IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF DODOMA

AT DODOMA

PC. CIVIL APPEAL NO. 10 OF 2022

(Arising from the decision of the district court of Singida in Civil Appeal No. 3/2022)

FRANK MASANGYA.....APPELLANT

VERSUS

ADVENTINA VALENTINE MSONYI
(Administratrix of estate of late
Buhacha Baltazar Kichinda).....**RESPONDENT**

JUDGMENT

Date of last Order:18th July, 2023
Date of Judgment:28th July 2023

MASABO, J:-

This is a second appeal. The appellant is aggrieved by a decision of Singida District Court which dismissed the appeal and confirmed the appointment of the respondent as administratrix of the estate of her late husband one, Buhacha Baltazar Kichinda (the deceased). In particular, he is aggrieved by the fact that; the district court endorsed the decision of Utemini Primary Court which appointed the respondent as administratrix of the estate of the deceased after it overruled his objection that the primary court had no jurisdiction to entertain the matter. He has fronted the following three grounds of appeal:

1. That, the Honourable District Court erred in law and facts by holding that the late Buhacha Baltazar Kichinda during his life time lived customary way of life while there is no evidence to prove the same.
2. That, the Honourable District Magistrate erred in law and facts by misdirecting himself when he justified that civil marriage contracted between the respondent and

the late Buhacha Baltazr Kichinda amounted to a customary way of life.

3. That, the Honourable District Magistrate erred in law and facts when he failed to distinguish between Christianity and denomination consequently mixed-up conditions for denomination to be the same as conditions for Christianity.

Hearing was done by way of written submission as ordered by my predecessor, Hon. Mdemu, J (as he then was) on 4th May 2023. Both parties enjoyed the service of legal minds. Submissions by the appellant were drawn and filed by Mr. Lucas Komba while those for the respondent were drawn and filed by Mr. Jackson Mayeka, both learned counsels.

Submitting in support of the appeal. Mr. Komba, counsel for the appellant submitted that the trial primary court erroneously entertained the application for letters of administration in Probate and Administration Cause No. 33 of 2020 as it had no jurisdiction. He amplified that, whereas the law clothes primary courts with powers to hear and determine probate and application for letters of administration of estates regulated by customary law and Islamic law, in the present case, the trial court exceeded its jurisdictional limits by entertaining the application for administration of an estate which is regulated neither by customary law nor Islamic law. Applying the mode of life test in support of his point, he argued that, the deceased professed Christian faith. He was baptised on 30th August, 1958 at the parish of Komuge. His certificate of baptism having number LB No. 357 and one Casmirus Mwita stood as his godfather. Later on, on 29th June, 1969 he had his first holy confirmation at Komuge parish and continued to profess Christianity to his last dates

and that, at the time of his death, he was congregating as a member of Saint Joseph the worker at Mandewa Singida Municipal.

In further amplification, Mr. Komba submitted that, the deceased contracted a civil marriage with his first wife and not customary marriage as the trial court held. He contended that, the fact that the deceased contracted a civil marriage does not mean that he lived a customary way of life. Even the respondent who claimed that the deceased was living a customary way of life did not render any proof that indeed, the deceased lived a customary way of life. He also argued that the fact that the deceased was not buried according to Christianity rites does not revoke his right of being a Christian. In conclusion he argued that the two lower courts did not consider the evidence adduced by the appellant and assigned no reason as to why they did not consider it. Consequently, they materially erred in law and facts. Supporting his submission, he cited the case of **George Kumwenda vs. Fidelis Nyirenda** [1981] TLR 211.

In reply, Mr. Mayeka submitted that the first appellate court was right in upholding that the trial court's finding that the deceased lived a customary way of life as there was enough evidence to prove the same. He argued that the respondent petitioned before the trial court for letter of administration by filing form No. 1 where it was stated that the deceased died intestate and he lived customary way of life. The evidence supporting this fact included, the act of the deceased contracting two marriages with two different women and none of which was religious marriage as they were all civil marriages. He added that, this was stated in the evidence was adduced by the respondent, PW2 and PW3 in Probate Cause No. 3 of

2020. He argued further that, even burial service of the deceased was not conducted in accordance with Christian rites. It was Mr. Mayeka's submission that, two tests, namely the deceased's mode of life and and his intentions, are crucial in determining the law applicable in the administration of the deceased. He referred to the case of **Catherine Priscus Massawe vs. Kamili Proti Massawe** Misc. Civil Appeal No. 05 of 2020 (unreported) and **Peles Moshi Masoud vs. Yusta Kinuda Lukanga,** Pc. Probate Appeal No. 04 of 2020 (unreported) in support.

