IN THE HIGH COURT OF THE UNITED REPUBIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

PC CIVIL APPELA NO. 43 OF 2021

(C/F Civil Revision No. 15 of 2020 at the District Court of Arumeru at Arumeru, Originating from, Emaoi Primary Court in Probate and Administration Cause No. 23 of 2020)

PETER PANTALEO MTUI.....APPELLANT

VERSUS

JULIANA PANTALEO MTUI.....RESPONDENT

JUDGMENT

09/8/2021 & 29/09/2022

GWAE, J

The facts of the present appeal can be traced back from Probate and Administration Cause No. 23 of 2020 where the respondent herein filed a petition at Emaoi Primary Court (herein the trial court) for letters of administration of the estate of the late Pantaleo Rafael Mtui who died intestate.

At the trial court, Form No. 1 which initiated the proceedings, and from the said form the following information can be gathered; that, the said Pantaleo Raphael Mtui died on 4/08/2020 at home and he was survived with the following relatives;

1. Juliana Pantaleo Mtui
2. Antusa Pantaleo Mtui
3. Florian Pantaleo Mtui
4. John Pantaleo Mtui
5. Bernadeta Pantaleo Mtui
6. Peter Pantaleo Mtui

The form also reveals that, the deceased had left the following properties; a house located at Ekenywa-Arumeru, a farm measuring six (6) acres, and another house and a farm located at Marangu-Moshi. Paragraph 7 of the form also demonstrates that, the deceased at the time of his lifetime he was a Chagga by tribe and he prophesized Christianity (Catholic).

After the filing of the petition by the respondent, the appellant herein filed a caveat, objecting the sought grant of letters of administration of the deceased person's estate by the respondent on reasons that, there has never been any family meeting which appointed the respondent and secondly, that, the respondent was biased and that she will not do justice to him.

The caveat was heard and it was finally determined, and the trial court found the same without merit hence dismissed it and the respondent

was granted letters of administration. Dissatisfied with the dismissal of the caveat, the appellant subsequently filed an application for revision in the Arumeru District Court calling the court to inspect the records of the trial court and satisfy itself as to the correctness, legality and propriety of the decision. The district court having revised the proceedings of the trial court was satisfied that, the proceedings and decision of the trial court were correct, consequently, the appellant's application for the sought revision was dismissed.

Dissatisfied, the appellant filed this appeal with four grounds of appeal however in his submission the appellant abandoned grounds number 1, 2 and 3 and argued only on ground number 4 which reads;

1. That, the District Court erred in law and in fact when upheld the decision of the Emaoi Primary Court which appointed respondent as administrator of the late Pantaleo Mtui without appreciating that the Primary Court lacks jurisdiction to register and hear Civil Cause No. 23 of 2020 as the late Pantaleo Raphael Mtui was a Christian by faith, and he lived his life according to Christian rites.

At the hearing of this appeal the appellant was represented by the learned counsel **Mr. Hamisi Mkindi** from Legal and Human Rights Centre

(LHRC) at Arusha, on the other hand, the respondent was under the legal representation of **Ms. Fauzia Mustapha Akonaay** the learned counsel. With leave of the court the appeal was argued by way of written submissions.

Submitting on this ground Mr. Mkindi stated that, the Primary Court lacked jurisdiction to hear and determine the suit on the reason that the deceased was a Christian by faith and he lived according to Christian rites including his Christian marriage contracted on 23/09/1959. The counsel went further to state that the jurisdiction of the Primary Court is provided under section 18 & 19 of the Magistrates' Courts Act Cap 11 Revised Edition, 2019 and specifically in the 5th schedule to the Act. To support his arguments the counsel cited the following cases which were decided by this court. **Sikujua Model Mwasoni v. Sikudhani Hansi Mwakyoma,** Probate Appeal No. 10 of 2020 and **Reginald Kora Hugo vs Desideri Riva Urassa & two others,** PC. Civil Appeal No. 24 of 2021. He therefore urged this court to quash the proceedings and ruling of the trial court.

On her part, Ms. Mustafa strongly argued that determination of the of law applicable that is whether customary, Islamic or Christianity the courts will consider Mode of life of the deceased and the intention of the

deceased before his or her demise. He went on submitting that, the deceased person in this case had two wives, Akulina, the mother of the respondent and another woman who is the mother of the appellant. She supported her case with the case of **John Ngomoi v. Mohammed Ally Bofu** (1988) TLR 63 and **Catherine Priscus Massawe vs Kamili Proti Massawe,** Misc. Civil Appeal No. 05 of 2020. The respondent's counsel concluded that since the deceased in this case lived in a customary mode of life then the Emaoi Primary Court had jurisdiction to determine the matter.

