

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
BUKOBA DISTRICT REGISTRY**

AT BUKOBA

(PC) CIVIL APPEAL NO. 26 OF 2022

*(Arising from Muleba District Court Civil Appeal No. 56 of 2021, originating from Mubunda
Primary Court in Probate Cause No. 3 of 2021)*

JACQUELINE TIBAMANYA.....APPELLANT

VERSUS

MAXIMILIAN PONSIAN.....RESPONDENT

JUDGMENT

*19/10/2022 & 02/12/2022
E. L. NGIGWANA, J.*

This is the second appeal which traces its origin from Primary Court of Muleba District at Mubunda where the respondent herein petitioned for a grant of letters of administration of the estate of late Justinian M. Bamanyisa who died intestate on 23/07/2021 in Moshi Municipality in Kilimanjaro Region where he was employed and working as a lecturer at Moshi Co-operative University. The record has it that the deceased left estate both in Moshi Municipality and at Mujumwa Village in Muleba District in Kagera Region. The deceased's body was therefore transported from Moshi-Kilimanjaro to the place of domicile to wit; Mujumwa Village within Muleba District and buried therein.

The respondent, having petitioned for a grant of letters of administration, encountered an objection from the wife of the deceased one Jacqueline Tibamanya (the appellant herein), the major ground of objection were that; **one**, the clan members meeting was not legally proper as they identified Keja Ayubu as one of the wife of the deceased while the

deceased only contracted a Christian Marriage with the appellant and they had never divorced the same given the fact that their marriage was monogamous, and she took care of the deceased until he met his death, and the death certificate is in her possession.

Two, the appellant being the sole wife of the late Justinian Bamanyisa, and being the only person who took care of the deceased to his death, and still taking care of the issues of marriage who are still below the age of 18 years, has interest in the deceased's estate therefore; deserves to be appointed as an Adminitratix of the estate of her deceased husband. She ended up praying to the court to dismiss the respondent's prayer and appoint her as an adminitratix of the estate of her deceased husband.

At the hearing of the objection proceedings, the appellant appeared vide one Protas Marijani Karani under the power of attorney. After hearing both parties, the Primary Court dismissed the objection and recognized that the deceased had two wives as the appellant contracted Christian marriage in 2002 and later contracted another Islamic marriage with Keja Ayubu.

The trial court finally in its own motion appointed **Denis Mutasingwa Jeremiah** (a clan member who had not petitioned for a grant of letters of administration) and **Amos Mugisha Benedicto** (A hamlet chairperson) on 05/10/2021.

The appellant was amused by that decision and appealed to the District Court of Muleba at Muleba, and she raised five grounds of appeal as follows;

- 1. That, the trial court erred in law and fact by disregarding strong evidence adduced by the appellant during the hearing.*
- 2. That, the trial court erred in law and fact in deciding the matter in favour of the respondent without due regard to preponderance of probability*
- 3. That, the trial court erred in law and fact by pronouncing the judgment based on contradictory evidence adduced by the respondent and his witnesses*
- 4. That, the trial court erred in law and fact by appointing administrators who were not parties to the application*
- 5. That, the trial court erred in law and fact by pronouncing the judgment thereof.*

Despite the herein above grounds which were crafted at the District Court by the appellant, submission advanced by the appellant's counsel Ms. Irene Biseko raised the issue of jurisdiction that the deceased died in Moshi Municipality in Kilimanjaro Region where he was working therefore the probate cause has to be opened at Moshi and not elsewhere. The appellant's counsel therefore prayed the District Court to nullify the whole proceedings of the trial court and grant any relief at its discretion.

In its findings, the District Court did not address or respond on the submissions of the trial court lacking jurisdiction but it stated that both the appellant Jacqueline Tibamanya who contracted Christian marriage in 2002 with the deceased and Keja Ayubu who had later contracted Islamic Marriage have marriage certificates and both are therefore legally married wives and that the deceased legally abandoned his Christianity faith to

Muslim faith. The District Court therefore concurred with the trial court that they are both marriages legally valid in the eyes of law.

The District Court further revoked the appointment of Denis. M. Jeremiah and Amos Mugisha Benedicto as co-administrators of the estate who were *suo moto* appointed by the Primary Court due to the reasons that they did not apply for it and that there were no reasons for not appointing the respondent Maximillian Ponsian who had applied for it.

