

**IN THE UNITED REPUBLIC OF TANZANIA  
IN THE HIGH COURT OF TANZANIA  
IN THE DISTRICT REGISTRY OF MTWARA  
AT MTWARA**

**PC. CIVIL APPEAL NO. 6 OF 2023**

(Arising from Mtwara District Court at Mtwara in Probate and Administration Appeal No. 01/2022, originating from Probate Cause No. 29 of 2022 of Mikindani Primary Court)

**DICKSON JOHN ELVAN ----- APPELLANT**

**VERSUS**

**HADIJA ALLY ----- RESPONDENT**

**JUDGEMENT**

*Date of last Order: 18.10.2023*

*Date of Judgment: 19.01.2024*

**Ebrahim, J.:**

The late John Elyan Malambo passed away on 28<sup>th</sup> May, 2022. Perusing through the proceedings in record, the deceased was survived with 1 widow and 4 children. On 12.07.2022, the appellant petitioned at the Primary Court of Mikindani vide Probate Cause No. 29/2022 to be appointed as an administrator of the estate of the late

John Elvan Malambo. During the hearing of the petition, the respondent herein raised an objection that the appellant did not mention another child of the deceased called Yuster John Malambo who is also an heir of the deceased estates.

After hearing the witnesses from both parties i.e. the objector and the petitioner, the trial court sustained the objection on the basis that Yuster John Malambo is the daughter of the deceased and proceeded to determine the main suit. The trial court appointed the appellant to be the administrator of the estates of John Elvan Malambo the deceased.

Aggrieved the appellant lodged an appeal at the District Court of Mtwara at Mtwara, Probate Appeal No. 1 of 2022. Upon hearing the submissions of both parties and consideration of the grounds of appeal, the appellate court upheld the decision of the trial court and dismissed the appeal.

Discontented, the appellant preferred the present appeal raising two grounds of appeal as follows:

1. That, the learned Magistrate erred in law by confirming the decision of the Mtwara District Primary Court in the Probate and Administration Appeal No. 1/2022 while the Court had no requisite jurisdiction.
2. That, the learned Magistrate erred in law and fact by upholding the decision of the Mtwara District Primary Court in the Probate and Administration Appeal No. 1/2022 that Yusta John Malambo is the children (sic) of the deceased without impenetrable evidence.

At the hearing of the appeal, the appellant appeared in person unrepresented, whereas the respondent was represented by Advocate Salehe Baraka Salehe. The appeal was heard by way of written submission. Parties duly filed their submissions according to the scheduled order.

I shall be referring to the submissions made by the parties in course of determining the merits of the appeal.

To begin with the 1<sup>st</sup> ground of appeal **Paragraph 1 (1) of Part 1 of the 5<sup>th</sup> Schedule of the Magistrate Courts Act [CAP. 11 R.E 2019]**

provides that; -

*"The jurisdiction of a primary court in the administration of deceased's estates, where the law applicable to the administration or distribution or the succession to, the estate is **customary law or Islamic law**, may be exercised in cases where the deceased at the time of his death, had a fixed place of abode within the local limits of the court's jurisdiction:"* [emphasis added].

A primary court is thus vested with powers in probate matters concerning Christians where it is proved that they lived customary mode or manner of life in which situation the question of professing Christianity does not interfere with the administration of his or her estate. There is a distinction between a Christian who lived and practiced normal customary life; and that who professed Christian religion and either by declaration or act or manner of life; it is evident that he intended his estates to be administered under the law applicable to Christians. The same observation was made in the persuasive case of **Gibson Kabumbire vs Rose Nestory Kabumbire**

(Probate Appeal 12 of 2020) [2021] TZHC 6009 (13 August 2021). I also subscribe to such observation.

In order to ascertain the above principle, courts have developed a the mode of life test in order to determine the applicable law; and the same must be established by evidence. In the case of **Benson Benjamin Mengi and Others vs Abdiel Reginald Mengi and Another** (Probate and Administration Cause 39 of 2019) [2021] TZHC 3202 (19 May 2021) it was observed that: -

*"In determining the applicable law, the Court is enjoined by judicial precedents to be guided by two legal tests, as it is reflected by myriad of case law including the famous cases of **Re Innocent Mbilinyi** [1969] HCD No. 283 and the case of **Re Estate of the Late Suleman Kusundwa** [1965] E.A. 247 among others. The said legal tests are as listed hereunder:*

*(1) Intention of Test.*

*(2) **Mode of Life Test.**" Emphasize added.*

This court applied the Mode of Life Test on the reasons stated in its judgment that: -

*"This Court is inclined to be guided by Mode of Life Test simply because the intention of deceased on which law should govern his estate can be inferred from his mode of life where the deceased dies without stating expressly this fact."*

