IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF MWANZA

AT MWANZA

PC. CIVIL APPEAL NO. 47 OF 2023

(Originating from Ilemela DC. Probate Appeal No. 18 of 2022 & Probate & Admin. Cause No. 06/2020 Ilemela Primary Court)

HAMIDU MAFTAH HAMSI.....1st APPELLANT
NGWEBEYA MAFTAH HAMIS.....2nd APPELLANT
AZIZA MAFTAH HAMIS.....3rd APPELLANT
ASHURA MAFTAH HAMIS.....4th APPELLANT
MBARUKU MAFTAH HAMIS.....5th APPELLANT
ASHA MAFTAH HAMIS.....6th APPELLANT
ALI MAFTAH HAMIS.....7th APPELLANT
ALLY MAFTAH HAMSI.....8th APPELLANT
SHAIBU MAFTAH HAMIS.....9th APPELLANT
ZENAH MAFTAHA HAMIS.....10th APPELLANT
ZAITUNI MAFTAH HAMIS.....11th APPELLANT
NAJMA MAFTAH HAMIS.....12th APPELLANT
SILHAT MAFTAH HAMIS.....13th APPELLANT
JENIFA MAFTAH HAMIS.....14th APPELLANT
JOHARI MAFTAH HAMIS.....15th APPELLANT
KULWA MAFTAH HAMIS.....16th APPELLANT
RUKIA MAFTAH HAMIS.....17th APPELLANT
HAJI MAFTAH HAMIS.....18th APPELLANT

VERSUS

AMIN MAFTAH HAMIS.....1st RESPONDENT
SHAIBU MAFTAH HAMI.....2nd RESPONDENT

JUDGMENT

21st September & 17th November 2023.

ITEMBA, J.

This is a second appeal originating from the Primary Court of Ilemela in Probate Cause No. 6 of 2022. On 7/1/2021 Maftah Hamisi (the

deceased) died intestate in Mwanza. The deceased is survived by 17 children and 2 wives who are not part of this case apart from the 2 respondents. The 1st and 2nd respondents are the deceased's sons. It is alleged that 15 out of 18 appellants were born out of wedlock of the deceased. The deceased left a number of properties including houses, cars, businesses, cash money and plots of land. Following his death, a family meeting was convened and it was resolved that the respondents who are among the deceased's sons, to petition for letters of administration of the deceased's estate. The appellants were caveators and some of the appellants did not appear to testify before the trial court. Nevertheless, the trial court appointed the respondents as co-administrators on 21/3/2022 and ordered them that they should distribute the deceased's properties to the lawful heirs. The appellants appealed to the District Court complaining that they were not involved in clan meetings appointing the respondents and that there should be an administrator from each of the deceased's wives, that some of the deceased's properties were sold unlawfully, some of the lawful heirs were not listed. They prayed for the court to appoint an Administrator General to administer the deceased's properties. The district court decided among others that, the deceased was a Muslim and only the

children born in wedlock were entitled to inherit his properties and that, there is no evidence to prove that the respondents had misused the deceased's properties.

Still aggrieved, the appellant is appealing before this court, his main grounds are that: -

1. *Both the trial court and first appellate court erred in law to rule that the appellants were the deceased's children born outside the wedlock, hence are not entitled to inherit the deceased estates.*
2. *Both the trial court and first appellate court erred in law and fact to appoint the respondents as administrators of the deceased's estate while they had already distributed the deceased's estate before appointment; as a result, they alienated the appellants' share.*

The appellants further prayed for the appeal to be allowed, a neutral person to be appointed an administrator of the deceased's estate in favor of all the heirs, the respondents to account for all the deceased's properties and costs of the appeal.

At the hearing, the appellants had the services of Mr. Denis Pauline while the respondents were represented by Messrs. Linus Amir and Reuben Kishosha all learned counsels. Initially, there were 23 appellants but Mr.

Pauline informed the court that the 1st to 5th appellants no longer have interest in the present appeal he will represent the remaining 17 appellants.

