

UNITED REPUBLIC OF TANZANIA

JUDICIARY

HIGH COURT OF TANZANIA

MOROGORO DISTRICT REGISTRY

AT MOROGORO

MISC. CIVIL APPEAL NO. 32 OF 2023

(Originated from Revision Application no. 37 of 2022 Kilosa District Court)

SEPRINA JOSEPH TESHA APPELLANT

VERSUS

GODLOVE MSINDAI ANTHONY RESPONDENT

JUDGEMENT

Date of last order: 03/08/2023

Date of Judgement: 13/10/2023

BEFORE: G. P. MALATA, J

The genesis of this application is from Probate Cause no. 11 of 2022 before Magole Primary Court whereby the parties herein were jointly appointed administrators of the estate of the late Anthony Solomon Msindai (deceased) who died intestate leaving behind one widow

SEPRINA JOSEPH TESHA, the Appellant and six issues, **GODLOVE MSINDAI ANTHONY** the respondent herein inclusive.

Following the decision of the Magole Primary Court appointing both the applicant and respondent herein as administrators. The applicant herein instituted Revision Application no. 37 of 2022 at Kilosa District Court seeking to revise and set aside decision of Probate Cause No. 11 of 2022 of Magole Primary Court appointing the parties herein.

The application was attacked by preliminary objection from the respondent to the effect that;

1. The District Court lacks jurisdiction to determine the revision.
2. The revision application is misconceived and incompetent.
3. The application is not brought in good faith.
4. The affidavit in support of the application is defective for it contains prayers.

Based on the third point of preliminary objection which the counsel for the respondent chose to argue, the District Court find the application for revision incompetent and the trial magistrate dismissed the application with costs.

Being aggrieved by the decision of the District Court, the applicant knocked the doors of this court with four grounds of appeal that;

1. The trial magistrate grossly erred in law and facts by dismissing the appellants case on the preliminary objection of the respondent which was not raised on pure point of law.
2. That, the trial magistrate erred in law and facts in dismissing the appellant's case as if it was heard on merit in lieu of striking it out on the reason that the appellant's case was not filed in good faith since the affidavit thereof was tainted with the false and untrue statements.
3. That, the trial magistrate grossly erred in law and facts by dismissing the appellants case by going to the root of main case basing on the proceedings and records of Probate cause no.11 of 2022 at Magole Primary Court as evidence supporting the finding that the appellants case was not filed in good faith as the whole affidavit thereof was tainted with false and untrue statements without affording the appellants the right to be heard on that point.
4. That, the trial magistrate erred in law and facts by failing properly to analyse and evaluate the submission of the appellant's advocate

in reply to the preliminary objection raised by the respondent to the effect that the whole affidavit was tainted by false and untrue facts as a result he failed to consider the facts that the trial primary court tried a case which had no jurisdiction.

5. That, the trial magistrate grossly erred in law and fact by dismissing with costs the appellant's application contrary to the precedents he relied upon in making his dismissal ruling which is contrary to the principle of stare decisis.

The appellant prayed to this court to allow the appeal, the decision of the District Court be set aside, and the decision of trial court be set aside for want of jurisdiction, costs of this appeal and any other orders this court may deem just and fit to grant.

When this appeal came for hearing both parties were represented, the applicant was represented by Mr. Emmanuel Ndaga, learned counsel and the respondent enjoyed legal services of Mr. Fred Sanga, learned counsel.

Submitting in support of the appeal Mr. Ndaga started with the 4th ground. He stated that jurisdiction means power to do something, section of the Magistrates Court Act and section 14(1)(a)(i) provides for the establishment and mandates to adjudicate the matter, as per the

cited provision the Primary Court is vested with mandate to adjudicate matters arising from Customary Law and Islamic Law. it was improper for Primary Court to register Probate Cause no. 11 of 2022 where the subject matter was neither Islamic nor Customary Law.

Mr. Ndaga submitted that, in determining the law to be applied in Probate matters there are two tests, mode of life test of the deceased and intention of the deceased as to how the deceased wanted his estate to be dealt with.

First, the deceased professed Christian religion, he was member of Lutheran denomination and he was married in Christian rites. The filed form from both sides indicated that the deceased professed Christianity thus the court had to ascertain its jurisdiction. Failure by the trial court and District Court to consider that point necessitated the matter to proceed without jurisdiction.

Submitting on 1st, 2nd and 3rd grounds, Mr. Ndaga submitted that the magistrate dealt with preliminary objection raised by the respondent at para 4 since the District Court was dealing with revision then it was premature for the District Court to examine and decide that the application was filed in good faith.

When a judge or magistrate dismissed a case, it means that the matter shall not proceed for trial, **Yahya Khamis vs. Hamida Haji Idd and two others**, Civil Appeal no. 225 of 2018, CAT at Bukoba (unreported), the proper remedy is that, when the court is satisfied that, the matter is incompetent for failure to comply with legal requirement in filing the same the effect is to struck out and not to dismiss it.