Still undaunted, the appellant has further appealed to this court now coining three grounds of appeal as follows: -

- 1. That, the 1st Appellate Court like the Trial Court erred in law and fact by not invoking the provision of section 12 (d) and 15(1) of the Law of Marriage Act and declaring that the deceased person had two wives while the first marriage still existed.*
- 2. That, without prejudice to the afore-stated ground above, the Appellate Court like the Trial Court erred in both law and fact by failing to take into account the provision of section 2 (a) of the 5th Schedule of the Magistrate's Court Act by appointing administrator(s) who has no interest in the estates of a deceased person.*
- 3. That, the 1st Appellate Court like the Trial Court erred in law and fact by not considering the place of death and domicile of a deceased person while the deceased died in Moshi and his place of domicile was Moshi.*

Invited to submit on the grounds of appeal, the appellant who was not represented had tried to talk on the crafted grounds. Starting with the first ground, she submitted that it was an error for both lower courts to rule that the deceased had two wives while she was the only a wife married in Christian Marriage which recognizes one wife and one husband. She added that the deceased had never legally married another wife. The one who is claimed to be a Muslim wife was a mere concubine and was a student at Moshi Co-operative University.

On the second ground, she contended that the appointed administrator has no interest in the estates and not trustworthy as the deceased died in Moshi but the respondent fraudulently obtained a death certificate that indicating that the deceased died at Muleba, while in real sense, the deceased had died in Moshi and she had already obtained a death certificate in Moshi.

On the third ground, she argued that the Primary Court of Muleba at Mubunda had no jurisdiction to hear Probate Cause No. 3 of 2021 because the deceased died in Moshi and he had fixed place of abode in Moshi.

Replying to the appellant's submission, the respondent submitted that he has interest because he knows the deceased's properties. He also added that he was confirmed as an administrator by clan meeting which was attended by the Appellant.

He conceded to the fact that the deceased died in Moshi and he was residing in Kilimanjaro Region since he was an employee of Moshi Co-operative University. He also conceded to have sought a certificate of

death in Muleba but added that he was not aware if the appellant had processed the same in Moshi. He had nothing to comment on whether the two marriages were valid or not. He ended his submission stating that it was the clan meeting decision that the probate be opened in Muleba because most properties of the deceased are situated at Muleba. He concluded by praying for this court to uphold the decision of the District Court.

In rejoinder, the appellant stated that in Muleba the deceased was brought for burial but the probate ought to be instituted in Moshi.

Having paid due consideration to the parties' arguments and the entire record in this appeal, the task now of this Court is to determine whether this appeal has merit.

I find apposite to start with the 3rd ground of appeal which is questioning the jurisdiction of the trial Court in this matter. As correctly argued by respondent's advocate in the District Court, the issue on jurisdiction was not raised at the Primary Court and as matter of principle, the appellate Court is not supposed to entertain issues which were not raised at the lower court/trial.

However, issues of law pertaining the Court's jurisdiction can be raised at any stage. See the case of **Tanzania Revenue Authority versus Tango Transport Company Ltd**, Civil Appeal No. 84 of 2009, and **Mwananchi Communications Limited versus Joshua K. Kajula and two others**, Civil Appeal No. 126/01 of 2016 (both unreported). Therefore, when it comes to issues of law on the Court's jurisdiction, there

is an exception to the general rule. It is for the aforesaid reasons I will deal with the third ground of appeal which is questioning the jurisdiction of the trial Court in this matter.

I grasped the lay appellant to have been saying that the trial court contravened the provision of Rule 1 (1) of the Fifth Schedule to Magistrates' Courts Act Cap 11 R.E 2019 because the deceased was residing in Moshi and the death occurred in Moshi where he had fixed place of abode therefore an application for a grant letters of administration was supposed to be lodged at the Primary court of Moshi District and not in any primary court in Muleba where the deceased was merely buried

Rule 1 (1) of the Fifth Schedule to Magistrates' Courts Act Cap 11 R.E 2019 states that;

*"The jurisdiction of a primary court in the administration of a deceased estates, 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**".*

Elaborating what a fixed place of abode means, the High Court of Tanzania at Tabora in **Fabian Robinson Bisaya**, PC Probate Appeal No.2 of 2019 (Unreported) had this to say;

"The fixed place of abode within the local limits of the court's jurisdiction is not restricted to the actual residence of the deceased at a time of his

death, but includes ownership of any immovable property within the jurisdiction of the trial Primary Court."

