THE UNITED REPUBLIC OF TANZANIA

(JUDICIARY)

THE HIGH COURT

(MUSOMA SUB REGISTRY)

AT MUSOMA

(PC) CIVIL APPEAL No. 78 OF 2022

(Arising from the District Court of Tarime at Tarime in Probate Appeal No. 6 of 2022; and originating from Tarime Urban Primary Court in Probate & Administration Cause No. 35 of 2022)

MORRIS MESS AKOTO ..... **APPELLANT**

Versus

ZULFA JOSEPH AKOTO ..... **RESPONDENT**

JUDGMENT

12.06.2023 & 14.06.2023
Mtulya, J.:

On 26th December 1989, **Joseph Akoto Obora** (the deceased) had expired at Mianduka area within Nyanduga Village in Koryo Ward of Rorya District in Mara Region. The record shows that the deceased belonged to *Luo* tribe of Rorya and professed Seventh Day Adventists sect of religion. During his expiry, the deceased had left behind two (2) properties, namely: first, land sized eight (8) acres; and second, residential house. Both properties are located at Nyanduga Village, which is the foundation of the present contest.

On the 5th day of May 2022, one of the deceased's daughters, **Mrs. Zulfa Joseph Akoto** (the respondent) had

approached **Tarime Urban Primary Court** (the primary court) and lodged **Probate and Administration Cause No. 35 of 2022** (the probate cause) praying for letters of administration. Before hearing and grant of the letters, **Mr. Morris Mess Akoto** (the appellant) had moved in the probate cause and registered a caveat with three (3) reasons, *viz*: first, the appellant is the only son of the deceased and must be given first priority in administration of the deceased's properties as per customs and tradition; second, the appellant was not summoned to attend a clan meeting which had proposed the respondent to be an administratrix of the deceased's properties; and finally, Nyiratho clan meeting of 7th March 2022 had confirmed the appellant as a son of the deceased and entitled to administer the deceased's properties.

During hearing of the caveat in the probate cause on 1st June 2022, the appellant had produced the three (3) indicated reasons and added two (2) other grounds of protest, namely: first, there was no citation in notice boards; and second, the respondent's name is **Godliver Onyango Okoto** and not **Zulfa Joseph Okoto**. During the proceedings, the Nyiratho clan meeting of 7th March 2022 was admitted as exhibit M. Finally, the appellant claimed that the respondent does not qualify to be

adminstratrix of the deceased's estates under *Wategi* customs and tradition.

In order to corroborate his statements, the appellant had brought eight (8) other witnesses from the deceased's family, Nyiratho Clan and Nyanduga Village chairman, namely: Kaduga Obora, Andrew Ayier, Magreth Obonyo, Kiey Obimbo, Lucas Ondiek, Bahati Hamed, Samson Wiva, Osolo Sayi. Of all witnesses, Kaduga Obora is a key witness who had identified himself at the 5th page of the proceedings to be: *mimi ni mdogo wa damu wa marehemu Joseph Akoto Obora...hawa wote ni Watoto wa marehemu.* Other witnesses went to the primary court and testified on exhibit M related to Nyiratho Clan. During cross examination, Kaduga Obora, as reflected at page 6 of the proceedings, testified that:

> *Nakujua wewe kama mtoto wa marehemu. Akoto alikuwa na wake wawili. Sijui kama ni wake wa ndoa. Sijui majina ya wake zake wa marehemu. Wewe ni mtoto wa Obora...*

The respondent on the other hand had testified that the deceased's clan meeting of Akoto Obora was convened on 26th February 2022 and proposed her as the only daughter of the deceased. The Akoto Obora clan meeting shows that:

Marehemu alikuwa na mke mmoja ambapo kwa sasa naye marehemu. Aliacha Watoto watatu, nyumba moja na shamba. Watoto wawili kati ya hao watatu walishafariki dunia. Amebakia mtoto mmoja aliye hai, Zulfa Joseph Akoto. Ukoo umemteua kuwa msimamizi wa mirathi.