Since the complaint of the appellant is glaringly centred at the jurisdiction of the trial court, I will therefore begin by addressing on the law applicable in Primary Courts in particular in the administration of the deceased person's estate. The administration of the deceased's estate by Primary Courts is regulated by the Fifth Schedule to the MCA, and Rule 1 of the said schedule provides as follows;

> *"1 (1) 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."*

It is worth noting that, courts have developed tests applicable in determining conflicts and choice of law in administration of deceased's estate which are Mode of life and intention of the deceased where one has not left a will and where he or she has left will respectively.

In the matter at hand, the proceedings at the trial court were initiated by Form No. 1 to which particulars of the deceased person are clearly stated. At paragraph 7 of the said form, it is indicated that, the deceased prophesized Christianity and to be precise he was a catholic. The paragraph is hereunder reproduced for easy of clarity;

> *"7. Marehemu alikuwa (eleza kabila lake)* ***Mchagga*** *na alikuwa mfuasi wa dini ya* ***Mkristo (Mkatoliki)*** *emphasis is mine."*

Nevertheless, in the testimony of the parties herein it is undisputed that the appellant is a relative to the respondent the fact which was admitted by the respondent in her testimony where she confessed to recognise the appellant as one of the beneficiaries of the deceased estate. Even SU II when testifying stated that his father had five children but he also recognises the appellant as their relative.

Reading from the testimonies of the parties together with the contents of Form No. 1 this court is of the firm view that, the appellant is

also the deceased's child outside the wedlock. The question that follows is, whether having a child out of the wedlock in law discards or confiscates the status or mode of a person from being a Christiania or Islam? It is with clear eyes that Christian marriages unlike Muslims are monogamous in the sense that the marriage is between one man and one woman. Plainly, it implies that having a child out of the wedlock a married man / woman has breached the sanctity of the marriage covenant which does not disallow polygamous. Perhaps at this juncture, it sounds wisely if I make a reference to the ten (10) commandments in specifically on the 7th commandment which prohibits adultery.

Nevertheless, it should be noted that, in determination of the law applicable it is not the religious affiliation that is concerned but rather the life style of the deceased. See the decision in the case of **Re Innocent Mbilinyi** (1969) HCD 283. In the matter at hand there is what can be termed as a *Hybrid mode of life*. On one hand the records (Form I) indicates that, the deceased was a Christian (catholic) while on the other hand the deceased is plainly seen to have a child out of the wedlock. This court **(Mlyambina, J)** while determining the case of **Benson Benjamin Mengi & 3 Others vs Abdiel Reginald Mengi & another,** Probate & Administration Cause No. 39 of 2019, (High Court DSM) faced with similar

situation and in his reasoning, he was of the view that, whenever there is a hybrid mode of life the court must ascertain as between the two modes of life (customary & Christianity) which one is dominant over other mode in order to conveniently determine the law applicable in the administration of estate.

The records of this case are such that apart from the fact that the deceased had a child with another woman whom we are not told whether they lived together, there is no any other evidence suggesting that he embraced customary rituals or practices such as those listed in the case of **Benson Benjamin Mengi (supra).** It is trite law that parties court bound by their own pleadings (See a judicial jurisprudence in **Makori Wassaga v. Joshua Mwaikambo and Another** (1987) TLR 88). Much as the records demonstrate that the deceased prophesized Christianity (catholic) this court is convinced that the fact that, the deceased had a child with another woman does not itself denote that the deceased subjected himself to a customary mode of life.

In my considered view, having a child out of the wedlock religiously constitutes the breach of 7th commandment but the same does not justify the court of law to declare such person's mode of life to have not been in accordance with Christianity rites. It therefore follows that, the dominant

part of life of the deceased person in this instant matter is Christianity as demonstrated in Form I. Pursuant to Rule 1 of the 5th Schedule to the Magistrate Courts Act (supra), therefore the trial court had no jurisdiction to determine the matter.

Consequently, the decisions and proceedings of both trial court and District Court are hereby quashed and set aside. Each party shall bear his or her costs of this appeal and those incurred in the courts below due to the undeniable existence of the parties' relationship.

It is so ordered.

M. R. GWAE
JUDGE
29/09/2022