

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF BUKOBA)

AT BUKOBA

PROBATE APPEAL NO. 2 OF 2022

(Arising from Muleba District Court in Civil Appeal No. 34 of 2021 and Original Probate Cause No. 05 of 2020 at Nshamba Primary Court)

JOHNSON BENEDICTOAPPELLANT

VERSUS

DAFROZA BENEDICTO..... RESPONDENT

JUDGMENT

Date of Judgment: 09.09.2022

Mwenda, J.

Before Kashasha Primary Court, Dafroza Benedicto filed a Probate Cause No. 15 of 2020 craving to be appointed as administratrix of the estate of the late Benedicto R. Ichulula. Before the said appointment, Mr. Johnson Benedicto filed an objection against Dafroza Benedicto from being appointed as an Administratrix of the estate of the late Benedicto R. Ichulula on the ground that she is not a legal wife to the late Benedicto R. Ichulula. On top of that, he said the listed respondent's children are not biological children of the late Benedicto R. Ichulula. At the end of the judicial day the Hon. trial Magistrate appointed Mr. Deodatus Buberwa Village Executive Officer and Mr. Renatus Tibenda as Administrators of the estate of the late Benedicto R. Ichulula on two grounds, one, that the applicant (Dafroza) was not the legal wife to the late Benedicto

and two, the conflicts between the late Benedicto's son and the applicant would lead to injustice during administration of the estate of the late Benedicto.

Aggrieved with the said decision Johnson Benedicto appealed before Muleba District Court in Probate Appeal No. 34 of 2021. In that appeal, he challenged the trial court's findings which held that, the respondent was a legal wife to the late Benedicto at the time of the death, that the respondents three kids are biological children of the late Benedicto and the appointment of Deodatus Buberwa and appointment of Renatus Tibenda as administrators of the estate of Late Benedicto.

Having heard the submission from both sides the first appellate court was of the view that the respondent was not a legal wife of the late Benedicto Rwamuleba. On the other hand, it was satisfied that the respondents three kids are the late Benedicto's biological children. On top of that it upheld the appointment of Deodatus Buberwa and Renatus Tibenda as administrators of Benedicto's estate.

This judgment did not please the appellant. He thus preferred the present Probate Appeal (No. 2 of 2022) before this court with six (6) grounds. The said grounds read as follows;

- 1) That, the Hon. Magistrate failed both in law and fact in failing to evaluate the evidence produced before her that there was never had been any form of marriage between the respondent and the late Benedicto Rwamuleba Ichulula (deceade) as the respondent was a legal wife to one

Damiano Kajukado whom are living together to date as also evidenced by the respondent herself in court when cross examined.

- 2) That, the Hon. Magistrate grossly misdirected herself in believing that the three children born of the respondent were the deceased's children in the absence of any cogent evidence required to substantiate the same as so requested by the appellant.
- 3) That, had the Hon. Magistrate directed her mind properly she would have found that the contradictions in the evidence by the Respondent's witness in the trial court were so overwhelming and went to root of the case such that they lacked credibility to be believed.
- 4) That the Hon. Magistrate grossly misdirected herself as to the marital status of the respondent when she joined hands with the trial court that the respondent was not the legal wife of the deceased at the time of his death, in fact the respondent had never been the deceased wife right from the beginning and therefore had nothing to claim from the deceased's estates had she observed that she would have come to a different decision.
- 5) That the Hon. Magistrate whether through inadvertence or wilful failed to address or record down in the proceedings the issues addressed in court particularly on the subsistence of the marriage between the Respondent and her Husband, the marriage of which is still subsisting and the issue raised regarding DNA TEST to substantiate the legality of the respondent's children to be have begotten by the deceased. Had the

learned Hon. Magistrate addressed such issues and recorded them down in the proceedings she would have come to a different decision. An affidavit to that effect can be sworn to substantiate our claim.

- 6) That, had the Hon. magistrate addressed the issues raised by the appellant in his submissions, she would have come to a different decision and find in favour of the appellant.

At the hearing of this appeal the appellant was represented by Mr. John Rwabuhanga the learned advocate while the respondent appeared in person without legal representation.

In his submission in chief Mr. Rwabuhanga said that before the first appellate court the Hon. Magistrate failed to evaluate the evidence adduced and find that the respondent was never married to the late Benedicto Ichulula as she did not bring any evidence to that effect. He added in that the first appellate court failed to evaluate evidence and reach to a finding that the respondent was and is still married to Damian Kajukamo.

Further to that he submitted that the respondent had no proof that she co-parented the three kids with the deceased. He said the respondent only relied on the baptism certificate and other school registration documents. The learned counsel was of the view that the respondent was required to summon church leaders to prove the said allegation. He said the only proof that the respondent's children are the late Benedicto's biological children is DNA which was never considered by the Hon. Magistrate of the first appellate court.

