

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(SUMBAWANGA DISTRICT REGISTRY)**

**AT SUMBAWANGA**

**CIVIL APPEAL NO. 9070 OF 2024**

(Originated from Ruling of (G.B. Luoga – Senior Resident Magistrate) Mpanda District Court in Civil  
Application No. 8483 of 2024)

**ANDREA BUKUKU ..... APPELLANT**

**VERSUS**

**REHEMA KIRITI SADICK ..... RESPONDENT**

**02/05/2024 & 07/05/2024**

**JUDGMENT**

**MWENEMPAZI, J.**

The appellant in this appeal was the respondent in the Civil Application made by the Respondent herein named in the District Court of Mpanda (herein named as trial court) whereby the trial court (Hon. G.B. Luoga, SRM) granted the application and ordered for the body of JUMA ANDREA BUKUKU who was previously known as LWITIKO ANDREA BUKUKU to be exhumed and reburied according to Islamic rites under the close supervision of the police and Municipal Health Officer. The order was issued on the 23<sup>rd</sup> day of April, 2024.

According to the application the applicant applied for an order for exhumation and reinternment of the deceased body of Juma Andrea who was buried on the 17<sup>th</sup> day of April, 2024 at Kashaulili cemetery. He also applied for any other order the court may deem fit to grant.

In the accompanying affidavit the applicant stated that she was the legal wife of the deceased referred by the applicant Juma Andrea Bukuku whereby they were married under Islamic marriage on 24<sup>th</sup> day of August, 2022 at Kigoma region. That marriage was preceded by their cohabitation since 2018 to 2022. At the time the deceased was professing a Christian religion. In order to be allowed to marry under Islamic rites, the deceased was required and change to religion to start professing Islamic.

The deceased agreed to change religion and started to profess Islamic religion until his death. It is stated that the late Juma Andrea Bukuku died via a car accident at Misunkumilo main road on the 15<sup>th</sup> April, 2024 and was buried at Kashaulili cemetery as a pagan while he was professing.

The applicant has stated that being a legal wife of the deceased she felt that it is not proper for her late husband to be buried without following Islamic rites, she wanted him to be buried under Islamic rites including general

cleaning of the deceased body, prayers and buried. Those procedure were not adhered to which in Islamic religion it is against God's order and commands.

According to paragraph 10 and 11 of the affidavit, the applicant requested the body of the deceased from his father Andrea Bukuku and the latter denied that his son was not professing Islamic religion and told her that he will be buried in Christian religion. That promise was also not fulfilled as it was rejected because the deceased had changed religion. Hence, he was buried as a pagan. The applicant has averred that if the prayers will not be granted, she will suffer an irreparable harm to the Islamic beliefs.

On the other side the respondent filed counter affidavit sworn by the Andrea Bukuku to the effect that the respondent is the father of the late Lwitiko Andrea Bukuku who was proclaimed dead on 15<sup>th</sup> day of April, 2024 when he met a road accident and a burial permit was issued on the next date. He averred that his son Lwitiko Andrea Bukuku was a registered voter with his registration identity No. T-1003-2428-026-4 and also had a driving licence No. 400 300115. He was a Christian of the Moravian Denomination and baptized with a Christian certificate.

That he never in his life changed his religion into Islamic, hence the allegations laid down by the applicant is a mere lie and an afterthought. He has therefore never changed his name to Juma Andrea Bukuku and denies the alleged marriage certificate and has stated that it is inadvisable as the same was made contrary to the law governing marriage – Law of Marriage Act, [Cap 29 R.E 2019].

In this appeal the appellant is challenging the decision of the trial court which granted the application. The appellant has raised four grounds of appeal namely: -

1. That, the court which heard the application erred at law to hold that Juma Andrea Bukuku and Rehema Kiriti Sadick were properly married by relying on what it purported to be a marriage certificate which made in contravention of the law.
2. That, the court which heard and determined the application misdirected itself to hold that Lwitiko Andrea Bukuku and Juma Andrea Bukuku is the same person without any proof whatsoever.