Arguing in support of appeal, Mr. Pauline submitted that both lower courts erred in excluding the appellants as deceased children while at page 16 of Primary Court proceedings and page 12 of District Court Judgment, it shows that the appellants are the children of the deceased. That, the decision is against the mandatory principle of statutory heirs in terms of section 10 of the Child Act as amended in 2019.

In reply, Mr. Reuben submitted that for the children to have their rights there must be evidence showing that the deceased was their biological father and there is no such evidence. In this, he cited the case of **Beatrice Brighton Kamanga and Amanda Brighton Kamanga vs Ziada William Kamanga** Civil Revision no. 13 of 2020, High Court, Dar es Salaam. He also referred the court to the case of **Naomi Luoga vs. Salome Swila** Probate Appeal No. 91/2018 HC Mbeya arguing that section 36 of the Child Act there must be a DNA test to prove parenting otherwise without proof the court will be opening a Pandora's box. He added that in the present case the deceased was Muslim and under Islamic law, when it

comes to children born out of wedlock, they had to be given their rights when their father was alive. He cited the case of **Kassim Zeni Slim and Abdu Zeni Slim and another** Probate and Administration Cause No. 44 of 2022 High Court, Temeke, insisting that Mohamad Law is clear, it defines the shares of each heir and it does not discriminate. That, the appellants could not prove their relation with the deceased and even the Law of the Child Act requires proof.

Replying to the second ground, the learned counsel cited the case of **Lucy Victor vs. Edward E. Badehe & Other** P.C Probate Appeal 4 of 2022 High Court, Mwanza, that the court which has power to vacate the appointment of an administrator is the appointment court and that the court cannot revoke the administrator because he has not yet allocated the properties. He added that there is no inventory showing that there was any sale of the deceased's properties and who were the beneficiaries. He finalized by stating that the reliefs prayed are non-achievable and the appellant cannot pray for costs this being a probate case.

The issue is whether the appeal has merit based on the 2 grounds raised by the appellants.

To start with, it is trite law that it is not the duty of the court to declare who are the heirs of the deceased's estate. That is the duty of the administrator of the estate. The court is limited to declaring who survived the deceased as listed in the petition by the petitioner(s) or upon determination of caveat. See the decisions in **Monica Nyamakare Jigamba vs Mugeta Bwire Bhakome as Administrator of The Estate of Musiba Reni Jigamba** Civil Application No. 199/01 of 2019 Court of Appeal, Dar Es Salaam and **Nasri Nassor Amrani and 3 others v Sabri Nassor Amrani** PC Civil Appeal No. 1 /2021, High Court, Dar es Salaam. In **Monica Nyamakare Jigamba** (supra) it was held that: -

> *'The probate or letters of administration court **has no powers to determine the beneficiaries and heirs of the deceased**. Similarly, it has no power to distribute the estate of the deceased. The law has vested that power to the grantee of probate or letters of 15 administration. This is clearly provided under section 108 of the Probate and Administration Act'.*

Moving to the grounds of appeal, in the first ground, there is no dispute that the appellants were born out of wedlock. The appellant's counsel insists that all the children have equal rights and they should

inherit from the deceased's property in terms of section 10 of Law of The Child Act.

Section 10 of the Law of the Child Act states that:

> *'A person shall not deprive a child of reasonable enjoyment out of the estate of a parent'.*

But, Section 4(1) of the same Act construct the child as hereunder:

> *'A person below the age of eighteen years shall be known as a child'.*

Briefly, according to the trial court record, all the appellants are above the age of 18 years and therefore, are not children in terms of the Law of the Child Act and under those circumstances, the trial court could not invoke section 10 of the Law of the Child Act. See also **Nasri Nassor Amrani and 3 others vs Sabri Nassor Amrani** (supra). The case of **Beatrice Brighton Kamanga and Amanda Brighton Kamanga vs Ziada William Kamanga** (supra) cited by the respondent I think it is distinguishable because the applicants in the said case were below the age of 18 years when their father passed away.