Mr. Rwabuhanga went on to submitting that the first appellate court did not consider the principles of writing a judgment contrary to section 312 (1) of Criminal Procedure Act. He submitted that the said judgment lacks point of determination and reasons for decision reached. To support his argument, he cited the case of JAFFARI RAMADHANI VS REPUBLIC CRIMINAL APPEAL NO. 311 OF 2017 (UNREPORTED), KAIMU SAID VS REPUBLIC CRIMINAL APPEAL NO. 391 OF 2019 AND DPP SHAPRIYA & CO LTD VS MEK ONE GENERAL TRADER & ANOTHER CIVIL APPEAL NO. 197 OF 2016. He then concluded his submission praying this appeal to be allowed.

In reply to the submissions by the learned counsel for the appellant, the respondent submitted that she still insists that she co-parented three children with the deceased, the late Benedicto Rwamuleba. She said that they used to live together at Ihangilo village and the late Benedicto received the dowry when one of their children got married. She further submitted that the first born child was recognized by the appellant's father and the appellant recognized them and one of her children was living at the appellant's homestead. She added in that she divorced her first husband before she married the deceased. She then concluded her submission praying this appeal to be dismissed.

In rejoinder the counsel for the appellant submitted that all that is stated by the respondent was never raised before the lower court. He said even the issue of getting married to the appellant's father was never raised so what is stated by the respondent is an afterthought.

On the submissions that she divorced her first husband before getting married to the late Benedicto, the learned counsel submitted that before the trial court the respondent testified that she married and was still living with the said Damian (her other husband). He then concluded his rejoinder praying this appeal to be allowed.

Having gone through the submissions by both parties the issue for determination is whether or not this appeal is meritorious.

A keen scrutiny to the appellant submissions all the way from the trial court, first appellate court and this (second) appellate court, the appellant is contesting two issues. Firstly, is the legality of the marriage between the respondent and the late Benedicto and secondly, the legitimacy of the respondent's children alleged to be co-parented between the respondent and the late Benedicto.

On the issue of marriage, the trial court dealt with it and found that the respondent was not the legal wife to the late Benedicto Ichulula. This position was upheld and maintained by the first appellate court. As I have stated earlier the trial court while deciding the said issue used the following words and I quote;

"Starting with grounds 1,2, and 3, these grounds challenge the fact that the respondent is not the wife of the deceased because the deceased had a Christian marriage with one Carolina. I think that this ground

lacks merits because the trial court ruled that the respondent was not a legal wife at the time of death."

With the said words which are unambiguous it is evident that the court noted in affirmative that the respondent was not married to the late Benedicto by the time of death, the finding which the first appellate court upheld, which this court being the second appellate court find no reasons to interfere.

With regard to the issue of legitimacy of the children alleged to be co-parented between the respondent and the late Benedicto Ichulula the trial court and the first appellate court maintained that the late Benedicto Ichulula was the father to the said children relying on exhibit 'A', 'B', 'C', 'D' and 'E'.

It is the trite law that he who alleges must prove. Section 110 (1) of the Evidence Act [CAP 6 R.E 2019] provide that;

110.-(1) 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.

In an attempt to prove her allegation regarding children before the trial court, the respondent tendered baptism certificates and school fees exchequer receipts. The appellant objected the same in that, they are not sufficient to prove that the said children belong to the late Benedicto. This court took time to go through the said school fee exchequer receipts. The same indicate the children's names and their surname (second name) as Bebedicto. Benedicto is

commonly used name and by itself as was rightly submitted by Mr. Rwabuhanga cannot prove that they are sons and daughter of the Late Benedicto Ichulula. This also applies to the Children's baptism certificates, that by themselves cannot prove the fact that they are deceased's children. In the circumstance of this case, scientific proof is crucial, preferably DNA evidence.

This court therefore find it prudent, for the interest of justice and by virtue of Order XXXIX Rule 28 of the Civil Procedure Code [CAP 33 R.E 2019] to order DNA profiling TEST to be conducted as additional evidence to the respondent's three children who are Evelius Benedicto, Kelvin Benedicto and Wivina Benedicto in order to determine if they are relate to the late Benedicto Ichulula. As I have stated above, these powers are derived from Order XXXIX Rule 28 of the Civil Procedure Code which reads as follows;

"Wherever additional evidence is allowed to be produced, the court may either take such evidence or direct the court from whose decree the appeal is preferred or any other subordinate court to take such evidence and send I when taken to the court."

From the forgoing observations this appeal is partly allowed by quashing the decision of the District Court in Probate Appeal No. 34 of 2021. By virtue of section 79(1) Civil Procedure Code [CAP 33 R.E 2019] the trial court is directed

to re-open the proceedings, summon the parties and issue directives of conducting DNA profiling tests to Evelius Benedicto, Kelvin Benedicto and Wivina Benedicto. The mode of facilitation should be that which is fair, just and friendly to the parties. Upon receipt of the DNA profiling test's results, the trial court shall then deliberate on the issue of legitimacy of the said Children.

It is so ordered.




A.Y. Mwenda

Judge

09.09.2022

This judgment is delivered in chamber under the seal of this court in the presence of Mr. John Rwabuhanga the learned counsel for the appellant and Ms. Dafroza Benedicto the respondent.




A.Y. Mwenda

Judge

09.09.2022