3. That, the court which heard and determined the application erred at law to hold that Juma Andrea Bukuku is deceased without any proof proving the same.

4. That, the court which heard and determined the application erred at law to hold that Juma Andrea Bukuku changed religion from Christianity to Islamic without any proof whatsoever.

At the hearing the appellant was being represented by Mr. Patrick Mwakyusa learned advocate and the respondent was being represented by Mr. Hamad Amour, learned advocate. Hearing was conducted viva voce in the open court setting.

The counsel for the appellant commenced to submit by challenging the jurisdiction of the trial court. He submitted that the application at the trial court was for an order to exhume the deceased body who was buried under the pagan rites and reinternment the same under the Islamic rituals as the deceased was professing Islamic religion after converting from Christian belief to Islamic religion. He argued that the application was made under section 95 of the Civil Procedure Code, [Cap 33 R.E 2019] and section 9 of the Inquest Act, [Cap 24 R.E 2019]. That section does not empower the

trial court to hear and determine the matter without there being the substantive laws allowing the court to do that. That was decided in the case

**Bunda District Council Vs. Villiam Tanzania Ltd [2002] TLR 385**

where it was held that: -

*"Inherent jurisdiction must be exercised subject to the rule that if the code does not contain specific provisions which would meet the necessities of the case in question such provisions should be followed and the inherent jurisdiction should not be involved. It is only when there is no clear of provision in the civil procedure that inherent jurisdiction can be invoked."*

The counsel had the view that since there is no specific law, the proper law to be invoked was section 2 (3) of the Judicature and Application of Laws Act, [Cap 358 R.E 2019]. That was also confirmed in the case of **Tanzania East Africa Mining Ltd Vs. Minister of Energy and Minerals**, Misc. Commercial Application No. 74/2014 High Court of Tanzania – Commercial Division (unreported). In that case it was held that: -

*"Section 95 of the Civil Procedure Code does not confer any jurisdiction on the high court or courts subordinate thereto; rather it provides for inherent powers of the High Court and subordinate courts, such powers can only be exercised where the code is silent on a certain procedure".*

In the same case it was also held that: -

*"Since the applicant has not cited section 2(3) of the judicature and application of laws Act, (JALA), which confers jurisdiction to this court to invoke its inherent powers, but instead has cited section 95 of the Civil Procedure Code alone, which does not confer any jurisdiction on this court to grant the orders sought in the application, it follows therefore that the application is incompetent for want of proper and specific citation of the enabling provision of the law".*

The counsel argued that the question of jurisdiction must be ascertained by the court at the beginning so that it is clear that the court is clothed with the necessary jurisdiction. In order to support the argument, the learned senior

counsel cited the case of **Fannuel Mantiri Ng'unda Vs. Herman Mantiri Ng'unda and two Others [1995] TLR 155 at 159** where the court of Appeal of Tanzania held: -

*"In our considered view, the question of jurisdiction is so fundamental that the 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. This should be done from the pleadings. The reason for this is that 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. For the court to proceed to try a case on the basis of assuming jurisdiction has the obvious disadvantage that the trial may well end up in futility as null and void on grounds of lack of jurisdiction when it is proved later as matter of evidence that the court was not properly vested with jurisdiction."*

In this case, the applicant cited section 95 of the Civil Procedure Code and Section 9 of the Inquest Act, [Cap. 24 R.E 2019] as enabling provisions. That means the trial court was sitting as a Coroner's Court. The counsel in the submission referred this court to section 4(1) of the Inquest Act, [Cap 24 R.E 2019] which provides for the functions of the coroner's court.