Moreover, in the case of **Beatrice Brighton Kamanga and Amanda Brighton Kamanga versus Ziada William Kamanga**, Civil Revision No. 13 of 2020 HC, (unreported) my learned Senior brother Hon. L. M. Mlacha, J while deliberating on an issue concerning the jurisdiction of Primary Courts within one District said the following;

*".....The appointment is done by Primary Court which exercise jurisdiction in the area where the deceased had a fixed place of abode before he died. This is basically the area of the whole District because the jurisdiction of the Primary Court covers the whole of the district where it is established. So, the deceased must have a fixed place of abode within the particular District. **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.**"*

(Emphasize added)

Drawing inspirations from the above authorities and considering the fact that the deceased had estates in both Moshi and Muleba districts, it goes without saying that he had two fixed places of abode therefore; any primary court in both Muleba and Moshi Districts had jurisdiction to determine this matter. Parties were free to choose where to open the matter between the two fixed places of abode. In that premise, the petition of administration of estate was therefore rightly filed in Primary Court of Muleba at Mubunda as the said court has jurisdiction hence, this

ground fails. The question which will follow later is whether what was filed was competent.

As regards the 1st ground of appeal, the appellant is not happy to see the lower courts are recognizing that the deceased had two wives while she contracted Christian marriage since 2002 which under section 12 (d) of the Law of Marriage Act, [Cap 29 R.E 2019], the marriage still subsists as there was no divorce between the deceased and appellant. Similarly, the appellant under section 15(1) of LMA (Supra) the law says no man, while married by a monogamous marriage, shall contract another marriage.

Reading the trial court record, it is apparent that the complaint raised by the appellant was against the decision of the clan meeting. However, in my view, the decision of the clan meeting cannot be challenged before the court of law because it is not a forum created by statutes upon which probate matters may be determined and allow any person who is aggrieved to appeal to the court of law. My learned brother, Kakolaki J. in the case of **Flora Augustine Mmbando versus Abdul Chang'a**, Civil Appeal No.243 of 2021 (Unreported) held that;

" The essence of conducting the clan or family meeting for submission in court when petitioning for administration is to let the clan/ family members be aware of what is going on concerning the administration of the deceased estate or in other words, acts as notice to family members and I would add reduces conflicts and unnecessary objections conflicts before the court as there will be consensus on who should be appointed to administer the estate."

Strictly speaking, it cannot even appoint an administrator. In the case of **Obeth Wange versus Anyangeny Mwasubila**, DC Probate Appeal No.1 of 2007 Chocha J (as he then was) held that;

"A clan however powerful cannot appoint an administrator. It merely nominates the candidate. Actually, the clan meeting aimed at nominating a suitable candidate for administration of the deceased estate is a matter of practice. The clan is under no legal obligation to do so."

Considering the circumstances of this case, it was not proper for the trial to admit, hear and determine a complaint against the decision of the clan meeting. Conversely, it was not legally proper to file a case and challenge what was discussed in the clan meeting; it was a prematurely filed objection as there was no any administrator who had exercised any duty pertaining what was discussed in the clan meeting.

As regards the 2nd ground of appeal, the complaint of the appellant is that the appointment of the respondent by the first appellate court, likewise the appointment of **Denis Mutasingwa Jeremiah** and **Amos Mugisha Benedicto** by the trial court (though their appointed had been revoked by the first appellate court) was contrary to the law as none of them had interest over the deceased's estate.

There is no doubt that jurisdiction of Primary Courts in Probate and Administration cases is provided for under section 19 (1) (c) of the Magistrates Courts' Acts Cap. 11 R: E 2019. The said section should be read together with the 5th Schedule of the Act. Paragraph 2 (a) of the Fifth Schedule to the Magistrates Courts Act, Cap. 11 R. E 2019 reads:-

"2 A Primary Court upon which jurisdiction in the administration of deceased's estates has been conferred may;

- (a) ***either of its own motion or on application by an person interested in the administration of the estate appoint one or more persons interested in the administration to be the administrator or administrators thereof, and in selecting such administrator, shall, unless for any reason it considers in expedient so to do, having regard to any wishes which may have been expressed by the deceased***".

The court as per paragraph 2(c) of the 5th Schedule to the MCA, may revoke any appointment of an administrator for a good and sufficient cause.

An administrator can be any person depending on the circumstances of each case. What matters most his/her ability to discharge his/her duties according to law. For instance, in the case of **Sekunda Mbwambo versus Rose Ramadhani [2004] TLR at page 439** the court held that; *"An administrator may be a widow/widows, parent or child of the deceased or any other close relative; if such people are not available or if they are found to be unfit in one way or another, the court has the power to appoint any other person or authority to discharge this duty."*

In the matter at hand, the Primary Court refused to appoint the respondent herein who had applied for letters of administration on the ground that he testified that he does not know the properties of the deceased situated in Moshi. Therefore, on 05/10/2021 the Primary Court appointed other two

persons; **Denis M. Jeremiah** (Clan member) and **Amos Mugisha Benedicto** (hamlet chairperson) to administer the estate of the deceased. However, in Civil Appeal No.56 of 2021, the District Court revoked such appointment and appointed the respondent simply because he had applied for letters.

