

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

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

PC. CIVIL APPEAL NO. 56 OF 2019

*(Arising from Probate and Administration Appeal No. 13 of 2018
Morogoro District Court; Origin Probate and Administration Cause
No. 202 of 2009 Morogoro Urban Primary Court)*

**SALEHE RAMADHANI PINTO (The Administrator
of the estate of the late ABBAS ABDALLAH).....APPELLANT
VERSUS**

JUMA PINTO.....1st RESPONDENT

IBRAHIM PINTO.....2nd RESPONDENT

JUDGMENT

Date of Last Order; 22/7/2021

Date of Judgment; 28/03/2022

S.M. KULITA, J;

This is the second appeal by **SALEHE RAMADHANI PINTO, the appellant**, who was aggrieved with the court's findings in the Probate and Administration Appeal No. 13 of 2018 Morogoro District Court dated 03/10/2018. He had unsuccessfully appealed at that District Court against the decision of Morogoro Urban

Primary Court in the Probate and Administration Cause No. 202 of 2009.

The brief history of the matter is that somebody Abdallah Mohamed Pinto, before he had passed away in 1960s bequeathed his two houses located in Morogoro Municipality to his four children. Two of them occupied the house located on Plot No. 1 Block F, Kikundi Street which is not an issue for this matter, while the other two children namely Abbas Abdallah Pinto and Ashura Abdallah Pinto occupied the house located on Plot No. 24 Block L, Shamba Street in Morogoro Municipality which is a suit premise for this matter.

The records transpire that Abbas Abdallah Pinto passed away in 1974 leaving the house cohabitated with his sister, Ashura Abdallah Pinto alone. It was evidenced and never disputed that Ashura Abdallah Pinto was not married and had no child. Upon the death of Abbas Abdallah Pinto in 1974 nobody was appointed to be the administrator of his estates till 2009 when the Appellant herein (Salehe Ramadhan Pinto) applied for it and was appointed by Morogoro Urban Primary Court via Probate and Administration Cause No. 202 of 2009. The letter for the administration of estates shows that the Appellant was appointed on 18/09/2009.

Before filing the said application for administration of estates of the late Abbas Abdallah Pinto and issuance of the letters of Administration by the Primary court, the appellant's aunt Ashura Abdallah Pinto, had gifted the said house located on Plot No. 24 Block L, Shamba Street in Morogoro Municipality to the Appellant. The records transpire that Ashura Abdallah Pinto had extracted a deed of gift/transfer dated 25/11/2009 for that purpose, which means that ownership of the property transferred to the Appellant. Six years later, in 2015 Ashura Abdallah Pinto passed away. It is when the caveat was filed in the Probate and Administration Cause No. 202 of 2009 at Morogoro Urban Primary Court that the deceased Abbas Abdallah Pinto left four issues before he had passed away but the 2nd Respondent and his fellow siblings to the deceased, Abbas Abdallah Pinto were not involved in the family meeting that led to the appointment of the administrator of estates. The issue was that they were not involved in the said probate matter while they have interest in the property located on Plot No. 24 Block L, Shamba Street in Morogoro Municipality of which their father, Abbas Abdallah Pinto was the co-owner with Ashura Abdallah Pinto.

The 2nd Respondent herein, **Ibrahim Ahmed Pinto** who testified for the caveators as SM I at the trial court stated that he

is a son of the deceased's (Abbas Abdallah Pinto's) young brother. He further stated that the appellant (Salehe Ramadhani Pinto) is the son for his elder father. He alleged that the Appellant didn't involve him and other persons including the four infants left by the deceased, late Abbas Abdallah Pinto, who had passed away in 1974, in filing the Probate and Administration Cause No. 202 of 2009 Morogoro Urban Primary Court. He said that the house was under co-ownership of Ashura Abdallah Pinto and Abbas Abdallah Pinto, hence the infants for Abbas Abdallah Pinto deserves their late father's share. The records also transpire that SM1 and his fellow came to note in 2015, ie. six years later, that the Applicant had already filed the Probate and Administration Cause for the property when they attended a funeral ceremony for the late Ashura Abdallah Pinto.

The other witnesses who testified for the caveat at the trial court are the following; Ziada Ramadhani Pinto (SM II) who is the Appellant's (Salehe Ramadhani Pinto's) sister; Aludiki Abbas (SM III) who testified as the deceased's (Abbas Abdallah Pinto's) son; and Nassoro Ramadhani Pinto (SM IV) who said to be a son of the deceased's (Abbas Abdallah Pinto's) young brother. All these witnesses testified almost the same thing as SM I (Ibrahim Ahmed Pinto) who is the 2nd Respondent in this 2nd appeal.

