

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB- REGISTRY OF MANYARA

AT BABATI

PC. CIVIL APPEAL NO. 6 OF 2023

(Appeal from the decision of the District Court of Babati in Civil Revision No. 1 of 2023

original Probate and Administration Cause No. 36 of 2022 Babati Primary Court)

GEORGE ABDON KILLINGA.....1ST APPELLANT

EVANCE ABDON KILLINGA.....2ND APPELLANT

HENRY ABDON KILLINGA.....3RD APPELLANT

VERSUS

ANNA JOSEPH RIWA

(Administratrix of the estate of late **ABDON ALOYCE KILLINGA**)...1ST
RESPONDENT

MICHAEL ALOYCE KILLINGA

(Administrator of the estate of late **ABDON ALOYCE KILLINGA**)..2ND **RESPONDENT**

JUDGMENT

Date: 24/5/2023 & 30/6/2023

BARTHY, J.

The above-named respondents petitioned for and subsequently were granted letters of administration of the estate of the late Abdon Aloyce



Killinga (the deceased) from Babati Primary Court (hereinafter referred to as the trial court).

It is on record that, the deceased passed away intestate on 14/11/2021 surviving with widow who is now the first respondent and children (some are the appellants herein).

The respondents petitioned for the letters of administration of the deceased estate without any no objection against them. Hence, they were duly appointed as co-administrators of the deceased's estate.

Sometimes later the applicants lodged an application for revision before the District Court of Babati (the district court) against the decision of the trial court. Essentially the applicants' major ground of complaint was that the deceased professed a Christian faith and all of his time he lived a Christian life. Therefore, in the dictates of the law, the trial court had no jurisdiction to entertain the matter.

Upon hearing the parties, the district court dismissed the application and upheld the decision of the trial court. Aggrieved with the decision of district the appellants preferred the instant appeal with four grounds of appeal as follows;



- 1. That the trial magistrate erred in law and fact for holding that the Babati Primary Court has jurisdiction to entertain the probate cause No. 36 of 2022 despite the evidence that the deceased professed and lived a Christian way of life.*
- 2. That the trial magistrate erred in law and fact for holding that the deceased estate was already distributed among the heirs despite the fact that there is no filled(sic) and signed(sic) forms V and VI.*
- 3. That the trial Magistrate erred in law and fact for (sic) holding that the law applicable in administration of the deceased estate will be determined by people who will benefit from the deceased estate.*
- 4. That the trial magistrate erred in law and fact for holding that the issue of jurisdiction shall be raised at the earliest state (sic) while the same can be raised at any stage before closure of the matter at hand.*

When the appeal was called on for hearing Mr. Amani Mkwama learned advocate appeared for the appellants, while Mr. Festo Jackson



learned advocate appeared for the first respondent and the second respondent appeared in person. The appeal was disposed of orally.

Mr. Mkwama argued on the first and fourth grounds of appeal together where he stated that the deceased professed Christianity faith. He regarded Section 18 (1)(a) of the Magistrates' Courts Act [CAP 11 R.E 2019], (the MCA) read together with Rule 1 (1) of the 5th Schedule to the same Act which provides for the jurisdiction of the primary courts on probate matter, where the law applicable is Islamic or customary law.

He contended that, once the deceased professed Christianity faiths then the primary court ceases to have jurisdiction. He added that, the deceased in the instant matter professed and lived a Christian life which was proved by his mode of life and the fact that he celebrated the Christian marriage.

To fortify his arguments, Mr. Mkwama referred to the decisions of this court in the cases of **Emmanuel Baso v. Jackson John Mponenja**, Pc Probate Appeal No. 7 of 2018 and **Sikujua M. Mwasoni v. Sikudhani Hans Mwakyoma**, Probate Appeal No. 10 of 2022 and **Rev. Florian**



Katunzi v. Goodluck Kulola & 7 others, Pc Probate Appeal No. 2 of 2014 (all unreported).

He went on stating that, in those case the issue for determination was on jurisdiction of the primary court in probate and administration matters, where the deceased professed Christianity. The court in those case held that, the primary court does not have jurisdiction.

Thus Mr. Mkwama faulted the district court in its findings that, the issue of jurisdiction was to be raised at earliest possible and not in revision stage. He was firm that, the issue of jurisdiction goes to the root of the case and it can be raised at any stage.

