IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

SHINYANGA SUB REGISTRY

CIVIL APPEAL NO. 202404171000008230

(Arising from Civil Appeal No. 000005398 of 2024 before Meatu District Court, the same arise from Objection Proceeding No. 1 of 2024 before Kimali Primary Court)

LUCIA KIGANGA PETER .....APPELLANT

VERSUS

NKAMBA MSELWA MADUHU .....RESPONDENT

JUDGMENT

23rd &31st May 2024

F.H. MAHIMBALI, J

The appellant had successfully petitioned for letters of administration of the late Miselwa Maduhu before Kimali Primary Court whom she alleged to be her husband. The respondent was unhappy with appointment of the appellant hence sought for revocation. The trial Court after had heard grounds for revocation dismissed it for lack of merit. The respondent was aggrieved by such decision, he successfully appealed before the first appellate Court which nullified the trial court's decision and thereafter revoked the appellant's appointment. Aggrieved by such decision the

appellant had approached this Court, marshalled with five grounds of appeal;

1. That, the first appellate court grievously erred in law and in fact for not taking into consideration the purported will which divided the estate of the deceased which the trial court ruled that it was based on forgery and was illegal.
2. That the first appellate court erred in law and in facts in relying and ultimately making decision based on hearsay evidence from the respondent who was absent during the existence of the marriage between the appellant and her deceased husband.
3. That the first appellate court erred in law and in facts in misinterpreting the separation between the appellant and her deceased husband by erroneously ruling that the marriage was finally determined by separation.
4. That, the first appellate court erred in law and in fact in disregarding the facts that the respondent and other beneficiaries had denied administering the estates of the deceased.
5. That, the first appellate court erred in law and in facts in disregarding the fact that during separation period between the appellant and her late husband the appellant was being maintained by the deceased husband.

During the hearing of this appeal both parties appeared in person and unrepresented. Arguing for her appeal, the appellant prayed that her grounds of appeal be adopted and form part of her appeal submission. She also added that, she has been wrongly denied inheritance of the deceased's estate. Though she was separated from him, was still being maintained by him and that she had been regularly visited by him. By the way, she added that during their life time, she was blessed with two children. Currently, one is still surviving. Thus, by that probate matter excluding her and her child, it was not proper and right. She prayed for this court to quash the said judgment of the first appellate court so that she may have a share of her inheritance.

The Respondent's reply to the arguments advanced by the appellant were that, this appeal is bankrupt of any merit and is bound to be dismissed. She added that the all grounds of appeal are devoid of any merit. She being a wife, she only had a right of claim of properties jointly acquired between them as the divorced wife after the dissolution or separation of their marriage and not during inheritance. That distribution of matrimonial property is distinct from distribution of the deceased estate. Since everyone entitled from that inheritance accordingly got his/her share, there is nothing left unattended.

Finally, she prayed for her reply to the grounds of appeal be adopted to form part of her submission.

Having heard both parties on merit, I have now to determine this appeal and the issue for consideration is whether this appeal has been brought with sufficient cause.

I have gone through the lower courts' records and submission by the parties. From the facts it is apparently clear that the deceased had three wives (Geni Masunga, Ngolo Talange and Angelina Thomas). The appellant was only concubine who stayed with deceased from 1997 to 2006 and they were blessed with two issues but only one survived. From 2006 to 2020 when the deceased died, the appellant had separated with the deceased and took her own life for more than 14 years. When the deceased died, the appellant came back and prayed for inheritance. As if that is not enough, she applied for letters of administration of the estates of the deceased. However, there is also evidence that each family of the deceased, had been allocated with properties by the deceased in his life time.

Now, the complaint by the appellant is that the purported will which alleged to allocate properties to each family was illegal.

I am aware that probate matter is a complexity field which involves choice of law in determination. It is crosscutting field. A person need not to be tied by a single rule to decide probate matter.

In the current matter, the complaint of WILL is misplaced. Notably, there is no WILL as alleged by the appellant made by the deceased. A clear finding is that the deceased was very keen, being polygamous family on the acquired properties he directly assigned those properties to his family during his life time. This is evidenced by the testimony of SM1, SM2, SM3, SM4 and the Appellant himself.

