

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
TEMEKE SUB - REGISTRY  
(ONE STOP JUDICIAL CENTRE)  
AT TEMEKE**

**PC CIVIL APPEAL NO 34 OF 2022**

*(Arising from the decision of District Court of Temeke at One Stop Judicial Centre Temeke in Probate Appeal No.29 of 2021 delivered by Hon. Swai S.O., SRM on 31<sup>st</sup> May, 2022 and originated from Probate cause No.179 of 2010 of Kinondoni Primary Court)*

**HERBERT GODFREY MWANACHE.....1<sup>st</sup> APPELLANT**

**ANDREW GODFREY MWANACHE.....2<sup>nd</sup> APPELLANT**

***VERSUS***

**ROSE COSTA MWANACHE.....RESPONDENT**

**JUDGMENT**

22<sup>nd</sup> & 30<sup>th</sup> September, 2022

**A.P.KILIMI, J.:**

Twelve years ago, the widow of the deceased one Rose Costa Mwanache (hereinafter the respondent) made an application of letter of administration of the estate of her husband the late Godfrey Stephen Mwanache at the Primary Court of Kinondoni through Probate Cause No.

279/2010. She was appointed as administratrix to that effect on 31/08/2010.

Eight years later, being unable to conclude this entrusted duty, appellants dissatisfied the way she administered the estate on 02/05/2018 knocked the door of the trial court objecting her appointment, their prayers were dismissed.

The appellants were aggrieved and appealed to the District Court of Kinondoni through Probate Appeal No. 23 of 2018. On 15/2/2019 the said District Court allowed their appeal and they were appointed new administrators of the said deceased estate.

As it appears on the record, the disputes did not end among the heirs, later on 04/11/2020 respondent went again at the trial court to pray for revocation of her successor administrators, on 05/03/2021 their administration were revoked after a long battle before the trial court. Like a game, the appellants were aggrieved by decision of the Primary Court of Kinondoni and again on 31<sup>st</sup> March 2021 they filed Probate Appeal No. 14/2021 in the District Court of Kinondoni. This time the district court found irregularities during the hearing of objection, and ordered re hearing of the

application for revocation be heard afresh before another magistrate with the composition of new assessors.

Upon rehearing, the trial court, this time again being overwhelmed by their disputes, referred the case to the District Court for the procedure of appointing the Administrator General. Appellants dissatisfied as usual filed probate appeal no. 29 of 2022 at District Court of Temeke at Temeke Judiciary One Stop Centre. Wherein before the court went on merit of the appeal, The District Court sua motu found an error on the point of law, that the trial court lacked jurisdiction, since the deceased livelihood was in Christianity faith. Thus dismissed the appeal and ordered a fresh application before a competent court.

Appellants aggrieved by this decision have referred this appeal to this court basing on the following grounds: -

1. That the honorable magistrate erred in law by determining the religion of the deceased late Godfrey Steven Mwanache at the appellate stage based on unsworn evidence of the appellants and other persons who were not parties to appeal case.
2. That the Honorable Magistrate erred in law for determining that the Primary Court had no Jurisdiction to determine Probate Cause No.

279/2010 by only asking the appellants on the religion of their late father but without giving the appellants right to heard on the issue of Jurisdiction of Primary Court to try Probate Cause No. 279/2010.

3. That the honorable Magistrate erred in law for failure to determine the appeal which was before him by looking on the evidence, records and law and raised on the issue of jurisdiction which was raised suo moto without any reason and went on to the wrong decision.
4. That the honorable Magistrate erred in law for failure to caution himself that the proceedings of the Probate Cause No. 279/2010 it has already been approved and used by High Court of Tanzania in Land Case 9 of 2012 and in Miscellaneous Civil application No. 211 of 2019 and hence his action act of nullifying the proceedings of Probate Cause No. 279/2010 amounting to misconduct by Judicial officer and affect the integrity of the Judiciary and encourage the loss of public confidence in Judiciary.
5. That, the Honorable Magistrate erred in law by nullifying the proceedings of Probate Cause No. 279/2010 by only looking on the religion of deceased late Godfrey Steven Mwanache without looking

on other test for determination of Jurisdiction and also available evidence of extramarital affairs of the deceased during his life time.

