IN THE HIGH COURT OF TANZANIA

(MWANZA SUB-REGISTRY)

AT MWANZA

PC CIVIL APPEAL NO.29 OF 2023

(Originating from Magu District Court in Probate Appeal No.15 of 2022 and Kisesa Primary Court in Probate and Administration Cause No. 2 of 2014)

MAKONGORO H. MASSAGA.....APPELLANT

VERSUS

JERRY ERASTO MASSAGA.....RESPONDENT

JUDGMENT

Date of Last Order:28/08/2023

Date of Judgment:25/09/2023

Kamana, J:

Makongoro H. Massaga and Jerry Erasto Massaga, the appellant and respondent, are brothers who are now before me fighting over the estate left by their father, Erasto Massaga, who died testate on 9th June, 2013. Following the death, the respondent applied for letters of administration of the estate of the deceased's estate through Probate and Administration Cause No.2 of 2014 in Kisesa Primary Court. The application was granted on 20th June, 2014.

In 2019, the appellant knocked on the doors of Kisesa Primary Court complaining that the respondent had failed to distribute the estate

to the lawful heirs. He complained further that the respondent had rented out their deceased father's business booths whose rents are not accounted for. In reply, the respondent contended that he had already distributed the estate to the lawful heirs including the appellant according to the deceased's will. Rejoining, the appellant submitted that the will was invalid and family members including him did oppose the will in the family meeting.

Upon hearing the parties, the primary court faulted the will as invalid for offending the requirements of the Local Customary Law (Declaration Order) No.4 of 1963 (GN No.436 of 1963) which requires that the will should be witnessed by the deceased's relative. The decision did not please the respondent who preferred an appeal to Magu District Court.

Thereat, the respondent advanced the ground that the trial court erred in faulting the deceased's will based on the Local Customary Law (Declaration Order) No.4 of 1963 without considering the deceased's mode of life. Upon considering the rival arguments, the first appellate court held that the trial court misdirected itself in invalidating the will without first determining the deceased's mode of life. Having concluded that the deceased was and lived a Christian life, the first appellate court

allowed the appeal and proceeded to quash and set aside the trial court's proceedings and orders. Its decision was anchored on the reason that the primary court is vested only with powers to determine probates that involve Islamic or customary laws.

The decision of the first appellate court was not welcomed by the appellant who preferred this appeal armed with three grounds of appeal. In determining the appeal, I will not reproduce the grounds of appeal and submissions of the parties thereto.

Suffices to state that upon perusing the records, I have noticed that when the respondent was filling in Form 1, he annexed the will. According to Form 1, the deceased was stated to have been a Christian. The primary court based on Form 1 and the will appointed the respondent to administer the estate in question. Worthy noting is the fact that no family member including the appellant contested against the application for letters of administration or the will.

That being the case, I asked myself whether the trial court had jurisdiction to entertain and grant the application for letters of administration without inquiring about the deceased's mode of life. This is due to the fact that the respondent stated in Form 1 that the

deceased was a Christian. To answer the question, I invited the parties to address the Court on the said issues.

The appellant submitted in brief that the primary court had jurisdiction to entertain the application for letters of administration of the estate of his deceased father. On his part, the respondent contended that his appointment as the administrator of the estate of his deceased father was made in error as the primary court did not have the power to administer the estate of the person who believed in Christianity.

Having heard the parties, I thought it prudent to consult the provisions of section 18(1) and paragraph 1(1) of the Fifth Schedule to the Magistrates' Courts Act, Cap.11 [RE.2019]. Essentially, the provisions stipulate clearly that the primary court is vested with powers to adjudicate probate matters where the applicable law is Islamic or customary.

That being the legal position, when Form 1 indicates that the deceased is a Christian, the primary court is required to satisfy itself as to whether the deceased, despite being a Christian, had abandoned the Christian ways of life. If the Court is satisfied to that effect, it can proceed to grant letters of administration as it is taken that upon abandoning the Christian ways of life, the deceased lived under

customary ways of life and intended that his estate be administered in such ways.

This is a matter of evidence as not all Christians live the Christian ways of life. To be a Christian is one thing and to live a Christian mode of life is another thing. One may be a Christian but his mode of life is largely influenced by the customary ways of life. While holding this view, I am persuaded by the position taken by my learned brother, Manyanda, J., when determining the case of **Gibson Kabumbire v. Rose Nestory Kabumbire**, Probate Appeal No. 12 of 2020 where he observed the following:

> *'It is trite law that Primary Courts have jurisdiction in Probate matters concerning Christians where it is proven 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 detracted from his or her customary life, there must be evidence to support the same, there is a distinction between Christians who live and practice normal customary life and those who have professed Christian*

religion and either by a declaration or by his acts or manner of life is evident that they have professed as such and intended that their estate will be administered under the applicable law to Christians.'

I have gone through the records of Kisesa Primary Court in respect of the matter at hand and found that the primary court did not inquire as to the mode of life of the deceased despite being informed through Form 1 that the deceased was a Christian. Had it directed its mind on that fact, the court would have inquired about the deceased's mode of life with a view to determining whether he had abandoned Christian ways of life or otherwise.

In the absence of proof that the deceased's mode of life was customary, the primary court overstepped its jurisdiction in granting the letters of administration to the respondent. Having arrived at that conclusion, the Probate and Administration Cause No. 2 of 2014 through which the respondent was appointed as administrator of the estate was a nullity.

Given that, I invoke my revisionary powers to quash and set aside the proceedings and orders of the primary court in the said Cause. Likewise, the proceedings and orders of the primary court in relation to

the objections filed by the appellant and of Magu District Court in Probate Appeal No. 15 of 2022 are quashed and set aside. Order accordingly.

Right To Appeal Explained.

DATED at **MWANZA** this 25th day of September, 2023.

KS KAMANA

JUDGE