IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

PROBATE APPEAL NO. 1 OF 2021

(C/O Probate Appeal No. 2 of 2021 Sumbawanga District Court and Originating from Sumbawanga PC. Probate cause no 47/1999)

(J. O. Ndira, RM)

RITHA KITHAMA ..... 1st APPELLANT

JOSEPH KITHAMA ..... 2nd APPELLANT

VERSUS

GIDEON KITHAMA (legal representative of **BERNADETTA KITHAMA BETTS**) **..... RESPONDENT**

Date: 17/02 & 14/03/2022

JUDGMENT

NKWABI, J.:

This is a second appeal, though not by the same party. The appellants were aggrieved by the decision of the District Court that nullified the proceedings and judgment of the trial court. The District Court had these to say:

> " *This court after having passed through the trial court proceedings, the ground of appeal and written submissions from both sides it has the conclusion view that trial primary court had no jurisdiction to try this matter since it involved deceased Christian, and there undisputed evidence from both sides that deceased was living Christian mode of life before his death, I therefore am in agreement with Ms Kasebwa*

learned counsel that the primary court had no jurisdiction to try this case as provided for .... "

After finding as such the District Court nullified the trial court case. Each party were ordered to bear their own costs.

Indeed, the first ground of appeal in the District Court which was raised by the respondent in this Court, through her counsel, Ms. Joyce Kasebwa was that in probate cause no. 47/1999, the trial court had no jurisdiction to handle the matter as it involved the deceased who was a Christian. That ground was resisted by the current Appellants through Mr. Edson Kilatu, learned advocate. After the probate case was declared a nullity for lack of jurisdiction by the trial court, the appellants in this court who were the respondents in the District Court lodged a petition of appeal in which, they again faulted the District Court in holding that the trial court had no jurisdiction to entertain the matter.

Since the issue of jurisdiction of a court or tribunal to entertain a matter that is before it is very fundamental and ought to be established by such a court

and or tribunal prior to embarking in the trial or proceedings and coming to a decision, I will start with this, that is the 4th ground of appeal in this court raised by the appellants.

I subscribe with the holding in **Ibrahim Kusaga v. Emanuel Mweta [1986] TLR 26** (HC) that a primary court may hear matters relating to grant of administration of estates where it has jurisdiction where the law applicable is customary law or Islamic law. I also associate myself with the view of the learned counsel for the appellants that the trial court ought to have ascertained if it had the requisite jurisdiction at the earlier stage by making inquiry (page 6 of the submission). Was that done by the trial court when the matter was filed and or started hearing? It is clear that that was not done. Neither in the application form for appointment of administratrix nor witness among the five witnesses who testified in court on 22/06/1999 said anything about the religion of the deceased. Now the next question is was the trial court correct to assume jurisdiction in the circumstances?

I hasten to say that the trial court acted perfunctorily while dealing with this matter before it. It did not consider whether it had the jurisdiction to

entertain the matter. Since it was not established in evidence that the deceased professed customary rites or Christian life or Islamic life, then the trial court acted without jurisdiction. There is no proof that the deceased lived a customary life to cloth jurisdiction to the trial court. It was therefore correct to hold that the trial court had no requisite jurisdiction to entertain the matter as it was decided by the District court. There is no evidence to prove that the deceased lived a customary life as asserted by the counsel for the appellants. That is sufficient to dispose of this matter and say that neither the respondent (Bernadetha Kithama Betts) nor the 1st appellant (Ritha Kithama) appointment as administratrix of the estate of the late Mathias Kithama were valid.

I am aware, in **Joseph Shumbusho v. Mary Grace Tigerwa & 2 others,** Civil Appeal No. 183 of 2016, CAT (unreported) the nullification of appointment of the administrator by the High Court went hand in hand with the appointment of another administrator of the estate and such appointment of the administrator was upheld by the Court of Appeal of Tanzania on the reason that such action would prevent waste of the deceased's estate. I understand that in **Shumbusho's** case, the High Court

had the jurisdiction to entertain the matter unlike this case where the trial court had no jurisdiction. This court too cannot confirm the appointment of Ritha Kithama as administratrix of the estate of the late Mathias Kithama because, in entertaining application for revocation of Benadetha Kithama Betts as administratrix of the estate of the deceased, no evidence was received by the court. It only acted on mere submissions of the parties who for instance the applicants in the trial court said damaging matters against the respondent in this appeal. This touches the claim of the appellants in their 5th ground of appeal that it was wrong for the appellate magistrate to hold the decision of the trial court was null and void while there was no procedural impropriety. I hold, there were fatal irregularities in the proceedings of the trial court that resulted into the appointment of Ritha Kithama, (the 1st appellant) as the matters that they stated and led to her appointment were not received under oath (testimony) rather they were mere submissions.

The trial court's proceedings that led to the appointment of respondent as administratrix of the estate were also marred by other fatal irregularities. One of them is basing the appointment of Benadetha Betts adimistratrix on

an incompetent or defective WILL which as was correctly replied on paragraph 6(b) of the reply to the petition of appeal filed by the appellants in the District court, the WILL was not witnessed by 2 witnesses as per the requirement of the law. The defective WILL was used as the basis of appointing the respondent as administratrix of the estate and the basis of finding no need of involving the appellants and other siblings of the deceased in the probate cause. Also, the alleged family or clan minutes filed in the trial court by the respondent did not involve some of the siblings of the deceased that seems to be justified by the invalid WILL. In the case of **Mushumbusi** (supra) the Court of Appeal of Tanzania underscored the importance of transparency by the administrator or adminitratrix in the administration of the estate in the following words:

> *"By virtue of his position, the appellant was supposed to act in good faith at all times for the sole benefit and interest of the estates of the deceased and to the beneficiaries of the estate including but not limited to providing information to the beneficiaries and heirs. It is in record that the appellant filed to the court the accounts exhibiting his administration of the estates of the late Rugaimukamu as required ..."*

In the circumstances, since there was no transparency in filing probate cause no. 47 of 1999 in the trial court, the alleged WILL is defective as I have indicated above, the hearing of the probate cause was irregularly carried out without citation of the probate under the pretext that the respondent ought to travel to London on a return air ticket and the subsequent appointment of the 1st appellant as administratrix of the estate without evidence (testimony or affidavit evidence), the proceedings in the trial court cannot be held to have no procedural impropriety as the counsel of the appellants wants this court to find as such.

Finally, for the reasons that the trial court had no requisite jurisdiction to entertain the probate cause and that the proceedings in the trial court which resulted into the appointments of the respondent and the 1st appellant respectively were married by fatal procedural irregularities, I uphold the decision of the district court though on a different ground. As such the nullification by the District Court the appointments of the respondent and the 1st appellant as administratrix of the estate of the deceased made by the trial court are according and respectively are upheld. Any interested party may lodge a fresh probate cause in a court he/she is satisfied would have

the requisite jurisdiction to entertain the matter. As the above discussion disposes of the matter, I need not discuss the rest of the grounds of appeal. The appeal fails and it is dismissed. Each party to bear their own costs.

It is so ordered.

DATED at **SUMBAWANGA** this 14th day of March, 2022.

J. F. NKWABI

JUDGE