

TANZANIA / JUDGMENT

HADIJA JOSEPH TUNGE

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The Judiciary of Tanzania IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA AT SHINYANGA CIVIL APPEAL CASE REFERENCE NO. 202411131000028662 HADIJA JOSEPH TUNGU APPELLANT Versus MISELYA KASSIM HAMBO..... RESPONDENT (Originating from the Decision of the District Court of Maswa at Maswa) (Hon. A.M.Khamisi - RM) Dated the 21st October, 2025 in Civil Appeal Case No. 2024087271000021054

JUDGMENT

5th & 21st March, 2025. F.H. MAHIMBALI, J. The appellant in this case claims to have lodged two concerns at different times before the Primary Court of Maswa District sitting at Nyalikungu. One that she had no confidence with the respondent as administrator of the estate of the late Charles Hambo Peter whom she claimed to be her husband for bad administration in the discharge of his duties and secondly for not recognizing her as wife and beneficiary of the 1 said estate and at 50% share. The two lower courts, confirmed that the two applications were res judicata, thus dismissed the latter. The appellant claiming that it was not but res nova, thus this appeal based on four grounds of appeal:

1. That both magistrates of the District and Trial Courts erred in law and fact in holding that the instant case is res-judicata while it is quite wrong.
2. That, both magistrates of the District and Trial Courts erred in law and fact by failure to recognize that the Appellant was the wife of the deceased Charles Hambo Peter.
3. That both Magistrates of the District and Trial Courts erred in law and fact by failure to trust that the appellants is un avoidable beneficiary of the deceased Charles Hambo Peter estates.
4. That both Magistrates of the District and Trial Courts erred in law and fact by failure to realize that only the share of the deceased that shall be the divided to his heirs not hundred percent of the estates. 2 On these grounds of appeal, the appellant prayed that the appeal be allowed with costs, the judgment and decree of the District Court of Maswa be dismissed and set aside, that the appellant be declared the lawful beneficiary of the deceased Charles Hambo Peter, any other relief as this Court shall deem fit and just to grant. The hearing of the appeal was done by way of written submissions whereas the respondent was

represented by Mr. Daud Masunga, learned advocate, the appellant argued it by herself. The appellant arguing that she is the legal wife of the deceased and thus beneficiary of his estate was wrongly excluded from the conduct of the said administration by the respondent who is the administrator of the said estate. She says, in the first place she had challenged the competency of the administrator having excluded some properties located at Kigoma and Tanga. She even suggested that the proper court to deal with the said estate ought to have been Kigoma instead of Maswa. Secondly, she challenged the administrator's role on excluding her from the list of beneficiaries of the estate of the deceased she being a wife of the deceased. Thus, the basis of the two applications, she therefore maintained that the said applications were not res judicata as objected and pleaded by the respondent. In support 3 of her submission, she cited several authorities such as Mire Artan Ismail and Zainab Mzee v/s Sofia, Njati, the High Court of Dar - Es Salaam Civil Appeal No.31 of 2006, Mandia J. as he the then was said that, I quote: "...the deceased must have a fixed place of a bode within the particular District, failure to observe the territorial jurisdiction may lead proceedings to be illegal and nullified appeal" Submitting in opposition of the appeal, Mr. Masunga submitted that it is undisputed facts that the case at hand originated from Nyalikungu primary court as an objection cause 09/2022, Originally on a Probate and Administration cause No 9 of 2022 in which it was also decided by Maswa District Court on Probate Appeal No.3/2022 and later on re-opened by the appellant on the same Court and the same claims by filing Probate form No.7 contains the same claims decided early, being the case the appeal by the appellant on the grounds of appeal raised by the is baseless as the appellate Court rightly observed the claims in Form No.7 filled by the appellant before the Courts contains the same claims filed in the year 2022 and later on filled on the same Court in 2024 in which it was decided in favor of the respondent due to the facts that the matter is RES-JUDICATA. He drew support of his position in the case of FELICIAN CREDO SIMWELA VS QUAMARA 4 MASSOD BATTEZY AND ANOTHER, DC Civil Appeal No 10 of 2020, High Court of Tanzania at Sumbawanga on page number 4 and 5 first paragraph Supported by the case of NSK OIL AND GAS LIMITED AND ANOTHER VS NATIONAL MICROFINANCE BANK PLC, Civil Application No.732/02/2024 CAT AT Dar Es salaam at page 5 and 6, where the principle of res-judicata was argued as quoted "...For the doctrine to apply the following conditions must be proved, these are; (i) the former suit must have been between the same litigating parties or between parties under whom they or any of them claim; (ii) the subject matter directly and substantially in issue in the subsequent suit must be the same matter which was directly and substantially in issue in the former suit either actually or constructively; (iii) the party in the subsequent suit must have litigated under the same title in the former suit; (iv) the matter must have been heard and finally decided; (v) that, the former suit must have been decided by a court of competent jurisdiction. Its applicability makes conclusive a final judgment between the same parties or their privies on the 5 same issue by a court of competent jurisdiction in the subject matter of the suit....." Mr. Masunga maintained that the appellant's main concern was the revocation of the respondent due to the reasons that she wished to be included in the list of the heirs as she claims to possess such legal rights, the matter which has already been decided in the former case at the trial court and between the same parties as elaborated above. He thus

