

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

AT BUKOBA

(PC) PROBATE APPEAL NO. 12 OF 2022

*(Arising from Karabagaine Primary Court Decision of Probate Cause No. 14/2021 and Probate Appeal
no.11/2021 of Bukoba District Court)*

ANGELA PHILBERT..... APPELLANT

VERSUS

URSULA BAZIL SAGI.....RESPONDENT

JUDGMENT

Date of last Order: 02.06.2023

Date of Judgment: 02.06.2023

A.Y. MWENDA

This is a second appeal attempting to challenge the decision of the District Court of Bukoba's Probate Appeal No. 11/2021. In the said appeal the respondent challenged the judgment by Karabagaine Primary Court in Probate Cause No. 14/2021 which among other things, (upon objection filed by Appellant challenging appointment of the respondent as the administratrix of the estate of her late husband), appointed the respondent and the appellant's daughter one Erica Pastory Faiko as administratrixes of the estate of her late husband. Having considered the submissions and the laws, the Hon. Senior Resident Magistrate adjudged in the respondent's favor. He quashed the proceedings while setting aside the judgment and orders of the primary court.

Aggrieved by the Appellate Court's decision, the Appellant lodged the present appeal advancing three grounds which read as follows:

1. **THAT** *the learned first appellate court magistrate (sic) erred in law for holding that, the trial court had no territorial jurisdiction to try a matter which was filed before it, as the issue was emanating from the neighboring ward, of the same judicial District, and not a geographical district.*
2. **THAT** *the learned first appellate court magistrate erred in law for failure to examine the mode of life of the deceased as a determinant of the forum and nature for probate issues, and relied on marriage certificate, which speaks less of the life style adopted by the deceased after attaining it, as the same should be used to determine probate issues. (sic)*
3. **THAT** *the learned first appellate court magistrate erred in law for removing Erica Pastory Faiko, from being a co-administratrix of the estate, while the it had no mandate so; as the said mandate is vested in a trial court. (sic)*

When this Appeal was set for hearing, the appellant was represented by Mr. NIYIKIZA SETH whilst the respondent marshalled one Mr. JOSEPH BITAKWATE learned Counsels.

When invited to submit in support of the grounds of appeal, Mr. NIYIKIZA SETH informed the Court that he was arguing the said grounds in sequence.

Regarding the 1st ground of appeal, the learned Counsel for Appellant submitted that the Appellate Court erred to rule out that the trial court had no territorial jurisdiction. While citing Section 18 of the Magistrates Court's Act, he was of the view that a primary Court may have jurisdiction to entertain any matter arising within the judicial District and not within the Administrative District. He was of the view that Karabagaine Primary Court has jurisdiction to entertain matters arising from Kyakairabwa.

Regarding the second ground of appeal, the learned Counsel for the applicant submitted that the District Court failed to consider the mode of life of the deceased as the determinant factor of the forum and nature of probate issues. The learned Counsel said that the deceased detached himself from Christian mode of life as he married many wives and was blessed with children out of the wedlock. The learned Counsel added that one of the issues (child) from the deceased's other marriages is the respondent's Co- administratrix who was revoked by the 1st appellate Court. The learned Counsel stressed further in that the deceased's mode of life determines the applicable Law and the same must be established by evidence. He

said that the evidence available reveal that the deceased detached himself from Christian ways of life before his death. To buttress this point, the learned Counsel cited the case of GIBSON KABUMBIRE V. ROSE NESTORY KABUMBIRE, PROBATE APPEAL NO. 12 OF 2020, HC, (Unreported).

Regarding the 3rd ground of appeal, the learned Counsel for the Appellant submitted that the 1st Appellate Court had no mandate to revoke ERICA PASTORY FAIKO as a co-administratrix of the estate because the said powers are retained to the appointing court and only upon objection. To support this point, the learned Counsel cited the case of RUTH VICTOR (As the administratrix of Estate of the Late Benjamin Philip Badehe) VERSUS EDWARD EMMANUEL BADEHE and 1 Another, PC PROBATE APPEAL NO. 4 OF 2022, HC (Unreported) and Rule 7 of The Primary Court (The Administration of Estate) GN. NO. 49/1977. The learned Counsel concluded his submission by praying this appeal to be allowed.

Responding to the submission by the learned counsel for the Appellant, Mr. Joseph Bitakwate, learned counsel for the respondent begun by supporting the 1st Appellate Court's findings in that the trial Court had neither territorial nor other legal jurisdiction to handle the matter. Relying on Item 1(1) of the 5th Schedule to the Magistrate Court's Act, the learned Counsel submitted that the mandates by the Primary Court are confined to matters where the law applicable is Customary or Islamic Law. The learned Counsel submitted that in the present matter, although the deceased married the appellant, he later on wrote a letter deserting

her in a bid to revert to his Christian mode of life to receive Sacrament. According to the learned Counsel, the said letter is dated 10/8/2018 and as such the deceased in question abandoned his customary ways of life. On that basis he was of the view that the Primary Court had no jurisdiction because the law applicable is the Probate and administration of Estate Act. To support this argument, he cited Section 92 (1) of the Probate and Administration of Estate Act.

Regarding the case of GIBSON KABUMBIRE (Supra) cited by Mr. Seth, Mr. Bitakwate was of the view that in it, the Court emphasized on the assessment of the evidence on the chosen different mode of life which the deceased did in the present matter.

