IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB - REGISTRY OF MWANZA

AT MWANZA

PC CIVIL APPEAL NO. 104 OF 2022

(Originating from District Court Nyamagana in Probate Appeal No.22/2021; Original in Probate Cause No.75/2021 at Mkuyuni PC)

REHEMA ADEN MAHAYU.....1ST APPELLANT

MARY JOHN KISUNA MALINDA.....2ND APPELLANT

VERSUS

FELISTER JOHN KISUNA MALINDA.....RESPONDENT

JUDGEMENT

Nov.1st, & Nov. 9th, 2022

Morris, J

This is a second appeal by the appellants. The Mkuyuni Primary Court (PC) appointed the respondent to administer estate of late John Kisuna Malinda. It was through probate cause no.75 of 2021. In the course of administration, the respondent was objected by the appellants on the allegation that the former excluded them, and several other entitled beneficiaries, from the list of heirs. The 1st appellant presented herself as the spouse of the late Malinda. The other appellant claimed to be the deceased's daughter. The trial PC declined their allegations. Dissatisfied, they preferred appeal no, 22 of 2021 before the Nyamagana District Court (DC). Once again, they were unsuccessful.

The present appeal is against DC's decision. Three grounds were raised. The first ground challenged DC's decision which declared appellants as not being wife and daughter of the deceased. The remaining two grounds premised on faulting the DC for affirming the allegedly PC's wrong decision. At the hearing, however, the appellants Counsel, Kundy Nyenji prayed to consolidate and argue grounds two and three jointly. Submitting in favour of ground one (1), Advocate Nyenji argued that the DC had mandate to re-evaluate the PC's evidence judiciously and without prejudice. She stated further that, the DC having found that children born out of the wedlock can inherit from deceased parents' estate (pages 10 & 11 of the DC's judgement), it erred to exclude the 2nd appellant from inheriting. Further, the Counsel submitted that DC analyzed evidence at PC and held that the trial court admitted exhibits which were not original or notarized. Accordingly, the appellant argued that it was faulty for DC to base on that reason to dismiss their appeal.

The Court was referred to the **Local Customary Law (Declaration) Order** No. 04 of 1963 (G.Ns 436 and 214 of 1963). The Counsel argued that this law bars children born out of wedlock to inherit from estates of deceased father unless there is a will to such effect. The objective of this law, according to the appellants, is to preserve peace and harmony in families. Ms. Nyenji also submitted that times have changed;

the level of elitism has risen; the court in **Beatrice Bryton Kamanga & Another v Ziad William Kamanga**; Civil Revision No.13/2020-HC-DSM (unreported) held that the cited GNs 214 and 436 of 1963 are illegal in purview of the **Law of Child Act**, 2009; and the **UN Convention on the Right of the Child**, 1989, to which Tanzania is a signatory, outlaws all forms of discrimination. Article 2(1) of this Convection was cited as relevant to the present appeal because it is *in perimateria* with section 5(2) of the **Law of the Child Act**. Consequently, the appellants were of the conclusion that both PC and DC passed inherently discriminatory decisions which were against the cited principles and laws.

Regarding the merged grounds (2 & 3) of appeal, the appellant's Advocate submitted that the DC dismissed the appeal from a wrong footing. She argued that the DC found out that the PC admitted and used photocopies to arrive at its decision (page 1 para 2 of the DC judgement) and thus held that the subject admission and application was contrary to the **Law of Evidence Act**, Cap 6 R.E. 2019. To the appellants, this was a new aspect which they had not raised in their appeal. Further, it was adjudicated on without giving parties an opportunity to address the court howsoever. It was also argued that the respondent never objected the photocopies being admitted. To the appellants' Advocate, parties accepted the documents being okay. Alternatively, the first appellate

Court having found that these documents were otherwise inadmissible, it had powers to order trial (trial *denovo*).

Thus, it was Ms. Nyenji's further submissions that the DC erred in entertaining the appeal which originated from the trial court which proceeded on unoriginal or uncertified or unnotarized documents. To buttress her point, Advocate Nyenji cited **Kristantus Msigwa v Mary Andrea Masuba,** Probate Case/Appeal No. 6/2019 HC at Mbeya(unreported) especially the holding that parties should be accorded an opportunity of being heard for every newly introduced issue. In final analysis, appellants prayed for the appeal to be allowed.

