IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB- REGISTRY OF DAR ES SALAAM

AT DAR ES SALAAM

PC. CIVIL APPEAL NO. 21 OF 2022

(Arising from the decision in Civil Revision No. 3 of 2022 in the District Court of Kibaha at Kibaha (Ng'hwelo, RM) dated 19th of May, 2022.)

SCOLASTICA SILVESTER RIOBA ..... APPELLANT

VERSUS

DINNA HAMISI MWANGATA ..... RESPONDENT

JUDGMENT

14th September, & 3rd November, 2022

ISMAIL, J.

This Judgment is in respect of an appeal from the decision of the District Court of Kibaha at Kibaha in Civil Revision No. 3 of 2022. The impugned decision was delivered by Hon. F.E. Ng'hwelo, RM on the 19th May, 2022. The origin of the proceedings that bred the instant appeal is probate and administration proceedings instituted in the Primary Court of Kibaha at Mailimoja, pursuant to *Probate Cause No. 60 of 2021,* in which the respondent, Dinna Hamisi Mwangata, applied for letters of administration of the estate of her late husband, Silvester Chacha Rioba. The latter died

intestate at Tarime Hospital on 13th September, 2021. He was laid to rest at Gamasara village, in Tarime District. The respondent, along with the deceased's daughter, one Gaudencia Silvester Chacha Rioba, were appointed as co-administrators of the estate deceased's estate. The present appellant is one of the deceased's children, a beneficiary, and a step daughter of the respondent.

As the records depict, the appellant was opposed to the petition by lodging a caveat, the ground for opposition being that the trial court was not vested with jurisdiction to try the matter. The appellant's objection to the petition fell through, as the trial court went ahead and appointed the respondent and Gaudencia Silvester Chacha Rioba as joint-administratrix of the deceased's estate. This decision did not sit well with the appellant. She chose to challenge the decision by way of revision, vide Civil Revision No. 3 of 2022. The appellant's main contention was two-fold. One, that the trial court did not have jurisdiction to entertain the petition on account of vast nature of the estate, extending from Kibaha to Tarime. In the appellant's view, the court at Mailimoja would not be able to interpret the Kurya Customary Law that was applicable in the matter. Two, that the procedure used by the trial court was flawed, on the ground that the matter was not treated as a normal civil suit subsequent to the filing of the caveat.

While the District Court found merit in the second limb of the appellant's grounds and ordered retrial of the matter before another competent magistrate, it was not convinced that the trial court was not vested with jurisdiction. Feeling shortchanged, yet again, the appellant took a ladder up to this Court, through the instant appeal. Three grounds of appeal have been raised in the Memorandum of Appeal, and they are as follows:

1. *That the District Court erred in law and fact to hold that the trial Primary Court had jurisdiction to adjudicate on the matter as the law applicable is customary law without considering the fact that the deceased had a place of abode at Tarime and was a Mkurya hence Kibaha Primary Court could not interpret the Kurya customary Laws;*

2. *That the District Court in its revisional powers erred in law to order retrial of the matter before the Primary Court that basically has no jurisdiction to determine the matter even where customary law is applicable;*

3. *That the District Court erred in law and fact for relying on the decision of the High Court that decided matters of the Chagga customs at Moshi at Moshi equating it with the Kurya customs to be decided at Kibaha Maili Moja.*

The appeal was disposed by way of written submissions the filing of which conformed to the schedule set by the Court.

The appellant began by a few decisions which emphasize on the fundamentality of courts' jurisdiction in determining matters that they preside over. These were: ***Fanuel Mantiri Ng'unda v. Herman M, Ng'unda & Others*** [1995] TLR 155; ***Attorney General v. LOhay Akonay & Another*** [1995] TLR 80; and ***Auto Garage Limited v. Abdulkadir Mohamed***, HC-Civil Revision No. 3 of 2000.

