IN THE HIGH COURT THE UNITED REPUBLIC OF TANZANIA

(MWANZA SUB-REGISTRY)

AT MWANZA

PC. PROBATE APPEAL NO. 4 OF 2022

(Originating from Probate Appeal No. 02 of 2021, the same arose from Originating from Chato Primary Court in Probate Cause No. 09 of 2021)

RUTH VICTOR As the Administratix of Estate of the Late Benjamini Philipo Badehe .....APPELLANT

VERSUS

EDWARD EMMANUEL BADEHE .....1ST RESPONDENT
KULWA BENJAMINI PHILIPO (As the Administrator of the Estate of the Late Benjamini Philipo Badehe .....2ND RESPONDENT

JUDGMENT

7th June, & 4th August, 2022

DYANSOBERA, J.:

This is a second appeal. The appellant herein appealed to the District Court against the decision of the Primary Court appointing her together with the two respondents as administrators of the estate of the late Benjamin Philip Badehe. The District Court, upon hearing the appeal, revoked the appointment of the 2nd respondent and retained the administration of the deceased estate in the hands of the 1st respondent and the appellant. The appellant was aggrieved being appointed as a co-administratrix with the 1st respondent hence this appeal.

The brief facts of the case for deciding this appeal are that the deceased Benjamin Philipo Badehe died intestate on 16th May, 2021. He

was survived by some children and two wives, namely, Ruth Victor (the appellant) and Rebeka Nkingwa. The deceased also left behind some possessions which form part of his estate.

Following the death of the deceased, the two respondents petitioned the Primary Court at Chato for grant of letters of administration. The appellant raised an objection but at the end of the day, both respondents and the appellant were granted letters of administration. Her first appeal to the District Court vide Probate Appeal No. 2 of 2021 was partly allowed in that the appointment of the 2nd respondent Kulwa Benjamin Philipo was revoked. Still aggrieved, she has filed this appeal on the following grounds:

1. That, the trial magistrate erred in law and facts by proceeding with the matter which the honorable court lacks jurisdiction to deal with as the trial court did not consider the mode of life of the deceased person believed in Christianity and not customary life.
2. That, the trial Magistrate erred in law and facts by proceeding with the matter without considering the evidence of the deceased legal wife and concluded that the deceased had two wives which is against the Law of Marriage Act and to consider the decision of Chato Primary Court was against the mode of life of the deceased.

3. That, the trial Magistrate erred in law and facts by appointing EDWARD BENJAMIN EMMANUEL, BABEHE as co administrator who is not competent as he tempered with the minutes of clan meeting without informing deceased legal wife and heirs (Children) and the deceased wife was competent Administratix who is competent to administer the estate of the late Benjamini Philipo Badehe.

During the hearing of the appeal, Mr. Linus Amri, learned Advocate, stood for the appellant whereas Mr. Arsein Molland, learned Counsel, represented the respondents.

Supporting the appeal, learned Counsel for the appellant submitted that the Primary Court at Chato had no jurisdiction to hear Probate and Administration Cause No. 9 of 2021 due to the fact that the deceased professed Christian faith and was buried in that belief and not in customary life, did not forsake that belief and did not divorce so as to live in a life other than Christianity. It was further argued on part of appellant that in the Primary Court, the minutes of family meeting of 21.5.2021 were clear that the deceased was married to a Christian wife and this means that he professed Christianity. To augment his point, counsel for the appellant cited Probate Appeal No. 10 of 2020 between

Sikujua Model Mwasoni V. Sikudhani Hansi Mwakyoma at page 8 on the issue of jurisdiction of the trial court.

In the second ground, learned Counsel for the applicant took this court through the provisions of Sections 2, 9, 11(4) and 11(5) and 43 (5) of the Law of Marriage Act [Cap. 29 R.E. 2019] arguing that in Christian marriage there is monogamy otherwise the marriage has to be registered. The case of **Msangi Hemed Msangi v. Domina Callist,** Matrimonial Appeal No. 5 of 2020 was cited by the Counsel in support of his argument.