He amplified that in **Catherine Priscus Massawe's** case the deceased contracted Christian marriage but the court considered the way of life the deceased lived before his death. In the instant case the deceased never prophesied Christian values as he had a child born out of wedlock, married two wives in different occasions, never contracted a Christian marriage and he was never buried in accordance with Christian rites. Moreover, it was highlighted that, being a Christian by name is not enough to make a person to be recognized as such but the way and conducts of a person make him to be Christian. Thus, the mere fact that the deceased was baptised, a believer of Roman Catholic church and member of saint Joseph the worker of Mandewa Singida is not enough to make him a Christian but his conducts showed that he lived a Christian way of life. Mr. Mayeka distinguished the case of **George Kumwenda vs. Fidelis Nyirenda** (supra) and argued that unlike in that case, the deceased herein did not prophesy Christianity.

The appeal was scheduled for judgment on 30th June 2023. While composing the judgment I observed the following fascinating background

of this appeal. It landed in court for the first time in 2020 as Administration Cause No. 33 of 2020 before Utemini Primary Court. This was soon after the interstate death of the said Buhacha Baltazar Kichinda (the deceased) on 5/5/2020. The deceased was survived by several heirs, including his wife one Adventina Valentine Msonyi who is the respondent in this appeal and his son, Frank Masangya who is the appellant herein.

The probate cause was instituted by the appellant and the respondent who jointly moved the trial court, Utemini Primary Court, for letters of administration of the deceased's estate. On 17th July, 2020, one Leticia Ihonde, identified as a former wife of the deceased and the mother to the appellant, objected the grant of letters of administration to Adventina Valentine Msonyi. After hearing of the parties, the trial court overruled the objection on ground that there was sufficient evidence that the respondent was the legal wife of the deceased and that, the caveator had been divorced from the deceased. Thereafter, the respondent defaulted appearance for more than three times without notice to the court. Consequently, the hearing of petition proceeded ex parte him and on 2nd November 2020, the respondent was appointed as sole administratrix of the estate of the late Buhacha Baltazar Kichinda.

However, later on, after the administratrix had already assumed her roles, the appellant emerged. Aggrieved by the appointment, he went to the District Court of Singida where he filed an application for revision before in Civil Revision No. 2 of 2020 complaining that the trial court wrongly entertained Probate Cause No. 33 of 2020 as it has jurisdiction. After she was served, the respondent raised a preliminary objection that, the

application contravened rule 30(1) of the Magistrates' Courts Act (Civil Procedure in Primary Courts) Rrules GN. No. 310 of 1964 and GN. No. 119 of 1983 which provides that a remedy available to a person aggrieved by a matter which was heard *exparte,* is to apply for an order of setting aside *ex-parte* order. The objection was sustained and the application was forthwith struck out.

Thereafter, the appellant went back to the trial court where he filed an application to set aside the decision of the trial court but the same was dismissed for being time barred as per provision of rule 5(1) of the Customary Law (Limitation of proceedings) Rules, 1963 GN. No. 311 of 1964. Aggrieved by the decision of the trial court refusing to set aside the appeal No. 4 of 2021. This too ended barren after it was dismissed for want of merit. The record shows that on unknows dates, the appellant's counsel wrote a letter to the District Resident Magistrate in charge of Singida District Court complaining that Probate Cause No. 33 of 2020 was improperly filed in the primary court as the same had no jurisdiction. Moved by this complaint, the court a revision, Civil Revision No. 08 of 2021, *suo motto and* invited the parties to a hearing. After all the parties were heard, the court issued its ruling on 04th November, 2021 to the effect that it has found the application to have no merits. It subsequently ordered that the issue of jurisdiction be raised before the trial court.

As directed by the district court, although his application for leave to set aside the exparte appointment order had been dismissed, the appellant went back to the primary where he raised an objection complaining that, the primary court had no jurisdiction to entertain the matter as the

deceased professed Christianity and had, because of that, abandoned the customary way of life. After inviting the parties to address it on this issue, on 20th of January 2022, the primary court overruled the objection holding that it was clothed with jurisdiction hence, it committed no error in entertaining the matter. Aggrieved, the appellant appealed to the District Court through Civil Appeal No. 3 of 2022. The first appellate court upheld the decision of the trial court hence the present appeal.