Advocate Amos Gondo who represented the respondent did not support the appeal. He was quick to state that the DC should not be faulted for having found (as was for PC) that appellants were/are not deceased's wife and daughter respectively. According to him, appellants failed to prove their relationship to the deceased. He cited section 110(1) and (2) of the **Evidence Act**, Cap 6 R.E. 2019; the **Registered Trustees of Joy in Harvest v. Hamza K Sungura**, Civil Appeal case no. 149/2017 CAT-Tabora (unreported) cited in **Wire Futakamba Mdisha@Willy Futakamba v. Felix Chacha**, HC-Musoma Civil Appeal No. 02/2021(unreported) at page 6. It was his further reiteration that it is a settled principle that the onus of proving the matter in civil litigation on a

balance of probability lies with the alleging person. He maintained that appellants never discharged their duty.

Like his counterpart, Advocate Gondo argued that law is clear regarding inheritance rights of children born out of wedlock. But he firmly stressed that such right is dependent upon appellants proving their relationship with the deceased. The respondent's Counsel submitted that the law cited by appellants and case of **Beatrice Kamanga** (*supra*) are inapplicable in this appeal. He was of the view that, as it dismissed the appeal after having seen no original documents to prove the appeal, the DC should not be faulted anyhow. Citing a few examples why he supported the DC's finding; the respondent's counsel stated that, the second appellant relied on a photocopy of photograph taken with the deceased to prove her being latter's daughter; the 1st appellant supported her allegation by using a certificate of burial in her name and the arguments that she had given care to the deceased.

Regarding grounds 2 & 3 (as consolidated); the Counsel for the respondent submitted that these grounds were not raised at and adjudicate by the 1st appellate court. This Court, according to him, lacks jurisdiction to entertain matters which were not considered by the lower appellate court. He argued further that, whereas ground 2 was raised before the DC, the same was abandoned by appellants. It cannot thus be

reverted to pursuant to **Halid Maulid v R** Criminal Appeal No.94/2021 CAT- Dodoma(unreported). In addition, ground 3 is completely new and should be disregarded. Finally, he prayed for dismissal of the appeal with costs.

Basing on what has been presented above, this Court is called upon to resolve one issue: whether or not the District Court was justified to have the concurrent finding with the Primary Court: that the appellants had failed to prove their relationship with late John Kisuna Malinda. From the outset, this Court is mindful of not re-evaluating evidence of the two subordinate courts unless justice warrants so. This is in accordance with the firmly settled legal principle that the second appellate court is not expected to interfere with concurrent findings of the lower courts save for compelling reasons in the interest of justice. Accordingly, this being the second appellate Court focus will be on points of law. The philosophical foundation for such warning is that the two previous courts, especially the trial one, had the privileged advantage of not only receiving the evidence but also examining the demeanor of the testifiers. This position is well stated in **Benedict Buyobe@Bene v R**, Crim. Appeal No.354 of 2016, CA at Tabora (unreported); and **Michael Joseph v R**, Crim. Appeal No. 506 of 2016, CA at Tabora (unreported); **DPP v Jaffari Mfaume Kawawa** [1981] TLR 149; **Mussa Mwaikunda v R** [2006] TLR 387 and

Wankuru Mwita v R, Crim. Appeal No. 219 of 2012 (unreported); and **Frank John Libanga @ Lampard and Another v R**, Court of Appeal (Dar Es Salaam), Crim. Appeal No. 55 of 2019 (unreported).

In my thoughtful view, the raised issue above comprises of three imperative tenets. First, factors that prove one as being a spouse or child of another; second, the essence and effect of 'best evidence rule'; and third, the rationale of the court in probate proceedings to be definite with beneficiaries of the deceased's estate. I undertake to analyze each of the trio norms in the light of the issue framed hereinbefore.