When this appeal came for hearing, the appellants were unrepresented while respondent was represented by Mr. Charles Ndaki learned advocate. Both agreed to argue this appeal by way of written submission, I would like to thank them for compliance of filing timely their submissions. Both have argued extensively and I will only refer to their submissions when the need arises during this judgment.

It was the appellants submission that they consolidate ground number 2 and 5 to be one ground.

In the first place the appellant contended that the first appellate erred in law by determining the religion of the deceased late Godfrey Steven Mwanache at the appellate stage based on unsworn evidence of the appellants and other persons who were not parties to appeal. Therefore, the first appellate court did not hear evidence rather it was merely opinion of First appellant, Second Appellant, and other two persons who were not parties to the said Appeal, they mentioned them to be one Steven Godfrey Mwanache and Victoria Godfrey Mwanache. They further submitted that; this was unprocedural of taking of evidence. In supporting their argument,

they cited the case of **Morandi Rutakymirwa v. Petro Joseph** (1990) TLR 49.

Appellants also submitted that no evidence were tendered at all, that the deceased had abandoned the customary way of life in and resorted to Christian way of life, therefore the Primary Court had jurisdiction to entertain the matter because the applicable law is customary. They referred the case of **Gibson Kabumbire v. Rose Nestory Kabumbire** Probate Appeal No. 12 of 2020 (unreported).

In reply the counsel for respondent argued general that, in regard to ground number one, two, three and five of appeal lacks merits, because the issue of religious was raised by the court suo motu and the parties were invited to address the same. It was the submission by the first Appellant that, the late Godfrey Mwanache was the Christian believer which was supported by the second appellant and other two relatives. Therefore, unsworn testimony as adduced by the Appellants were collaborated by other relatives, and therefore Appellant cannot deny their averment at this stage after being knowing its impacts.

The respondent counsel further submitted that, the Appellants cannot question the locus stand of the other relatives, Victoria Godfrey Mwanache and Steven Godfrey Mwanache as the record is very clear that, are the ones who filed application for revocation to their appointments in the primary court, and upon the grant of the said application, Appellants were revoked as being the jointly administrators of the estate of the late Godfrey Steven Mwanache and this marks as the gist of this Appeal. He further contended that during trial, it was shown that, the late Godfrey Mwanache was a Christian and married the respondent Rose Costa Mwanache under Christian marriage. Also, some properties under probate have registered title. All these proved that, the primary court of Kinondoni lacks jurisdiction to entertain the said probate matter.

The respondents further submitted that; 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 stage of proceedings, 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 entertain the matter. To support this argument referred the case of **Esther George Nyerembe Vs Phinehas E Nyerenebe & 2 Others**, Pc Civil Appeal No 24 OF 2021

(unreported). Also, he submitted that the primary court is not vested with jurisdiction in any proceedings affecting registered title under Land Registration Act. During trial, it was shown that, the deceased was having, some properties with registered title.

I have considered keenly these grounds of appeal, the rival submissions of the parties and the entire record of this matter, and I am of the considered opinion they are interrelated; thus, in conveniently mode of disposing them, one main issue will cut across all grounds, and this is, whether the first appellate court was justifiable to quash the entire proceeding of the probate cause no. 279 of 2010 on the point of lack of jurisdiction.

It is the trite law that Primary Courts have Jurisdiction in Probate matters concerning Christians where it is proved 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 detached from his or her customary life, rather must be evidence to support the same. There is a distinction between Christian who live and practice normal customary life and those who have professed Christian religion and either



by a declaration or by act or manner of life is evident that they were professed as such as intended that their estate will be administered under applicable law to christian ( see **Gibson Kabumbire versus Rose Nestory Kabumbire** (supra)

In order to ascertain this principle above, courts have developed a test. This is the mode of life which determines the applicable law and the same must be established by evidence. I wish to refer my brother Mlyambina, J, in the case of **Benson Benjamin Mengi and 3 Others vs. Abdiel Reginald Mengi and Another**, Probate and Administration Cause No. 39 of 2019 (unreported) at page 16 when was determining the law applicable stated as follows: -