One pertinent issue emerging from these facts and requiring the immediate attention of this court is, whether, after the trial court had assumed jurisdiction and appointed the administratrix of the estate on 2nd November 2020, it was legally valid for it reopen the matter and entertain the objection on jurisdiction raised belatedly by the appellant and whether, the trial court's decision on this issue which is the kernel of this appeal has any legal standing. As these points were not among the grounds of appeal set out in the memorandum of appeal, pursuant to Order XXXIX rule 2 of the Civil Procedure Act, Cap 33 RE 2019, I invited the partiers to address the court.

Addressing the court on this issue, Mr. Komba counsel for the appellant submitted that the reopening of the matter by the trial court was in good order. He cited rule 9(1) (b) of the Primary Courts (Administration of Estates) Rules GN No. 49 of 1971 and submitted that, according to this rule a beneficiary to the deceased estate has a right to file an application for annulment of the appointment of the administrator if there are facts that can render the appointment invalid. He argued that the question of jurisdiction is one of such as it had the effect of rendering appointment

invalid. He also added that, since the probate cause was not closed the court had jurisdiction.

Mr. Mayeka on his part, submitted that the trial court materially erred in entertaining the issue of jurisdiction as it had already assumed jurisdiction and appointed the administratrix of the estate. He argued that the jurisdiction issue had the effect of overturning the decision which the same court had previously rendered. He further argued that, this was unprocedural as the primary court had no powers to overturn its own decision. If the appellant was aggrieved by the appointment, he ought to have followed proper procedure; that is filing a revision or an appeal before a higher court. He cited the case of **Scholastica Benedict vs. Martin Benedict** [1993] TLR 1(CAT).

I have considered the submissions by both parties. There is no dispute and I entirely agree with Mr. Komba that, the question of jurisdiction is of paramount importance and courts are enjoined to first ascertain if they have jurisdiction before entertaining any judicial matter. The Court of Appeal instructively held so in **Richard Julius Rugambura vs. Issack Ntwa Mwakajila and Tanzania Railways Corporation,** Civil Appeal No. 2 of 1998 (unreported), when it stated that -

> The question of jurisdiction is paramount in any proceedings. It is so fundamental that in any trial even if it not raised by the parties at the 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.

Cementing this position in **Tanzania Revenue Authority vs. Tango Transport Company Ltd,** Civil Appeal No. 84 of 2009 [2016] TZCA 84 [TANZLII], the Court of Appeal held that: -

> Principally, the objection to the jurisdiction of the court is a threshold question that ought to be raised and taken up at the earliest opportunity, in order to save time, costs and avoid an eventual nullity of the proceedings in the event the objection is sustained.
>
> The law is well settled and Mr. Bundala is perfectly correct that a question of jurisdiction can be belatedly raised and canvasses even on appeal by the parties or the court *suo moto* as it goes to the root of the trial (see, **Michael Leseni Kweka, Kotra Company Ltd, New Musoma Textiles Ltd,** cases supra). Jurisdiction is the bedrock on which the court's authority and competence to entertain and decide matters rests.

Similarly, and as correctly submitted by Mr. Mayeka, the law is settled that, when a court decides on certain issue, it cannot reopen such issue save on instances allowed by the law as, after deciding such issue it becomes *functus officio.* As held in **Kamundu vs. R** (1973) EA 540: -

> A court becomes functus officio when it disposes of a case by a verdict of a guilty or passing sentence or making some orders finally disposed of the case.

The same principle in **Bibi Kisoko Medared vs. Minister for Lands Housing and Urban Developments and Another** [1983] TLR 250 where it was held that: -

> In a matter of judicial proceedings once a decision has been reached and made known to the parties, the adjudicating tribunal thereby becomes functus officio.

And, in **Hassan Ng'anzi Khalfan v. Njama Juma Mbega and Another,** Civil Application No.336/12 of 2020 (unreported), the Court of Appeal while discussing its review powers, remarked that:-

> "We wish, in the first place, to point out that powers of the Court to review its decision constitutes an exception to the general rule that once a decision is composed, signed and pronounced by the Court, the Court becomes functus officio in that it ceases to have control over the matter and has no jurisdiction to alter or change it. [emphasis added]

From the above narrated facts, it is crystal clear that, the trial court reopened the matter after being instructed by the district court and this was after several days had lapsed since the trial court seized jurisdiction and appointed the respondent as a sole administratrix of the estate. Mr. Komba has submitted, and I agree with him that rule 9(1) of the Primary Courts (Administration of Estates) Rules vests in the primary courts powers to reopen its decision for purposes of revoking or annulling the appointment on certain circumstances say, when the letters were fraudulently obtained, when the court was ignorant of certain facts, when the appointment was defective in substance or when the grant has become useless or inoperative. What I do not agree with him is his argument that, the court can reopen the matter and interrogate whether or not it had jurisdiction to determine the application.