*"The functions of the coroner's court is to inquire into the death of any person who:*

- a) is reasonably suspected to have died violently or of unnatural cause;*
- b) dies a sudden death the cause of which is unknown;*
- c) dies while in official custody, or consequences of the execution of a sentence passed on him;*
- d) dies or is found dead in such place and in such circumstances as to require an inquest in pursuance of the provisions of any written law".*

Section 4(2) provides that Coroner's Court shall not hear or inquire into any matter or proceedings arising otherwise than under the Inquest Act. He submitted that the duty of the coroner's court is to inquire into the death of

unknown person or a violent death whose cause is unknown. He went submitting that given the provisions of the Act, the same is inapplicable to the situation facing the present case. He argued that Lwitiko Andrea Bukuku died the known death even the affidavit of the applicant shows that the late Lwitiko died due to car accident and that is confirmed in the burial permit, that the death of Lwitiko Andrea Bukuku was due to an accident. He submitted that the trial magistrate contravened the law as demonstrated above.

The counsel submitted that on the basis of jurisdiction, the District Court had no jurisdiction and therefore prayed that the decision be quashed and subsequent order be set aside. Therefore, this appeal be allowed with no order as to costs.

Submitting on the grounds of appeal, the counsel capitalized the energy on the first ground of appeal that the trial court erred at law to hold that Juma Andrea Bukuku and Rehema Kiriti Sadick were properly married by relying on what it purported to be a marriage certificate which was in contravention to the law. He went on to submit that, marriage in the country is governed by the law of marriage Act, [Cap 29 R.E 2019]. He submitted that under

Islamic Marriage section 2(1) it is officiated by kadhi – Muslim priest or preacher or a leader of Muslim community who has been licensed under the Act, Law of Marriage Act (LMA) to celebrate marriages in Islamic form section 33(1) of the Law of Marriage Act, [Cap 29 R.E 2019] requires certificates to be issued. The same must be in a prescribed form. He went on to challenge the annexed certificate that it was deficient of the features prescribed in the law of marriage.

There is an explanation that normally in Islamic marriages those certificates are issued. That is in contravention of the law and it does not justify the alleged marriage.

The learned counsel for the appellant submitted that, this is not a religious conflict; it is a conflict between Rehema who alleges to be the wife of the late Lwitiko, and Andrea Bukuku. That point was quickly seconded to by the counsel when his turn was due to reply to the submission in chief.

The counsel prayed to submit on ground 2,3 and 4 together. He submitted that the certificate of birth of Lwitiko Andrea Bukuku, baptismal certificate, voters identify card, and a burial permit were attached as annextures. All the exhibits are concerned with Lwitiko Andrea Bukuku and not Juma Andrea

Bukuku. The trial court did not receive any evidence that the deceased Lwitiko Andrea Bukuku is the same person as Juma Andrea Bukuku. In the application, it was not stated that Juma Andrea Bukuku changed religion. There is no any evidence brought by the respondent that Lwitiko Andrea Bukuku is Juma Andrea Bukuku.

The counsel for the appellant submitted that Lwitiko Andrea Bukuku was buried at Nsemulwa not Kashaulili. And that it is their belief that in changing the religion one professes there is a procedure. No evidence was produced that the said procedure was followed.

The fact that the respondent was married to Juma Andrea Bukuku has not been proved.

It is our submission that religion takes care of the person's soul and not the body. It is surprising that the respondent wants to exhume the body to bury again under the new rites. He argues on behalf of the appellant that the move shows lack of love to the deceased.

In conclusion he prayed that this court should not to allow exhumation of the body. That will be injurious to the health of the society around. Since

the issue concerns the society, the counsel informed this court that they do not pray for costs.

As it was earlier on shown, the respondent was being represented by Mr. Hamad Amour, learned advocate. In reply to the submission in chief he commenced by responding to the issue of jurisdiction which was raised by the counsel for the appellant as an objection to the application in general.

He submitted by showing concern to the practice of raising issues without prior notice as a surprise to be a bad practice and unfair to the adverse party. However, it is their opinion that the trial court had power to admit, hear and determine the matter before it.

