

**IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA**

PC PROBATE APPEAL NO. 2 OF 2021

*(Arising from Probate Appeal No. 5 of 2021 Bariadi District Court, originating
from Probate Cause No 01/2021 Mkula Primary Court)*

SABATO MAIGA APPELLANT

VERSUS

MALEMI KUBWELA MSUKULA.....RESPONDENT

JUDGMENT

13th July, & 12th August 2022

MKWIZU, J:

This appeal originates from the decision by Mkula Primary Court in Mirathi No. 1 of 2021 in objection proceedings lodged against the petition for letters of administration filed by the respondent herein **MALEMI KUBWELA MSUKULA**. The facts as decanted from the records are that **MBOLE ANASATAZIA KUBWELA** a woman in gender and a wife to the appellant died intestate. She was survived by a widower, the appellant. The respondent, a brother to the deceased was, by the clan meeting proposed to administer the deceased properties, seemingly owned by the deceased alone. His petition for letters of administration was filed at Mkula Primary court but could not go smoothly. There was a filed objection by the appellant, the deceased husband that he was not involved in the meeting proposed the respondent administrator. The trial primary court found for the objector, now the appellant.

The respondent's appeal to the District Court was successful. Both parties were appointed co-administrators with an additional order that the respondent should administer assets acquired by the deceased before she got married to the appellant and the appellant should administer those properties acquired during the subsistence of the marriage with the deceased. The Appellant is not happy, he has come to this court with four grounds of appeal, to wit:

1. That the appellate Magistrate erred in law and facts by appointing the respondent to be one of the administrators of estates without specifically pointing out the properties to be administered by the Respondent which are said to be acquired by the deceased before she got married to the appellant.
2. That the appellate Magistrate erred in law and facts by failing to note that the Respondent had no interest to the properties to be administered.
3. That the appellate Magistrate erred in law and facts by appointing the respondent to be one of the administrators contrary to the evidence on the records
4. That the appellate Magistrate erred in law and facts by making an order which is difficult to execute based on the evidence on the record and the situation surrounding this case.

But before hearing the appeal, the respondent's counsel, Mr. Baraka Makowe prayed before the court to raise two legal issues relating to the jurisdiction of the primary court in determining the matter and the regularity or otherwise of the trial court's proceedings. With the leave of the court, both the two raised issues together with the main appeal was

to be disposed of by way of written submissions. Both parties did file their main submissions except for the rejoinder submissions. When the matter came for mention for purposes of setting a Judgement date, the applicant notified the court that he had no intention of filing a rejoinder hence this decision based on the submissions in chief of the parties.

In support of the appeal, the appellant challenges the 1st appellate court's decision for appointing the respondent administrator of the deceased's estate without specifying the properties acquired before and during the subsistence of his marriage with the deceased to form the basis of each of the administrator's portion of administration. He said, three properties were identified to belong to the deceased's estates and that is three houses located in one piece of land at Lamadi, Busega District and one plot located at Mwakiloba Village within Busega District. And that the plot was purchased on 21/8/2020 and the houses were built therein in 2002 which is the period during the subsistence of his marriage with the deceased contracted in 1985.

Arguing grounds two and three together, the appellant blamed the 1st appellate court for appointing the respondent administrator of the deceased's estate for he had no interest whatsoever in the deceased's estate. He said since the evidence proves the existence of legal marriage between him and the deceased since 1985 and in the absence of any divorce decree, it is certain that the properties were acquired by their joint efforts and therefore an interested party as per section 43 of the Indian Succession Act, 1865.

He on ground four condemned the 1st appellate court for issuing an unexecutable decree. He said, the evidence portrays a difficult relationship between the two administrators as indicated by the chasing of the appellant at the meeting that appointed the respondent administrator, and therefore the two individuals cannot afford to work together in performing their assigned duties as co-administrators of the deceased's estate. He did not submit to the raised points of law by the respondent.