Moreso, in this case where the appellant had previously unsuccessfully attempted to move the court under rule 9(1). As it has been alluded to earlier on, his attempt to move the court to revoke the appointment of the administrator ended in vain after it was dismissed for being time

barred. Thus, by the time the appellant returned to the trial court, there were two decisions of the same court against him, that is, the ruling dated 2/11/2020 by which the respondent was appointed a sole administrator and the ruling dated 22/1/2021 by which his application for revocation of the respondent was dismissed for being time barred. The anomaly is too vivid in the proceedings because, the appellant's return to the court was by way of 'Notisi ya Pingamizi la Awali', that is 'A Notice of Preliminary Objection'. For convenience, I will reproduce the notice. It stated;

> "Notisi ya Pingamizi la Awali
> Fahamu kuwa, wakili wa upande wa mleta maombi unatarajia kuibua pingamizi la kisheria na kuomba mahakama yako tukufu kufuta shauri la Mirathi No. 33/2020 kwa gharama kwa hoja ifuatayo:
> Kwamba mahakama ya Mwanzo Utemini ilisikiliza shauri la Mirathi Na 33/2020 wakati haina mamlaka kisheria kusikiliza shauri hilo.

It would appear that, having been ordered by the district court to return to the primary court, the applicant hurriedly grabbed the opportunity as it conveniently created an avenue for circumvention of the law and have the two standing decisions of the trial court overturned. As the content of the notice demonstrates, the appellant did not move the court under rule 9(1) but it moved the court by way of preliminary objection. This was materially wrong as a preliminary objection is raised at preliminary stages of the matter. Under no circumstances can it be raised after a decision has been entered.

In my further reading of the record, I have observed that, the respondent's counsel raised the issue of *functus officio* in the course his

reply submission to the so-called notice of preliminary objection. He argued that;

> **Mheshimiwa Hakimu;**
> Mahakama yako kwa sasa haina mamlaka ya kuweza kusikiliza pingamizi hilo kwasababu mikono yako imefungwa (functus officio) kutokana na maamuzi yaliyotolewa kwenye shauri namba 33/2020 ya kumteua mjibu maombi. **Katika kesi ya Scholastica Benedict vs. Martin Benedict (1993) CA TLR 1 Mahakama ya rufani ya Tanzania ilisema "As a general rule a primary court has no jurisdiction to overturn its own decision as it becomes functus officio after making it decision..."**

In essence, the counsel was asking the court not to entertain the matter as having appointed the respondent as an administratrix in Probate No. 33 of 2020, it became *functus officio*. In support of this point, he cited the case of Scholastica **Benedict vs. Martin Benedict** (supra). In rejoinder, the appellant's counsel responded to this argument. He rejoined that the argument that the court was *functus officio* was devoid of any merit as the trial court had to reopen the matter and decide the issue following the orders it received from its superior, the District Court of Singida in Revision Case No. 08 of 2021. Following these contending submissions, it was expected that the trial court would resolve the contention prior to determining the merit of the objection. Ironically, it passed unnoticed by the primary court as there was no discussion let alone, determination of the same. Thus, it remained undetermined as the court went straight to the merit of the application. This was a material error. Considering that both parties had addressed the trial court on the same issue, it was incumbent for the court to deliberate and determine it. Similarly, this issue

skipped the attention of the first appellate court hence the necessity of addressing it at this stage.

Back to the merit of the two points, in the foregoing of what I have stated, it is obvious that the reopening of the matter by the trial court for purposes of entertaining the preliminary objection after it had already assumed jurisdiction and appointed the administratrix of the estate was fatally wrong. Needless to emphasis, just like in civil suits, in probate matters, the order appointing the administratrix is tantamount to a judgment of the court and the same remain valid unless overturned by the court of competent jurisdiction or vacated by the same court under rule 9(1) of the Primary Courts (Administration of Estates) Rules.

In the upshot, I nullify, quash and set aside the proceedings of the trial court from 17th December 2021 and its ruling delivered on 20th January 2022. I subsequently nullify, quash and set aside all the proceedings and the judgment of the District Court of Singida in Civil Appeal No. 3 of 2022 for being predicated in nullity proceedings and ruling. This being a probate matters, I make no orders as to costs. It is so ordered.

DATED at **DODOMA** this 28th day of July, 2023

J. L. MASABO
JUDGE