It is natural that individuals in the society relate to one another. Hence, there exist various forms of relationships: parental, marital, commercial, family, contractual and banker-customer; to name but a few. Each of such forms is distinctly established and thus provable by specific factors, especially in litigation. That is, aspects which constitute a matrimony; as an example, are not the same that prove one to be a granny of another or a partner to one another - for that matter. My point here is, the court will have to be supplied with specific thread of evidence for it to hold with certainty that so and so were in a given or alleged legal relationship. Ofttimes, certain laws define the scopes of respective relationships.

Related to this appeal are two forms: spousal (marital) and parental relationships for the first and second appellant respectively. Whereas the former claims to be the wife of late John Kisuna Malinda, the second appellant alleges to be the deceased's daughter. The basic question is therefore, a set of evidence each of them was expected to produce at the trial to prove the respective family lineage or heredity. I will start with the first appellant. Record holds it that she presents herself as having been married to the late John Kisuna Malinda. In law, marriage is capable of being proved vide a couple of evidence such as, production of authentic marriage certificate; oral testimony (especially for customary marriages and/or presumptuous unions). In the present matter, the first appellant produced a copy of the document allegedly proving that the deceased had paid dowry to her parents. Apart from the said document being a photocopy, the 2nd appellant did not call an independent witness who would have proved, among other facts, that s/she was present during that important family event of customary dowry rites.

Underscoring the importance of proving existence of marriage between parties, the Court of Appeal in **Gabriel John Musa v Voster Kimati**, Court of Appeal (Dodoma), Civil Appeal No. 344 of 2019 (unreported) held that it was improper for the trial court to only determine issues related to property and other reliefs without first establishing a

substantive issue of whether the presumption of marriage between the parties was rebuttable or not.

As for the Mary John Kisuna, second appellant who claims to be the daughter, expected evidence for her to prove being a daughter include, certificate of birth, affidavit of birth, oral testimony by one or both parents and Deoxyribonucleic Acid (DNA) test results/report. None of these was tendered in the trial to justify her claims. Instead, she tendered a photocopy of a photograph allegedly taken with the deceased. If courts of law will relax the rule to accommodate such a lax-line of proof, surely a floodgate of surrogateship and putative parenthood cases will be swung wide ajar. This risk will likely twist the courts already-busy-diary to unmanageable scale.

I now turn to the second tenet. That is, the rationale of the "best evidence rule". According to D.W. Elliot, **Elliot and Phipson Manual of the Law of Evidence**, 12th edition; this rule precludes the production of inferior evidence if the best evidence could be produced. Ordinarily, the rule requires that where the contents of a document are material to the case, the party should tender in court the original save for exceptional circumstances exempted by law. The case of **Teper v R** [1952] 2 All ER 447 is accordingly persuasive here. Further, in this connection, the **Law**

of Evidence Act, Cap 6 R.E. 2019 echoes this rule under sections 24 and 66. The latter provision, states:

> *'Documents must be proved by primary evidence except as otherwise provided in this Act.'*

The best evidence rule, also known as original documentary rule; further assists the court to arrive at a just decision. It was held in **Josephat Joseph v R**, Court of Appeal (Arusha), Crim. Appeal No. 558 of 2017 (unreported) that courts must evaluate "the evidence of each of the witnesses, assess their credibility and make a finding on each of the contested facts in issue". Other cases in this regard are **Ramadhan s/o Aito v R**, Crim. Appeal No. 361 of 2019 (unreported) and **Stanslaus Rugaba Kasusura and AG v Phares Kabuye** [1982] TLR 338.

The counsel for the appellants submitted that the District Court, having found out the trial Primary Court admitted and used photocopies instead of original documents, it should have ordered re-trial at the Primary Court. The basis of her argument was that during envisaged re-trial, the appellant would use the original documents instead. With respect, I do not subscribe to the appellants counsel's invitation. I have a couple of reasons for my position. Firstly, it is not guaranteed that the parties during the subject re-trial will produce the requisite original