The application to exhume and re-interment was made under section 95 of the Civil Procedure Code and section 9 of Inquest Act. That, section 95 of Civil Procedure Code, gives power to the court and determine issues which will lead to justice. He submitted that the counsel for the appellant has not submitted on the section which ousts jurisdiction of the court to hear and determine application of the nature as this one.

He submitted that the citation of the law, does not confer jurisdiction to the court. The jurisdiction of the court emanates from the law.

In the submission in chief, the counsel cited section 4(1) of the Inquest Act, [Cap 24]. The section applies when the court sits as coroner's court. The counsel for the respondent submitted that in the impugned application, the trial court sat as a normal court.

On the grounds of appeal, he observed that the appellant's counsel has submitted that the certificate of marriage which was tendered/adduced is invalid for failure to meet the legal requirement. The words "to be in prescribed form" does not refer to the appearance. It refers **to the contents**, that they must conform to the law(emphasis is mine).

The certificate which was adduced has all the ingredients of the valid certificate. It has names of parties who got married, it has their signatures; it has names of two witnesses as required and their signatures, it has the place and the marriage was conducted in public and it has also the name of the officiating officer. The certificate has all languages; Arabic, Swahili and English. The certificate being issued by Islamic Development Trust does not invalidate the certificate.

Our courts have been receiving the certificates as evidence in a divorce case and the documents have been in use. If this certificate will not be

recognized, *it will create double standard.* That there are times the certificates are held valid and times when they are not valid. It is the opinion of the respondent that the certificate is a valid certificate proving marriage.

The counsel replied to the grounds 2, 3 and 4 as follows: -

An argument that Lwitiko and Juma are not the same person, the trial court was right to decide in a positive way that they are one and the same person. The District Court arrived at the decision after considering the pleadings and oral submissions by the parties.

In the pleadings, both sides agreed that the person died on 15/04/2024; that the body was buried on 17/04/2024. The circumstances show that Lwitiko and Juma are one and the same person. Thus, the burial permit bearing the name Lwitiko is sufficient to show Juma has passed away.

The last ground of appeal fault that there was no evidence that Lwitiko Andrea Bukuku changed his religion without there being any evidence. The counsel has said there must be procedure of change of religion. However, that has not been clarified further, what procedure was supposed to be followed.

The counsel submitted that when a person changes religion from any religion to Islam, there is no certificate which is issued. However, he is required to state his profess which changes his religion into Islamic religion.

This person, is dead, the question is what then shows us that he changed religion. The counsel replied the self-posed question by suggesting that they will go back to look at his way of life. The deceased in this case, contracted an Islamic marriage before a sheikh. That is enough to show that he was a Muslim.

He submitted also that the appellant's counsel has submitted there are many people who have contracted marriage whose nature is between a Christian and Muslim. Although the law of marriage Act recognize various marriages, but in this case the deceased contracted an Islamic marriage in the mosque before Islamic religion leaders.

The counsel for the respondent submitted that although this is not a religious conflict but the counsel for appellant erred and said what religion wants to exhume the body. It is the wife of the deceased who wants to exhume. It is intended to fulfil four rights a deceased who is a Muslim is entitled to. The rights are: -

1. The right to be washed according to Islamic procedures.
2. The right to be shrouded (kuvishwa sanda).
3. The right to be prayed for according to Islamic rites.
4. To be interred according to Islamic rites.

On the difference of names, Lwitiko Andrea Bukuku and Juma Andrea Bukuku the counsel for the respondent submitted that it is not a new thing in our courts of laws. On this issue, he prayed to refer to the decision in the case of **Abdallah Ismail Mnyone Vs. Nasra Mzava**, Probate Appeal No. 5 of 2022. In the case referred, the deceased was named Gure Joel Mnyone but the widow took the marriage certificate with the name of Rajab Aziz Mnyone and the appellate court found that the two names referred to the same person. The counsel prayed this appeal to be dismissed.

