial assets listed in the petition but remained undistributed by the settlement order. They included a 50.8 acres farm at USA – River, Arumeru District, a 6 acres farm at Weruweru – Hai District, 315,500 shares in Bonite Bottlers Limited, 752,500 shares in IPP Limited and 4 shares in The Guardian Limited. I hold this view because the respondent had not filed the answer to the petition which was filed on 9/4/2015. Therefore, as submitted by Mr. Kahendaguza, those are the properties the proviso to clause 6, intended to cover the respondent entitlement to not less than 35% shares.

Clause 7 covers any other properties to be identified. This clause also gave room for variation of the maintenance order before 15/6/2015. Up to 15/6/2015, the parties neither recorded any agreement in relation to the

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properties listed in the petition or identified nor varied the maintenance order.

I have reviewed the contents of clause 7 of the consent order it is my view that it was intended to be a safety valve for a discussion on the undistributed matrimonial assets and maintenance. The last phrase "or other outstanding issues" is too general to be assigned a meaning as it is impossible, in matrimonial proceedings, to fathom any other issue beside divorce, custody, division of the assets and maintenance. In that regard it is my finding that maintenance issue was inadvertently included in clause 7 because it had been covered by clause 4 of the order.

Further, if the discussion on outstanding issues was to last by 15/6/2015 from 13/3/2015 when divorce decree was passed, the intended variation of the maintenance order would be of little no value. I agree with Mr. Kahendaguza that such order was not intended to last for life because the proviso to section 115 of the Law of Marriage Act [Cap. 29 R.E 2019, except by order of the court on special reasons to be stated, bars a man to maintain his divorcee. However, a wife can be maintained during the cause

of the proceedings per section 115 (1) (c) which was expected to end on 15/06/2015.

Mrs. Tenga has argued that there was nothing wrong with Mr. Mengi maintaining his wife for life if he wished. I do not agree. While it is true Mr Mengi could have voluntarily done so, such an agreement cannot be enforced against his estate because an agreement in contravention of the law is unenforceable. Clause 6 of the order which set the deadline and close 5 which awarded costs to the respondent meant to have the proceedings terminated by 15/06/2015. As submitted by Mr. Kahendaguza, awarding costs on 13/03/2015 implied that the case had to end by 15/06/2015.

Therefore, I hold, failure to finalise the matter by 15/6/2015 closed the case. The trial court erred to continue the proceedings post 15/06/2015 without even requiring the parties to report on their compliance with clause 6 of the consent order which is drafted in mandatory terms.

Assuming I am wrong in the above finding, the next question is whether the proceedings abated on 31/10/2018 upon death of the late Mercy Mengi. Mrs. Tenga and Mr. Ringia have submitted that a claim for division

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of matrimonial properties is an action in rem which survives a party to a case.

I agree with them as far as other proceedings of civil nature are concerned. Matrimonial proceedings are an exception. In this jurisdiction, a right to matrimonial properties which is in one spouse's name belongs to that party until when it is proved that the parties either intended to have community ownership of the properties or the other spouse proves his/her contribution in the acquisition of the property concerned. Therefore, when a spouse dies the surviving party cannot sue in a normal civil court or on matrimony rights for determination of his/her share in the property on ground of contribution in its acquisition. This is the position stated in **Mr. Anjum Vicar Saleem Abdi v. Mrs. Naseem Akhtar Zangie,** Civil Appeal No. 73 of 2003, Court of Appeal – Arusha (unreported) and **Leticia Mtani Ihonde v. Adventina Valentina Masonyi**, Civil Appeal no. 521 of 2021, Court of Appeal – Musoma (unreported).

In **Mr. Anjum Vicar Saleem Abdi** (supra) the wife sued the son on a normal suit for peaceful enjoyment of the matrimonial home following the demise of her husband. The Court of Appeal held that the remedy was

available in the probate court through administration of the deceased's estate. In **Leticia Mtani Ihonde** (supra) the wife sued the administrator of the estate of her former husband claiming her share in the undistributed matrimonial assets. The Court of Appeal, at page 15, held:

> *'... where the husband has died the surviving spouse cannot seek distribution of the matrimonial assets in a matrimonial cause, and any claim or perceived rights thereto must be sought in a probate and administration cause'.*

By similar extension, when a party to a matrimonial cause dies without having tendered evidence of his/her extent of contribution in the properties the case abates. A legal representative cannot step into his/her shoes to sustain the claim. However, the right survives where each of them has given evidence and the case is pending for a decision or appeal which is not the case here. Mr. and Mrs. Mengi died before they either agreed on remaining properties forming the matrimonial assets or giving evidence on each one's extent of contribution in their acquisition which terminated the jurisdiction of the matrimonial court.

For clarity, the law is that when a party to a matrimonial cause pass on, the family court loses jurisdiction on both divorce, custody, maintenance

and division of the assets. Such death not only automatically ends the couples' matrimonial vows but also makes the surviving spouse the natural guardian of his/her children entitled to physical possession of the children. Jurisdiction over properties of the deceased shifts to the probate court for administration.

The natural question from this conclusion is how does the probate court identify the deceased's properties from the matrimonial assets? Mr. Ringia asked the same question in his submissions. The answer is simple and unpleasant. In case of death of both couples or one of them the properties go to the estate of the deceased in whose name they are registered or acquired and maintained.

Consequently, I hold that the settlement decree of 11/11/2021 that followed the deed of settlement filed by the respondents as administrators of the estates of the late Mr. Reginald Mengi and Mercy Anna Mengi is invalid. When it was filed the matrimonial court had lost its jurisdiction. In terms of section 44(1) of the Magistrates Court Act [Cap. 11 R.E 2019], I accordingly quash it. The proceedings leading to its existence are set aside

for being unlawful. Considering the nature of this case, I give no orders as to costs.

I.C. MUGETA

JUDGE

11/8/2022

Court: - Ruling delivered in chambers by video conference to the counsel for the parties who are in their respective offices, Paschal Mshanga for the applicants, Judith Ulomi for the 1st respondent and Nakazael Tenga for the 2nd respondent.

Sgd: I.C. MUGETA

JUDGE

11/8/2022