Sm1. " *mimi napinga msimamizi wa mirathi ya marehemu baba na mama yangu Geni Masunga haimhusu Lucia Kiganga kwasababu yeye alikua na mji wake na vitu vyake alikua na ng'ombe 8 akaondoka nazo mwaka 2006 pia slope mwamanoni alikua amepanga yeye hakuwa na nyumba"*

SM2 " *... marehemu alikua na wanawake watatu ambao ni Geni Masunga, Ngolo Talang na Angelina Thomas lakini mpingwaji hakuwa mke wake alikua mtembezi tu na walizaa Watoto wawili mmoja akafariki na aliopo ni Geni Miselwa. Mpingwaji alikua amepanga sentani mwamanoni alikua anajitegemea nashangaa yeye kudai mali ya geni Masunga wakati ambapo kila kaya ya marehemu ilikua inajitegemea"*

SM3 " *..... nilikua mwenyekiti wa eneo hilo wakati huo, nafahamu pia marehemu Miselwa Maduhu aligawanya mali kwa kaya zake 3, kaya ya geni Masunga, Ngolo Talange na Angelina Thomas* "

SU1(the appellant) "*..... Kusema kwamba kila afamilia ilikua na mali yake si kweli mimi niliondoka na Watoto na hatukuvunja mji tulitenegana tu kwa kutoelewana na sikutoka na mali nilliacha kwenye mji mkubwa ambayo ngómbe 100 tulizitafuta na mume wangu na geni masunga Pamoja na wake wengine,..... mimi naelewa kuwa mali hiyo ipo yote na inanihusu pia na mtoto wangu, familia ya Ngolo Talange na familia ya Geni Masunga ispokuwa familia ya Angelina Thomas ambaye aligawiwa na mme wake ng'ombe na eneo lake alipewa ng'ombe za kuenda kununulia eneo Singinda* "

From the extract above, there is no proof as to whether the appellant was a wife of the deceased. However, there is no dispute that the deceased allocated properties to each family as admitted by the appellant. The apparent question comes in mind is that how is it possible for a person who has interest over the properties left it to another person and expected to have ownership /share for long period more than 14 years?

I must therefore conclude that, since there was no evidence as to whether the deceased left a will then the same cannot be entertained and thus the administration of his estates has to be treated as being intestate.

The appellant had also complained for the first appellate court to base its decision on hearsay evidence. Notably, hearsay evidence can be defined as third person's assertions narrated to a court by a witness for the purpose of establishing the truth of that which he asserts (See In **Subraminium V Public Prosecutor, [1956] 1 W.L.R. 965 (P.C.) at 970).**

In my thorough scanning of the evidence in record, none is hearsay evidence adduced by parties. The all witnesses from both sides adduced their testimony while boasting to have seen and heard from the deceased himself. However, the rule is that a statement given in proceedings about something other than that by the person who directly perceived it is inadmissible. The rule against hearsay is thus exclusionary in the sense that it excludes hearsay evidence in the course of proceedings. See **R vs Gibson** [2008] 1 SCR 397, **Sparks vs R,** [1964] A.C. 964.

The appellant had also complained that it was an error for the first appellate Court to interpret that the appellant and the deceased had separated. I must sincerely agree with the appellant that it was an error to interpret that the deceased and the appellant were separated on

account that there was no proof of a valid marriage between the two. Section 107 (2) of the Law of Marriage Act provides for ingredients of issuing decree for divorce; among it is separation. Therefore, separation would be weighed in determination if only parties had petitioned for divorce decree and the court ruled on that base. That was not the case in the current matter, no separation of spouses to a dispute not referred in Court and so determined.

In my close digest, it is perhaps true that the appellant had not concluded any valid marriage rather she was a concubine. I once decided in the case of **Felister Boniface Gumshi vs Mhindi Sendama Ng'wandu, Pc. Civil Appeal No.44 of 2023 (unreported)**

> *"Before I proceed to determine the merit of the distribution, I wish to comment one thing that, since a presumption of marriage is not known a type of marriage but just a recognized long cohabitation of parties which needs legal protection as far as custody and maintenance of children is concerned in one aspect and also protection of assets jointly acquired by both parties during their cohabitation jubilation. That being not a marriage, the courts of law have no legal mandate of dissolving such a relationship. As it is not legally recognized as lawful marriage, it is thus not dissolvable by courts of law but dissolved by the parties' own wishes"*

Therefore, being a concubine as she was, the appellant had to file her claims over the properties jointly acquired with the deceased during the lifetime of the deceased. For a divorced spouse/ or even a separated spouse or concubine claiming her right on inheritance from the deceased after he has died is not founded by law. A divorcee does not inherit but only gets distribution from the properties jointly acquired during their lifetime. A divorcee cannot wait and claim inheritance from properties she alleged to have jointly acquired between them during their life time. If that was not claimed subsequent to her divorce/separation, she slept with her right. As inheritance is not a substitute of division of matrimonial properties jointly acquired during their life time, nor is it an investment for a divorcee to claim interests from it.