In rejoinder the counsel for the appellant submitted as follows: **First**, the counsel has argued that the issue of jurisdiction was a surprise. There are various decisions which allow to raise the issue at any time. **Second**, the counsel for respondent has submitted that the trial court had inherent jurisdiction. He submitted that on behalf of the appellant they have cited the case ***Tanzacoal East Africa Mining Ltd Vs Minister of Energy and***

**Minerals (Supra)** which clears the air by guiding what should be done. The applicants ought to have moved the court under Judicature and Application of Laws Act [Cap 358 R. E 2019]. **Third**, the counsel submitted that there is no law ousting jurisdiction I have cited section 4(1) of the Inquest Act. **Fourth**, that the District Court is not a coroner's court. Section 2 of the Act provides that the magistrate acting under the inquest act is a coroner. **Fifth**, that the marriage certificate is valid. The counsel for the appellant has argued that the contents are not proper as required by law. **Sixth**, the law provides for Swahili or English no Arabic. **Seventh**, Islamic development Trust is not an authority to issue marriage certificates, the law entrusts that duty to the United Republic of Tanzania. **Eighth**, that such certificates are recognized. No authority cited. That would be possible before the Law of Marriage Act. **Ninth**, Juma and Lwitiko are the same. The counsel for the appellant has argued that they are different persons. Juma was buried at Kashaulili and Lwitiko was buried at Nsemulwa. **Tenth**, that there was a agreement on the date of death. The counsel for the appellant submitted that they opine that each side mentioned the date in respect of their subject person (deceased). **Eleventh**, that no certificate is issued to the person changing religion but says words professing the religion that is

not proved in the case. **Twelveth**, that the life style of the subject (Lwitiko) changes. That was not proved in the affidavit. **Thirteenth**, the cited case **Abdallah Ismail Mnyone** is on the names. The appellant's counsel has submitted that they are names, religion of the deceased and that there was marriage and the cited case is irrelevant. He therefore prayed for the appeal to be allowed with no order as to costs.

I have heard the parties and also read the record presented before me concerning the dispute at hand. Clearly, the first issue of determination is whether the trial court had jurisdiction, other issues are whether there was proof of marriage and whether the legal requirement has been met to prove that Lwitiko Andrea Bukuku is the same person as Juma Andrea Bukuku.

The issue of jurisdiction is so fundamental that it had to be resolved before the trial court can entertain the matter. The counsel for the appellant cited the case of **Fannuel Mantiri Ng'unda Vs. Herman Mantiri Ng'unda and two Others** (supra). In the cited case it was held that: -

*"...as a matter of practice, it is essential for the courts at all times in the first instance to ascertain from the*

*pleadings stage if they are properly vested with jurisdiction and not to let the matter to chance”.*

In the same vein, in the case of **Yohana Bulole Vs. Anna Benjamini Malongo**, Civil Appeal No. 18 of 2020, Court of Appeal of Tanzania (sitting at Bukoba) held that (page 11): -

*"It is common ground that jurisdiction of courts is a creature of statute and is conferred and prescribed by the law and not otherwise..."*

*It is therefore primary duty of every court, before venturing into a determination of any matter before it, to first satisfy itself that it is vested with the requisite jurisdiction to do so”.*

In the present situation, the applicant moved the trial court by section 95 of Civil Procedure Code and section 9 of the Inquest Act, [Cap 24 R.E 2019]. From the cited case of **Tancoal East Africa Mining Ltd Vs. Minister of Energy and Minerals** (supra) as the citation shows at page 6 -7 in this judgment, section 95 of the Civil Procedure Code confers no jurisdiction to the trial court. Indeed, as truly argued by the counsel for the respondent

that jurisdiction is the creature of law, that law in my view, must correctly be cited in the pleadings.

