

**IN THE HIGH COURT OF TANZANIA
(SONGEA DISTRICT REGISTRY)
AT SONGEA**

PC. CIVIL APPEAL NO.1 OF 2022

(Arising from Civil Case No. 17 of 2021, Songea District Court)

STELLA JOHN GWASSA..... APPELLANT

VERSUS

EDGAR JOHN GWASSA.....1ST RESPONDENT

ESTA JOHN GWASSA2ND RESPONDENT

JUDGMENT

14/02/2023 & 28/02/2023

E. B. LUVANDA, J.

This is a second appeal. The ground of appeal which the Appellant argued in this appeal is a replica of what he grounded at the first appellate court.

This appeal was argued by way of written submissions, where Mr. Vicent Kassale learned Advocate for the Appellant, abandoned ground number two and three in the petition of appeal, and argued ground number one only, which goes thus: That the appellate court (sic, first appellate court) erred in law and facts when it dismissed the ground of jurisdiction of the trial court which by looking at the entire records of the

trial court it is evident that the trial court had no jurisdiction to entertain the matter.

The learned Counsel for Appellant submitted that the appellate court misdirected itself when it mistakenly confused the issue of jurisdiction as was submitted by the Appellant to the issue of marriage when it held that "that being the situation the trial court has jurisdiction to try Christian and no-Christian marriages". He submitted that the Appellant submission was not on the deceased's marriages, but was that the trial court had no jurisdiction to determine and decide the matter before it in which pertain and concerned the deceased who was a Christian and who lived a Christian mode of life through his life.

He submitted that the deceased lived a Christian mode of life that is why he got married to another wife after the previous wife had passed away and yet, the deceased to proof his Christianity he celebrated the later marriage. He submitted that it is clear that the deceased was Christian and professed Christianity for living a Christian life. The learned Counsel submitted that the jurisdiction of primary court is limited to estate under the customary or Islamic law only. Citing section 18 (1) (a) (i) of the Magistrates Courts Act Cap 11 R.E. 2019, and item 1(1) of the Fifth

Schedule to Cap 11(*supra*); **Christina Alexander Ntonge vs Limi Mbogo**, Pc Civil Appeal No. 11/2017 HC of Tanzania Dar es Salaam.

The Respondent made a very short and brief but complete reply in three lines only, thus the Respondent tend to urge that the appellate court had jurisdictions to entertain the matter, hence the decision of the appellate court was right.

The Appellant who is among the nine children's survived by the deceased John Ndimbo Gwassa, made appearance at the trial court to oppose the application for the grant of letters of administration to Edgar John Ndimbo Gwassa and Esther John Ndimbo Gwassa who were nominated by the clan meeting to administer the estate of the deceased above named. Her objection was overruled by the trial court. However after hearing both the Applicants and the Objector, the trial court appointed three administrators to wit the two nominated by the clan meeting and the Objector (Appellant herein).

At the first appellate court one of the ground of appeal by the Appellant, she faulted the trial court for appointing her while she never applied to be joined. This ground was among the two grounds which was abandoned by the Appellant in this appeal. The first appellate court disallowed the Appellant's appeal. The Appellants staged her second

appeal to this court, this time round is neither challenging her appointment nor that of her fellow administrators, rather is saying the first appellate court erred to hold that the trial court had jurisdiction to try Christian and non-Christian marriages while her argument was that the trial court had no jurisdiction to determine and decide the matter before it which pertained and concerned the deceased who was a Christian and lived a Christian mode of life throughout his entire life.

To my view, the first appellate court is faulted for nothing. The issue of marriage was introduced by the learned Counsel for Appellant himself. Actually even in this appeal as to how the deceased professed and lived the alleged Christian life, the learned Counsel for Appellant had no choice other than inferring to the marriage celebrated by the deceased. Had the learned Counsel for Appellant made no mention of the word marriage when buffing up his argument to the purported deceased's Christianity, invariably, the first appellate court could have not landed there.

To my view, in the situation of this case where the learned Counsel for Appellant, is inferring the issue of Christianity to the form of marriage contracted by the deceased, no way we can avoid to borrow a leaf from the law governing marriages.

The first appellate court correctly indicated how the existence and status of marriages can be proved, say by production of a certificate of marriage or by tendering evidence of marriage, referring to the provisions of section 55 (a) of the Law of Marriage Act, Cap 29 R.E. 2019 and a case of **Elizabeth Mohamed vs Adolf John Magesa**, Administration Appeal; No. 14/2011, High Court at Mwanza.

In the records of the trial court, the Appellant who testified as Objector (PW3), said nothing regarding the mode of life of the deceased and made no mention of the form of marriage contracted by the deceased, apart from saying the deceased married Dororosa then married another wife.

Edgar John Gwassa (DW1) said his father passed away on 12/12/2002 and during his life time he was living with two wives that is Dororosa Mtega and Paula Kinyero.

Ester John Gwassa (DW2) stated that the first wife of the deceased was Dororosa Mtanga died in 1980 and then married the second wife in 1982 and contracted marriage. Joseph Gwassa (PM4) who is aged 98 and brother of the deceased, stated that the deceased passed away on 12/12/2002, had the first wife Dororosa and after her demise it is when in October 1982 the deceased married a second wife.

Among the witnesses who testified before the trial court no one stated that the deceased had contracted a Christian marriage either with the first wife (Dororosa) or the second wife (Paula). Nowhere it reflect that the deceased was a Christian let alone a fact that was living and professed a Christian life, as alleged. There is no evidence indicating that the deceased attended any Christian religious rite of sprinkling water (baptism). No evidence that the deceased was attending church or participating on any ecclesiology activity. No evidence that the deceased was buried with Christian rite at his funeral ceremony. To my view, the mode of life of the deceased has to be deduced from the evidence adduced before the trial court. Herein, such evidence is totally missing. In this regard the argument of the learned Counsel for Appellant flop for want of merit.

It is record of the trial court, in particular at the hearing of the objection, Ester Gwassa (DW2) was recorded to had asked the court to dispense justice, and made the following remarks, I quote in verbatim,

"Baba ameacha mali toka 2002 lakini mimi sifaidiki na mali hizo wanafaidika watu watano tu, ninashangaa, mpingaji anasema anawatambua wadogo zake watatu kila siku alikuwa anasema hawatambui hao watoto wanne wadogo, zetu na hatukuwatendea haki wakashindwa hata kusoma."

These facts were not cross examined by the Appellant (Objector at the trial court), meaning that she accepted its truth.

In so far the deceased passed away on 12/12/2002, and since then his estate has never been administered and in view of the complaint above that some heirs are vandalizing, wasting and taking advantage of the unadministered estate. And in so far circumstances herein suggest that some heirs for reasons known to themselves, are unwilling the estate to be administered. This can be evidenced by a fact that even some are objecting their own appointment to administer the deceased estate, while the estate is said to be in their control illegally. And they are doing so by these unmerited wrangling and protracted appeal process.

In view of the above, I order for the matter to be remitted back at the trial court for continuation of the procedures of administration proceedings.

The appeal is dismissed, under the circumstanced of this appeal I was preparing to shoulder costs of this appeal to the Appellant or Advocate personally, however I have declined my move.

E.B. LUVANDA

JUDGE

28/02/2023