Bearing in mind the nature of the preliminary objection, that is application being filed in bad faith, upon the court being satisfied on the same the remedy was to struck out and not to dismiss it. Finally, he prayed the appeal to be allowed.

In reply thereto, Mr. Sanga submitted that, the first point touched jurisdiction and that the rest did not including the third one. We thus support the appeal based on section 18 (1)(a)(i) of the MCA. We also beg to refer to fifth schedule Rule 1(2)(a) of Magistrate Court Act and the case of **Cornel Ferdinand Minangu vs. Salustin Ferdinand, PC Civil Appeal no. 40 of 2022.**

Mr. Sanga submitted that, the point which is in respect of jurisdiction was not determined and that, it is true that the Primary Court had no jurisdiction.

From the submission of both parties, having in mind that the counsels agreed that the primary court was not clothed with requisite jurisdiction to entertain the matter and that point alone sufficed to dispose this appeal.

Both counsels submitted that, the Court had no jurisdiction to entertain and determine the appeal because it originated from the decision of the Primary Court which had no jurisdiction to entertain and determine the probate cause in which the deceased professed Christianity. He pointed out that, probate of this nature is governed Magistrate Court Act and he cited Section 14(1)(a)(i) while on the other hand Mr. Sanga cited Section 18(1)(a)(i) of the Magistrate Court Act.

This court is now placed to either confirm or otherwise on whether the primary Court had jurisdiction to entertain and decide on the matter where the facts of the deceased depict that he professed Christianity.

It is settled law that, whenever a suit is made before a court of law, the fundamental issue is to decide on whether the court has jurisdiction to deal with it. The East African Court of Appeal in **Shyam Thanki and Others Vs. New Palace Hotel [1971]1 EA 199** held inter alia that;

"The Courts in Tanzania are created by statute and their jurisdiction is purely statutory. It is an elementary

principle of law that parties cannot consent to give a court jurisdiction while it does not possess"

Further, in the case is **Fanuel Mantiri Ng'unda vs Herman Mantiri Ng'unda** [1995] TLR 159 where the Court held that,

*"The jurisdiction of any Court is basic; **it goes to very root of the authority of the court to adjudicate upon cases of different nature.** The question of jurisdiction is so fundamental that courts as a matter of practice on the face of it be certain and assured of their jurisdictional position at the commencement of the trial."*

This issue will not consume much time of this court. The jurisdiction of Primary Court with regard to probate and administration causes is very clear. The general mandate of Primary Court with regard to probate and administration of estates is gathered from **section 18 of the Magistrates' Court Act [Cap. 11 R.E 2019]** and specifically in the fifth schedule to the Act.

As rightly submitted by Mr. Sanga the jurisdiction of Primary Court in Probate is governed by **section 18(1) of the Magistrate Court Act** which provides that;

(1) *A primary court shall have and exercise jurisdiction*

(a) in all proceedings of a civil nature-

*(i) where the law applicable is **customary law** or*

Islamic law:

*Provided that **no primary court shall have jurisdiction** in any proceedings of a **civil nature relating to land;***

(ii) for the recovery of civil debts, rent or interests due to the Republic, any district, city, municipal or town council or township authority under any judgment, written law (unless jurisdiction therein is expressly conferred on a court or courts other than a primary court), right of occupancy, lease, sublease or contract, if the value of the subject matter of the suit does not exceed fifty million shillings, and in any proceedings by way of counter-claim and set-off therein of the same nature and not exceeding such value; The Magistrates' Courts Act [CAP. 11 R.E. 2019]

(iii) for the recovery of any civil debt arising out of contract, if the value of the subject matter of the suit does not exceed thirty million shillings, and in any proceeding by way of counterclaim and set-off therein of the same nature not exceeding such value; and

(b) in all matrimonial proceedings in the manner prescribed under the Law of Marriage Act.

(c) in all proceedings in respect of which jurisdiction is conferred on a primary court by the First Schedule to this Act;

(d) in all proceedings in respect of which jurisdiction is conferred on a primary court by any other law; and

(e) in all proceedings in which the Attorney General's right of audience is excluded.

*(2) The Chief Justice may, by order published in the Gazette, confer upon a primary court jurisdiction in the administration of deceased's estates **where the law applicable to the administration or distribution of, or the succession to, the estate is customary***

law or, save as provided in subsection (1) of this section, Islamic law.

Rule 1 of the fifth schedule to the MCA;

*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:*

Provided that, nothing in this paragraph shall derogate from the jurisdiction of a primary court in any proceedings transferred to such court under Part V of this Act.

From the above excerpt, the Primary Court has jurisdiction in all customary and Islamic matters pertaining to probate and administration of estate. Thus, any matter arising out of that parameter of law cannot be entertained by the Primary Court.