Picking the reasoning in the cited decisions, the appellant held the view that the trial court at Mailimoja did not have jurisdiction to entertain the matter. The appellant further contended that 5th Schedule to the provisions of the Magistrates' Court's Act, Cap. 11 provides that jurisdiction of the court in matters of succession, in respect of which the applicable law is customary or Islamic law, can only be exercised only where the deceased's place of abode was within the local limits of the court's jurisdiction. But, where the applicable law is the provisions of the Probate and Administration of Estates Act, Cap. 352 R.E. 2019, the primary court lacks jurisdiction. It was the appellant's contention that the District Court was wrong to hold that the trial court had jurisdiction where the deceased died in Tarime, fixed place of abode. The appellant took the view that the decision of the Court in ***Catherine Priscus Massawe v. Kamili Proti Massawe***, HC-Misc. Civil

Appeal No. 5 of 2020 (unreported) was wrongly applied in the circumstances of this case.

The appellant concluded that the proper forum before which the matter was to be preferred was the Primary Court in Tarime, where Kurya customary law would be applied to a great effect.

The respondent held a divergent view on the matter. While agreeing that jurisdiction is a matter that carries a profound weight in court proceedings, it is incorrect, in his view, to contend that the Mailimoja Primary Court did not enjoy jurisdiction over the matter. The respondent contended that the deceased had two places of abode at the time he met his demise. This means, the respondent contended, the courts in Tarime and Mailimoja had equal or concurrent powers to handle the matter. The respondent argued that, since the clan meeting settled on her as their nominee for the administration of the deceased's estate, the choice of Mailimoja primary court cannot be faulted. This is in terms of paragraph 1 (1) of Part I of the 5th Schedule to Cap. 11.

The respondent took the view that the requirement of choosing a court within the local limits of the place of the deceased's abode is intended to safeguard the rights and interests of lawful heirs and avoiding third parties applying for administration over the estate they have no interest in. This

view was fortified by the decision of the Court in ***Yohana Mgema Escobar @ Yohana John Mgema v. Richard Francis Mgema***, HC-Misc. Civil Revision No. 4 of 2020 (unreported), in which the rationale behind the choice of filing a case in a court at a place of abode was underscored.

Regarding the contention that trial of the proceedings in Tarime would be conducted with the aid of the aid of assessors, the respondent's argument is that section 52 of the Written Laws (Miscellaneous Amendments) (No. 3) Act, 2021 repealed section 7 of Cap. 11 to provide that courts would not be bound by opinions of the assessors. He discounted the contention on the significance of the Tarime court.

The respondent urged the Court to dismiss the matter in its entirety with costs.

The appellant's rejoinder did not introduce anything new. It was merely an emphasis of what was submitted in chief.

From these rival submissions, the broad question is whether the court was in fault when it entertained the matter under consideration.

It should be remembered that jurisdiction of the primary courts in probate and administration matters is provided for under section 19 (1) (c) of Cap. 11. This provision stipulates as hereunder:

"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) 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 therein."

The quoted provision is complimented by the provisions of paragraph 1 (1) of the 5th Schedule to Cap. 11 which stipulated as hereunder:

"1-(1) the jurisdiction of a primary court in the administration of the deceased's estate, where the law applicable to the administration or distribution or the succession to the estate is customary 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 limit of the court's jurisdiction."

It is beyond certainty that, though the deceased died and was buried in Tarime, he maintained a second home in Kibaha Mailimoja where part of his family resided. These included the respondent, his wife, and their children. This means that the choice of where to be buried was even and

would tilt either way depending on either where the deceased met his demise, or where he was buried. This means, therefore, that courts in Kibaha Mailimoja and Tarime enjoyed concurrent jurisdiction, as far as matters pertaining to administration of estate are concerned. It is upon the parties to make a choice of where they would wish to institute their petitions for probate and administration. This position is cemented by the decision of the Court in ***Hyasinta Kokwijuka Felix Kamugisha v. Deusdedith Kamugisha***, HC-Probate Appeal No. 104 of 2018 (unreported), where in it was held as follows:

