**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**MOSHI DISTRICT REGISTRY**

**AT MOSHI**

**PROBATE APPEAL NO. 3 OF 2022**

**(C/F Probate Appeal No. 13 of 2021 in the District Court of Moshi, Original Moshi Urban Primary Court in Probate Case No. 164 of 2021)**

**WILLIAM SIMON CHUWA.....APPELLANT**

**Versus**

**COSMAS JOSEPH MASSAWE.....RESPONDENT**

**Last Order: 30th August, 2022**

**Date of Judgment: 28th Sept, 2022**

**JUDGMENT**

**MWENEMPAZI, J.**

This is a second appeal preferred by the appellant William Simon Chuwa after being aggrieved by the Moshi District court decision in Probate Appeal

No.13 of 2021 dated 10th March, 2022. He has now appealed to this Court on three grounds of appeal namely:

1. That, the trial court erred in both law and facts in not finding that the will was defective and discriminatory.
2. That the trial court erred in facts and law in finding that the court had jurisdiction to try the case probate (sic).
3. That the trial court erred in fact and law as it failed to consider the procedure to be followed when one died testate

On 26th July, 2022 when the matter was set for hearing parties prayed to proceed by way of written submission and so leave was granted to parties to proceed with hearing by way of written submission. Appellant prepared and filed his own submission whereas Ms. Fay Grace Sadala learned counsel prepared and filed submissions for the respondent.

I have thoroughly perused the two lower courts records of proceedings, their respective judgments, grounds of appeal raised before the Moshi District court, and the submissions for and against the appeal before this Court, the effort is highly appreciated but I will not reproduce the

submissions verbatim. However, I will consider them in the course of composing this judgment.

A brief background leading to this appeal can be summarized as follows: That the late Veronica Simon Chuwa prior to passing away on 28th June, 2021, is stated to have written a "Will" dated 7th June, 2020 where she named Cosmas Joseph Massawe her grandson and the respondent in this matter as an executor. Upon the late Veronica's passing away the respondent applied to be appointed an administrator of the deceased's estate vide Probate & Administration Cause No.164 of 2021. Before the application was heard, the Appellant herein raised an objection against the respondent's application of being appointed the administrator of the deceased estate. His objection was based on three grounds, first that the trial court had no jurisdiction to hear the matter, secondly that the will of the deceased was invalid because it contravened the local customary laws relating to inheritance and thirdly, that the applicant did not fill out a prescribed form in accordance with the law. The Moshi Urban Primary court after determining the objection raised and hearing of the application, it granted the application. Dissatisfied with the decision, the appellant

appealed to the District Court in Probate Appeal No. 13 of 2021. The District Court upheld the trial court's decision hence the present appeal.

In determining this appeal since there are only three grounds of appeal, I will be responding to each ground of appeal as preferred by the appellant. On the first ground of appeal the appellant challenged the validity of the will by contending that the same was defective and discriminatory. He argued so on the basis that it did not comply with the law on the issue of number of witnesses required, testamentary capacity and the fact that himself and other children of the deceased as legal heirs were denied inheritance in the will. Supporting his point, the appellant referred to the case of **Benson Benjamin Mengi and Others vs. Abdieli Regnald Mengi and Another**, Probate Administration Cause No. 39 of 2019 (unreported).

Before I embark on examining the will, having examined the trial court's record, I noted the following facts with respect to the challenged will. First of all the testator stated clearly on paragraph number one of the will that the same was made orally and later deduced into writing where the testator signed by affixing her thumb print. Secondly, the will was

witnessed by four witnesses among which the two were children of the testator and the other two were her friends. Third fact is that the testator/ deceased did not bequeath any property in her will as she had already given her properties to her grandson as a gift. The fourth fact is that the respondent was named as an executor of the said will.

Now, in determining the issue of validity of the deceased will as contested by the appellant based on the number of witnesses the following must be noted. As already noted earlier the will in question was an oral will and the law is very clear on the number of witnesses required in such a will to be not less than four (4) of which two must be from the clan members and any other two people. This is provided for under item 11 of the 3rd schedule to the Local Customary Law (Declaration) (No.4) Order of 1963 (G.N. No. 436 of 1963). This being the position of the law and examining the will in question I find it to have complied with the requirement because it was witnessed by four people two of which were the deceased's children and the other two were her friends. The appellant stated that the other two were her relatives but this fact was not substantiated. I therefore see no reason to fault the will on this aspect.