Having considered the said case, I think it is inapplicable in the circumstances of the case. In this case we are dealing with the mode of life of the deceased at the time of his death and not on the registration of marriage. Further, the cited case was a matrimonial cause while the current case is probate and administration cause. These are two distinct proceedings governed by different regimes of legislations.

In the third ground of appeal, the appellant is against the decision which blessed Edward Emmanuel Badehe to be administrator of the estate of the late Benjamini Philipo Badehe. It is argued on part of the appellant that to be administrator is not a simple task and that the hardship of a husband is recognized by his wife. Counsel for the appellant was of the view that Edward Emmanuel Badehe was not the proper person to be granted the letters of administration as he had no clean hands hence

incompetent and unable to administer well the deceased's estate. It was contended by Counsel for the appellant that the only fir person was the widow who was competent.

Opposing the appeal, Counsel for the respondents submitted that the first ground of appeal is baseless and the cases cited by Counsel for the appellant are irrelevant as the Primary Court had jurisdiction to try the case as in order to determine the jurisdiction of the court, it is the mode of life of the deceased. According to him, the attire and customary tools of the deceased indicated that the mode of life of the deceased was customary law as he lived with two wives and the clan members recognized this fact. Further that the deceased had other children from different wives/women as reflected in the judgment of the trial court.

It was further contended on part of the respondents that the deceased established his homestead at his Village of Buzirayombo in Chato District. Admitting that the deceased was a Christian, Counsel for the respondent argued that deceased's mode of life was, however, not Christian, rather a Sukuma as reflect in Form No. 1. Counsel for the respondents was also clear that the appellant cannot be permitted to address the deceased for her own interests. The Christian marriage of the deceased with the appellant was also challenged for failure to comply with the law and also for failure to harmonize the names of the deceased as

appearing on the certificate of marriage and his real names, learned Advocate for the respondents clarified. Reference was made to the case of **Ally Ahmad Dauda (Administrator of the Estate of the late Amina Hussein Senyange) v. Raza Hussein Ladha Damji and two others**, Civil Application No. 525/17 of 2016 at page 14.

Insisting that the Primary Court had jurisdiction to entertain the matter on hand, learned Counsel for the respondents submitted that the deceased might have professed Christianity but did not live that mode of life. The mode of life of the deceased was, according to him, customary; the determinant factor being the mode of life of the deceased and, therefore, the concurrent finding of the two lower courts was proper. Reliance was placed on the case of **Gibson Kabumbire v. Rose Nestory Kabumbire**, Probate Appeal No. 12 of 2020 at page 15 & 16. The case of Hon. Mgeyekwa, J was sought to be distinguished.

On the second ground of appeal, counsel for the respondent submitted that the court, in the instant case, sat as a probate court and not a matrimonial court and therefore, the matters of matrimonial proceeding were inapplicable and the duty of the Primary Court was only to appoint an administrator and not to find who the legal wife was. Only that during the hearing of the probate and administration cause, the trial court was

apprised of the fact that the deceased was married to two wives and that his evidence was not controverted before the trial court.

Besides, Mr. Arsein Molland argued, the Primary court appointed three administrators for reasons apparent at page 17 of the trial court's judgment. The aim of the clan was geared at protecting the interests of the two families of the deceased and that Edward Emmanuel Badehe was added to diffuse the conflicting interests of the two families. These conflicts included the appellant moving away the deceased's properties causing the other side lose trust on that other side. Counsel for the respondent further pointed out that the District Court wrongly removed Kulwa Benjamin Philipo in the administration without answering the issue on who was going to protect the interests of the other side.

Counsel for the respondent insisted that there was a conflict of interest between the heirs and the appellant who intended to remain alone while the others did not trust her and that the alleged issue of tempering was not proved.

Furthermore, Counsel for the respondents faulted the decision of the District Court in revoking the appointment of the 2nd respondent without assigning any legal justification. It was argued on part of the respondents that this court should not disturb the concurrent findings of the courts below. The case of **Kadily Ally v. R,** Criminal Appeal No. 99 of

2020 was cited in support of the Counsel's argument. He prayed 2nd respondent's letters of administration revoked by the District Court to be restored and the respondents be awarded costs.