In his reply thereto the Respondent, Salehe (Appellant herein) submitted that the late Abbas Abdallah Pinto left no child and the house was bequeathed to him by the late Ashura Abdallah Pinto as gift. He further testified that thereat Primary court that, as it was for late Abbas Abdallah Pinto, Ashura left no child. He submitted that the property was therefore lawfully transferred to him.

Having heard the said caveat, the Primary Court agreed with the caveators' submissions and decided that the 4 (four) mentioned persons alleged to be the issues left by the deceased, late Abbas Abdallah Pinto be given their late father's share as the disputable house was co-owned by the late Ashura Abdallah Pinto and the said late Abbas Abdallah Pinto.

Dissatisfied with the said decision the Appellant herein, Salehe Ramadhani Pinto appealed at the District Court of Morogoro via Probate and Administration Appeal No. 13 of 2018 unsuccessfully. Hence this appeal against **JUMA PINTO (1st RESPONDENT)** and **IBRAHIM PINTO (2nd RESPONDENT)** in which the Appellant prays for the judgment of the District Court to be quashed and his appeal be allowed with costs, relying on the following grounds;

1. That the judgment is bad in law as the Learned Magistrate on appeal erred in not addressing and making decisions on important points in the appeal.
2. That the Learned Magistrate on appeal erred in law in not making decision on point that the Law of the Child Act, 2009 is not applicable in this case because when the law came into operation on 6th November, 2009, the applicant had already administered the estate by bequeathing ownership of the house in dispute from Ashura Abdallah Pinto on the 22nd day of September, 2009.
3. That the Learned Magistrate erred in not appreciating the fact that the house that Ashura Abdallah Pinto and Abbas Abdallah Pinto inherited in 1964 was a mud house. That the present brick house had been paid for the National Housing Corporation by Ashura Abdallah Pinto alone after the death of Abbas Abdallah Pinto in 1974. Hence the shares of Ashura Abdallah Pinto and Abbas Abdallah Pinto cannot be the same.

Submitting on the 1st ground of appeal the Applicant stated that the District Court failed to address and make decisions on important points of law. The applicant submitted that he elaborated those points of law in the 2nd and the 3rd grounds of appeal.

As for the 2nd ground of appeal the appellant submitted that the District Court was wrong to rely on the Law of the Child Act, 2009 in its decision as the said Act came into operation on 6th November, 2009 while the cause of action arose on 22/09/2009. He said that the said statute is not applicable in this case because when the statute was enacted on 06/11/2009 the applicant had already been bequeathed and administered the house in dispute.

The appellant further submitted that, before enactment of the said statute, Law of the Child Act, 2009, under the law of inheritance, the children born out of wedlock could not inherit the estates of their dead father. He said that in that regard the appellant could have not given the shares of the house of the late Abbas Abdallah Pinto to the children born out of wedlock, including the 2nd Respondent.

In his submission in respect of the 3rd ground of appeal the appellant stated that while it was bequeathed to Ashura and Abbas the house in dispute had the mud walls but it was later on demolished and constructed with bricks by Ashura while Abbas had already passed away.

That was the end of the Appellant's submission in support of his appeal

In the reply thereto the Respondents submitted in respect of ground no. 1 of appeal by stating that, in composing its judgment the District Court considered and deliberately addressed and made decision relying on important points of law. They said that the District Court never raised any issue *suo motto*.

Replying the 2nd ground of appeal the respondents submitted that the District Court having observed that in the Probate and Administration Cause No. 202 of 2009, Morogoro Urban Primary Court it was neither proven that the deceased (Abbas Abdallah Pinto) lived under Islamic way of life nor customary way of life, his children including the 2nd Respondent cannot be excluded from inheritance for the reason that they were born out of wedlock. They added that the matter at hand accrued in 2017 when the Respondent lodged a caveat at the Primary Court. It is the Respondents' submission that, by that time, 2017 the law of the Child Act was already in force. Hence applicable for the matter at hand.

Further submitting on the same ground of appeal the Appellants stated that the appointment of the Appellant as the Administrator of estates in the Probate and Administration Cause No. 202 of 2009, Morogoro Urban Primary Court, was fraudulently as no

citation was made so that the interested persons could have gone to court and enter the caveat.