Submitting on the second ground of appeal where the trial court had determined that the probate and administration matter had been closed while the inventory and final accounts forms were not properly filed before the trial court. As there was no proof as to how the properties of the deceased were distributed to the heirs.

Mr. Mkwama was firm that the procedures to close the said matter were not followed, thus the district court had misdirected itself.



His arguments with regard to the third ground Mr. Mkwama faulted the district court having decided that the parties were at liberty to decide on the law applicable over the deceased estate. He was firm that it is the mode of life of the deceased that governs the law to be applicable.

The test on the mode of life of the deceased in determining the jurisdiction of the court was considered by the court in number of cases just to mention just few, he cited the cases of **Gibson Kabumbulile v. Rose Nestory Kabumbulile**, Probate Appeal No. 12 of 2020, High Court at Mwanza, **Benson Benjamin Mengi and 3 others v. Abdiel Reginald Mengi and others**, Probate and Administration Cause No. 39 of 2019, High Court at Dar es salaam quoted from the case of **Sikudhani Hans Mwakyoma v. Sikujuu M. Mwasoni**, Probate Appeal No. 10 of 2022 High Court at Mwanza.

Mr. Mkwama argued that, on all cases the court considered two tests in determining the law applicable. The first test being the intention of the deceased when he left the will. The second being looking on the mode of life of the deceased.



He thus regarded the mode of life of the deceased in this matter to have confessed Christian faith and therefore his estate ought to be administered according to his rites. Thus, the primary court was said to lack jurisdiction to determine the matter.

Mr. Mkwama urged this court to quash the decision the decisions of the primary court and that of district court, nullify its proceedings and the appointment of the administrators of the deceased estate and order retrial before the court of competent jurisdiction.

On reply submission made by Mr. Jackson contended that, the appellants were involved in all stages and they never objected to the appointment of the respondents as the administrators of the deceased estate.

He added that, the respondents were able to discharge their duties as administrators and the assets were distributed to the heirs. The fact that was said to have never been contested by either party at any stages.

Mr. Jackson further retorted that, it was not made clear by the appellants as to why the issue of the jurisdiction was not raised at the earliest stage.



With respect to the referred case authorities cited by appellants' counsel, Mr. Jackson regarded to be irrelevant to the circumstance of this matter; he further pointed out that the cited case authorities are distinguishable and not binding to this court. He therefore prayed for the appeal to be dismissed.

The second respondent on his reply submission he initially opposed the appeal, then changed to support it stating that he was compelled by the first appellant to close the probate matter.

Rejoining, Mr. Mkwama essentially reiterated his submission in chief.

Having gone through the parties' rival submissions and going through the records, in determining merit of this appeal or otherwise, the pertinent issue for my determination gathered from the grounds of appeal is whether the trial court had jurisdiction to entertain the matter.

In addressing the question of jurisdiction which was raised at the district court for the first time through revisional proceedings, the district magistrate was of the view that, the said objection should have been raised at the earliest possible stage and not during the revision stage. The



view which was subscribed by Mr. Jackson, learned advocate for the first respondent.

Mr. Mkwama was of the settled mind that the issue of jurisdiction of the court can be raised at any stage even on appeal.

With respect I agree with the arguments of Mr. Mkwama that, the issue of jurisdiction of the court can be raised at any stage even on appeal or revision. This position was underscored by the Court of Appeal in the case of **R. S. A. Limited v. Hanspaul Automechs Limited Govinderajan Senthil Kumal**, Civil Appeal No. 179 of 2016, Court of Appeal of Tanzania at Dar es Salaam (unreported) held that;

It is settled law that, an objection on a point of law challenging the jurisdiction of the court can be raised at any stage, it cannot be gain said that it has to be determined first before proceeding to determine the substantive matter

This was also stated in the case of **Shahida Abdul Hassanal Kassam v. Mahedi Mohamed Gulamali Kanji**, Civil Application No. 42 of 1999 (unreported).

— *at my*

However, for unnecessary delays and in order to avoid unnecessary utilization of resources, it is advised to be raised at the earliest possible stage. This was emphasized in the case of **CRDB PLC v. Lucy Wambura**, Revision No. 459 of 2021, High Court at Dar es salaam (unreported).