*"In determining the applicable law, the Court is enjoined by Judicial precedents to be guided by the two legal tests as it is reflected by myriad of case law including the famous cases of **Re Innocent Mbilinyi** (1969) HCD 283 and the case of the **Re Estate of the Late Suleiman Kusundwa** [1965] EA 247 among others."*

Then Hon. Judge the went on listing the two legal tests namely

**'Intention of Test' and 'Mode of Life Test'.** He chose to apply the Mode of Life Test on reasons that: -

*"This Court is inclined to be guided by Mode of Life Test simply because the intention of the deceased on which law should govern his life where the deceased dies without stating expressly this fact."*

In view thereof, the next point to be considered is whether there is evidence establishing that the deceased in this matter abandoned his customary lifestyle and resorted to purely Christian life.

As highlighted above, since it was appellate sua motu, but reasonably the first appellate court called for additional evidence, for purpose of clarity let me reproduce that addition evidence found at page 4 of the typed appellate court proceeding;

***"Mahakama***

*Wadaawa wameelezwa juu ya dosari ya kisheria ambayo nimekutana nayo wakati naandika hukumu hii. Mahakama imewataka wadaawa kueleza juu ya mamlaka ya Mahakama ya Mwanzo kusikiliza shauri hili tangu awali nao wamejibu.*

**Sgd. S.Swai**

**HM**

**31/5/2022**

***Mleta Maombi wa kwanza***

*Marehemu alikuwa ni baba mzazi, alikuwa anaishi kwa kufuata dini ya Kikristo. Alikuwa anaenda kanisani. Alikufa na kuzikwa Kikristo. Alitulea kwa misingi ya Kikristo.*

***Mleta maombi wa Pili.***

*Aliyosema mleta maombi wa kwanza ni sahihi kabisa.*

***Victoria G. Mwanache***

*Walivyosema warufani ni sahihi kabisa sisi wote ni watoto wa marehemu. Mjibu mrufaniwa ni mama yetu mzazi anaumwa.*

***Steven G. Mwanache***

*Waliyosema wadogo zangu juu ya maisha ya baba ni sahihi kabisa mimi ndio mtoto mkubwa wa marehemu.*

***Mahakama***

*Baada ya kupata historia hiyo ya marehemu ambayo haionekani popote kwenye jalada la Mahakama ya mwanzo, Mahakama hii inaona Mahakama ya Mwanzo haikuwa na mamlaka tangu awali (25/8/10). Hivyo inasoma maamuzi mbele ya warufani na ndugu waliopo.*

***Sgd. S.Swai***

***HM***

***31/5/2022"***

Having considered the above, in my view I find the mode of life of the deceased was not explained, as it appears above, they merely said the faith of the deceased but not the life style of the deceased. Evidence on how the deceased lived was important on determining the choice of laws.

Nonetheless, one of principles for allowing additional evidence is to the effect that it must be shown that such evidence could not have been

obtained with reasonable diligence for use at the trial, was not within the knowledge of, or could not have been produced at the trial by the party seeking to tender the same. This is a probate cause filed in 2010, deceased heirs have been in court for the same till now, and mostly assisted by learned advocate. In my view they were at better place to know the life of the deceased than anybody else even at the beginning of disputes 2018. Be as it may, I am in agreement with the appellant's counsel when he argued that it was unsworn evidence. In my view, unsworn evidence as additional evidence need to be taken with caution unless other circumstances to corroborate are looked upon. This could be different if it could have been affidavit duly sworn.

The next point raised by the counsel for appellant was in respect that the deceased owned registered properties, therefore the trial court was having no jurisdiction. Although, literally, section 18(1)(a)(i) of the MCA appears to oust jurisdiction of primary courts in probate matters involving registered landed properties. The said provision reads: -

*"18. Jurisdiction of primary courts Act*

*(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:*

***Provided that no primary court shall have jurisdiction in any proceedings affecting the title to or any interest in land registered under the Land Registration Act'***  
(Emphasis added).