In a brief rejoinder, Counsel for the appellant maintained that there was miscarriage of justice in that justice was not done to the legitimate children taking into account the minutes of clan meeting. He was of the view that the administrator had bad intention and is not trustworthy as he took no note to inform the deceased's family on what was going on.

On the second ground, Counsel for the appellant insisted that there could be no recognition of two wives who are not recognized by law as, according to him, decision of the lower courts validated the marriage of two wives Christian wife and a customary wife and that this would lead to the distribution which could include those who are not legally entitled. Counsel for the appellant was also emphatic that the deceased lived in concubinage life but went on respecting his Christian marriage of a single wife. He concluded his rejoinder by submitting that there was intention to twist the truth.

I have considered the rival submissions of the parties to this appeal. I have also perused the proceedings of the trial Primary Court and the judgments of both the District Court and the Primary Court.

I propose to start with the first ground of appeal on the complaint that the trial magistrate erred in law and facts by proceeding with the matter which the honorable court lacks jurisdiction to deal with as the trial court did not consider the mode of life of the deceased person believed in Christianity and not customary life.

There is no dispute that the question of jurisdiction is of paramount importance and courts are enjoined to first ascertain if they have jurisdiction before entertaining any judicial matter. This position was well echoed by the Court of Appeal in the case of **Richard Julius Rugambura v. Issack Ntwa Mwakajila and Tanzania Railways Corporation**, Civil Appeal No. 2 of 1998 (unreported) whereby it made the following observation: -

> 'The question of jurisdiction is paramount in any proceedings. It is so fundamental that in any trial even if it is not raised by the parties at the initial stages, it can be raised and entertained at any stage of the proceedings in order to ensure that the court is properly vested with jurisdiction to adjudicate the matter before it'.

The question of jurisdiction of the primary court was raised before the two lower courts. According to the trial court's record, the first issue

posed at the trial court was '*Je, Mahakama hii ina mamlaka ya kusikiliza shauri hili?* ' In determining this issue, the trial primary court took into account the provisions of section 19 (1) (c) of the Magistrates Courts' Act [Cap. 11 R.E.2019]: Fifth Schedule to the said Act on Powers of the Primary Court in Administration Cases, the Primary Courts (Administration of Estates) Rules, GN No. 49 of 1971 and the case of **Hadija Said Matika v. Awesa Said Matika**, PC Civil Appeal No.2of 2016 on the considerations to be taken into account in determining a probate and administration matter; that is first, the deceased's names, tribe and religion. Second the permanent place of abode of the deceased at the time of his demise where the court has jurisdiction and third, the law applicable. The trial court was satisfied that, on the available evidence, it had jurisdiction.

With due respect, I think the trial court was correct in interpreting the law. The law on the jurisdiction of the Primary Court is clear. The Magistrates' Courts Act, Cap 11 R.E. 2019, under section 19(1)(c), in particular, provides thus: -

> *"(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"

Likewise, in the Fifth Schedule to the Magistrates' Courts Act, particularly paragraph 1(1) provides that:-

"1-(I) The jurisdiction of a primary court in the administration of 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.

(2) A primary court shall not appoint an administrator of a deceased's estate in respect of an estate to which the provisions of the Probate and Administration of Estates Act are applicable or of which a grant of administration has been made under that Act, or of which the administration is undertaken by the Administrator-General under the Administrator-General (Powers and Functions) Act; or where the gross value of the estate does not exceed Shs.1,000/- unless the court is of the opinion that

such an appointment is necessary to protect the creditors or beneficiaries."

Going by the above provisions, I am in no doubt that they clothe the primary court with jurisdiction to determine the matter of probate and administration of estates of the deceased. Besides, under paragraph 2(a) of the Fifth Schedule, the primary court is mandated to appoint any party interested to the estate of the deceased *suo motto* or on an application by any party interested in the administration.