In her testimony, as reflected at page 11 of the typed proceedings in the probate cause, the respondent stated that:

mimi simtambui mpingaji kuwa msimamizi wa mirathi na kama mtoto wa Baba yangu. Mpingaji miaka yote alikuwa wapi hajawahi kufika kwenye msiba wala nyumbani. Baba hakuwahi kututambulisha. Leo ameibukia wapi?

The questions raised by the respondent were not replied by the appellant, instead the appellant insisted on Nyiratho Clan meeting without any link with the Akoto Obora Clan meeting, and how the two clan members are related. The respondent, in the probate cause, had also summoned a total of four (4) other witnesses from both the deceased's and Nyiratho clans, namely: Jakob Gendo, Cyprian Ojwang, Raphael Lala, Josephat Odera, and Ochieng Kadya. According to the testimony of Jakob Gendo,

the respondent was proposed by the deceased's clan meeting whereas the appellant belongs to the other clan of Nyiratho.

The record shows further that all other respondent's witnesses testified that the appellant does not belong to the deceased's clan and has never participated in any family or clan problems associated with the deceased's family and failed to explain where he was for those ages to 62 years. After registration of all relevant materials, the primary court on 7th June 2022, had declined the caveat produced by the appellant in the probate cause. The reasoning of the primary court is reflected at page 4 and 5 of the decision that:

> *...sheria haibagui mwanamke au mwanaume kuwa msimaizi wa mirathi, bali ni mtu yeyote mwenye maslahi katika mali za marehemu anaweza kuomba kuteuliwa kuwa msimamizi wa mirathi ya marehemu...mpingaji tofauti na maelezo yake tu, na yale ya mashahidi wake kwamba walikaa kwenye ukoo wa nyiratho, ambao haumhusu marehemu, mpingaji hajaweza kutoa nyaraka yeyote mahakamani hapa kuthibitisha kuwa yeye kweli ni mtoto wa marehemu...*

The decision and reasoning of the primary court in the probate cause aggrieved the appellant hence rushed to the **District Court of Tarime at Tarime** and filed **Probate Appeal No. 6 of 2022** (the probate appeal) and complained on four (4) issues. The district court heard the parties and upheld the decision of the primary court without any order to costs. The reasons of declining the appeal are found at page 3, 4 and 5 of the judgment, in brief, that:

> *...jurisdiction of the primary court in the administration of the deceased's estates is provided under paragraph 2 of the 5th Schedule to the Magistrates' Courts Act [Cap. 11 R.E. 2019] and the Primary Courts (administrator of Estates) Rules, GN. No. 49 of 1971, [and I found no provision] which prohibits women from administering the estates of the deceased....the deceased was from the Kaduga Clan and not Nyiratho and as such, [Deceased's Clan Meeting of 26.02.2022] which appointed the respondent to apply for letter of administration of the deceased's estates was valid...SM2 stated that the appellant is the only male child of the deceased. However, when cross*

examined by the respondent, SM2 stated that the deceased had two wives but was not sure if they were duly married and did not know their names...the appellant alleged that he was the deceased's child hence he was supposed to prove his allegation on the balance of probabilities...I am satisfied that the deceased had one surviving child, the respondent.

The reasoning of the district court in the appeal was brought in this court with four (4) complaints filed in **(PC) Civil Appeal No 78 of 2022** (the appeal), which in brief show that: first, the lower courts have declined to resolve the issue of place of abode of the deceased; second, the lower courts erred in holding the appellant is not son of the deceased; third, the lower courts erred in picking-up the failure of SM2 to cite names of the wives of the deceased is a fault; and finally, the lower courts failed to consider participation of the appellant in the deceased's clan meeting.