considered the matter as *resjudicata* and thus the appeal is unmerited after being conclusively concluded. Submitting on the fourth ground of appeal which state both Magistrates of the District court and Trial Court did not error in law and fact by realizing that the deceased property are not yet finally divided to the deceased heirs, Mr. Masunga argued that since it is the trite law that deceased property is only distributable to the legal heirs and not for strangers, the appellant's alleged claims on shares from the deceased property and her own shares in it, the appellant misconceived the conception of the court as she being not recognized as wife of the deceased she was not entitled to anything concerning the shares as she was declared as a stranger to a deceased property. 6 Having heard the parties' submissions, it is undisputed that the appellant had unsuccessfully challenged the respondent's appointment as administrator of the said estate and also his administration duties after he had excluded her as one of the beneficiaries of the said estate at the capacity as the deceased's wife. In digest to the case's facts, it can be established that there are some shortcomings in the proceedings calling for an examination of the law and procedure in details, for that matter, I am guided by the Court of Appeal's decision in the case of *Miraji Salimu Nyangasa vs Ramadhani Omary Sewando (As Administrator of Estate of the Late Hussein Omary Sewando)* (Civil Appeal No. 686 of 2023) [2024] TZCA 895 (17 September 2024). To start with, the jurisdiction of Primary Courts in probate and administration of estates is as provided by section 19 (1) of the Magistrates' Courts Act, (Cap 11 R.E. 2019) (the MCA) which states thus: 19.(1) The practice and procedure of primary courts shall be regulated and, subject to the provisions of any law for the time being in force, their powers limited

- (a) N/A
- (b) N/A 7
- (c) in the exercise of their jurisdiction, in the administration of estate, by the provisions of the Fifth Schedule to the Act; and, in matters of practice and procedure, by rules of court for primary courts which are not inconsistent therewith; and the said code and schedules shall apply thereto and for regulation of such other matters as are provided for therein." (Emphasis added) The import of the above provision is that, the jurisdiction of Primary Courts in probate and administration of estates is exercised under the Fifth Schedule to the MCA and rules of court for Primary Courts which are not inconsistent with the Fifth Schedule. The rules of Primary Court referred to under this section are those which were made under the Magistrates' Courts Act 1963 and served by section 72 (3) of the MCA which reads; "Any applicable regulations made under the Magistrates' Courts Act, 1963, and in force to the date upon which this Act comes into operation, shall remain in force as if they have been made under this Act until such time as they are amended or revoked by rules made under this Act" 8 The rules/regulations referred to in section 72 (3) of the MCA are; (i) The Primary Courts (Administration of Estates) Rules, GN 49 of 1971 (the Administration of Estates Rules), (ii) The Magistrates' Court (Civil Procedure in Primary Courts) Rules, GN 310 of 1964, (iii) The Primary Court Evidence Rules, GN 22 of 1964, and (iv) The Customary Law