On the first appeal before the District Court, the appellant's first ground of appeal was couched in the following terms:

> 'That the trial Magistrate erred in law and fact by proceedings with the matter which the Honourable Court lacks jurisdiction to deal with as the deceased person believed in Christianity and not in customary law'.

The District Court concurred with the trial court on the question of jurisdiction and held that the trial court was clothed with the requisite jurisdiction to determine the probate and administration cause No. 09 of 2021. It thus dismissed that first ground of appeal.

I think the findings of the two courts below cannot be faulted. In the first place, there is no dispute that customary law is the default system

for Tanzanians of African descent. Tanzanians of African communities can escape the application of customary law only if they can satisfy one of the requirements of the two statutory tests. One, under the Judicature and Application of Laws Act [Cap. 358 R.E.2019], if it is shown that it is apparent from the nature of any relevant act or transaction, manner of life or business that matter is....to be regulated otherwise by customary law. Two, under the Probate and Administration Act [Cap 352 R.E.2019] that the deceased professed Islam or Christianity and "written or oral declarations... or his acts or manner of life reveal that he intended his estate to be administered according to Islamic law or the Indian Succession Act".

In the case under consideration, there was no evidence that the above two statutory tests were met. It can be safely argued that the deceased most likely did not consider inheritance matters or even understand the various available statutory options. Indeed, true intent could only be determined by a will which would do away with the need to apply any intestate succession law.

This court (Hon. F.K. Manyanda), in the case of **Gibson Kabumbire v. Rose Nestory Kabumbire**, Probate Appeal No. 12 of 2020, observed at pp. 15 and 16 as follows: -

> 'It is trite law that Primary Courts have jurisdiction in Probate matters concerning Christians where it is prove that they lived

customary mode or manner of life in which situation the question of professing Christianity does not interfere with the administration of his or her estate. The reason is that by merely being a Christian, does not mean one has been detracted from his or her customary life, there must be evidence to support the same, there is a distinction between Christians who live and practice normal customary life and those who have professed Christian religion and either by a declaration or by his acts or manner of life is evident that they have professed as such and intended that their estate will be administered under the applicable law to Christians.

I subscribe to that reasoning.

In the instant case, there was no evidence to suggest that the deceased had abandoned the customary way of life in favour of a Christian and non-traditional which could bring into the application of the Indian Succession Act, 1865 which applies to Christians. The case of Probate Appeal No. 10 of 2020 between **Sikujua Model Mwasoni V. Sikudhani Hansi Mwakyoma** cited by learned Counsel for the appellant is inapplicable in the circumstances of this case. With due respect to the learned Counsel for the appellant, that case was also cited out of context. The **ratio decidendi** in that case is found at p. 10 of the typed judgment on the general principle that a second appellate court cannot adjudicate

on a matter which was neither raised as a ground of appeal nor deliberated and determined in the lower court.

In this case, as said above, the question of the primary court having jurisdiction to try this probate and administration matter was raised before the two lower courts, deliberated upon and determined. As rightly submitted by learned Counsel for the respondent, the cited case is inapplicable in the circumstances of this case.

Second, it was amply proved in evidence that the deceased's mode of life at the time of his death was neither Christian and nor non-traditional but customary. This is according to the evidence unfurled before the trial court which was also taken into account by the District Court. For instance, Edward Emmanuel Badehe, the 2nd respondent, is recorded to have told the trial at p. 19 of the proceedings that:

> *'natambua uwepo wa wake wawili halali wa marehemu kaka yangu Benjamin Philipo Badehe'.*

During cross examination, the same 2nd respondent told the trial court that:-

> *'Katika kikao cha ukoo cha tarehe 21.5.2021 na yeye [appellant] akiwa mjumbe kikao kilitambua kuwa wake wawili: Ruth Victor*

ndoa ya kikristo na Rebeka Nkingwa ndo ya kimila. Kimila marehemu alikuwa na wake wawili.'

