

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

PC CIVIL APPEAL NO. 27 OF 2019

*(Arising from Probate Appeal No. 27 of 2019 Kinondoni District Court,
Originating from Probate and Administration Cause No. 130 of 2018,
Kinondoni Primary Court)*

RASHID GAMA.....1ST APPELLANT

MARTHA GAMA.....2ND APPELLANT

VERSUS

NYASO LUGUSHA GAMA.....RESPONDENT

JUDGMENT

26/08/2021 & 02/12/2022

S.M. KULITA, J.

Dissatisfied with the decision of Kinondoni District Court in Civil Appeal No. 27 of 2019 the appellants herein namely **RASHID GAMA** and **MARTHA GAMA** lodged this appeal relying on the following four grounds.

1. That the 1st appellate court erred in law and fact for not considering the appellants' grounds No. 1, 2 and 4 in its judgment. It also failed to observe that the trial court relied on incurable irregularities in the proceedings and judgment.

2. That the 1st appellate court erred in law and fact for failure to give reasons which led it to recalcitrance the case laws cited by the appellants in their written submissions which strongly bind the 1st appellate court accordingly.
3. That the 1st appellate court erred in law and fact for failure to observe that the respondent as an administratrix was supposed to distribute the deceased's estate according to the law in force.
4. That the 1st appellate court erred in law and fact for failure to observe that the respondent failed to file inventory at the trial court within a period of time prescribed by the law.

The matter was argued by way of written submissions. Both parties are represented by the learned advocates. While the appellants enjoyed the legal services of Mr. Dominicus Nkwera, Advocate, the respondent is represented by Mr. John Mbitu Mriu, Advocate.

Submitting in support of the appeal with regard to the first ground, Mr. Dominicus Nkwera, Advocate submitted that, during his lifetime the deceased professed Christian faith, so the applicable law ought to be used in the administration of his estate is the Probate and Administration Act or the Indian Succession Act of 1865 which are not applicable in Primary Courts. He said that the laws applicable in the Primary Courts in relation to the probate and administration matters are either Islamic or customary. The Counsel averred that, in that sense the Primary Court of Kinondoni had no jurisdiction to hear and determine the Probate and Administration Cause No. 130 of 2018 as the deceased professed Christianity faith. Mr. Nkwera referred this court to a number of events to substantiate his argument that the deceased was a good follower of the Roman Catholic

teachings. For the same purpose Mr. Nkwera also referred some of the paragraphs in the trial court's decision.

With regard to the procedural law in applying for the letters of administration, Mr. Nkwera explained that the Respondent attached only the Death Certificate and the Burial Permit for the deceased without signing the filled form No. 1. She also never circulated form No. 2 for affixing the same in the court or/and public premises like the key buildings within the locality of the place of abode of the deceased. The Counsel also alleged that the trial court's record does not indicate whether the respondent signed the undertakings in Form No. IV upon her appointment and whether the trial court clearly explained to the respondent about the estate she was to administer in terms of rule 7(1) and (2) of GN No. 49 of 1971. To support his argument that, what was done was fatal, Mr. Nkwera cited the case of **Hadija Said Matika V. Awesa Said Matika, PC. Civil Appeal No. 2 of 2016, High Court at Mtwara.**

Further to his submission, Mr. Nkwera submitted that the court assessors were not given an opportunity to give their opinion before the trial court delivered its decision. He said that that issue is neither reflected in the trial court's proceedings nor the judgment. The counsel said that the said omission is fatal. To support his argument he cited the cases of **Esther Mwano V. Constantino Magogo, Land Appeal No. 15 of 2014, H.C.** and **Chadiel Mduma vs Denis Mushi, Civil Appeal No. 41 of 2013.**

Arguing the second ground of appeal, Mr. Nkwera briefly submitted that in its decision, the first appellate court did not consider the cited

cases in the appellants' submissions while they were binding for the said 1st appellate court to adopt.

