

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(MOROGORO SUB-REGISTRY)
AT MOROGORO

PC. PROBATE APPEAL NO. 8 OF 2022

(Arising from Probate Appeal Cause No. 3 of 2022; In the District Court of Morogoro, at Morogoro which Originated from the Decision of Urban Primary Court of Morogoro, at Morogoro in Probate Cause No. 321 of 2021 delivered on 4th February, 2022).

MOHAMED HAMISI JUMANNE MALINDA.....1ST APPELLANT

NURU ISSA HUSSEIN2ND APPELLANT

VERSUS

CHIKU HAMISI JUMANNE..... RESPONDENT

JUDGEMENT

31st August, 2023

CHABA. J.

The appellants, Mohamed Hamisi Jumanne and Nuru Issa Hussein have jointly appealed to this Court against the Judgment and Orders of the District Court of Morogoro, at Morogoro in Probate Appeal No. 3 of 2022, delivered on the 1st day of July, 2022. In their petition of appeal, the appellants are challenging the said decision for setting aside the decision of the Urban Primary Court of Morogoro, at Morogoro in Probate Cause No. 321 of 2021, delivered on 4th February, 2022. Their petition of appeal has been premised upon the following three grounds of appeal as hereunder: -

1. *That, the trial magistrate erred in law and fact for failure to interpret properly the provisions of the Law of the Child hence arrived in a wrong conclusion.*
2. *That, the trial resident magistrate erred in law and fact by ignoring the evidence testified by SM.3 in the trial court who used to be the wife of the deceased.*
3. *That, the trial magistrate erred in law and fact for disregarding the strong evidence of SU.4 (Mwanahawa Ramadhani) who was the uncle of the deceased.*

Before dwelling on into the petition of appeal, I find it apt to give the background story that gave rise to this petition of appeal as discerned from the Court records. The background story goes like this: At the Primary Court of Morogoro, at Morogoro the respondent herein instituted a Probate Cause No. 321 of 2021 to administer the estates of his late father Hamis Jumanne Malinda who passed away in 2004. Unexpectedly, the appellants herein filed an objection proceeding against Probate Cause No. 321 of 2021 alleging that the petitioner / respondent, Chiku Hamisi Jumanne excluded them from the lists of lawful heirs while are among the beneficiaries.

Upon hearing both parties, the trial Primary Court believed and it was convinced that the appellants were lawful heirs to the deceased's estates. It is on record that, the trial Court further believed that, the first appellant was a child of the late Hamisi Jumanne Malinda while the second appellant was a

grand-daughter of the late Hamisi Jumanne Malinda. According to the record, the trial Primary Court was of the view that, since Moshi Hamis Jumanne Malinda (also deceased) was the daughter of the late Hamis Jumanne Malinda then her daughter (who is the 2nd appellant) was also entitled to inherit the estates of his grand-farther on behalf of her late mother, Moshi Hamisi Jumanne Malinda.

As already stated earlier on, this decision didn't amuse the respondent herein (Chiku Hamisi Jumanne), she therefore decided to file her appeal before the District Court of Morogoro, at Morogoro where it was registered as Probate Appeal No. 3 of 2022. The first Appellate Court after re-evaluating the entire evidence of the trial Primary Court and submissions on the grounds of appeal, nullified the judgment of the trial Primary Court holding that, there was no cogent evidence adduced before the trial Primary Court which proved that, appellants are either children or lawful heirs of the estates of the deceased, one Hamisi Jumanne Malinda. In its finding, the first Appellate Court directed her mind on the requirement of the provision of section 35 of The Law of The Child Act, [CAP. 13 R.E. 2019] which provides for the need of evidence in proving parentage of the child. It is the holding of the first Appellate Court that going through the evidence on record, current position of the law and the decision of this Court in the case of **Judith Patrick Kyamba Vs. Tunsume and Others (Probate and Administration Cause No. 50 of 2016) [2020] TZHC 1364**



(28 May 2020), the appellants are not children of the deceased, Hamisi Jumanne Malinda.

Having briefly stated the background facts giving rise to the instant appeal, during hearing of the present appeal, the appellants were represented by the Mr. Hassan Nchimbi, the learned advocate whereas the respondent enjoyed the legal services of Mr. Batholomew Tarimo, also learned advocate. By consensus, parties agreed to dispose of the appeal by way of written submissions and both parties complied with the Court's scheduled orders.

The appellant's counsel Mr. Hassan Nchimbi was the first person to take the floor. He started by praying to the Court that he will argue ground one of the petition of appeal separately but ground two and three together.

