

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
DAR ES SALAAM SUB-REGISTRY
CIVIL APPEAL NO.66 OF 2023

(C/f Probate and Administration Cause No.98 of 2021 in the District Court of Ilala at Kinyerezi)

DAWSON RWE GASIRA.....APPELLANT

Vs

PEREGRINA JACOB BITESIGILWE.....1ST RESPONDENT

PRUDENCE JOHN KASIMBAZI.....2ND RESPONDENT

JUDGMENT

Date of last Order:5-2-2024

Date of Judgment: 24-4-2024

B.K. PHILLIP, J

Aggrieved by the judgment of the District Court of Ilala at Kinyerezi (Henceforth "District Court"), the appellant herein lodged this appeal to challenge the same. The grounds of appeal are reproduced verbatim hereunder;

- i. That, the trial Court erred by totally failure to take into a consideration of the well evaluated evidences and testimonies on the face of record of the Appellant (*sic*) and his witnesses and biased favor (*sic*) the Respondents herein hence unjustifiable verdict against the Appellant.
- ii. That, the trial court erred both in law and facts by ignoring the apparent contradictory testimony of the Respondents and his witness together with their fabricated evidence as shown in the trial court record.

In this appeal, the appellant prays for the following orders:

- a) That, this appeal be allowed.
- b) That, the decision and orders of District Court of Ilala at Kinyerezi dated 27th March, 2023 Before Honourable Kihawa, Resident Magistrate in Charge, be set aside and nullified.
- c) Declaration that the deceased and the appellant was (*sic*) legally married hence had valid marriage in exclusion of all others.
- d) Costs of this appeal.
- e) Any other relief (s) as this honourable Court deems fit and just to grant.

The learned Advocates Renatha Byabato and Emmanuel Hyera appeared for the appellant and respondents respectively. The appeal was argued by way of written submissions.

Before going into the arguments raised by the learned advocates in their written submission, let me give a brief background to this appeal. This appeal originates from a Probate and Administration Cause in the matter of the estate of the late Petrida Benedict Kyaruzi (Henceforth "the deceased"), who passed away on 17th May 2017 intestate. Initially the matter was filed at the Primary court of Ukonga where by the 1st respondent herein applied to be appointed as the administratrix of the estate of the deceased and the appellant herein filed a caveat against the petition. The matter was decided in favour of the appellant herein (the caveator). The 1st appellant appealed to the District Court. Her appeal did not sail thorough. The District Court upheld the judgment of the Primary Court of Ukonga. Undaunted, the 1st

respondent appealed to this Court vide (PC) Civil Appeal No.20 of 2019, in which this court quashed the proceedings of both lower courts and ordered the matter to be *tried de novo* before another Magistrate. So, the case file was transmitted to the Primary Court of Ukonga for trial *de novo*. The matter was heard afresh and the trial court appointed the appellant and the 1st respondent as co-administrator of the deceased estate. The 1st respondent was not satisfied with that decision. She filed an application for revision in the District Court and she joined the 2nd respondent herein as a party to that application. The same was struck out for being misconceived. Thereafter the 1st appellant filed an appeal against the judgment of the primary court before the District Court of Ilala at Kinyerezi vide appeal no.4 of 2021. The appeal was heard on merit and the District Court's decision was to the effect that the Primary Court had no jurisdiction to entertain the matter because the deceased professed Christian religion. It directed the parties to file a fresh petition before a court of competent jurisdiction, that is when the respondents herein filed the application whose judgment is challenged in this appeal.

Back the appeal in hand, Ms. Byabato's submission in support of the 1st ground of appeal was as follows; The trial Court erred in failure to take into consideration the well-evaluated evidence and testimonies of the Appellant and his witnesses and for being biased in favor of the Respondents herein as a result entered judgment in favor of the respondents unjustifiably. Ms. Byabato contended that the trial court failed to grasp the historical background of the matter and failed to consider the Appellant's evidence supported by his witnesses which proved that the Appellant celebrated

Christianity marriage with the deceased and even before officiating it on 5th June 2013 they had already lived together as husband-and-wife way back 2003. She went on to argue that the 1st petitioner did not dispute the aforesaid evidence presented in court by the appellant. No one objected to the marriage between the deceased and the appellant rather it was after the death of the deceased when the Respondents raised the allegations that there was the existence of civil marriage between the 2nd respondent and the deceased contracted way back on 3rd June 1991.