credentials. Secondly, if there is a possibility for them to tender original documents during the re-trial, the appellants have not exhibited a factor(s) which had prevented them from tendering the appropriate documents during the trial subject of this appeal. Thirdly, re-trial is not a recipe for slipshod litigants in order to accord them the second chance of making up their previous reckless mistakes. Fourthly, law must assist litigation to get to an end. The philosophy here is that every right to litigation should be fixed in particular size of time. That is, as it is the case for life, litigation must come to an end. Reference is made to, for example, cases of **Tanganyika Land Agency Limited and 7 Others v Manohar Lai Aggrwal**, CA, Civil Application No. 17 of 2008, (unreported); **Salim Mohamed Marwa @ Komba and Another v Republic**, Court of Appeal (Dar Es Salaam) Criminal Application No. 1 of 2020 (unreported); and **Lilian Jesus Fortes v Republic**, Court of Appeal (Dar Es Salaam) Criminal Application No. 77/01 of 2020 (unreported).

The third tenet is for the Court to make a finding on the importance of having formally ascertained beneficiaries of deceased's estate. In probate and administration proceedings, major roles of the courts include, appointing executors/administrators; confirmation of beneficiaries and oversight of administration process. In the case of **Benjamin Merick Njiga v Francis Mahushi Masalu**, Pc Civ. Appeal No.84 Of 2022

(Unreported), these roles were reiterated. The obvious importance is to protect the estate of the deceased in the interest of the beneficiaries. If this role is not done benevolently, courts' integrity in this connection will be exposed to jeopardy. That is, the rationale of having a specified line of regime in this respect, is to protect interests of deserving relatives of the testate or intestate deceased as beneficiaries thereof.

In the present appeal, the first appellate Court analyzed and re-evaluated evidence tendered in the PC and came to a conclusion that, not only the PC wrongly admitted appellants' evidence but also the whole pack did not tally with or prove the appellants-desired reliefs. I hereby quote part of the relevant excerpt from DC judgement (pages 10-11) for ease of clarity. In its verbatim form, it runs as:

> '*There in this instant case the law of evidence applies as the exhibit provided by the appellants are mere copies not original documents or certified copies of the original documents. So, the appellants could have been allowed to inherit the deceased late John Kisuna Malinda who was the said husband of the 1st appellant as she allege and the father of the 2nd appellant as so allege respectively if they could not have contravened* ***S. 66*** *of the* ***Law of Evidence Act, Cap.6 R.E.2019****, hence inadmissible evidence which should have been expunged by the lower court as they were not certified.*'

In view of the finding of the DC, I am loath to agree with the appellant's Counsel that the first appellate Court introduced and decided on a new issue without according parties the opportunity of being heard. Records reveal that the appellants raised and argued, before the DC, two related grounds of appeal (1st and 2nd) which necessitated the said Court to re-evaluate evidence tendered in the trial court. In so doing, the DC rightly analyzed the authenticity and admissibility of the appellants-tendered documents. Parties had submitted on such aspect too. Hence, they had their right to hearing duly enjoyed.

This Court has also demonstrated how the requisite legal principles inherent in circumstances of this appeal were unsatisfactorily complied with by the appellants. Consequently, the first ground of appeal is unmerited.

The consolidated 2nd and 3rd grounds of appeal will not detain the Court for so long. As rightly submitted by the respondent's counsel, matters not raised in the first appeal cannot be raised at the second appellate stage. Further reference may be made to the case of **Halid Maulid and Farijara Hamisi @ Ntare v R**, Court of Appeal (Dodoma), Crim. Appeal No. 342 of 2020 (unreported). Thus, by abandoning the second ground of appeal at the District Court, the appellants lost the opportunity to raise and argue it before this second appellate Court.

Further, similar consequences befall the 3rd ground for it is newly introduced at the present second appeal. In the final analysis, therefore, the two grounds should be, as I hereby hold, disallowed.

Putting all the above conclusions and reasoning, this Court finds that the first appellate Court was right to hold as it did. This appeal is dismissed. Each party will bear own costs.

It is accordingly ordered.

C.K.K. Morris
Judge
November 9th, 2022

Judgement delivered in the presence of Ms. Kundy Nyenji, learned advocate for the appellants (appellants present too) and Advocate Nyenji holding brief of Mr. Amos Gondo, learned advocate for the respondent.

THE HIGH COURT OF TANZANIA
MWANZA

C.K.K. Morris
Judge
November 9th, 2022