Amplifying the third ground of appeal, Mr. Nkwera expounded that the beneficiaries filed an objection at the trial court contesting the unfair distribution of the deceased's money. He submitted that, basing on that ground they contested for revocation of the respondent as the administratrix of the deceased's estate, however the trial court rejected to hear and determine the said objection. The counsel is of the views that that is contrary to the law. He bolstered his argument with the provisions of the 5th Schedule, Paragraph 2(c) of the Magistrates' Courts Act which gives the trial Magistrate an obligation to revoke the letters of administration that it had granted. To buttress his argument Mr. Nkwera cited the cases of **Sekunda Mbwambo V. Rose Ramadhani [2004] TLR 439 HC** and **May Mgaya V. Salimu Said (the administrator of the estate of the late Said Salehe) & Another, Civil Appeal No. 264 of 2017, CAT at Tanga.**

Mr. Nkwera also added that the Respondent did not file any document to show that she had used part of the money to pay salaries and taxes, nor debts and other costs incurred in the administration of the deceased's estate.

Finally, on the 4th ground of appeal, Mr. Nkwera submitted that for more than twenty four months period since she was appointed the Administratrix, the respondent has failed to file the inventory and the statement of the account of the deceased's estate. In that regard Mr. Nkwera averred that, it is an indication that the respondent has never distributed the estate to the rightful heirs contrary to the provisions of

rule 10(1) of the G.N. No. 49 of 1971 which is fatal. On this, Mr. Nkwera again cited the case of **Hadija Said Matika V. Awesa Said Matika** (supra).

In his concluding remarks Mr. Nkwera prayed for this court to allow the appeal and grant the orders prayed in the petition of appeal.

Responding the appellants' submissions with regard to the first ground of appeal, Mr. John Mbitu Mriu, Advocate for the Respondent submitted that the first appellate court satisfied itself that the Probate Appeal No. 27 of 2019 Kinondoni District Court was filed out time. He explained that, for that reason the said District Court was refrained from entertaining the said appeal.

The Counsel went on to submit that the complaint that the first appellate court failed to consider the issue of jurisdiction is misconceived. He said that it was the trial Magistrate's finding that the appropriate law to be applied was Customary. The reason behind arrival into that decision according to the trial Magistrate's is that, it was evident that the deceased had issues out of wedlock who are the Appellants, hence the deceased's estate was rightly to be administered customarily. The Counsel added that, applying the Customary Law would enable them (appellants) who are also the deceased's issues to inherit from their father's estate.

Further to his submission, Mr. Mriu disputed the applicability of the Indian Succession Act of 1865 and the Probate and Administration of Estate Act, relying on the contention that the applicability of the said laws would alienate the appellants' rights to inherit from their father's estates. To support his argument he cited the case of **Violet Ishengoma**

**Kahangwa & Another V. The Administrator General & Another
[1990] TLR 72.**

Amplifying on the second ground of appeal Mr. Mriu submitted that the question of jurisdiction ought to be raised earlier. He contended that the Respondent adhered the legal procedures in administering the estate of the deceased, thus the claims on irregularities in the application for the grant of letters of administration cannot stand as for now.

With regard to the claim that the trial Magistrate did not consider the cited cases, the Respondent's counsel was of the view that the trial Magistrate took cognizance to the evidence adduced and all cited cases.

Responding the third ground of appeal Mr. Mriu contended that the applicable law in the administration of the deceased's estate was customary law. He explained that the appellants claim is not on the distribution of the whole estate but on the distribution of money at the CRDB Bank. He said that the said issue was discussed in the family meeting which was convened on 10th October, 2019. The Appellants attended the said meeting but raised no objection to that effect. It is Mr. Mriu's further submission that the respondent was required to pay the expenses which were due in respect of the deceased estate and she actually did so.

Lastly, on the fourth ground, the Counsel submitted that the inventory was filed within the prescribed time on the 28th day of January, 2019. He contended that the appellants were summoned to appear at the trial court but they didn't. He claimed that the first inventory went missing in the file, thus the respondent was requested to supply her copy. The same was received on the 5th day of June, 2020.

In his conclusion Mr. Mriu prayed for this court to dismiss the appeal for want of merit.

I have duly considered the submissions from both parties and went through the original record to the appeal. The issue for determination before me is whether this appeal is meritorious.