It is also the appellant's complaint that the respondent and other beneficiaries, had denied administering the estates of the deceased. It is important to note, the office of an administrator has always been closely linked with position and duties of an administrator of an estate. It is purely a duty of trust, not personal gain. The Court of Appeal in the case of **Naftary Petro vs Mary Protas (Civil Appeal 103 of 2018) [2019] TZCA 357 (30 October 2019)** while making reference to the case **Sekunda Bwambo v. Rose Ramadhani [2004] TLR 439** which is the decision of the High Court by Rutakangwa, J. (as he then was), extracted

in **Sekunda Bwambo** (supra) at pp. 443-444 describing it as a classic exposition of qualifications of a fit person for appointment as an administrator as well as the duties and responsibilities of such a person, thus:

> "*The objective of appointing an administrator of the estate is the need to have a faithful person who will, with reasonable diligence, collect all the properties of the deceased. He will do so with the sole aim of distributing the same to all those who were dependants of the deceased during his life-time. The administrator, in addition, has the duty of collecting all the debts due to the deceased and pay all the debts owed by the deceased. If the deceased left children behind, it is the responsibility of the administrator to ensure that they are properly taken care of and well brought up using the properties left behind by their deceased parent After the administrator has so faithfully administered and distributed the properties forming the estate he has a legal duty to file an inventory in the Court which made the appointment giving a proper account of the administration of the estate. This action is intended to help any one of the beneficiaries who feels aggrieved at the way the property was distributed and thus*

dissatisfied to lodge his/her complaints to the Court which would in turn investigate the same and decide the matter in accordance with the dictates of the law.

In view of all this, it is evident that the administrator is not supposed to collect and monopolize the deceased's properties and use them as his own and /or dissipate them as he wishes, but he has the unenviable heavy responsibility which he has to discharge on behalf of the deceased. The administrator might come from amongst the beneficiaries of the estate, but he has to be very careful and impartial in the way he distributes the estate."

Though each case must be decided by its own facts; I fully associate myself to the findings of the Court of Appeal to the position of the administrators in the estate of the deceased. It is an endless war between relatives. People must surely know the extent of their interests in the properties left by the deceased.

For administration to take a recourse there must be existence of the following; Existence of estates to be administered, heirs and lastly there must administrator of the estates.

In the instant matter, the estates which are ought to be administered are uncertain, as have been detailed that, the deceased at the time of his death had already allocated properties to his respective family during his life time. Therefore, each family has its own properties which benefit all heirs in respect of each family. It is however evidenced that the appellant when moved from the husband, she moved with all properties allocated to her by deceased as evidenced by SM1, SM2, SM3. The appellant on the other hand, had averred that when moved from her husband, she surrendered her properties to a the senior family of the deceased, the argument which is unsupportive by any proof.

For sure as per facts of the case, the appellant's interests to administer the properties of the deceased can be found by drawing long line. Firstly, there is nothing left to be administered. Secondly, there is no any remoteness of interest over the estates of the deceased after the appellant had lost interest since when she had moved away.

I am aware that every person with interest over the estates may apply for administration of estates being relative or not. But the same should be reasonably exercised. Since there is no certainty of properties of the deceased to be administered, then the appellant cannot claim to have been denied with the right of administration of the said estates even

if she was a concubine. By the way, I wonder if a concubine's right (if any) can extend to the administration of the deceased estates. If any, her interests perished with the demise of the deceased.

Whereas, the appellant had argued that since the deceased continued to maintain the appellant and the child, that implies that they were not separated. This ground is however only relevant where there is proof to that effect. I say so, because it is a question of fact. It needed proof as to whether the deceased continued to maintain the appellant and the child. Secondly existence of marriage is not determined by maintain ship rather legal effect. Yet, since there is no dispute that the appellant was blessed with one issue with the deceased, then custodial of a child was a must and by doing that does not necessarily mean the appellant maintained spouse ship. There ought to be a clear proof on that.

As regards to the said child left with the appellant, as per the facts of this case, there is nothing left for his/her share. The appellant has to proceed maintaining her child to what is bestowed/blessed to her as she/he cannot inherit the grave.

With all the said, I find no reasons to fault the first appellate court's findings; and consequently I uphold it with directives that each

party/family should enjoy the properties left and designed to it respectively. Accordingly, appeal is dismissed with no order as to costs.

DATED at SHINYANGA this 27th day of May 2024.

F.H. Mahimbali

Judge