Obviously, the function of the coroner court is to inquire into death which is violent and also into the causes of certain death whose cause is unknown. The counsel for the appellant cited section 4(1) of the Inquest Act, [Cap 24 R.E 2019], and in this case it is reproduced at page 9 of this judgment.

As it is clear that the deceased Lwitiko Andrea Bukuku died due to an accident, section 4(2) of the Inquest Act, [Cap 24 R.E 2019] ousts the jurisdiction to the trial court.

The above explanation aligns with the submission made by the counsel for the appellant which directs us to the holding in the case of **Tancoal East Africa Mining Vs. Minister of Energy and Minerals** (supra) that the applicant ought to have cited the provisions of section 2(3) of Judicature and Application of Laws Act, [Cap 358 R.E 2019].

Under the circumstances, it is my firm view that trial court when hearing and determining the matter at hand had no jurisdiction to entertain the same.

On the question as to whether, there was proof of marriage between the respondent and the deceased the late Lwitiko Andrea Bukuku, the respondent produced as annexure a marriage certificate which has been challenged to be lacking the compliance of the law. According to the Law of Marriage Act, [Cap 29 R.E 2019], section 9(1) *Marriage means a voluntary union of a man and a woman, intended to last for their joint lives.* Section 25(1) (b) provides that a marriage may, subject to the provision of this Act, be contracted in Tanzania in Civil Form or where both the parties belong to *specified religion*, according to the rites of that religion. A marriage in Islamic form means a marriage contracted in the manner recognized by Islamic or by any school or sect of that faith. Section 30 of Law Marriage Act provides that the marriage in a specified religion may be celebrated in a place habitually used as a place of public worship or a place of gathering by followers of that religion, by a minister of that religion who was been licensed in that behalf by the Registrar General. Section 33 provides for the requirement to issue a marriage certificate in duplicate, which certificate must be in a prescribed form, signed by the parties and two witnesses. In my understanding that is registration of the marriage. However, under

section 41(f) of the Law of Marriage Act, [Cap 29 R.E 2019] failure to register does not invalidate the marriage.

In our situation, the certificate annexed is a sign that the late Juma Andrea Bukuku and the respondent may have had an agreement to live together as husband and wife and celebrated their marriage but they did not register the same as per the Law of Marriage Act, [Cap 29] which would provide them a certificate in a prescribed form as provided by the law.

Now the question is whether Juma Andrea Bukuku and Lwitiko Andrea Bukuku are the same person. The answer to that is simple, if at all Lwitiko Andrea Bukuku is the same person as JUMA ANDREA BUKUKU, then the other step after change of name, the late Lwitiko Andrea Bukuku ought to have declared change of name in the Deed Poll made under the Registration of Documents Act, [Cap 117]. The declaration of the change of name is made under the Oaths and Statutory Declarations Act, [Cap 34 R.E 2019]. The said Deed poll must be registered and in this case produced for evidence. Since all the steps are lacking in, we have Lwitiko Andrea Bukuku as the legally valid name in this case. That is why the evidence in record bears the said name in the annexed documents which are: - birth certificate,

baptismal certificate, driving licence, voters registration card and burial permit.

Under the circumstances the appeal is allowed based on the legal position that the trial court had no jurisdiction to hear and determine the application as explained herein above. The ruling and consequent orders were thus null and void. They are accordingly quashed and set aside respectively. No order is issued as to costs.

It is ordered accordingly

Dated and Signed at Sumbawanga this 07<sup>th</sup> day of May, 2024.



**T.M. MWENEMPAZI**  
**JUDGE**

Judgment delivered this 07<sup>th</sup> day of May, 2024 in the presence of appellant in person and Mr. Patrick Mwakyusa, learned advocate for appellant and presence of respondent in person and Mr. Hamad Amour, learned Advocate for Respondent.



**T.M. MWENEMPAZI**  
**JUDGE**  
**07/05/2024**