

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
[ARUSHA DISTRICT REGISTRY]**

AT ARUSHA

PC CIVIL APPEAL NO. 56 OF 2021

*(C/F Civil Appeal No. 36 of 2020 District Court of Arumeru of Arumeru, Original Probate and Administration Cause No. 56 of 2020
Enaboishu Primary Court)*

JOEL LESIAN MOLLEL APPELLANT

VERSUS

THOBIAS LESIAN MOLLEL RESPONDENT

JUDGMENT

9th August & 12th October, 2023

TIGANGA, J.

This appeal originates from Enaboishu Primary Court (the trial court) in Probate and Administration Cause No. 56 of 2020 regarding the administration of the estate of the late Lesian Kimunyaki who died intestate on 1st April 2020. Parties to this appeal are blood brothers, they are all children of the late Lesian Kimunyaki (the deceased).

Before the trial court, the appellant herein petitioned to be appointed as administrator of their late father's estate. The respondent objected to his petition on the ground that, the appellant was not proposed by the family meeting and that he was not trustworthy to be an administrator. After hearing both parties on the objections the trial court overruled the objection

and appointed the appellant herein to be the administrator. Aggrieved, the respondent herein appealed to the District Court of Arumeru at Arumeru in Civil Appeal No. 36 of 2020 (the 1st appellate court). The 1st appellate court was of the view that the trial court did not give reasons for overruling the objection. Also, from the clan meeting minutes, almost all family members proposed the respondent to be the administrator, and none of them were summoned or appeared before the trial court to support the appellant's appointment. In that regard, the 1st appellate court allowed the appeal and revoked the appellant's appointment and consequently ordered the persons proposed in the clan meeting to petition for letters of administration.

Disgruntled with the decision, the appellant preferred this appeal on the following grounds;

1. That, the 1st Appellate Court erred in law and fact in failing to apprehend that the trial court magistrate had no jurisdiction to determine the probate and administration of estate cause regarding the deceased who professed Christianity during his lifetime, an act which vitiated and/or nullified the whole proceedings thereof.

Alternatively;

2. That, the 1st appellate court erred in law and fact in ordering only people appointed by the clan meeting to petition for letters of administration, an act which tends to preclude the rights of the appellant herein from petitioning while he has interest with the estate of the deceased.
3. That, the 1st appellate court erred in law and fact in revoking the appointment of the appellant as the administrator of the estate of the deceased for the reasons that "all interested people in the deceased estate who are 17 children and three wives no any person has testified before the trial court to support the appointment", the position which is not a requirement of the law, hence rendered injustice.
4. That, the 1st appellate court erred in law and fact in failing to apprehend that, there were no forged family meeting minutes presented to the trial court, since forgery is a criminal offence and there was no proof of such, an act which rendered an erroneous decision and prejudiced the rights of the appellant herein.

During the hearing which was by way of written submissions, the appellant was represented by Mr. Jakob Malick, whereas the respondent was represented by Mr. Hamisi Mkindi, both learned Advocates.

Starting with the first ground of appeal, Mr. Malick contended that, the trial court had no jurisdiction to entertain the Probate Cause as the deceased professed Christianity and the 1st appellant court erred in overlooking such fact. It is his submission that the deceased was baptized and received a Holy Communion at Mungushi Parish, Maruvani Congregation of the North East Central Diocese of the Evangelical Lutheran Church of Tanzania, ELCT.

He was also of the view that the deceased passed away three months after his baptism hence, the trial court erred in entertaining his probate as the same was contrary to sections 18 (1)(a)(i), and 19 (1)(c) as well as the 5th schedule to the **Magistrates Courts Act**, [Cap 11 R.E 2019] (MCA). To cement his argument, he referred the Court to the case of **Borah Tinganyi Muze vs. Florence Jacob Chacha & 3 Others**, PC Probate Appeal No. 06 of 2021, and **Hysintha Kokwijuka Felix vs. Deusdedith Kamugisha**, Probate Appeal No. 4 of 2018 both High Court cases which underscored that, the issue of jurisdiction can be raised at any time and the fact that the Primary Court has no jurisdiction to entertain probate and administration

cases where the law applicable is **Probate and Administration of Estate Act**, [Cap 352 R.E. 2002] is a legal issue which can be raised at any time. He prayed that both decisions of the subordinate Courts be nullified.

In reply, the respondent conceded to the fact that the deceased professed Christianity and his burial was done following Christian rituals. However, his conversion to Christianity was done at the late stage of his life because throughout his life he lived following Maasai traditions as he even married three wives. He further said that there is no any proof that, the deceased totally abandoned his traditional ways of life. The learned counsel referred the case of this Court in the case of **Petro Langaël vs. Terevail Langaël Nanyaro**, PC. Civil Appeal No. 36 of 2022 in which mode of life was insisted as a criterion to determine whether the deceased professed Christianity or followed customs and traditions.

Rejoining on this Mr. Malick insisted that, the deceased prophesied Christianity and even his children were raised in the Christian way of life. Also, he was of the view that there is no proof of his mode of life.