About the issue of testamentary capacity of the testator the appellant argued that the testator was not in a good state of mind due to her long illness. This allegation was also not supported by any medical report to that effect therefore I find it to be unjustifiable. The fact that the testator was sick it does not mean that her brain was impaired by the sickness. In fact the appellant did not even mention the disease that the deceased was suffering from to establish that her capacity to write a will was impaired. Therefore this issue lacks merit.

Another issue challenging the will the appellant argued that it was discriminatory because the testator did not bequeath anything to her children who were the legal heirs. As rightly argued by the learned counsel for the respondent this issue was not raised neither at the trial court nor at the first appellate court therefore it cannot be discussed at this stage on second appeal as it is legally prohibited. See the case of **Nurdin Musa Wailu vs. Republic** Criminal Appeal No. 164 of 2004 (unreported).

Now, moving on to the second ground of appeal where the appellant questioned the jurisdiction of the trial court by contending that it lacked jurisdiction to determine the matter. The appellant was of the view that the

first appellate court did not consider the provision of section 3(1) of the MCA instead cited section 19 (1) of the MCA. He contended that based on the provision of section 3 of the MCA the trial court had no territorial jurisdiction over the matter while there is a primary court which is established in Kibosho within the place of abode of the deceased person and where the estate is located. This issue shall not detain me much because the same has already been determined properly by the trial court and the first appellate court. What I want to clarify at this juncture is that the primary court's territorial jurisdiction is provided for under section 3(1) of the MCA which clearly states that, "*There are hereby established in every district primary courts which shall, subject to the provisions of any law for the time being in force, exercise jurisdiction* ***within the respective districts in which they are established***" (emphasis added). This provision entails that primary court's territorial jurisdiction is limited to the district which it is established. This means if in one district there is more than one primary court then all of them will have jurisdiction over matters arising within the district. Having said so I find no reason to fault the lower courts findings on this issue. Therefore, the ground lacks merit.

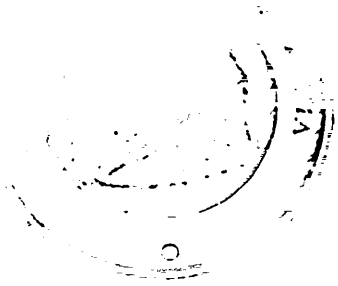
Finally on the third ground the appellant challenged the lower courts' decision by contending that both courts ignored the fact that the application was not accompanied with the original death certificate of the deceased. He argued that this is one of the key requirements during application for administration of the deceased estate. Underscoring the point, he cited the case of **James Peter Midelo vs. Asia Mzee Ngoto and Martha Machemba** Civil Appeal No. 223 of 2018 (unreported) and another case of **Rashidi Hassanithe vs. Mrisho Juma [1998] TLR. 134** where the court cited Rule 39 of the Probate Rules GN. No. 10 of 1963 and held that upon application for probate or letters of administration or a will must be accompanied by the death certificate of deceased.

What I have noted from this ground is that the same was raised on first appeal but it was never raised at the trial court. Be it as it may, the law cited by the appellant does not apply in Primary courts where the estates are administered in accordance with customary and Islamic laws. For this reason, the procedure governing the administration of deceased estates in primary courts is governed by the **Primary Courts (Administration of Estates) Rules G.N. No. 49 of 1971**. Under this law the procedure of

application of appointment of an administrator is done through a prescribed Form No. 1 and there is no requirement of enclosing an original death certificate.

Apart from that, it is my considered view that a death certificate is only important in circumstances where the death of the deceased person is contested. In the present case this has never been an issue. At the trial court death of the deceased was not a disputed fact. If it was then the death certificate would have been necessary. However, in my perusal of the trial court's record, I noted there is a letter from the respondent dated 13/8/2021 addressed to the Resident Magistrate in charge of the Primary court titled, "OMBI LA KUFUNGUA SHAURI LA MIRATHI YA MAREHEMU VERONICA SIMON CHUWA". In this letter the respondent did inform the court among other things that the original death certificate was in the custody of RITA due to the existing conflict thus they were only given a copy until an administrator is appointed. The appellant was also aware of this fact as can be noted from page 7 of his submission in support of the grounds of appeal. I therefore do not see any law or procedure that was contravened. In that regard this ground also lacks merit.

For the foregoing reasons, I find this appeal lacking in merit and therefore I see no reason to fault the lower courts' decision. This appeal is therefore dismissed with no order as to costs considering the parties relationship. It is so ordered.



**T. M. MWENEMPAZI**

**JUDGE**

**28th SEPTEMBER, 2022**