(Limitation of Proceedings) Rules 1964, GN 311 of 1964. The Primary Court may also apply rules made under the Second Schedule (Sheria za Urithi) to the Local Customary Law (Declaration) No.4 Order 1964, GN No. 436 1964, (made under section 11 of the Judicature and Application of Laws Act, Cap 1 R.E. 2019). These laws apply to the Primary Court in the exercise of its jurisdiction in probate and administration of estates but subject to the Fifth Schedule. It means that, in case of conflict, the Fifth Schedule takes precedence. Rule 1

- (1) of the Fifth Schedule gives the Primary Court power to administer the estate of the deceased where the law applicable is Customary or Islamic law and where the deceased, at the time of his death, had a fixed place of abode within the local limits of the court's jurisdiction. The local limits of the jurisdiction of the Primary Court is not the ward or division it serves, but the area of the district within which the court is established. See section 3 of the MCA. So the deceased must have had a place of abode within the district in which the court is established. Rule 1 (2)
- (a) of the Fifth Schedule restricts the application of the Probate and Administration of Estates Act, [Cap. 352 R.E.2002] in Primary Courts. The Primary Court has power under rule 2 of the Fifth schedule to appoint and revoke appointments of administrators. It has power to control the process, but is not expected to interfere with the functions of the administrator who must work independently. See the decision of the High Court made in Ibrahim Kusaga vs Emanuel Mweta [1984] TZHC 8 (16 April 1984) as subscribed by the Court of Appeal in Miraji Salimu Nyangasa (supra). Apart from the primary function of appointing administrators, revoking the appointments and controlling the process, other functions of the Primary Court are contained under rule 8 of the Administration of Estates Rules. They read thus: "8. Other matters to be decided by the court Subject to the provisions of any other law for the time being applicable, the court may, in the exercise of the jurisdiction conferred on it by the provisions of the Fifth Schedule to the Act, but not in derogation thereof, hear and decide any of the following matters, namely
 - (a) whether a person died testate or intestate;
 - (b) whether any document alleged to be a will was or was not a valid or subsisting will;
 - (c) any question as to the identity of persons named as heirs, executors or beneficiaries in the will;
 - (d) any question as to the property, assets or /liabilities which vested in or lay on the deceased person at the time of his death;
 - (e) any question relating to the payment of debts of the deceased person out of his estate;
 - (f) any question relating to the sale, partition, division or other disposal of the property and other assets comprised in the estate of the deceased person for the purpose of paying off the creditors or distributing the property and assets among the heirs or beneficiaries;
 - (g) any question relating to investment of money forming part of the estate; or 11

(h) any question relating to expenses to be incurred on the administration of the estate." (Emphasis added). Issues coming under rule 8 must be entertained as interlocutory matters. They must be raised and decided before the probate or administration is closed. Next is the actual practice. Ordinarily, the matter will start with the clan/family meeting. This meeting originates from rule 6 of the Second Schedule (Sheria za Urithi) to The Local Customary Law (Declaration) Order 1963, GN 279 of 1964. Rule 6 states; "Baaada ya matanga watu wa ukoo hukusanyika na kuhesabu urithi na kushauriana juu ya madai na madeni yote aiiyokuwa nayo marehemu, "This literally means that, after burial the clan will sit to deliberate on issues touching the assets and liabilities of the deceased. This was later developed, through precedents, to include the element of proposing a fit person to administer the estate of the deceased. It is a meeting of close family members which may be comprised of the father, mother, brothers, sisters, uncles and aunts of the deceased. Relatives of the wife may also be invited. It is an important forum which is encouraged because it assists in filtering issues and reduce future tensions in court. If this forum is used properly, it can make the 12 business of the court easier at the later stage; during the appointment of the administrator or executor of the will, identification of heirs, identification of assets of the deceased and the choice of the applicable law. But, where for some reasons, the clan/family have failed to meet, or have met but a person, let say the wife or a child of the deceased, has been excluded from the meeting, he can still come to court by way of objection and get his right. And if no petition is filed, he can obtain a referral letter from the local authority explaining why the clan/family meeting did not include him. In such a situation, the court if satisfied with the information contained in the letter, it should allow him to file the petition. The court may require an affidavit to accompany the letter. See the position set by the High Court in in Hadija Saidi Matika vs Awesa Saidi Matika, PC Civil Appeal No. 2 of 2016 (unreported) and Shabani Musa Mhando vs Ester Msafiri Mhando, (Probate and Administration Cause No. 75 of 2020) [2021] TZHC 677 (16 July, 2021) TanzLII which the CAT in Miraji case (above) fully did subscribe to it, as I hereby do it. Once a person is in possession of the minutes of the clan/family meeting duly signed or a letter from the local authority and an affidavit as the case may be, he will fill Probate Form No. I as required by rule 3 13 of the Administration of Estates Rules. It is important here to note that the scheme is regulated by 6 forms available in the Schedule to the Administration of Estates Rules which must be used. These forms regulate the process from the beginning to the end. See Hadija Matika (supra), William Simon Chuwa vs Cosmas Joseph Massawe, (Probate Appeal No. 3 of 2022) [2022] TZHC 13367 (28 September, 2022) TanzLII, Jonathan K. Ngomero v. Esther Julius, (PC Probate Appeal No. 10 of