He also added that it was not clarified as to whether the Appellant narrated at the trial court if the deceased's mode of life was Customary or Islamic, before he had lodged the said Probate and Administration Cause thereat the Primary Court.

As for the 3rd ground of Appeal the Respondents replied that the fact that the property in dispute was a mud house but it was later on modified into a brick house at the costs of Ashura, it is not an important matter to be considered in the division of the estates. They said that it is not a partnership matter or matrimonial cause whereby in division of assets the shares are divided according to the rate of contributions/shares made by each party.

Having gone through the rival submissions of both parties, as well as the lower courts records from the District Court and Primary Court, here is my observation;

Starting with the 3rd ground of appeal; On this ground the appellant just stated that while it was bequeathed to Ashura and Abbas the house in dispute had mud walls but it was later on demolished and constructed with bricks and the costs were upon Ashura while Abbas had already passed away. The Respondents are of the views

that, that is not an important matter to be considered in the division of the estates as it is not a partnership matter nor matrimonial cause whereby in division of the assets the rate of shares or contribution for each member/party is considered. In my view rate of shares or contribution should be considered, if it will be decided that the 2nd Respondent and his fellow siblings deserve the share.

However, upon going through the records, I have noted that this issue was newly established at the District Court. It was not among the issues that had been discussed during trial at the Primary Court. In that sense the Appellant was not supposed to raise this issue at the District Court. According to **Order XXXIX, Rule 27(1) of the Civil Procedure Code [Cap 33 RE 2002]** the appellant is precluded to raise new evidence in appeal. This was also held in **ISMAIL RASHID V. MARIAM MSATI, Civil Appeal No. 75 of 2015, CAT at DSM (unreported)**. I therefore find this ground of appeal meritless.

As for the 2nd ground of appeal, I have this to say; Whether the Respondents have the rights to inherit or not, each party tried to justify its argument relying on the Law of the Child Act. Among the argument that the Appellant had raised in his submission is that the cause of action for this matter arose before the enactment of the Law of the Child Act on 6th November, 2009 in which the illegitimate

children had no right to inherit. But the Appellant never cited any statutory provision or case law to justify what he asserts. On the other hand the Respondents replied that the trial Magistrate at the first appellate court had already resolved that issue by the time the application was lodged at the trial court in 2017, that the Law of the Child Act was existing hence applicable.

My comment on those submissions by the appellant and Respondents is that, the Law of the Child Act does not apply to the elder person like the parties to this case. The said statute was enacted purposely for protecting the rights of the children whose age is below 18 (eighteen). The fact that the purported heirs in this matter are not the children of the intended age of below 18 years, the Law of the Child Act does not apply. Section 2 of the Act which possesses the heading **Application** states;

*"This Act shall apply to Mainland Tanzania in relation to the **promotion, protection and maintenance of the welfare and rights of the child.**"*

Section 4(1) of the said Act defines a Child as hereunder;

"A person below the age of eighteen years shall be known as a child"

Subsection (2) went further in showing that the statute is for protecting the **best interests of a child** by providing that it shall be a **primary consideration** in all actions concerning children whether **undertaken by** public or private social welfare institutions, **courts** or administrative bodies.

As the Law of the Child Act has nothing to do with the matter at hand, I find this ground of appeal has no merit as well.

In his 1st ground of appeal the appellant stated that the District Court did not address and make decision on the important points. On the other hand the Respondents replied that the court regarded the important points that had been raised by the parties. This ground of appeal looks to be so general, its analysis is therefore going to be of the same nature. That the court is going to scrutinize the proceedings of the lower courts in general as against or for the decisions that had been made. Among the areas that I find necessary to rely on is the Legality of the Probate and Administration Cause No. 202 of 2009 Morogoro Urban Primary Court and whether the deceased, late Abbas Abdallah Pinto left issues.

In his submission to oppose the appeal the Respondents alleged that no citation had been made for the Probate and Administration

Cause No. 202 of 2009 before the Appellant (Salehe Ramadhani Pinto) was appointed by Morogoro Urban Primary Court to administer the estates of Abbas Abdallah Pinto. But there is no evidence adduced to prove that allegation. As the one who alleges, the Respondent ought to have proved that allegation.

Be it noted that administration of estates is granted after the citation being made. I went through the Primary Court records and noticed that on 09/09/2009, which was her first date to attend that matter, the trial Magistrate ordered for the citation to be published. The fact that the matter was then heard and determined on the 18/9/2009, it means the Magistrate was satisfied that the said order had been fully complied with.