Nevertheless, the same law confers to Primary court's jurisdiction in probate causes where the applicable law is customary or Islamic law after been conferred with such jurisdiction by the Chief Justice under the provisions of sections 18(2) and 19(1)(c) of the MCA. Section 18(2) reads:-

***"18(2) The Chief Justice may, by order published in the Gazette, confer upon a primary court jurisdiction in the administration of deceased's estates where the law applicable to the administration or distribution of, or the succession to, the estate is customary law or, save as provided in subsection (1) of this section, Islamic law.***

***19(1) The practice and procedure of primary courts shall be regulated and, subject to the provisions of any law for the time being in force, their powers limited-***

*a).....*

*b).....*

*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. "*

(Emphasis added).

Pursuant to the provisions of the law above, the order of the Chief Justice was published as Government Notice No. 320 of 1964 which conferred jurisdiction on primary courts in matters of administration of estates regardless of whether the subject-matter is land registered under the Land Registration Ordinance, provided the applicable law is customary or Islamic law, other than matters falling under the Marriage, Divorce and

Succession (Non-Christian Asiatics) Ordinance. (See also **Dickson Jimmy Kombe (Administrator of the Estate of the late Jimmy Jacob Kombe) vs. Ruwaichi Jimmy Kombe**, PC Civil Appeal No. 14 of 2019 (unreported)).

Having the above observation, I am in agreement with the Counsel for the Respondent that there is no cogent evidence revealing that the deceased abandoned his customary lifestyle. From this premise, I am in considered opinion that, in the absence of evidence as shown above that the deceased had abandoned the customary way of life in favor of Christian way of life, the primary court had jurisdiction and justified by using customary law. Having concluded so, I hold that all grounds raised lacks merit and are hereby dismissed in their entirety.

The next point, I wish to observe an order which caused an appeal to the first appellate court, The Primary Court ordered forwarding the case to the District Court for appointing Administrator General.

It is a trite law that, the Primary Court has been conferred with jurisdiction to entertain administration cases where the law applicable is customary law



or Islamic law as provided under Paragraph 1 (1) of the Fifth Schedule of MCA. Likewise, it has power to appoint one or more persons interested in the estate of the deceased, an officer of the court or some reputable and impartial person to be administrator of the estate of the deceased. (see Paragraph 2 (a) and (b) of the Fifth Schedule of Magistrate Court Act Cap.11 R.E.2019 ). Similarly, it has the powers to revoke any appointment of the administrator for good and sufficient cause. (See paragraph 2 (c) of the Fifth Schedule of above law). However, the Administrator General is not among them.

Therefore, according to paragraph 1 (2) (a) of the Fifth Schedule, the jurisdiction of the Primary Court over administration of deceased estate is ousted when it comes to the application of the Administrator General (Powers and Functions) Act Cap 27 R.E.2002.

It therefore, it is my considered opinion that, the Primary court was proper to refer the matter to the District Court for the appointment of Administrator General, but to my view in order this reference to be justified, the said Primary Court must satisfy itself that in accordance to the circumstances of the probate in dispute no any officer of the court or some

reputable and impartial person is desirable to be administrator of the estate of the deceased.

In conclusion thereof, I wish to say, I am aware that, in principle the issue of jurisdiction can be raised at any stage even on appeal. However, in the circumstances of this case, the same has been raised at the first appellate court as observed above was not proved. In the upshot, I hereby nullify the entire proceedings of first appellate court and I quash its decision forthwith. The decision of trial court is hereby remained undisturbed and intact. The file be remitted to the trial court for compliance with its order dated 8/10/2020.

Appeal dismissed. Since this is a Probate matter no cost to any party granted.

It is so ordered.

DATED at DAR ES SALAAM this 30<sup>th</sup> day of September, 2022.



~~AGS~~ 

**A.P.KILIMI**

**JUDGE**

**30/09/2022**

**Court:** Judgement delivered in chambers in the presence of Mr. Charles Ndaki advocate for respondent, respondent absent and all appellants present. Right of Appeal dully explained to them.



  
**A.P.KILIMI**

**JUDGE**

**30/09/2022**