

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(MWANZA DISTRICT REGISTRY)  
AT MWANZA**

**PC. CIVIL APPEAL NO. 45 OF 2018**

*(Arising from the Decision of Nyamagana District Court in Probate Appeal No. 13 of 2021, Originating from Mkuyuni Primary Court in Probate Case No. 33 of 2019)*

**SIKUDHANI HANS MWAKYOMA..... APPELLANT**

**VERSUS**

**SUKUJUA MODEL MWASONI..... RESPONDENT**

**JUDGMENT**

*30<sup>th</sup> September, & 13<sup>th</sup> October, 2022*

**OTARU, J.:**

This is a second Appeal by **Sikudhani Hans Mwakyoma**, the Appellant herein, challenging the decisions of the Mkuyuni Primary Court as well as Nyamagana District Courts, that held that the late **Paul Perfect Lyapa** who died intestate, was not a Christian and therefore the Primary Court has Jurisdiction to deal with the Administration of his Estate.

Briefly stating, the facts of this Appeal are such that in 2019 the Appellant successfully petitioned through Probate and Administration Cause No. 33 of 2019, at Mkuyuni Primary Court for letters of administration of the estate of the late **Paul Perfect Lyapa**. In the year 2020, the Respondent successfully applied to the same court for

revocation of the letters on the ground of unfair distribution of the deceased's estate by the Appellant. The appointment of the Appellant was revoked and replaced by a court broker. Dissatisfied with the decision, the Appellant appealed to the District Court of Nyamagana through Probate Appeal No. 4 of 2020 in which she contended that the Primary Court had no jurisdiction to entertain the matter, the ground that the District Court upheld. Dissatisfied, now the Respondent appealed to the High Court through PC Probate Appeal No.10 of 2020, which quashed and set aside the proceedings, decision and Order of the District Court. The High Court also revised the decision of the Primary Court and directed it to hear the matter afresh and determine its jurisdiction through the '*mode of life*' of the deceased test.

The trial court complied with the direction and declared that the deceased exercised customary mode of life and therefore it (the Primary Court) had jurisdiction to entertain the matter.

The Appellant, dissatisfied with the decision of the trial court appealed to District Court arguing that the trial court wrongly evaluated the evidence and applied the '*mode of life*' test thereby arriving at a wrong decision. She unsuccessfully, prayed for the judgment of the trial court to be set aside and a declaration that the deceased was Christian

M. Osham

because he was baptized and buried as a Christian. The District Court, in determining the *mode of life* of the deceased, considered his behaviour throughout his lifetime as argued by the Respondent, and not towards the end of life as contended by the Appellant. In dismissing the Appeal, the District Court arrived at the same conclusion as did the trial court, that even though the deceased was a Christian, he did not live nor practice Christianity as he had abandoned the Christian way of life to the customary way of life. Again dissatisfied, the Appellant filed this Appeal. As the appeal was filed in Kiswahili, the following is a literal translation of the grounds of Appeal, that:-

1. The District Court erred in law and fact when it confirmed the decision of the trial court by stating that there was no evidence that the late Paul Perfect Lyapa had a Christian mode of life;
2. That the District Court erred in law and in fact when it confirmed the decision of the trial court that the deceased had abandoned Christian way of life without stating what customs he was professing; and
3. That the District Court erred in law and fact when it failed to analyze the evidence adduced by the Appellant in the trial court thereby arriving at a wrong decision.

M. O. O. O.

When the Appeal came up for hearing Mr. Chiwale Nchai Samwel learned Advocate, appeared for the Appellant, while the Respondent enjoyed the representation of Mr. Kweka, learned senior Advocate. Arguing in support of the Appeal the Appellant's counsel decided to argue grounds 1 and 3 together and ground 2 separately.

On the 1<sup>st</sup> and 3<sup>rd</sup> grounds, the counsel for the Appellant, pointing at page 3 of the District Court's decision and page 2 of the Primary Court's decision, stated that there was ample evidence that the deceased was a Christian but the same was not well analysed by the Courts below. Counsel relied on the baptism Certificate of the deceased submitted in the Primary Court, the burial photos showing the Catechist attending the service, presence of a choir from the Roman Catholic Church and that the burial took place at the area of '*Jumuiya*', literally translating into a local Roman Catholic Community.

The Appellant's counsel strongly argued that at the end of his life's journey, the deceased became a Christian basing on the fact that the Catechist as well as the Catholic choir are seen at the burial, explaining that, if one is not a Christian these people would never have attended. He strongly refuted the contention that the deceased stopped being a

*M. O. O. O.*

Christian claiming that the Appellant and the deceased were in the process of blessing their 14 year union but then death took him.

Appellant's counsel further argued that absence of a Priest should not have bothered the lower court so much, because a priest can delegate his duties and concluded by stating that had the District Court properly analysed the evidence, it would not have come to the decision it did.

The learned Advocate for the Appellant relied on the case of **Re-Innocent Mbilinyi** [1969] H.C.D 283 cited in the lower courts claiming that the court looked towards the end of life and not the beginning. Thus, just as Innocent Mbilinyi became a Christian towards the end of his life, so did the deceased herein. He further argued that the District Court should have relied on **Re-Innocent Mbilinyi's** case, he would not have misdirected himself as he did.

On the second ground which is about customs the deceased was following, the Appellant's counsel contends that unlike in **Innocent Mbilinyi's** case where it was clear that Mr. Mbilinyi followed Ngoni customs and tradition, it is not clear what customs and tradition was the deceased following. Finally, the Appellant's counsel prayed for the Appeal to be allowed by quashing the lower courts' decisions, and

*M. Odam*

declare that the deceased was a Christian, thus the Primary Court had no jurisdiction to hear the matter. Counsel also prayed for any other reliefs that the Court may deem fit to grant.