The issue of the jurisdiction of the court is the creature of the statute and a bedrock prior determination of the matter. It cannot be conferred by the parties to the case as decided by the district court stating;

It is true and correct that the records of this case do not show which kind of law will be applicable at the time of distribution of deceased estate. This will be determined by all people whom will be benefited from the deceased properties.

The district court did error to determine that it is the heirs/beneficiaries who will determine the law applicable in the administration of deceased estate. In the case of **Tanzania Electric Supply Company Limited (TANESCO) v. Independent Power Tanzania Ltd (IPTL)** [2000] TLR 324 in which, the Court reiterated the principle that, parties cannot by agreement confer jurisdiction to a court,



As rightly submitted by Mr. Mkwama that, the powers of the primary court in administration of the estate of a deceased person are governed by the provision of Section 18 (1)(a) read together with Rule 1 (1) of the Fifth Schedule to the MCA.

According to Section 18 (1)(a) of the MCA the primary court has jurisdiction in all proceedings of a civil nature where the law applicable is customary law or Islamic law.

The provision of Rule 1 of the Fifth Schedule to the MCA provides that;

*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: [Emphasis added]*

In determining the law applicable, as rightly pointed out by Mr. Mkwama that the court had always considered two tests. The first test



being the intention of the deceased when he left the will behind. The second being looking on the mode of life of the deceased if he died intestate.

In the present matter, the deceased died intestate. Therefore, the test of mode of life of the deceased is crucial in order to determine the law applicable in the administration of the deceased estate.

As Mr. Mkwama properly stated that judicial precedents when there is no will left behind then the mode of life test will be considered in determining the law applicable in the administration of the deceased estate. As cited in the cases of **Gibson Kabumbulile v. Rose Nestory Kabumbulile**, (supra), also in the case of **Benson Benjamin Mengi and 3 others v. Abdiel Reginald Mengi and others** (supra) and the case of **Sikudhani Hans Mwakyoma v. Sikujua M. Mwasoni** (supra).

Going through the records of the trial court, it reveals that, the deceased was a Christian and he professed Christianity. This is supported by the evidence of PW1 (the first respondent herein) quoted to have informed the trial court that;



*"Marehemu ni mume wangu wa ndoa ya kikristo
tuliyofunga Babati, Marehemu alikuwa muumini wa dini
ya Kikristo"*

Where the first respondent informed the trial court that the deceased was her husband whom they celebrated the Christian marriage and lived a Christian life. Her evidence PW1 was supported by that of PW2 who is quoted to have said;

"...marehemu alikuwa muumini wa dini ya Kikristo..."

*...translated to mean (the deceased was the Christian
believer)*

Going by the above pieces of evidence it is plainly clear that the deceased was a Christian and his modality of life followed Christian norms. Equally the form No. 1 which instituted a probate matter before the trial court shows clearly that the deceased was a Christian.

The above position was succinctly stated in the case of **Ibrahimu Kusaga v Emmanuel Mweta** [1986] TLR 26 in which it was stated that;



A Primary Court may hear matters relating to grant of administration of estates where it has jurisdiction, i.e., where the law applicable is customary law or Islamic law.

From the above decision it is apparently clear that the trial court had no jurisdiction because the deceased professed Christianity and he also died professing Christianity.

This view was further subscribed in the decisions of **Emmanuel Baso v. Jackson John Mponenja** (supra), **Sikujua M. Mwasoni v. Sikudhani Hans Mwakyoma** (supra) and **Rev. Florian Katunzi v. Goodluck Kulola & 7 others** (supra) which I find them relevant to the instant matter.

It is therefore regardless of the stage the matter had reached before the trial court, any matter determined without the jurisdiction is null and void ab initio.

In upshot and for the foregoing reasons, this appeal has merits. The proceedings and decisions of the two courts below are quashed and set aside, the appointment of the respondents as co-administrators of the deceased estate is also annulled.



Interested party is at liberty to lodge a probate cause in a court of competent jurisdiction. Given the nature of the matter I will not make orders as to costs.

It is so ordered.

Dated at Babati this 30th of June, 2023.



A handwritten signature in blue ink, appearing to read "G. N. Barthly", written over a horizontal line.

G. N. BARTHY,

JUDGE