It is fortunate that these provisions have already received interpretation and there is plethora of authorities, see the case of **Jacob Mwangoka vs. Gurd Amon** [1987] TLR 165, **Zacharia Milalo vs. Onesmo Mboma** [1983] TLR 240, **Khadija Said Matika vs. Awesa Said Matika**, Civil Appeal no. 2 of 2016 **Scolastica Benedict vs. Martin Benedict** [1993] TLR 1 and **Cornel Ferdinand Minangu vs. Salustin Ferdinand (supra)**

For instance, in **Zacharia Milalo** (supra) at page 243 and 244, Lugakingira J, as he then was stated;

*In so far as I know, there are three situations in which the primary court would not have or would be deprived of jurisdiction. **These are where the law applicable is neither customary law nor Islamic law**; where jurisdiction is expressly taken away by statute; and where the dispute is of such legal and technical complexity as to be considered beyond the competence of such court. In all other aspects the primary court has and may exercise jurisdiction.*

In the case of **Scolastica Benedict vs. Martin Benedict** [1993] TLR 1, the court held that;

*While section 15(1)(c) of the Magistrates Courts Act 1963 (now s. 19 of the Magistrates' Courts Act 1984) did not specify the particulars relating to the administration of estates, the order of the Chief Justice published as Government Notice No. 320 of 1964 conferred jurisdiction on primary courts in matters of administration of estates regardless of whether the subject-matter is land registered under the Land Registration Ordinance, **provided the applicable law is customary or Islamic law**, other than matters falling under the Marriage, Divorce and Succession (Non-Christian Asiatics) Ordinance.*

In the present appeal the records show that, the applicable law is neither customary nor Islamic law, automatically the primary court doesn't have jurisdiction

That being the case, the decision of Magole Primary Court was a nullity as the trial court entertained a matter without jurisdiction. Further, it is evident that the Kilosa District Court ended the matter on the issue of bad faith as one of the preliminary objections.

In law, the issue of existence or not of bad faith was purely a factual matter and did not qualify to be a preliminary objection within the meaning of it as it needed evidence to establish and prove the same.

Preliminary objection must be an issue on point of law and raises on point of law. It should not attract production and consideration of evidence proving of such point. Existence of bad faith or not cannot be attained without production of evidence proving the same, thus it is not a point of law.

In this appeal, it is common ground that the deceased was a Christian and was buried in accordance with Christian rituals. That is evidenced by Certificate of Marriage dated 16th May, 2015 and that there was no contrary version that the deceased never professed Christianity.

Due to that uncontroverted evidence of the deceased professing Christianity, it goes without saying therefore that, the deceased lived, professed, died and buried under Christian rituals. By virtue of section 18 (1) of the Magistrates Courts Act, the Magole Primary Court had no jurisdiction to deal with estate of late **Antony Solomoni Msindai** as he was a Christian.

In the event, it is the finding of this court that, the trial court had no jurisdiction to deal with the said proceedings including appointment of administrator of the Estate of the late **Antony Solomoni Msindai**, thus anything done thereto by Magore Primary Court is as good as nothing and I hereby declare that the decision in respect of anything done

including the decision, the source of the present appeal in respect of the said estate are nullity for want of jurisdiction.

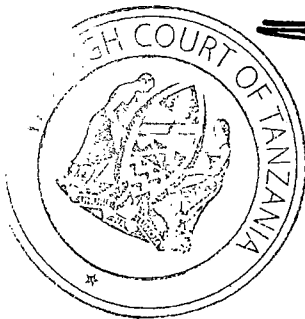
It is further ordered that, since the present appeal emanate from the nullified proceedings and decision of Magole Primary Court, then this proceedings and decision by the Kilosa District Court is as well declared a nullity.

Having said so, I hereby set aside the decision in Miscellaneous Civil Application no. 37 of 2022 for being nullity ab initio, as it rooted from nullity proceedings. If the administrators, have in the exercise of nullified appointment did administer the estate of the late **Antony Solomoni Msindai** to the end and close it, then for avoidance of disturbance and inconvenience to the heirs for the already done exercise, the heirs can maintain the status quo instead of restarting the process for already distributed estate to the heirs, unless circumstance demands otherwise.

If distribution has already been done, certainly some of the heirs might have already spend their shares, thus calling for return of distributed shares and start afresh the exercise is next to impossible. It may lead to uncalled for and unnecessary indoor conflict amongst the heirs.

IT IS SO ORDERED.

DATED at MOROGORO this 13th October, 2023.



G. P. MALATA

JUDGE

13/10/2023

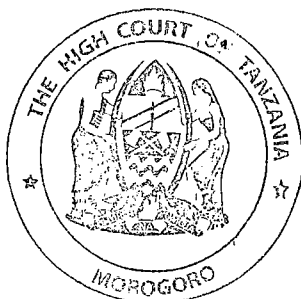
Court: Judgement delivered at Morogoro in Chambers this 13th October, 2023 in the presence of Mr. Frank Ngeze, Advocate for Appellant and in the presence of Respondent.

A. W. MMBANDO

DEPUTY REGISTRAR

13/10/2023

Court: Right to appeal to the Court of Appeal explained.



A. W. MMBANDO

DEPUTY REGISTRAR

13/10/2023