The appeal was scheduled for hearing the day before yesterday, and the appellant being a lay person and aware the complaints contained both facts and points of law, he hired the legal services of **Mr. John Manyama**, learned counsel to argue

the complaints. During submission in favor of the appeal, Mr. Manyama had joined ground number three (3) and four (4) of the appeal as they were related and briefly submitted as follows:

First, the primary court in Tarime District had received and determined the probate cause originated from Nyanduga village in Rorya District contrary to the law enacted in section 19 (1) (c) of the **Magistrates Courts Act [Cap. 11 R.E. 2019]** (the Act) read together with paragraph 1 (1) of the Fifth schedule to the Act and precedent in **Amie Sadick Sanga v. Lucian Samson Sanga,** (PC) Civil Appeal No. 82 of 2021.

Regarding the second and third reasons of appeal, Mr. Manyama submitted that both lower courts held that the appellant is not the son of the deceased without any DNA examination results and they totally relied on failure of SM2 to mention names of the deceased's wives. According to Mr. Manyama, failure of the deceased's brother (SM2) to cite names of the deceased wives is not fatal to decline rights of the appellant.

On the final reason of appeal, Mr. Manyama submitted that the primary court had received two (2) clan meeting minutes from the deceased family and Nyiratho family, but had declined to consider the Nyiratho Clan Meeting Minutes which had

proposed the appellant to be an administrator of the deceased's estates. In his opinion, the deceased's clan meeting had avoided the appellant hence must be declared invalid. Finally, Mr. Manyama prayed the proceedings and decisions of the lower courts be nullified for want of right of the appellant.

Replying the submission, the respondent, who appeared in person without any legal representation, stated that Rorya District Court was recently established and all their disputes were previously resolved at the primary court in Tarime District. According to the respondent, the appellant just emerged and claimed to be the son of the deceased at old ages with grandsons and granddaughters. The respondent submitted further that they lived in one and the same village of Nyanduga, but the appellant had remained silent on the indicated allegation without any good cause. In the opinion of the respondent, the appellant should not be granted right at this stage from the deceased's estates as the appellant's mother knows the truth of the appellant's father.

The respondent submitted further that the appellant's mother was married and gave birth to the Nyiratho Clan. According to the respondent SM2 does not belong to the deceased's clan, but *chama cha saccos*. Regarding summoning

the appellant in the deceased's clan meeting, the respondent submitted that it was impossible to call someone who was not known to the clan of the deceased. According to the respondent, the appellant had declined appearance during difficult times of the deceased's family and burial ceremony of the deceased.

In a brief rejoinder, Mr. Manyama submitted that the respondent was supposed to lodge the probate cause at Riagoro Primary Court in Rorya District and not at the primary court in Tarime District. According to Mr. Manyama, SM2 is called Kaduga Obora and the deceased was called Joseph Okoto Obora, which shows that the dual are from the same clan of Obora. Finally, Mr. Manyama stated that the appellant is the son of the deceased and needs to participate in the administration of the deceased's estates. In his opinion, this court may quash proceedings and decisions of the lower courts in favour of clan meeting that will invite the appellant to participate in the proceedings of proposing administrator of the deceased's estates.

I have perused the record of the present appeal and glanced the two (2) indicated clan meetings produced in the probate cause, and materials produced by the parties, it is vivid that the respondent had produced better evidence than the

appellant. The respondent had testified to belong to the deceased's family and the only daughter of the deceased as of current. The facts and evidences produced during the hearing of the probate cause show that there are two (2) clans, of the deceased and that of Nyiratho. It is vivid from the record that the appellant belongs and sat in the meeting of Nyiratho clan.

It is unfortunate that the appellant had remained silent on the record with regard to two (2) issues, namely: first, the nexus between deceased's Obora (Kaduga) clan and Nyiratho clan; and second, where he was for a total of sixty-two (62) years before alleging to be a son of the deceased. The respondent was right in cross examining him during the hearing of the probate cause on where he was for all those ages.

However, the appellant had declined replies on the indicated questions. In the primary court, it is the appellant who had registered the caveat on several issues. The burden of proof was at his shoulders, he was supposed to substantiate his allegation by evidence. With regard to the claim that he belongs to the deceased's family, any reasonable person would expect him to produce documentary evidence in birth certificate, maternity card, clinic card or DNA examination results.