On the other hand, the respondent's submissions were prefaced by the submissions on the legal point he raised before the hearing. On the regularity or otherwise of the trial court's proceedings, the respondent's counsel said, while the proceedings show that the trial was conducted in the presence of two assessors, that is J. Majaba and S. Sabo, the decision was made by P. Bulengela and M. Sukula who did not attend the hearing of the matter contrary to the law. He on this cited the case of **Sophia Proper V Charles Sikuru**, Misc. Land Application No. 57 of 2020 H/C(unreported) and that of **Ameir Mbarack & Another V Edga Kahwili**(CAT Civil Appeal No. 154 of 2015 (Also Unreported) where it was stated that a member who had not attended a hearing cannot participate in decision making. He on this invited the court to invoke its revisional powers under sections 32(1) (a) and 32(2) of the MCA, Cap 11 Re 2019 to perfect the court's records.

On the issue of jurisdiction of the trial court, the Respondent's counsel said, since it is on the records that the deceased and the appellant had contracted a Christian marriage, then, the trial primary court automatically lacked jurisdiction to determine the petition for its mandate is only limited

to Islamic and Customary laws. Referring the court to page 7 of the trial courts records and its decision on the nature of the marriage between the appellant and the deceased, the respondent's counsel insisted that, having concluded that there existed a Christian marriage between the two, the trial court ought to have found itself without jurisdiction to determine the petition under the fifth Schedule paragraph (1)(1) of the Magistrates Court Act.

Responding to the appellant's grounds of appeal, the respondent's counsel contended that, the appellate magistrate's decision is specific on who was to administer what. Parties are aware of the deceased's properties acquired prior to and after the demised marriage. He was of the view that the condemnation of the 1st appellate court's finding is shaky. He said the evidence is also plain clear on what was owned by the deceased prior to the marriage as testified by one Elikana Magongwa and Shimba Mganga which is why the trial court boldly directed the appellant to administer what was jointly acquired.

Regarding grounds two and three, the respondent's counsel said, there is no law requiring the administrator to have interest in the deceased's estate save for the duty to administer it. Seemingly on the alternative, the counsel said, both parties herein have a special interest in the deceased estate, the appellant's special interest is in the properties acquired by the deceased after the marriage while the respondent's special interests are in the properties acquired before the marriage. He added that the records bear it that the deceased left no issue, and therefore since the trial court resorted to the application of the customary law, then under Local

Customary Law (Declaration) Order 193 GN NO. 273/1963 (-sheria za urithi) respondent has a duty to administer the properties left by his sister before she was married to the appellant. He for that reason prayed for the dismissal of the grounds of the appeal.

The respondent counsel also was in opposition to the fourth ground of appeal. He said, the parties were ordered to jointly administer the deceased estate but each on the distinct properties of the deceased estate with directives that each should observe the court's decision. The learned counsel was of the view that the difficulties if any in the execution of the court's decision is an individual assumption, suggesting an individual hidden agender for the detriment of the deceased's estate. He lastly invited the court to dismiss the appeal with costs.

I propose to begin with the legal points raised by the respondent's counsel. It should be noted here that these two points are being raised here for the first time but being points of law, the law allows them to be raised at any stage of the proceedings, that is the reason why this court is embarking on determining them.

The first point is on the jurisdiction of the trial primary court. Rightly as observed by the Respondent's counsel that the jurisdiction of the court is a creature of statute and is conferred and prescribed by the law and not otherwise. Defining the term "Jurisdiction" the Court of Appeal in **Yohana Balole V Anna Benjamine Malongo**, Civil Appeal No. 18 of 2020(unreported) said:

*"...the authority which a court has to decide matters that are litigated before it or to take cognizance of matters prescribed in a formal way for Its decision. **The limits of this authority are imposed by the statute**; charter or commission under which the court is constituted and may be extended or restrained by similar means. A limitation may be either as to the kind and nature of the claim or as to the area which jurisdiction extended, or it may partake of both these characteristics. "[Emphasis added].*

The Court went further to say

"... it is, therefore, a primary duty of every court, before venturing into a determination of any matter before it, to first satisfy itself that it is vested with the requisite jurisdiction to do so"

The primary court in our case was seized with the administration of the estate of the late Mbole Anastazia Kubwela who passed away on 26/11/2020. Prescribing the jurisdiction of the primary Court on such a matter, section 18 and 19 of the Magistrate Court's Act says:

- "18 (1) A primary court shall have and exercise jurisdiction -
(a) In all proceedings of a civil nature –
(i) where the law applicable is **customary law** or **Islamic law**: ...