In his submission, counsel for the Respondent declared that he himself is a Roman Catholic and that there is no Roman Catholic who can be allowed to marry a second wife while in a subsisting marriage. Counsel submitted that when the deceased married the Respondent as a first wife, he was not a Christian. If at all he was associated with Christianity towards the end of his life, it was because he was convinced by those surrounding him but he never became one. He was buried by neighbours and the surrounding community with no church leaders because he was not a Christian, insisting that a Roman Catholic Priest cannot delegate his powers to bury the dead.

Counsel for the Respondent argued further, that the deceased was polygamous as he was living with another woman without divorcing his first wife, therefore the deceased was a man of culture and he never at any point in time wanted to abandon his mode of life.

On the case of **Re Innocent Mbilinyi** cited by the Appellant, counsel for the Respondent stated that the same might no longer be a

good law, hence the Court should consider it with that in mind. In the end, he prayed for this Court to dismiss the Appeal for lack of merits.

In his quick rejoinder, the learned counsel for the Appellant reiterated his position that the Court should consider the *mode of life* towards the end of life and not otherwise and added that there is no record that the Respondent was the wife of the deceased. On the baptism certificate, he averred that it was produced and the same was never challenged in court.

Having gone through the proceedings and the submissions by both parties, the question before this Court is **whether the Appeal has merits or otherwise.**

The Appellant's counsel has vehemently faulted both Primary Court's and District Court's decisions, contending that both lower courts have failed to analyse the evidence produced before the trial court that is why they came up with a wrong decision. He avers that the deceased died while proclaiming Christianity. The Respondent on the other hand strongly contend that the deceased was never a Christian but a traditionalist following local customs.

The trial court used the *mode of life* test in compliance to the directive of the High Court in PC Probate Appeal No. 10 of 2020. The

M. Othman

Appellant's counsel argued that the lower courts wrongly applied the *mode of life* test, as the same should be applied towards the end of ones life and not otherwise.

To determine how the deceased's estate should be divided this Court was faced with a similar situation in the case of **Gibson Kabumbire vs Rose Nestory Kabumbire**, in Probate Appeal No. 12 of 2020, HC Mwanza (Unreported). In that case, the Court relied on the decision of **Benson Benjamin Mengi and 3 Others vs Abdiel Reginald Mengi and Another**, Probate and Administration Cause No. 39 of 2019 (Unreported) where Hon. Mlyambina J, had this to say;

*'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 the case law including the famous cases of Re Innocent Mbilinyi (1969) HCD No. 283 and the case of Re Estate of the late Suleiman Kusundwa [1965] EA 247, among others.'*

Thereafter, the Hon. Judge proceeded on listing two legal tests that are applicable in these situations, namely the '*intention of the deceased*' test and the '*mode of life*' test. The Hon. Judge chose to apply the '*mode of life test*' and gave the following reasons:-





*'this Court is inclined to be guided by the mode of life test simply because the intention of the deceased on which law should govern his estate can be inferred from his mode of life where the deceased dies without stating expressly this fact.'*

The Court further stated at page 17 of the Judgment, that *'the Court should proceed to apply the law which is applicable to **dominant part of the mode of life** of the deceased person* (emphasis is mine).

Following the above authority and the reason cited above, this Court has no mandate of faulting the use of *'mode of life'* test to determine the applicable law as the trial court followed the order of the High Court, which was never challenged by the Appellant. As stated in the **Benson Mengi's** case above, the *mode of life* of the deceased must be gathered from the evidence adduced in court and applied to the **dominant part** of the *mode of life* of the deceased. This is exactly what was done in the lower courts.

From the adduced evidence, the late Paul Perfect Lyapa lived with the Respondent for 7 years and they have one issue together. In 2006, the deceased started living with the Appellant with whom they also have one issue. The Appellant herself at page 13 of the Primary Court Judgment testified that the deceased paid dowry and they were

*M. Odam*

married customarily. The learned counsel for the Appellant has tried to convince this Court that the deceased died while professing Christianity but his averments have failed to appeal into my mind. I say so because evidence adduced in the trial court, shows that for most part of his life, the deceased was neither a Christian nor a Muslim but was described to have been following a local tradition. There is no evidence that he ever intended to divorce the Respondent. His burial ceremony was clearly not conducted through strict Christian rites. But even if the burial had been conducted through strict Christian rites, this would not have changed the dominant mode of his life, which was definitely not Christianity. This fact, I believe, is also known to the Appellant, that is why the initial probate case was initiated by herself in the Primary Court, the issue of Christianity is but a mere afterthought.

In order for the deceased to be considered as a Christian, according to the **Benson Mengi's** case above cited, the deceased must have professed Christian way of life for the dominant part of his life and the same should have been so reflected through the adduced evidence. As such, the issue of baptism certificate and burial ceremony are insignificant under the circumstances.

*M. O. O. O.*


The fact that the deceased died before ending his marriage with the Respondent while at the same time cohabiting with the Appellant further proves that the deceased never lived a Christian way of life which is monogamous in nature. I therefore, as did the courts below, hold the view that the deceased followed customary ways of life for the dominant part of his life and the Primary Court has jurisdiction to try the matter, as it correctly did.

Having said so, I find that this Appeal is devoid of merits and is hereby dismissed. The matter is remitted to the Primary Court of Mkuyuni for continuation of the necessary processes, since it is vested with the jurisdiction to hear this matter.

It is so ordered.



**DATED** at **MWANZA** this 13<sup>th</sup> day of October, 2022.

  
**M.P. OTARU**  
**JUDGE**