Regarding the 2nd ground of appeal, the learned Counsel for the respondent submitted that the argument that the deceased had multiple wives is not supported by evidence. He said that the only evidence available on the record is that the deceased married the appellant but before his death he chose to revert to his Christian mode of life by writing a letter and on that basis the primary Court had no jurisdiction to deal with the matter before it.

Regarding the 3rd ground of appellant, Mr. Bitakwate submitted that it is not true that the appointing Court is the one which can only revoke administratorship of the estate. He said that what was emphasized in the cited case is distinguishable with the present matter.

To conclude, the learned counsel submitted that the present appeal has no merits, and it is liable to be dismissed. He prayed this court to uphold the decision of the 1st Appellate Court.

In rejoinder Mr. Seth reiterated to his previous submission but added that the 1st appellate court did not provide any directives as to what the parties should do next. He was of the view that if this court finds that the trial court had no jurisdiction to try the matter, then an order directing the parties to start the appointment process afresh and in accordance with the Law be issued.

Having considered the submissions levelled by the learned Counsels for the parties and upon perusal of the records, I found it pertinent to start with the first ground of appeal which challenges the trial Court trying this matter without jurisdiction.

Its trite law that ascertainment of jurisdiction is fundamental before entertaining any judicial matter. While discussing this proposition, this Court (Dyansobera J), in RUTH VICTOR (As the administratrix of Estate of the Late Benjamin Philip Badehe) VERSUS EDWARD EMMANUEL BADEHE and 1 Another (supra), while citing the case of RICHARD JULIUS RUGAMBURA V. ISSACK NTWA MWAKAJILA AND TRC, Civil Appeal No. 2 of 1998 had this to say, that:

"The question of jurisdiction is paramount in any proceedings. It is so fundamental that in any trial even if it is not raised by the parties at initial stages, it can be raised and entertained at any stage of the proceedings in order to ensure

that the Court is properly vested with jurisdiction to adjudicate the matter before it."

At the hearing of this appeal, the learned Counsel for the respondent submitted that the trial Court had neither territorial nor legal jurisdiction to handle the matter as the law applicable in the said case is the Probate and administration of Estate Act [CAP 352 R.E 2002]. The reasons he advanced are that the deceased abandoned his customary ways of life before his death, the fact which is supported by evidence.

I have gone through the trial Courts records, the deceased one Pastory Mutabingwa Faiko, contracted a Christian marriage with the Respondent one Ursula Bazal Sagi. They however separated in 1967 and thereafter, the deceased married the appellant, one Angela Filbert. Through a declaration made on 10th August 2018, the deceased renounced his second marriage to the appellant in order to obtain Sacrament (The said declaration is available in the record)

With this brief History of the deceased's marriage life, it is clear that by Marrying the appellant, he adopted a customary mode of life. However, having renounced it through his declaration, he abandoned the customary previous mode of life. On that basis, the legal question to ask ourselves is whether the Primary Court was vested with jurisdiction to entertain the matter at hand.

By virtue of Section 18(1)(a)(i) of Magistrate Courts Act [CAP 11 R.E 2019], the jurisdiction of the primary court is confined on matters of civil nature where the law applicable is Islamic or Customary Law. This section read as follows that: -

"18. (1)A primary Court shall have and exercise jurisdiction –

(a) In all proceedings of civil nature-

(i) where the law applicable is customary law or Islamic law:

The learned counsel for the appellant was of the view that by marrying the appellant as a second wife, that entail he abandoned his Christian ways of life. Much as the court agrees that abandonment of Christian ways of life may lead to the deceased' estate be administered under the customary law, the circumstances in this case are different. As it is hinted above, the deceased made a declaration renouncing his second marriage. Since there is evidence to that effect, then the primary court had no jurisdiction to entertain the matter. This court had on several occasions dealt with matters with similar nature to the present case. In the case of Gibson Kabumbire v. Rose Nestory Kabumbire (supra) held inter alia that:

"It is trite law that primary courts have jurisdiction in probate matters concerning Christians where it is proved that they lived customary mode or manner of life in which situation the question of professing Christianity does not interfere with the

*administration of his or her estate. The reason is that by merely being a Christian does not mean one has been detached from his or her customary life, **there must be evidence to support the same...*** [emphasis added]

Based on the evidence regarding deceased declaration detaching himself from his previous marriage that entail he intended his estate to be administered under the applicable Christian Law which is Probate and Administration of Estate Act [Cap 352 R.E 2002]. On that basis the primary court had no jurisdiction to entertain the same as the law applicable is neither customary law nor Islamic law.

Since this ground is sufficient to dispose of this appeal, I found no reasons to dwell on other grounds of appeal. This appeal is thus unmerited and it is hereby dismissed. The judgment and order of the District Court are upheld.

The parties are advised to initiate the fresh probate and administration process in accordance with the law. Otherwise, there is no order as to costs.

It is so ordered.

 
A.Y. Mwenda
Judge
02.06.2023

Judgment delivered in chamber under the seal of this court in the presence of the Appellant Ms. Angela Philbert and in the presence of Joseph Bitakwate Learned Counsel for the respondent.




A.Y. Mwenda

Judge

02.06.2023