Submitting on the first ground, Mr. Hassan Nchimbi highlighted that the evidence adduced before the trial Primary Court is clear that, the first appellant is a biological child of the deceased, Hamis Jumanne Malinda. He pointed out that, in the trial Primary Court, the first appellant (Mohamed Hamisi Jumanne Malinda) brought a witness namely; Zena Yusuph (SM.3) who was the ex-wife of the late Hamisi Jumanne Malinda and her mother. Mr. Nchimbi submitted that, SM.3 gave unchallenged evidence to the effect that, she was married by the deceased and they were blessed with two issues including the first appellant. He went on submitting that, another evidence which was unchallenged at trial was adduced by SU4 (Mwanahawa Ramadhani), who was an independent witness of the Court. Mr. Chimbi averred that, the said witness

testified that she knows the first appellant as a child of the deceased, Hamisi Jumanne Malinda and further testified that the mother of Nuru Issa Hussein was the daughter of the deceased, Hamis Jumanne Malinda. It was Mr. Nchimbi's submission that, had the first Appellate Court directed properly its mind on this unchallenged evidence, it could have not decided as it did. He maintained that, taking into consideration the above facts it was his firm view that, the elements of proving parentage under section 35 (a) & (d) of the Law of The Child Act were met.

As regard to the 2nd and 3rd grounds, I found it more or less a repetition of what was submitted by the Counsel for the appellant in the first ground of appeal. I say so because, Mr. Nchimbi is stressing on the probative values of the evidence adduced before the trial Primary Court especially the testimonies of SM.3 (Zena Yusuph) and that of SU4 (Mwanahawa Ramadhani). Mr. Nchimbi underscored that, this being the second Appellate Court it has powers in rarely circumstances to interfere with the concurring facts by the Lower Courts. To buttress his contention, Mr. Nchimbi referred this Court to the case of **Hamad Ally Hemed Vs. Said Mohamed Said**, Misc. Land Appela No. 72 of 2017 (HCT -DSM) (unreported), where it was held:

"The practice is that in a second appeal the court rarely interferes with the concurrent finding of facts by the courts below. It is only when there are misdirection or non-

direction on the evidence by first appellate court, that the court can interfere".

Finally, Mr. Nchimbi prayed the Court to allow the appeal, set aside the Judgment of the first Appellate Court and uphold the decision of the trial Primary Court.

In reply, commencing with the first ground of appeal, the Counsel for the respondent, Mr. Tarimo emphasized that the first Appellate Court properly re-evaluated the evidence on record that was recorded and taken at the Primary Court and found that there was no proof of either marriage between the deceased, Hamis Jumanne Malinda and SM3 (Mwanahawa Ramadhani). Mr. Tarimo averred further that, the first appellate Court similarly, correctly found that the evidence adduced by SU4 (Zena Yusuph) did not qualify as public evidence in acknowledging the parentage of the child. The Counsel supported the decision of the District Court of Morogoro by stating that, there was no proof under section 35 of the Law of the Child Act (supra). He prayed this Court to dismiss the first ground of appeal for lack of merit.

On the 2nd and 3rd grounds, Mr. Tarimo maintained that there was no cogent evidence to prove that, the appellants are lawful heirs of the estates of the deceased, Hamisi Jumanne Malinda. He underlined that, the appellants stayed 8 years without even introducing themselves to the family of the deceased or file an application for parentage as required by the law under

section 34 of the Law of the Child Act. It was Mr. Tarimo's contention that, the evidence of SM3 and SU4 had no probative values and should be ignored as it was correctly ignored by the first Appellate Court. He urged this Court to dismiss these grounds of appeal with costs for a reason that, the same have no merits.

I have impassively gone through the trial Court records and the records of the first Appellate Court. Having considered as well the rival submissions advanced by the Counsels for both parties, I have found a serious issue that at this juncture, I feel compelled first to address it before venturing into the merits or demerits of the present.

First of all, it is apparent on Court records that the first Appellate Court in its judgment re-assessed the evidence adduced before the Primary Court and came up with a conclusion that, there was no evidence in the eyes of the law tendered in accordance with the requirement of the provision of section 35 of the Law of The Child Act. This means that, there was no evidence to prove the issue of parentage. However, on close scrutiny of the trial Court record, it is my finding that the appellants filed no application for parentage at the lower Primary Court. According to the records, what was filed by the appellants was an objection proceeding for appointment of the respondent (Chiku Hamisi Jumanne) as an administratrix of the estates of the late Hamisi Jumanne Malinda, because they were not included in the list of heirs. So, the question whether the 1st appellant (Mohamed Hamisi Jumanne Malinda) was a biological child of the late Hamisi Jumanne Malinda, or whether the 2nd appellant (Nuru

Issa Hussein) was the child of the late Moshi Hamisi Jumanne Malinda, and whether the said Moshi was the daughter of the deceased, Hamisi Jumanne Malinda, was not supposed to be discussed by the Urban Primary Court of Morogoro. The proper forum was the Juvenile Court.