In determining this issue of jurisdiction, it is clear that the same was not raised before the courts below. But this being a crucial issue, it can be

raised anytime even at the appeal stage, by either a party to the case or by the court *suo mottu*. In the case of **Yazidi Kassim t/a Yazidi Auto Electric Repairs vs. The Hon Attorney General**, Civil Application No. 354/04 of 2019, CAT at Bukoba, Court of Appeal had this to say;

*"It is a long-established principle that issues of jurisdiction may be raised at any time thus, the parties have a duty, not only a right to raise and address such issues at any time. The case of **John Sangawe v. Rau River Village Council** [1992] T.L.R 90, will demonstrate this point."*

In law, the issue of jurisdiction is basic for any court and it needs to be decided way early into the case, as it is what gives that particular court authority to determine the matter before it. The Court of Appeal in the case of **Fanuel Mantiri Ng'unda vs. Herman Mantiri Ng'unda & 20 Others**, (CAT) Civil Appeal No. 8 of 1995 (unreported) insisted on the importance of ascertaining the jurisdiction of the Court before proceeding to determine the matter before it. It held that;

*"The question of jurisdiction for any court is basic, it goes to the very root of the authority of the court to adjudicate upon cases of different nature ... **The question of jurisdiction is so fundamental that courts must as a matter of practice on the face of it be certain and assured of their***

jurisdictional position at the commencement of the trial ... It is risky and unsafe for the court to proceed with the trial of a case on the assumption that, the court has jurisdiction to adjudicate upon the case. "[Emphasis mine.]

The jurisdiction of the primary court in respect of the Probate and administration of estates cases is provided under Section 18 (1) (a) (i), (2), and 19 (1) (c) of the MCA, as well as item 1 (1) of the Fifth Schedule to the same law. The sections read;

18.-(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;

*(2) The Chief Justice may, by order published in the Gazette, confer upon a primary court jurisdiction in the administration of the 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.** (emphasis added)*

Section 19 (1) of the same law reads;

"19.-(1) The practice and procedure of primary courts shall be regulated and, subject to the provisions of any law for the time being in force, their powers limited-

(a) n/a

(b) n/a

(c) in the exercise of their jurisdiction in the administration of estates by the provisions of the Fifth Schedule to this Act, and, in matters of practice and procedure, by rules of court for primary courts which are not inconsistent therewith; and the said Code and Schedules shall apply thereto and for the regulation of such other matters as are provided for therein."

As to the provisions of Rule 1 (1) of the Fifth Schedule to the same law states;

*"1.-(1) 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." (emphasis added)

Another law that governs the administration of estates in the Primary Courts is the **Primary Courts (Administration of Estates) Rules** G.N. No.49 of 1971. From all of the above provisions of law, it is clear that the jurisdiction of the Primary Court in granting the letters of administration of the deceased estate is limited to the estate which is regulated by customary

and Islamic law and not any other laws. On the same note, in order to know whether the deceased professed customary, Christian, or Islamic values so that the court can determine its jurisdiction, evidence has to be brought before the trial court showing what faith the deceased was professing and which mode of life s/he was living.

In the appeal at hand, the appellant claimed that the trial court determined a deceased probate contrary to the law because the latter professed Christianity. He was baptized and formally became a Christian three months before he died in 2020. The respondent argues that, although the deceased was baptized and even buried following Christian rituals, throughout his life, he followed Maasai customs and traditions. As much as I agree with the respondent on this, such a mode of life was not testified or proved at the trial court during the hearing. The only record that shows him as a person who practiced Maasai customs and traditions is the fact that he married three wives and had seventeen children.

Apart from this fact, there is no other factor that proved how he lived his life. The trial court ought to have gone further and inquired more on the mode of life in general and whether the deceased abandoned his customary lifestyle or not to ascertain whether it had jurisdiction to determine his

probate. This position was made clear in the case of **Hadija Said Matika vs Awesa Said Matika**, PC Civil Appeal No. 02 of 2016, HC at Mtwara.

In yet another case of **Benson Benjamin Mengi and 3 Others vs. Abdiel Reginald Mengi and Another**, Probate and Administration Cause No. 39 of 2019 HC DSM (unreported) which I find highly persuasive, the court mentioned two tests to be considered in determining the jurisdiction of the Primary Court in probate matters as 'intention of test' and 'mode of life test'. It held thus;

*"In determining the applicable law, the Court is enjoined by judicial precedents to be guided by the two legal tests as it reflected by the myriad of case law including the famous cases of **Re Innocent Mbilinyi** (1969) HCD 283 and the case of **Re Estate of the Suleiman Kusundwa** [1965] EA 247 among others....This Court is inclined to be guided by Mode of Life Test simply because the intention of the deceased on which law should govern his life where the deceased dies without stating expressly this fact."*

In the appeal at hand, none of the above tests was applied. As there is no Will left by the deceased, and there is no extra evidence from any of the witnesses on whether the deceased really followed Christian values and abandoned Masai tradition and customs or was still practicing customs and traditions of his tribe before or after his baptism and for how long was he

practicing any of the two. It was therefore necessary for the mode of life of the deceased to be ascertained by the trial court by evidence before determining the matter, failure to do so invalidates the proceedings and the decision thereto.

Although the respondent's learned counsel has challenged this aspect on the ground that the deceased mode of life proved he lived following the traditions of Maasai, the same was not proved in any way apart from the fact that he married three wives. As observed earlier, this alone does not prove that he followed Maasai customs and traditions and that he did not abandon them before or after his baptism.

Based on the above, I quash and set aside the proceedings, decisions, and orders of the District Court of Arumeru in Civil Appeal No. 36 of 2020 and that of Enaboishu Primary Court in Probate and Administration Cause No. 56 of 2020. I hereby direct the trial Primary Court record to be remitted back for the trial court to hear the parties afresh on the issue of the mode of life of the deceased to determine the jurisdiction of the court and if satisfied with the jurisdictional capacity to proceed to appoint the administrator(s) as per the law.

As this ground determines the appeal on that legal aspect then I find no need to deal with the rest of the grounds of appeal for whatever decided without jurisdiction cannot stand. In the upshot, the appeal is allowed, but this being a probate matter I give no orders as to costs.

It is so ordered.

DATED and delivered at **ARUSHA** this 12th day of October 2023



A handwritten signature in black ink, appearing to read "J.C. Tiganga", written over a horizontal line.

J.C. TIGANGA

JUDGE