19-(1) (c) in the exercise of their jurisdiction in the administration of estates by the provisions of the Fifth Schedule to this Act, and, in matters of practice

and procedure, by rules of court for primary courts which are not inconsistent therewith; and the said Code and Schedules shall apply thereto and for the regulation of such other matters as are provided for therein

And Paragraph 1 of the Fifth Schedule, of PART 1 of the MCA state as follows:

1.-(1) The jurisdiction of a primary court in the administration of a deceased's estates, where the law applicable to the administration or distribution or 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:

Provided that, nothing in this paragraph shall derogate from the jurisdiction of a primary court in any proceedings transferred to such court under Part V of this Act.” (Emphasis added)

It is clear therefore from the above provisions of the law that the jurisdiction of the primary court on the administration of the deceased estate is limited to customary and Islamic law. However, in determining the choice of law to be applied in any probate matter, two tests must be established. That is, the '**mode of life**' the deceased lived and '**the intention of the deceased**' before his/her death as decided in **Re Innovent Mbilinyi, Deceased** (1969) HCD) 283. The mode of life test is evidenced by the lifestyle of the deceased and the Intention of the

deceased is conveyed where one lives a will and makes written or oral declarations in relation to the administration of his or her estate when still alive.

The reason given by the Respondent's counsel in challenging the trial court's decision is that the conclusion by the trial court that the deceased had contracted a Christian marriage with the Appellant reflects the deceased mode of lifestyle for purposes of the selection of the applicable laws.

I have revisited the trial court's records. The information filled in FORM NO 1 is silent on the deceased's mode of life. It is however in the Appellant's evidence on page 7 of the trial court proceedings that though he had customarily married the deceased in 1985, the two contracted a Christian marriage in 2009. This fact was supported by exhibits A and B . This is also reflected in the trial court's decision on page 8 where the court was satisfied that the appellant and deceased had contracted a Christian marriage. This position was also seconded by the 1st appellate court on page 5 of its decision. Without more ado, the two courts below went ahead to appoint an administrator of the deceased estate. As rightly argued by the respondent's counsel, the trial court was duty bound to go beyond that fact and establish the mode of life of the deceased to ascertain whether the deceased had abandoned the customary norms despite the Christian marriage or not before opting for customary laws as the guiding rules in the administration of her estate.

Faced with a similar situation, in **George S/O Kumwenda v. Fidelis Nyirenda** [1981] TLR 211, the Primary court had invoked the application

of customary law and on appeal, the District Court overruled the Primary Court and opted for the application of statutory law. In the High Court Kisanga J. (as he then was) ordered a retrial because the two Courts below had arbitrarily made a choice of law without first investigating the mode of the life of the deceased. I am persuaded by this decision.

The choice of the law applicable, in this case, was as well randomly chosen and applied without determining why customary law and not statutory law or any other law in place. This is more so because the facts on the records reveal the changing of the lifestyle of the deceased from customary life to Christianity which raises doubt if indeed the customary law was still applicable to her estate or not. This renders the entire proceeding a nullity.

That said, I order for retrial with directives that the trial court should first determine the mode of life of the deceased so as to allow a justified choice of applicable law in the administration of the deceased's estate. And since this point disposes of the matter, I find it unnecessary to determine the second point of law and the grounds of appeal. Given the fact that the error was committed by the court, I make no order as to costs.

Dated at Shinyanga this 12th day of August 2022



E.Y. Mkwizu

JUDGE

12/8/2022

Court: Right of appeal explained.



E.Y. Mkwizu

JUDGE

12/8/2022