In his further evidence, the 1st respondent testified that apart from the two wives of the deceased, the other survivors were Suzana Masubi, the deceased's mother, Kulwa Benjamin Philipo, Victor Benjamini, Solile Benjamini, Masunzu Benjamini and Malagwa Benjamini.

The same 1st respondent is, at p. 24 of the typed proceedings of the trial primary court, recorded to have stated: -

'Marehemu Benjamini Philip Badehe ni kaka yangu ***alikuwa ni msukuma na aliishi kwa kufuata mila na desturi za kisukuma'*****.**

As if that is not enough, with regard to the other deceased's children born out of wedlock, the appellant had, at p. 8 of the typed proceedings, the following to say:-

"Sambamba na hayo, marehemu ameacha mtoto mmoja ambaye ni Kulwa Benjamin ambaye amelelewa nyumbani kwao, lakini pia marehemu alitambua alipoanza kazi aliandika tarehe 30.4.1999 aliandika watu wanaoweza kumrithi aliandika warithi wake ambao ni Ruth Victor mimi, Dickson, Sylvia na Irene hapo tulikuwa na watoto watatu. Nyingine aliandika tarehe 7.7.2005 alitambua uwepo wa Victor

Benjamini na hakunitambulisha Kulwa ni mrithi wake. Lakini familia tunatambua uwepo wa Kulwa na maisha yote hatukuwa kuishi nae na aliishi kwao na baba yake, ***kwani alikuwa mtoto wa nje ya ndoa. Pia marehemu*** **ameacha watoto wengine wa nje ya ndoa ambao wanaishi na mama zao** *Solile Benjamin, Masunzu Benjamini na Malagwa Benjamin.*

Clearly, this means that the deceased Benjamin Philipo Badehe did not profess and practice Christianity at the time of his death, rather, he abandoned the Christian way of life in favour of customary and traditional way of life.

The first ground falls away.

With respect to the second and third grounds of appeal, to grant a probate of a will where the deceased died testate or letters of administration where the deceased died intestate, the executor in the first case, must be named in the will if the will is valid or in intestate estate, an administrator could be anybody even a non-relative of the deceased or just a court official so long as they are found to be honest and capable of taking care of the property of the deceased. This aspect is envisaged under paragraph 2 (a) and (b) of the Powers of Primary Courts in Administration cases, Fifth Schedule to the Magistrates' Courts Act [Cap. 11 R.E.2019] and where

there is a conflict between interested persons, the court may appoint an independent administrator such as the Administrator General. As the records of the lower court shows, the trial court decided to appoint the appellant along with the two respondents to be administrators of the deceased so as to diffuse any conflicting interests on the side of the two wives of the deceased. I think the law and circumstances of the case enjoined the trial court to take that recourse.

This disposes of the second and third grounds of appeal.

The revocation by the District Court of the 2nd respondent's letters of administration was not only uncalled for but also illegal as according to rule 9 (a) of the Rules of Administration of the Deceased's Estate in Primary Courts commonly known as the Primary Courts (Administration of Estates), Rules, Government Notice No. 49 of 1971, the court competent to revoke the appointment of the administrator is the court which granted the letters of administration. As matters stand, the District Court did not appoint the 2nd respondent as administrator of the deceased's estate as such it had no jurisdiction. Furthermore, the factors for revocation or annulment of the administrator are stipulated under sub-rule (1) of rule 9 paragraphs (a) to (e) of the said Rules. As pointed out by Counsel for the respondents, the revocation by the District Court of letters of

administration granted by the Primary Court to the 2nd respondent had no justification.

For the reasons stated, I find this appeal devoid of any legal merit and dismiss it.

Invoking the revisionary powers invested in this court, I quash and set aside the order of the District Court revoking the appointment of the 2nd respondent and restore the judgment of the Primary Court.

Order accordingly.

W.P. Dyansobera
Judge
4.8.2022

This judgment is delivered under my hand and the seal of this Court on this 4th day of August, 2022 in the presence of the appellant and the 1st respondent and Mr. Linus Amri, learned Counsel for the appellant. The 2nd respondent is absent.

W.P. Dyansobera
Judge