

IN THE HIGH COURT OF TANZANIA

(MWANZA SUB-REGISTRY)

AT MWANZA

PC CIVIL APPEAL NO.70 OF 2022

(Arising from Probate Appeal No.7 of 2021 in Nyamagana District Court at Nyamagana)

ERASTO EVARIST.....APPELLANT

VERSUS

BERTHA MONGI.....1ST RESPONDENT

BETTY BUJIBA.....2ND RESPONDENT

JUDGMENT

22nd February & 18th March, 2024

KAMANA, J.

When the appeal against the decision of Nyamagana District Court in Probate Appeal No. 7 of 2022 was called on for ex parte hearing, Mr. Stephen Kaijage, learned Counsel for the appellant drew the attention of this Court to the effect that Mwanza Urban Primary Court when entertaining Probate Cause No. 21 of 2012 that led to Probate Appeal No. 7 of 2022 had no jurisdiction.

Amplifying his argument, Mr. Kaijage contended that according to Form I that initiated Probate Cause No.21 of 2012 in Mwanza Urban Primary Court, Basila Michael Minja, the one who applied for letters of administration of the estate of the late Theresia Mlay, stated that the deceased believed in Christianity. Given that, the learned Counsel held

the view that since the deceased believed in Christianity, the primary court did not have jurisdiction to entertain the cause.

In strengthening his arguments, Mr. Kaijage contended that as per section 18(1) (a) of the Magistrates' Courts Act, Cap. 11 [RE.2019] (MCA), the jurisdiction of primary courts in civil matters is limited to matters revolving around Islamic and customary laws. Given that, he argued that the primary court acted without jurisdiction to appoint an administrator of the estate of the person who professed Christianity.

He urged the Court to quash and set aside decisions and orders of the primary court and those of the Nyamagana District Court as they arose from illegality. To buttress his stance, the learned Counsel cited the case of **Regina Kora Hugo v. Desideri Riva Urassa and Others**, PC Civil Appeal No. 24 of 2021 (HC-Unreported).

The records depict that Theresia Mlay died on 12th September, 2011. On 31st January, 2012, one of her children by the name of Basila Michael Minja instituted Probate Cause No. 21 of 2012 in Mwanza Urban Primary Court seeking to be appointed as the administrator of the estate of the deceased. Amongst the particulars the applicant stated was the fact that the late Theresia Mlay professed the religion called R/C which I take to mean Roman Catholic, a Christian denomination.

It is further revealed that after the appointment, the administrator administered the estate of the deceased before withdrawing from discharging the duty. Following the withdrawal, the Primary Court appointed the respondents. The appointment of the respondents was objected to though in vain by the appellant in the Primary Court. Aggrieved by the decision of the Primary Court in respect of his objections, the appellant appealed to Nyamagana District Court.

It should be noted at this point that the records are deadly silent as to whether the two respondents when appointed changed the particulars filled by Basila Michael Minja in Form I. Reverting to the appeal in the District Court, the said Court upheld the decision of the Primary Court which led the appellant to file this appeal on several grounds which I do not see a reason to reproduce them.

Having elucidated albeit briefly the background to this appeal, it is high time I discussed the provisions of section 18(1)(a) of the MCA. As rightly contended by Mr. Kaijage, the jurisdiction of the primary courts, according to section 18(1)(a) in matters of a civil nature is exclusively on matters whose law applicable is either Islamic or customary. The section reads:

'18. - (1) A primary court shall have and exercise jurisdiction

(a) in all proceedings of a civil nature—

(i) where the law applicable is customary law or Islamic law;'

Further, in matters relating to the administration of estates, the law is clear that the jurisdiction of primary courts is within the ambits of Islamic or customary laws. This position is categorically stated under Rule 1 of the Fifth Schedule to the MCA. The Rule reads:

*'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 is mine).*

That position of the law has been given a thorough interpretation by this Court in several cases including the case of **Regina Kora Hugo v. Desideri Riva Urassa and Others** (Supra) where the Court (Gwae, J) quoted with approval the observation of the Court in the case of **Rev. Florian Katunzi v. Goodluck Kulola and Others**, PC. Probate Appeal No. 02 of 2014 (Unreported) (Makaramba, J (Rtd)) as follows:

'It is now settled law, in granting letters of administration of estates, the jurisdiction of a 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.'

That being the position of the law, there is no doubt that Mwanza Urban Primary Court acted without jurisdiction in appointing administrators of the estate of the late Theresia Mlay who professed Christianity. It is worth noting that Form I paragraph 7 which requires particulars of the deceased in terms of belief is not there for cosmetic purposes. It is there to enable the Primary Court to ascertain whether it has jurisdiction or otherwise. Had Mwanza Urban Primary Court directed itself to Form I, it would have rejected the application as it visibly stated that the deceased professed neither Islam nor customary way of life.

Inspired by the provisions of section 18(1)(a) and Rule 1 of the Fifth Schedule to the MCA and the cited authorities, I invoke my revisional powers by quashing and setting aside the proceedings, judgment and orders of Mwanza Urban Primary Court in Probate Cause

No. 21 of 2012. As a consequence, the proceedings, judgment and orders of the Nyamagana District Court crumble.

Any person who wishes to administer the estate of the late Theresia Mlay must apply in the court of competent jurisdiction. Since the matter involves siblings, I see no reason to order costs.

Right to Appeal Explained. Order accordingly.

DATED at MWANZA this 18th day of March, 2024.



KS KAMANA

JUDGE