

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

TEMEKE HIGH COURT SUB-REGISTRY

(ONE STOP JUDICIAL CENTRE)

AT TEMEKE

MISC. PROBATE AND ADMINISTRATION APPLICATION NO.

28454 OF 2023

(Originating from a probate and administration cause no. 11 of 2023)

STEVEN FRANCIS ZANGIRA.....APPLICANT

VERSUS

FRANSIC XAVIER NG'ATINGWA.....1STRESPONDENT

CAROLINE GIDEON MLINGI..... 2ND RESPONDENT

RULING

21/05/2024 & 05/06/2024

SARWATT, J.;

The applicant filed this application under section 2(3) of the Judicature and Application Laws Act(Cap 358 R.E 2019), section 49(1)e of the Probate and Administration of Estate Act, Cap 352 R.E 2019, and section 95 of the Civil Procedure Code, seeking the Court to order, administrator of the estate to

alter the list of Inventory and estate of account and remove Caroline Gideon Mlingi from the list of beneficiaries of the estate of the late Francis John Zangira, and order for costs and any other relief that the Court deems fit to grant. The application was made by way of Chamber summons supported by the affidavit sworn by the applicant. Both respondents opposed the application and filed counter affidavits to that effect.

According to the affidavit sworn in support of this application, the reason advanced by the applicant in support of this application is that the appointed administrator of the estate (1st respondent), despite having full knowledge that 2nd respondent had never married his late father (the deceased), but he has included her in the list of beneficiaries. She is listed to take some properties. The sworn affidavit of the applicant indicates in paragraph 10, that it would be unfair if the 2nd respondent is left in the list of the beneficiaries as she does not qualify for such right since she is not a legal heir.

At the hearing of the present application, the applicant was represented by advocate Barnaba Luguwa. Advocate Claudio Msando represented the 1st respondent, while the 2nd respondent enjoyed the service of Lucy Nambuo, a learned advocate. With leave of the Court, the application was heard by

way of written submissions.

Submitting in support of the application, Mr. Luguwa started by praying that the contents of the applicant affidavit be adopted to form part of his submission and went on to submit that the second respondent is not the wife of the deceased as she acknowledged that she had never contracted any marriage with the deceased. This is because they didn't undergo any ceremony as provided under section 25 of the Law of Marriage Act, Cap 29 (the Law), which includes the manner of contracting a marriage.

According to the counsel, the respondents are trying to indicate the length of the span in which the second respondent has lived together with the deceased, and it seems that the respondent wants this Court to invoke the principle of presumption of marriage under section 160(1) of the Law. However, the person who wants to rely on this principle has the duty to prove that they were duly married, as the presumption is a rebuttable one.

It was the counsel's further contention that proving to be duly married means the second respondent has to confirm that the deceased and her contracted a marriage in the manner provided for under section 25 of the Law, as to cohabit for a long time does not turn the said relationship into marriage. To

support his assertion, he cited the case of **Zacharia Lugendo v Shadrack Lumilang'omba** (1987) TLR 31

On the issue of whether the second respondent is entitled to inherit the estate of the deceased, it was the counsel's contention that section 28 of the Indian Succession Act provides that if a man left no widow, then his property shall belong to his lineal descendants or to those who are kindred to him not being lineal descendants, if none is kindred to him it shall belong to the state. According to the learned counsel, for a person to fall within the beneficiaries, that person has to have consanguinity with the deceased or a married couple, who is also referred to as a widow, and she has to be married to the deceased and not concubinage. He added since the second respondent is not a wife of the deceased, it follows, therefore, that she is not a widow nor heir and a beneficiary.

The first respondent's counsel, on his submission, referred the Court to section 160 of the Law and submitted that it is undisputed that the deceased and the second respondent had never celebrated a marriage according to sections 9 and 10 of the Law. However, the applicant's assertion that the second respondent is a concubine is not correct since, in law, a person with no marriage cannot be in a concubine relationship as a concubine arises

when one is having a sexual relationship with someone who has lawful subsisting marriage.

It was Mr. Msando's contention that the relationship between the deceased and the second respondent falls under a presumption of marriage as they have lived together for more than two years and gained the reputation of being a husband and a wife. The counsel further urged the Court to administer justice to the second respondent as the applicant's submission doesn't indicate that during the stay between the deceased and the second respondent, there has been a sour and tiresome relation with no contribution.

The second respondent's counsel, in her written submission, started by praying to adopt the second respondent's counter affidavit to form a party of submission and averred that the argument that the second respondent does not qualify to inherit is wrong as our laws recognize such women as the wife under section 160(1) of the Law which provides for the presumption of marriage. According to Mrs. Nambua, the applicant's argument that his stepmother is not allowed to inherit is an afterthought since he did not raise it at the clan meeting.

The learned counsel further argued that the applicant has no valid reasons to disinherit the second respondent as the deceased stayed with her for more than twenty years peacefully. Therefore, under the circumstances, she is the only legal wife left by the deceased. It was the counsel's contention that since, during this period, no other woman was living with the deceased was identified, and she buried the deceased as well, as the clan meeting recognized her as the legal wife, the applicant cannot go against all clan members.