It is the position of the law that, when it comes to matters of parentage, ordinarily Courts seized to have the requisite jurisdictions. This is per dictates of the provision of section 3, the Interpretation Clause to the Law of The Child Act (supra) which provides that: -

"Court" means: -

- (a) a Primary Court, the District Court, the Resident Magistrate's Court or the High Court;*
- (b) for purposes of adoption, the High Court; and*
- (c) for purposes of parentage, a Juvenile court;***

The record of the Trial Primary Court reveals that, on 18th November, 2021, the appellants herein raised an objection which itself reads;

**"MOHAMED HAMISI JUMANNE MALINDA,
NURU ISSA HUSSEIN,
S. L. P. 166,
MOROGORO
18/11/2021**

**HAKIMU MKAZI MFAWIDHI,
MAHAKAMA YA MWANZO MJINI,
WILAYA YA MOROGORO,
S. L. P.,
MOROGORO**

**YAH: PINGAMIZI DHIDI YA SHAURI LA USIMAMIZI WA MIRATHI NA.
321/2021**

.....N/A

1. *"Mleta Maombi ya usimamizi wa mirathi tajwa hapo juu, katika maombi yake ameshindwa kuwataja warithi au wanufaika wote wa mali za marehemu HAMISI JUMANNE MALINDA, kwa mfano kuna watoto wawili halali wa marehemu ambao ni MOHAMED HAMISI MALINDA na MOSHI HAMISI JUMANNE MALINDA hawakutajwa kama warithi katika shauri la usimamizi wa mirathi tajwa hapo juu.....".*

After raising the above issue, the trial Primary Court proceeded to hear and determine the above objections whether the deceased Hamisi Jumanne Malinda was the biological father of **Mohamed Hamisi Malinda and Moshi Hamisi Jumanne Malinda** and whether **Nuru Issa Hussein** was entitled to inherit on behalf of her late mother Moshi. Therefore, the Primary Court clothed itself with the jurisdiction of Juvenile Court questioning itself whether it had jurisdiction or not. It is clear that, this point escaped the mind of the Resident

magistrate on appeal. In my opinion, that is why the learned magistrate also misdirected herself upon applying the provision of section 35 of the Law of the Child Act, without first satisfying herself whether the appellants applied for parentage.

Secondly, the petition of appeal to this Court shows that the appeal was filed on 29th July, 2022 and it was stamped with the rubber-stamp of this Court on the same day by the registry office. Having reviewed this record of appeal, I am of the settled view that, this appeal being originating from the Primary Court was wrongly filed in this Court. It is the position of the law that, appeals to the High Court on matters originating from Primary Court are supposed to be filed in the District Court and not directly to this Court (the High Court). This is so provided under section 25 (3) The Magistrate's Courts Act, [CAP. 11 R.E. 2019] which provides: -

*"Every appeal to the High Court shall be by way of petition
and shall be filed in the district court from the decision
or order in respect of which the appeal is brought".
[Emphasis added].*

Again, Rule 5 (3) and (4) of the The Civil Procedure (Appeals in Proceedings Originating in Primary Courts) Rules; GN. No. 312 of 1964, provides for proper procedure for the registration of appeals at the High Court which originates from Primary Courts. The rules read as follows: -

"5 (3) When a petition of appeal to the High Court is filed in the District Court, the district Court shall cause the date of filing to be endorsed on the petition before dispatching it to the High Court.

(4) When a petition is received in the High Court, it shall immediately be numbered and entered in a register to be kept for that purpose".

From the foregoing analysis of the evidence on record and the position of the law, I am of the firm view that the appellants were supposed to comply with the above provisions of the law and the rules before coming to this Court. I say so because, it is on record that, the appellants enjoyed the legal services from the learned trained mind person who is presumed to be conversant with the law. In this regard, any contravention of the mandatory laws and procedures, have no excuse and cannot be accommodated by this Court at this stage.

Since the trial Primary Court had no jurisdiction to entertain the issue of parentage, it means that even the appeal preferred to the first Appellate Court, herein the District Court of Morogoro, at Morogoro was improper and incompetent as I have endeavored to demonstrated herein above.

Thirdly; It is the respondent who petitioned for letters of administration before the Urban Primary Court of Morogoro, at Morogoro on 12/12/2021 and

she attached the death certificate of the deceased which shows that Hamisi Jumanne Malinda passed away on 12/12/2004 as indicated on the death Certificate No. 1560695A. This means that, the respondent instituted the Probate Case after elapse of 17 years. I have gone through the said application which was reflected in the Probate Form-I and found that, there were no reasons advanced at the trial Court by the respondent for such a long delay. In the case of **Mwaka Musa Vs. Simon Obeid Simchimba**, Civil Appeal No.45 of 1994, (unreported), the Court of Appeal of Tanzania observed that: -

"Where probate or administration is for the first time applied for after three years from the death of the deceased, the petition shall contain a statement explaining the delay".

For the reasons stated above, I consequently quash the proceedings and set aside the Judgments and Decree of both Lower Courts below. The parties are at liberty institute and or apply afresh if so wishes, but upon complying with the legal requirements. **It is so ordered.**

DATED at **MOROGORO** this 31st day of August, 2023.



M. J. Chaba

JUDGE

31/08/2023

A handwritten signature in blue ink, located in the bottom right corner of the page.

Court:

Judgment delivered this 31st day of August, 2023 in the presence of the Respondent and Mr. B. Tarimo, Learned Advocate and in the absence of the Appellants.



A. W. Mmbando

DEPUTY REGISTRAR

31/08/2023

Court:

Right to Appeal to the parties fully explained.



A. W. Mmbando

DEPUTY REGISTRAR

31/08/2023