I start my endeavor with the first ground of appeal which is about jurisdiction and procedure. It is settled law that jurisdiction of Primary Court in administration of probate is derived from the provisions of section 3 and section 19(1) (c) of the Magistrates' Courts Act, read together with paragraph 1(1) of the 5th Schedule to the Act which provides;

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

Similarly in the case of **Sikujua Model Mwasoni V. Sikudhani Hans Mwakyoma, Probate Appeal No. 10 of 2020, High Court, Mwanza District Registry (unreported)** it was held;

"It is clear that when it comes to the issue of probate, the Primary Court has jurisdiction over all civil matters where the law applicable is customary and Islamic law and the court determines probate matters if parties had a customary marriage or Islamic marriage".

As for the matter at hand the issue is how the deceased was living, and it is where the mode of administering his estate is used to be

determined. In the case of **RAYHAAN ABDULMAJID LADHA V. SUSMITA ABDULMAJID LADHA, Civil Case No. 145 of 2019, High Court, DSM District Registry (unreported)** there was a challenge that the administration of the deceased's estate should not adopt the Islamic mode as the deceased did not comport himself as a muslim. However, it was settled that, as that was his previous life style before he adopted to live in Islamic mode of life. It was therefore held that, the fact that the deceased had converted into Islam, and used to live and practice under that mode of life till when he died, that overrides the deceased's previous form of life. It is regarded to have been overtaken by event. Thus, the current one stands to be regarded.

Therefore what the court should consider in determining the mode to be adopted in administering the deceased's estate is the deceased's life style by the time he was passing away, not his previous life style that has passed a long time ago.

Reverting to the instant matter, it is Mr. Nkwera's submission that, the deceased was Christian who lived his way with the modesty of Christianity. He therefore rightly considered that the trial court was seized with the jurisdiction to entertain the application for grant of letters of administration to the Respondent. I actually went through the record of the trial court and noticed that the deceased and the respondent contracted a Christian Marriage in the Catholic Church at Mwananyamala, Dar es Salaam. That was 30th day of September, 1980. There is nothing to suggest that during his lifetime the deceased used to live in the customary mode of his tribe which is Ngoni.

Among the matters that the lower courts regarded in declaring that the Primary Court was right to deal with the case, is that the deceased's mode of life was customary, the reason behind being that he had children out of wedlock. The things to consider on this, is whether having the children out of wedlock automatically disqualifies the deceased from being regarded professing Christianity. In my view it is not.

The thing to be considered is the deceased's life style by the time he was passing away. The Respondent never stated in his submissions as to when the deceased born the said children out of wedlock, is it recently or a long time ago? In the absence of proof that it is recent, the contrary is proved. The fact that the said children (Appellants herein) have attained the adult age that enabled them to be parties to the case for this matter, it means the deceased had born them a long time ago. It is therefore wrong to conclude that that was the deceased's mode of life till the time he was passing away. Hence that ground must fail.

I can thus agree with the submission of the Appellants' counsel that the deceased was professing Christianity. Therefore, contrary to the findings of the trial and the 1st appellate court, it is the Statutory mode of Administration which was supposed to be adopted in administering the deceased's estates.

The law applicable in the Primary Courts in relation to the Probate and Administration matters is either Islamic or customary law. The fact that during his lifetime the deceased was professing Christianity, the applicable law ought to be used in the administration of his estate is the **Probate and Administration Act** or the **Indian Succession Act of 1865** which are not applicable in Primary Courts. As the current matter

does not fall under Islamic nor Customary law, the Primary Court of Kinondoni had no powers to entertain for lack of jurisdiction. See the case of **Gibson Kabumbire V. Rose Nestory Kabumbire, Probate Appeal No. 12 of 2020, High Court, Mwanza District Registry.**

From the foregoing analysis I find the first ground of appeal meritorious. As the same is sufficient to dispose of the appeal regarding the **illegality** that the trial court had no jurisdiction, **I hereby nullify and quash the proceedings and the decision of both, District and Primary Courts.** In that sense I find it unnecessary to deal with the other grounds of appeal.

In upshot the **appeal is allowed.** The parties still have the right to pursue the matter by instituting the case before the court with requisite jurisdiction. This being the family matter I make no order as to costs.



S.M. KULITA
JUDGE
02/12/2022