Furthermore, Mrs. Nambua stated that the applicant's averment that the deceased and the second respondent did not contract a civil or religious marriage is uncalled for as the Law recognizes that where a man and woman live together under one roof for more than two years are husband and wife.

Mrs. Nambua further contended that the applicant is trying to challenge the document, which is yet to be filled in Court by the administrator, and even if the document is filed, the applicant does not have the mandate to question it. According to the counsel, to be regarded as a concubine, the other party must have a subsisting marriage. She cited the case of **Cecilia Mshamu v Dick Kawogo** (2001) TLR 318, and according to the counsel, even the concubine has the right to be entitled to a share of what they acquire with

his partner, citing the case of **Godfrey Moses Mapalala v Flora Neema Daudi**.

Rejoining, the applicant's counsel reiterated what he had submitted earlier. He added that the first respondent's assertion that the second respondent be regarded as a wife since she was recognised as such during clan meeting and burial ceremony is misconceived as the law casts a duty on the person who relies on such assertion to prove the relation and as succession is a blood-related aspect, one cannot succeed if she is not legally related to the deceased.

On the second respondent's submission that she was not concubine as the deceased was not married to anyone, the learned counsel rejoined and submitted that the fact that the deceased was not married to anyone is not correct as the second respondent lived with the deceased in concubine and what was going on therein was mere fornication as there was no marriage to consummate and no matter how the relationship last, the length of time does not convert a concubine into a marriage.

Having heard the contending arguments of both parties, the issue before me is to determine whether the sought orders can be granted. From the

submissions of both parties, it is indisputable that the second respondent and the deceased never contracted a religious or civil marriage. It is also undeniable that they lived together under one roof for more than twenty years. In the circumstances, there is a need to invoke the provision of section 160(1) of the Law which reads;

"Where it is proved that a man and woman have lived together for two years or more, in such circumstances as to have acquired the reputation of being husband and wife, there shall be a rebuttable presumption that they were duly married."

The provision of the Law, as stated above, clearly stipulates that if a man and a woman lived together for two years and they had acquired the reputation of the husband and wife, then they can be presumed to have been duly married. In the present case, though the applicant in his written submission referred second respondent as a concubine, it is gathered from the sworn affidavits, as well as the written submissions by the parties, that the deceased and the second respondent lived together as husband and wife since 1994 until his demise in 2019 and that the clan members regarded her as a wife during the burial ceremony. She was also listed as one of the heirs of the deceased estate in the clan meeting.

Basing on the above findings, it is pretty clear that she gained the reputation of being a wife as required under section 160(1) of the Law. Therefore, there is a presumption that the deceased and 2nd respondent were a husband and wife. Thus, the administrator of the estate was correct to list her as the beneficiary in the petition for the letters of administration before this Court.

Having so determined, I'm going back to the present application to see if the orders sought by the applicant are tenable. The applicant preferred the present application so that the Court orders the administrator of the estate to remove the second respondent from the list of beneficiaries as she is not an heir. In my view, I think the applicant misconceived himself. This is because it is not the role of the Court to identify who the heirs are but the duty of the administrator of the estate. Requesting the Court to declare whether a person is an heir or not can be regarded as requiring the Court to step into the duty of the administrator's legal duty to identify who the beneficiaries are.

Section 108 of the Probate and Administration of Estate Act provides for the duties of the administrator of the estate, and it clearly states;

"The executor or administrator shall, with reasonable

diligence, collect the property of the deceased and the debts that were due to him, pay the debts and the costs of administration, and distribute the estate to the persons or for the purpose entitled to the same or trustees for such persons or purposes in accordance with the provision of this Act, as the same may be”.

From the above provision, it follows that the administrator has to collect the properties of the deceased and the debts, pay the debts, identify the rightful heirs of the deceased, and to whom the amount of residue of the proceeds of the deceased estate should be distributed. The Court of Appeal of Tanzania at Dar es Salaam, in the case of **Mariam Juma v Tabea Robert Makange**, Civil Appeal no.38 of 2009), decided that the Court has no jurisdiction to determine who the heirs are. In the case of **Monica Nyamakare Jigamba v Mugeta Bwire Bhakome as administrator of the estate of Musiba Reni Jigabha and Another**, Civil Application no. 199/01 of 2019 Court of Appeal at Dar es Salaam, made a similar observation that the probate Court has no power to step into the shoes of the administrator and determine who are the heirs of the deceased as the Law vests those power to the grantee of probate or letters of administration. The

Court remarked;

"It is our considerable view that the High Court went beyond its jurisdiction by directing the administrator of the deceased estate to join the 2nd respondent as the beneficiary and by removing one of the deceased estates listed by the administrator, that is, the house and bestowed it to the 2nd respondent."

For the reasons stated above, the order sought by the applicant can not be granted, and in the event, the application is hereby dismissed, no order as to costs.

Dated at Dar es Salaam this 05th day of June, 2024.



S. S. SARWATT

JUDGE

Delivered in the presence of the applicant, 1st respondent and the 2nd respondent in persons.

Right of appeal is fully explained.