Ms. Byabato argued further that generally, there was no contracted marriage between the 2nd Respondent and the deceased since during the lifetime of the deceased neither the 1st Respondent nor the 2nd Respondent raised such allegations or objected to the legality of marriage between the appellant and deceased which was contracted at church the Oasis' of Healing Ministry. DW3 Pastor Prosper Ntepa testified before the court that he witnessed the marriage between the deceased and the appellant. DW4 Alex Kyaruzi also testified that he was the deceased's clan member and the deceased introduced no other man as her husband than the appellant herein. Ms. Byabato faulted the District Court for relying on the marriage certificate tendered in court by the 2nd respondent and admitted as exhibit P2 on the reason that the same was tainted with suspicious forgeries explained in court by Police Officer P7462 ASP Emmanuel Malima.

Coming to the 2nd ground of appeal Ms. Byabato argued that, there was an apparent contradiction in the testimony of the respondents and his witnesses. Further, she contended that the respondent's evidence was fabricated on the reason that the marriage certificate tendered in court by

the 2nd respondent was different from the one found in the deceased's job file, one certificate indicates that the marriage between the respondent and the deceased was contracted in 3rd June 1991 whereas the second one indicates that the marriage was contracted on 3rd June 1990. Ms. Bybato contended that despite the obvious contradiction in the respondent's evidence the trial court declared the purported marriage between the deceased and the 2nd respondent as a valid marriage while she recognized the marriage certificate tendered in court by the appellant as a valid marriage certificate. Mr. Bybato beseeched this court to allow this appeal and set aside the judgment of the District Court.

In rebuttal Mr. Hyera Challenged, Ms. Bybato for submitting extensively on the background of this appeal. He contended that there was no need to do so. He went on to argue that the issue of who had the lawful marriage with the deceased between the appellant and the respondent, was determined by this Court (Hon, De-Mello, J as he then was) to the effect that the marriage between the deceased and 2nd respondent was purely monogamous, thus the deceased could not enter in any other valid marriage with the Appellant. He contended that as far as the issue of the validity of the marriage is concerned, this court is *functus officio*. To cement his arguments he cited the case of **Kamundu Vr Republic (1973) EA 540** and **Bibi Kisoko Medard Vs Minister for Lands Housing and Urban Developments and Another (1983) TLR. 250.**

In the alternative, Mr. Hyera submitted that during the trial the respondents tendered in court exhibits P2 and P3, marriage certificates, and proof that

those marriage certificates were recognized by RITA. No divorce was ever entered between the deceased and the 2nd respondent; thus the 2nd respondent was the lawful husband of the deceased up to the date of her death. He insisted that P. 7462 ASP Emmanuel testified in court that the deceased's file in the Ministry of Home Affairs shows that the deceased's husband was the 2nd respondent. Further, Mr. Hyera contended that the contradiction on the date of marriage that is whether the marriage was contracted on 3rd June 1990 or 1991, was cleared by the respondent's witnesses. He was emphatic that the issue is whether the deceased was married to the 2nd respondent, and the same has been answered in the affirmative that is, the deceased was married to the 2nd respondent.

Concerning the 2nd ground of appeal, Mr. Hyera reiterated his arguments made in response to the 1st ground of appeal. He pointed out that the evidence adduced proved that the marriage between the deceased and the 2nd respondent was contracted on 3rd June 1991. In conclusion of his submission, Mr. Hyera implored this court to dismiss this appeal with costs.

In rejoinder, Ms. Byabato reiterated her submission in chief and contended that the issue of who had a valid marriage with the deceased between the appellant and respondent was never resolved by this court (Hon, De-Mello, J, as she then was). He contended that the impugned decision dealt with the issue of the validity of the marriage. The District Court recognized the alleged marriage between the deceased and the 2nd respondent in total disregard of the contradiction in the evidence tendered in court by the 2nd respondent and the testimonies of the appellant's witnesses such as Pastor Ntepa (WD3)

who conducted the marriage ceremony between the appellant and the deceased, and DW5 the deceased's neighbor, who confirmed that the deceased and the appellant were living together as wife and husband. In short, Ms. Byabato was emphatic that the evidence adduced by the 2nd respondent was full of contradictions not worth to be relied on by the trial court and this court. She reiterated the prayers she made in her submission in chief.