Another thing that the Respondents had argued in their submission to oppose the appeal is that, it was not clarified by the Appellant if the deceased's mode of life was Customary or Islamic before he had lodged the said Probate and Administration Cause No. 202 of 2009 at Morogoro Urban Primary Court. According to the evidence on record the mode of life by the late Abbas was not Christianity, as he was a Muslim by religion but he had not married for the reasons which were not stated. Impliedly the probate matter for Abbas' estate being filed at the Primary Court was right, as his mode of life falls under customary.

According to the Respondents' testimony at the trial court which had been adduced by the 2nd respondent herein one Ibrahim Ahmed Pinto, son of the deceased's (late Abbas Abdallah Pinto's) youngbrother who testified for the caveat as SM1; Ziada Ramadhani Pinto (SM II) who is the Appellant's (Salehe Ramadhani Pinto's) sister; Aludiki Abbas Pinto (SM III) who testified as the deceased's (Abbas Abdallah Pinto's) son; and Nassoro Ramadhani Pinto (SM IV) who said to be a son of the deceased's (Abbas Abdallah Pinto's) young brother; all suggest the same argument that Ibrahim Ahmed Pinto (SM1) who is the 2nd Appellant herein, Aludiki Abbas Pinto (SM III) and two other persons whose names have not been captured in the proceedings are the deceased's (Abbas Abdallah Pinto's) children, hence they have rights to inherit Abbas' property (house share). On the other hand the Appellant herein (Salehe Ramadhani Pinto) disputed by stating that the late Abbas Abdallah Pinto had left no issue while passing away in 1973.

In weighting the evidence that had been adduced at the trial court, as well as the circumstances of the case in general, it is my considered view that the Respondents' case is tainted with a shadow of doubts, particularly on the following grounds;

First; apart from the mere statements of the Caveators at the trial court including the 2nd Respondent herein that Abbas Abdallah

Pinto was their father, there was no other evidence submitted to suffice the allegation that the 2nd appellant (SM1), Aludiki Abbas (SM III) and two others whose names have not been captured in the records are the real children of the late Abbas. The mere statements of SM1, SM II, SM III and SM IV without strong evidential proof to support the same should not be easily admitted by the court. The said SM1 and SM III can be persons who intend to rob that said property in conspiracy with SM II and SM IV through that purported capacity.

Be it noted that, the fact that the said house is located within the Municipality (Morogoro) it must be commercially prime, hence a possibility of persons attempting to rob the same is great. According to the records the Appellant was not stranger to Ashura nor Abbas. Furthermore, he had been taking care of the late Ashura for a long time before she passed away in 2015. He was therefore conversant with the property and the persons who were holding it before the same had been transferred to him. Hence, I find him a right person to inherit the property.

Secondly; silence of the 2nd Respondent and his fellow siblings for over 35 years concerning the ownership of the suit property since the death of Abas Abdallah Pinto, in 1974, whom they allege to be their father, to 2009 when the Appellant herein lodged the

application for Probate Administration and consequently granted by the Primary Court of Morogoro Urban on 18/09/2009, makes me to regard the application/caveat by the Respondents at the trial court afterthought. Though they allege to have noticed in 2015 that the property had been transferred to the Appellant since 2009, still the shadow of doubt is there, as the trial court's record at page 31 of the typed primary court proceedings transpire that in 1990 the said issue of property ownership arose when the late Ashura was still alive but nothing has been said as to what followed thereafter. Failure of the caveators (Respondents herein) to address the trial court as to what further action they had taken thereafter, in claiming for their share over that property, gives me a picture that the claimants had no right over that said house.

From the above findings, I am with the standing point that the letters of administration for the estates of the late Abbas Abdallah Pinto was rightly granted to the appellant by the Primary Court of Morogoro Urban on the 18/09/2009 through the Probate and Administration Cause No. 202 of 2009.

However, I hereby nullify for being unjustifiable, the trial court's ruling dated 19/01/2018 regarding the caveat filed by the Respondents, which was then blessed by the District Court of Morogoro on 03/10/2018, that the property should also be

collectively inherited by the Appellant and those other persons who are alleged to be the infants of the late Abbas Abdallah Pinto.

Therefore, the property, house located on Plot No. 24 Block L, Shamba Street in Morogoro Municipality should continue to be under the ownership of the Appellant, Salehe Ramadhani Pinto as the sole proprietor.

In upshot, I find the appeal meritorious, hence allowed. No order as to costs.



S.M.KULITA

JUDGE

28/03/2022