As per the records, there is no dispute that the deceased was Muslim and until his death, he professed Islamic religion. There is evidence that

the deceased was a prayerful man and he even built a mosque in Buswelu, within Mwanza and offered some of his income from his 3 rental properties to run the said mosque. I hold that, the trial court and first appellate court were right to find that the deceased professed Islam and his estate ought to be administered in Islamic principles. Since the applicable law is Islamic and since the appellants were born outside of the deceased's wedlock, principally, they are not entitled to inherit anything from the deceased's estate. Under customary law, the position would have been different depending on the particular tribe. See: **Amina Taratibu Mbonde vs Selemani Ahmed Mtalika** [2020] T.L.R 56. Furthermore, in **Said Aleiko (Administrator) vs. Mwatatu Ibrahim**, (1967) H.C.D. No. 50, it was held that, under Islamic Law, the illegitimate child is considered to be the child of its mother only so the right to inheritance to an illegitimate child is through marriage. Yet, there is an exception to this rule where a biological father may make a will bequeathing part of his properties to his illegitimate child, provided that share shouldn't exceed 1/3 of his whole estate. See: **Asha Shemzigwa vs. Halima A. Shekigenda (**1998) T.L.R 254. I agree with the respondent's counsel who cited the case of **Kassim Zeni Slim and Abdu Zeni Slim and another** (supra) where it was held that:

"Mohamadan law has never been discriminatory. Such children are entitled to Hibah. This is a right of a father to give him a share in his properties while still alive. If the deceased fails to do so, siblings can do so under Surat Annisai 4:8 which reads:

.... Na wakati wa mgawanyo wa mirathi wakihudhuria jamaa zenu, na mayatima na maskini basi wapeni kitu katika mali hiyo ya urhithi na semeni nao maneno mazuri"

Therefore, the respondents can still consider the appellants as heirs and as explained above, that consideration is within their mandate not of the court. The 1st ground lacks merit and it is hereby dismissed.

In the second ground, it is alleged that the respondents allocated the deceased's properties even before their appointment. The learned counsel did not even mention the said properties to be specific. Having gone through the records, the properties alleged to be disposed by the respondents were; a motor vehicle make TATA with registration number T 562 DEM, 2 buses, furniture in Kigamboni Dar es salaam, NSSF benefits and some children were not given money for subsistence. In respect of the motor vehicle, it is in evidence that the clan meeting agreed to sell it because it was not working and its value was diminishing. That, it was agreed, the money should be kept in a joint account administered by some

of the family members. These facts feature in the clan meeting of 14/10/2021. Further, the respondents sold the said motor vehicle for TZS 20,000,0000/= and the money is still in the account and it will be distributed once there is an administrator in place. As regards the said bank account, the first respondent testified that, it is maintained at Amana Bank in the name of **Amini, Shaibu** and **Hamis** and that **Jamal** was not cooperative in opening the account because he did not bring the relevant documents, therefore, his name did not feature in the account. Regarding the house in Kigamboni, evidence reveals that it is not sold but it is rented and the money is kept in the same account apart from some of money which was used for renovation. Either, there is no evidence regarding the 2 buses or the NSSF claims. All this evidence about how the said properties were disposed or dealt with, and the reasons thereof, is not opposed by the appellants. This court finds that, there is a reasonable explanation of the properties alleged to have been disposed by the respondents unlawfully and therefore, there is no evidence to show that the respondents have misused the deceased's properties. As well, the second ground fails. This means, there is no need to appoint an Administrator-General or any neutral

person for the respondents who are deceased's children are available and capable of administration.

In summary, the decision of Ilemela District Court is upheld to the extent explained. The file to be remitted to the trial court for the respondents to proceed with the administration of the estate of the deceased under Islamic Principles.

The appeal is hereby dismissed with no orders as to costs.

DATED at **MWANZA** this 17th Day of November, 2023.

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L. J. ITEMBA

JUDGE

Judgment delivered via audio conference this 17th Day of November 2023, via audio conference in the presence of Denis Pauline and Reuben Kishosha learned counsels for the appellants and respondents respectively and Ms. Glady Mnjari RMA.

L. J. ITEMBA

JUDGE