In the instant case the evidence adduced before trial court clearly indicate that the mode of life of the late John Elvan Malambo was two-fold. For the purpose of clarity let me reproduce the evidence adduced by the appellant found at page 2 of the hand written trial court proceedings;

***"Mahakama:***

*Imemuuliza Mwombaji maswali yafuatayo; Je marehemu maisha yake yalikuwa ya kimila au muislam? Na je aliishi Mtwara.*

***Mwombaji naye anajibu: -***

***Marehemu alikuwa Mkristo lakini alikuwa anaishi maisha ya kimila."*** Emphasize added.

The appellant submitted that he testified at the trial court that his late father's practical Christianity mode of life. He cited the case of **Florian Katunzi vs. Goodluck Kulola and Others**, PC Appeal No. 02 of 2014 (Unreported) where it was held that; -

*"It is now settled law, in granting letters of administration of estates, the jurisdiction of the primary court is limited where the law applicable is customary and Islamic law. A primary court therefore has no jurisdiction where the estate is that of a person who professed Christian religion as the case presently, where the deceased died professing Christianity."*

Counsel for the respondent submitted that the evidence relied by the trial court in ascertaining the matter was adduced by the appellant at the trial court in the petition to be appointed as administrator of the deceased's estates.

After going through the trial court proceedings there is no where showing that the deceased's mode of life was Christianity. The mode of life of the deceased was customary life style as evidenced by the appellant himself at the trial court and not as he alleges in his submission. Therefore, the issue that the trial court had no jurisdiction to entertain the matter is baseless.

Moving to the 2<sup>nd</sup> ground of appeal. The appellant argued that on the issue of parentage the court can rely on **Section 35 (a) – (e) of**

**The Law of the Child Act [CAP. 13 R.E 2019]** to establish parentage and the DNA test which is regulated under the **Human DNA Regulation Act, 2009** where samples are collected and analysed to establish parentage, kinship etc. He further argued that it is vital to conduct the DNA test to avoid a chance of a person not in bloodline of the deceased to inherit the deceased's estate since the trial court declared Yuster John Malambo to be the daughter of the deceased without conducting of DNA test. He added also that the birth certificate which was tendered before the trial court was issued while the deceased had passed away of which it creates doubts. Hence the court should not act on it without conducting an inquiry.

Counsel for the respondent contended that DNA Test is among the means to justify parentage. He cited the case of **Judith Patrick Kyamba vs Tunsumbe and Others** (Probate and Administration Cause 50 of 2016) [2020] TZHC 1364 (28 May 2020) where it was held that;-



*"It is my found view, that the contents of the tendered birth certificates remain unchallenged in absence of evidence to the contrary, the records therein are true. The same were issued by the person (RITA) who is entrusted to do so. It therefore, follows that the tendered birth certificates of the issues of the deceased are conclusive proof that the person named therein were born on the date stated and the parents are those spelt out in the certificate. That fact alone is decisive in settling the issue."*

Going through the trial court records, it is clear that the issue of DNA Test as raised by the appellant in the second ground was not raised or discussed in the trial court. In the case of **Remigious Muganga vs Barrick Bulyanhulu Gold Mine** (Civil Appeal 47 of 2017) [2018] TZCA 219 (10 October 2018), the Court of Appeal was of a settled principle that the higher court will only look into matters which came up in the lower court and adjudicated up; and not new matters which were neither raised nor decided by the trial Court or the high Court on appeal. On the basis of the foregoing reasons, there is no gainsaying that the issue of DNA Test raises a new matter which cannot be entertained by this court.

As per the evidence established before the Primary Court that Yuster John Malambo was parented by the deceased as her father; the question whether the deceased was a biological father has no merits. There is no any evidence in record showing that for all the time from the birth of the issue up to the death of the deceased, he ever disowned her or claimed for DNA Test. The birth certificate of Yuster John Malambo tendered before the trial court is sufficient proof that she is the deceased's daughter.

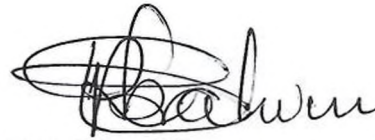
With the above observation, I find that there is no cogent evidence revealing that the deceased's mode of life was Christianity. In the premises, I am of a position that the deceased led the customary way of life and thus the primary court had jurisdiction to entertain the matter of his estate and justified to deploy customary law. Also, basing on the birth certificate of Yuster John Malambo and the evidence adduced at the trial court, it is not disputed that Yuster John Malambo is the child of the deceased John Elivan Malambo.

Having so concluded, find the appeal lacks merit and it is hereby dismissed in its entirety. The two lower Court decisions are upheld.

Having regard to the nature of the case that it involves family members; I shall not order for costs. Each party shall bear its own costs in this appeal.

It is so ordered.



  
**R.A Ebrahim**  
**Judge.**

**19.01.2024**  
**Mtwara.**