I do not agree with the District Court instead, I subscribe the move taken by the Primary Court appointing two administrators one from the clan and the other a neutral one after learning that the respondent lacked such a qualification of being administrator owing to the reason he did not know the properties which were going to be administered. The District Court was wrong to have revoked the administrators appointed by the Primary Court as they would have done justice in such a circumstance.

The duties of an administrator/administratrix appointed by the Primary Court are statutory thus should not be a worry. Paragraph 5 of the Fifth Schedule to the MCA Cap 11 R.E 2019 provides that;

"An administrator appointed by a primary court shall, with reasonable diligence, collect the property of the deceased and the debts that were due to him, pay the debts of the deceased and the debts and costs of the administration and shall thereafter distribute the estate of the deceased to the persons or for the purposes entitled thereto and, in carrying out his duties, shall give effect to the directions of the primary court."

It is trite law that for the petition for letters of administration of Estates to be granted there must be proof of death, evidenced by a death certificate or affidavit of a relative or a person who attended the burial of the

deceased or where for any reason beyond the control of the petitioner a death certificate is unavailable, an affidavit of a person who saw the remains of the deceased being interred or cremated; or an affidavit from a medical practitioner who pronounced the death of the deceased, filed in lieu thereto. See **Rashidi Hassani versus Mrisho Juma** [1988] TLR 134) and **James Peter Midelo versus Asia Mzee Ngotto and another**, Civil Appeal No. 223 of 2018.

Now, cementing on the issue of competency as I earlier hinted, there is no doubt that probate matters are serious and sensitive matters. In this case, both the appellant the respondent admit that late Justinian M. Bamanyisa died intestate on 23/07/2021 in Moshi Municipality in Kilimanjaro Region where he was working but his body was transported from Moshi-Kilimanjaro to the place of domicile to wit; Mujunwa Village within Muleba District and buried therein. It is suprising to see that a death certificate of deceased with **Serial No.1003859468** issued on 09/09/2021 accompanying the petition indicates that **the last known residence of the deceased was Mujunwa Muleba, Kagera Region, and that the deceased died on 23/07/2021 at Mujunwa Kagera Tanzania**. The same further indicates that the one who gave such information to the the Registrar who issued the said certificate is the respondent. I would like to state at the outset that death certificate is not mandatory but where it is the only document accompanying the petition to prove death of the deceased, it cannot be said that its presence or absence is immaterial, and it should not be misleading or in accurate in any material. In the instant matter, it goes without saying that the said certificate was misleading in respect of the last known residence of the deceased and the place of death

therefore, it cannot be said that that the petition for letters of administration filed in the trial court was accompanied by a valid death certificate of the deceased.

However, through the objections raised by the appellant, it was brought into attention of the trial court that a certificate of death of the deceased issued in Moshi was within the appellant's possession, but her objection was not addressed. Indeed, two death certificates in respect the same deceased cannot co-exist. It was not proper for the trial court to leave that issue unaddressed.

Furthermore, I have learned that the trial court permitted **Protas Marijani Karani** who had a special power of attorney to argue the objections raised by the appellant but the trial court did not bother to satisfy itself whether there were reasons for appointment of the said person as an attorney.

It is common knowledge that there must be reasons to grant the power of attorney; for instance; where the grantor is outside the country, or that he/she has encountered a serious accident which has caused incapacitation or the grantor is seriously sick or too old, and any other reasons recognized by the law as the case may be.

A special power of attorney presented before the trial had no even a single reason as to why Protaz Marijani Karin was appointed by the appellant. The trial court proceedings are also silent on the reasons why he was appointed. In my view, that was not right.

Considering what transpired in this matter, and taking into account seriousness and sensitivity of probate matters and the interest of justice, I hereby exercise revisional powers of this court to nullify the proceedings and resultant decisions and orders of the lower courts. Parties are at liberty to petition for letters of administration before a court of competent jurisdiction. Should the intending petitioner opt to accompany a death certificate in the fresh application, he/she must use a valid death certificate of the deceased. Given the nature of the matter, I enter no order as to costs. It is so ordered.

Dated at Bukoba this 2nd day of December, 2022.



E. L. NGIGWANA

JUDGE

02/12/2022

Judgment delivered this 2nd day of December 2022 in the presence of the respondent in person, Hon. E .M. Kamaleki, Judges' Law Assistant and Ms. Lounsi Kyaruzi, B/C.



E. L. NGIGWANA

JUDGE

02/12/2022.