Having keenly analyzed the submissions made by the parties, let me proceed with the determination of the grounds of appeal. First of all, I have noted that the grounds of appeal are mainly challenging the lower's finding on who had a valid marriage with the deceased between the appellant and the 2nd respondent. I understand, that the grounds of appeal have to be founded on the court's findings in the impugned decision. The matter before the District Court was a Probate and Administration Cause in respect of the late Petrida Benedicto Kyaruzi filed for appointment of the administrator of the deceased estate. I have noted that the District Court diverted the issue which it was supposed to deal with, instead of deciding on who is the suitable person(s) to be appointed as the administrator of the deceased estate embarked on the determination of who had a valid marriage between the appellant and the 2nd respondent, as a result, it ended up declaring which one was a valid marriage something completely irrelevant in the matter that was before the court. Consequently, as alluded to earlier in this judgment, the appellant filed this appeal, mainly challenging the validity of the marriage between the deceased and the 2nd respondent and nothing concerning the appointment of the administrator of the deceased estate.

It is worth noting that the trial court's reasoning in the determination of the application that was before was guided by the provision of the Law of Marriage Act. This can be detected by looking at the issues framed for determination by the Court, to wit;

i) Whether the caveator was the legal husband of the deceased person

ii) Whether the second petitioner was the legal husband of the deceased person.

iii) Who should therefore be appointed the administrator of the estates of the deceased?

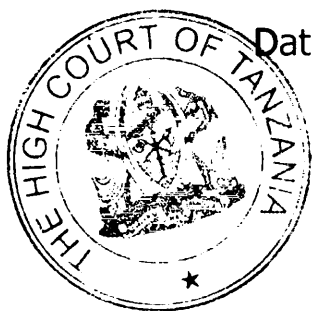
There is no gainsaying that the trial court misdirected itself by dealing with extraneous issues that were not the subject of the matter before the court. In the case of **Stephen Maliyatabu and Sarah Issaya Dyoya Vs Consolata Kahulananga, Civil Appeal No.337 of 2020**, (unreported), the Court of Appeal held that in Probate and Administration Cause the trial court is required to consider who is the suitable party to be appointed as administrator of the deceased estate and not extraneous matters such as matrimonial issues on the validity of the marriage between the deceased and the petitioner and/or caveator and rights of the beneficiaries. For ease of reference let me reproduce the relevant part of the decision of the Court of Appeal;

"We are inclined to point out that what is contained in the impugned judgment really taxed our mind because while the matter subject of this

appeal is a Probate and Administration Cause, when one looks at the evidence martialled and the impugned judgment the impression is that what was before the High Court is a matrimonial dispute governed by the Law of Marriage Act. This is what made us earlier on, to pose a question as to what was the subject of adjudication before the High Court? It is without dispute that the subject of this appeal was a probate and administration cause.....Although, the court before which the probate cause is filed has discretion to grant letters of administration, the law requires such discretion to take into account greater and immediate interests in the deceased's estate in priority or more remote interest. This entails appointing an administrator who will diligently and faithfully administer the estate of the deceased in order to achieve the judicious exercise of discretion which facilitates and simplifies the task of appointing the administrator of the estate of the deceased. The follow up question is whether the High Court judiciously exercised its discretion to appoint the administrator of the estate of the late Elias Rukonga Maliyatabu in accordance with the law.? Our answer is in the negative and we say so because it is unfortunate that the High Court considered extraneous factors and proceeded to adjudicate on them which dents a judicious exercise of discretion in appointing a person fit to administer the estate of a deceased person.....Thus, as correctly submitted by the learned counsel for the parties, these are matters regulated by the Law of Marriage Act when resolving a petition for divorce or separation which is between the spouses and not between so to say co wives. In the premises; the probate and administration of estates matter was not a proper forum to address issues relating to matrimonial disputes. See: MARIAM JUMA VS TABEA ROBERT MAKANGE, Civil Appeal No. 38 Since it is settled that, the discretion to appoint a suitable administrator must take into account the dictates of the law, we are satisfied that, the discretion was not properly exercised.....We find the 1st ground of appeal merited

and it is allowed. The impugned judgment and subsequent orders made by the learned High Court Judge are hereby quashed and set aside. We remit the case file for the petition and caveat filed to oppose the petition to be placed for expedited hearing before another Judge..."

From the foregoing and on the strength of the case of **Stephen Maliyatabu** (supra), I hereby quash and nullify the proceedings of the District Court and set aside its judgment. Further, I hereby order a trial *de novo* of this case before another Magistrate. The case file shall be transmitted to the District Court of Ilala at Kinyerezi forthwith. Due the fact that the parties in this case are not responsible for the faults that culminated in the issuance of the order for *trial de novo*, each party will bear his/her costs. It is so ordered.



Dated this 24th day of April 2024


B.K. PHILLIP

JUDGE