In the absence of the evidences, and considering SM2 could not cite names of his brothers' wives, that leaves a lot to be desired on him. The record further shows that the appellant is aged 62 years old as depicted at page 3 of the proceedings and the same years are recorded to SM2 at page 5 of the proceedings, whereas the respondent is recorded 72 years of age at page 11 of the proceedings. The impression one may get is that the appellant and SM2 were born in the same year and no one is better positioned to state on the father of the other. At least the respondent can tell for them at the age of ten (10) years, when the dual were born.

It is unfortunate that in the record of appeal, the materials registered at the primary court are silent on important witness, the appellant's mother who would have shed a light on the contest. Similarly, there are no reasons on the record on why this important witness was not brought at the primary court. The law is certain on the subject that as indicated in the established precedent of **Hemedi Saidi v. Mohamed Mbilu** [1984] TLR 113, where it was stated that:

> *...where, for undisclosed reasons, a party fails to call a material witness on his side, the court is entitled to draw an inference that if the witnesses*

were called, they would have given evidence contrary to the party's interests.

The cited thinking has been cherished in this court and Court of Appeal without any reservations (see: **Chacha Mayani v. Julius Jacob & Another**, Land Appeal No. 10 of 2023 and **Jonathan Kalaze v. Tanzania Breweries Limited**, Civil Appeal No. 360 of 2019). This court decides matters depending on the registration of relevant materials, and where allegations of litigants need corroboration, they must produce the same or give reasons for such failure. A party who produces better evidence than the other contestant always wins a case. That is the law in enactment and practice established by this court.

The law was enacted in section 3 (2) (b) of the **Evidence Act** [Cap. 6 R.E. 2019], that: *A fact is said to be proved when, in civil matters... its existence is established by a preponderance of probability.* The provision was copied and inserted in Regulation 6 of the **Magistrates' Courts (Rules of Evidence in Primary Court) Regulations**, GN No. 22 of 1964 & No. 66 of 1972.

Under the circumstances of the present appeal and totality of evidences produced at the primary court, it is difficult to state that the appellant had substantiated his allegation that he is the child of the deceased or had registered necessary materials to

prove that he belongs to the deceased's clan to enjoy rights and privileged of the deceased's clan meetings.

I am aware that the issue of law challenging jurisdiction of the court may be raised at any stage of the proceedings, even in an appeal (see: **R.S.A. Limited v. HansPaul Automechs Limited & Govinderajan Senthil Kumai**, Civil Appeal No. 179 of 2016 and **Agripa Fares Nyakutonya v. Baraka Phares Nyakitonya,** Civil Appeal No. 40 of 2021). The first reason of appeal was therefore brought in the present appeal by Mr. Manyama to test the mandate of the primary court located at Tarime.

However, the record of the instant appeal shows that the respondent had approached the primary court on 5th day of May 2022, when the mandate of Tarime Urban Primary Court was extended to Rorya District via the **Magistrates' Courts (Tarime District Court (Concurrent Jurisdiction over Rorya District) Order, GN. No. 31 of 2016**, whereas its revocation had occurred on 22nd of October 2022 via the **Magistrates' Courts (Tarime District Court (Concurrent Jurisdiction over Rorya District) (Revocation) Order, GN. No. 612 of 2022**. In such circumstances, the submission of Mr. Manyama in the first ground of appeal is a sorry argument without any merit.

In the end, and having said so and considering the totality of evidence produced in the primary court, I am moved to uphold the decisions of the lower courts and I hereby mark this appeal dismissed for want of merit. I do so without costs as the contest concerned probate cause.

It is so ordered.

F.H. Mtulya

Judge

14.06.2023

This Judgment was pronounced in Chambers under the Seal of this court in the presence of appellant, **Mr. Morris Mess Akoto** and in the presence of the respondent, **Mrs. Zulfa Joseph Akoto**.

F.H. Mtulya

Judge

14.06.2023