> *"…It follows therefore that a person may institute a case in any primary court within the district where the deceased at a fixed abode at the time of his death. However, for the interest of justice and easy access to the court, it is advisable to institute a case closer to the place where the deceased had a fixed abode at the time of death. In my view, the magistrate may inquire about the place of the deceased's fixed abode at the time of death and advise the applicant accordingly. This approach is necessary because some people wishing to administer estates may file probate and administration cause far from the deceased's family. The person applying for appointment far from the deceased's fixed abode may be trying to hide other family members from his appointment. I, therefore, urge magistrates to be watchful on this to avoid unnecessary and*

unwarranted objections thereafter. A person who applies for administration without informing other interested parties normally meets objections after his appointment is known. The ordinary citizens who do not know the geographical jurisdiction of primary courts may also be wondering why the court allowed the applicant to apply far from the deceased's fixed abode. In my view, unless there are compelling reasons, a person should be advised to file the probate and administration cause to the primary court which is closer to the deceased's fixed abode and other interested parties."

In the case of ***Beatrice Brighton Kamanga & Another v. Ziada William Kamanga***, HC-Civil Revision No. 13 of 2020, the Court quoted with approval, the Court's earlier decision in ***Mire Artan Ismail and Zainab Mzee v. Sofia Njati***, HC-Civil Appeal No. 31 of 2006 (unreported), in which Mandia J., as he then was, held:

"If the deceased had two or three fixed places of abode, let's say, Dar es Salaam, Lindi and Kyela Mbeya, any of the primary courts in the respective districts can hear the matter. It will be upon the choice of the parties. But wisdom demands that the case should be opened in the district where he has the majority of his family members."

It is my take that the choice of Mailimoja, as the forum before which the probate and administration proceedings were conducted, is unblemished, and I find nothing offensive in that respect.

The appellant has vehemently contended, in ground two of the appeal, that the court at Mailimoja Kibaha would be starved of the service of assessors who are conversant with the Kurya customary law. I find this argument strange and unable to resonate. Customary laws are a body of laws which are known across the country and they would be applicable to the members of the community irrespective of where the subjects of the said law are located or reside. Thus, if a decision is made that the applicable law is Kurya customary law, those who are known to be conversant with the law will be located and their assistance enlisted. The geographical location alone would not facilitate or scupper the application of assessors who belong to a certain community. It is my unflustered conclusion that it was quite in order for the District Court to rule that proceedings instituted in Mailimoja Kibaha were properly instituted and that the court was clothed with jurisdiction to preside it over and determine them. It is in view thereof, that I hold that grounds one and two of the appeal are destitute of merit and I dismiss them.

Regarding ground three of the appeal, the consternation by the appellant is that Chagga customs were equated with Kurya customs and she

thinks this was not correct. I have combed through the impugned decision. Whilst the case of ***Catherine Priscus Massawe v. Kamili Massawe*** (supra) that related to the applicability of Chagga customs was referred to in the course of deliberations, it is utterly flawed to contend that Kurya customs were subordinated to or equated with Kurya customs. Reference to the said case was made only with a view to impressing upon the parties to understand that primary courts are vested with jurisdiction over matters in respect of the applicable law is Islamic or customary law. That was the only inspiration that the court drew from the said decision and nothing else. It would be quite inappropriate to contend that such decision swayed the decision in any other way than that of guiding on the jurisdiction of the trial court whenever the law applicable is either Islamic law or customary law. On the basis of the foregoing, I find this ground hollow and I dismiss it.

Overall, I find the appeal lacking in merit and I dismiss it, and uphold the decision of the District Court of Kibaha. I make no order as to costs.

Order accordingly.

DATED at **DAR ES SALAAM** this 3rd day of November, 2022.

M.K. ISMAIL

JUDGE

03/11/2022