2020) [2021] TZHC 3177 (12 May, 2021) TanzLII and Bernard Serikali

v. Valerius Thomas Munegena, (PC Probate Appeal No. 69 of 2022)

[2022] TZHC 13469 (5 October, 2022) TanzLII, decisions of the High Court. Form No. 1 will lead the petitioner to provide the following information to the court: (i) the name of the petitioner, his address and why he is seeking to be appointed; (ii) the name of the

deceased, the date of death and his last place of abode; (iii) the will of the deceased and name of the executor, if any; (iv) the list of relatives of the deceased and their relation to him; (v) the list of assets of the deceased and their estimated value; (vi) tribe and religion of the deceased. The information provided in Form No. I will lead the magistrate to check his jurisdiction up front. This will be known by a look at the last 14 place of abode of the deceased, his tribe and religion. This will give him a hint on territorial jurisdiction and whether Customary or Islamic laws are applicable. The name of the petitioner the list of relatives and their relation with the deceased and list of assets will be useful to people who has an interest in the estate of the deceased. It is thus important to fill this form carefully, as it is from the information contained in this form whereby the jurisdiction of the Court is firstly founded. In the current case, the deceased seems to be a Christian by name and religion, however the trial court assumed jurisdiction. It is not clear if there has been any information/statement that despite being Christian, he lived a customary mode of life. If this has not been clear, it is fatal in the proceedings. Secondly, the trial court attended the two applications distinctly from the main suit/probate cause instead of treating them as objection proceedings to the main probate cause which in law (as per *Mirajis'* case above), in case of any objection to the petition such as on the appointment of the petitioner or any other issue; they are resolved before the hearing of the petition and at an early stage (See *Hadija Matika* (supra). 15 Where the objection is on the will, the list of heirs, the list of assets of the deceased or the wife of the deceased, it must be heard separately at an early stage, unless the objector does not object the appointment Where it is based on the legality of the wife, as was in this case, the court may apply the Law of Marriage Act, Cap 29 R.E. 2002 to resolve the issue. See the decision of the Court in *Hamisi Saidi Mkuki vs Fatuma Ally*, (Civil Appeal No. 147 of 2017) [2018] TZCA 341 (19 November, 2018) TanzLII, where the presumption of marriage contained under section 160 of the Law of marriage Act was used to establish that the respondent (Fatuma Ally) who had lived with the deceased for 9 years under the same roof had attained the status of a wife. See also *Mariamumu Juma vs Tabea Robert Makange*, (Civil Appeal No. 38 of 2009) [2016] TZCA 736 (29 January, 2016) TanzLII and *Stephen Maliyatabu and Another vs Consolata Kahulananga*, (Civil Appeal No. 337 of 2020) [2023] TZCA 132 (22 March, 2023) TanzLII. That said and done, I will now revert to our case to see if there was full compliance as to the law and the procedure as outlined above. It is obvious that there was laxity in the conduct of the proceedings leading to a violation of the law and procedure which has an effect in this appeal. 16 Firstly, it applied customary law to a Christian person without there being a statement of justification on the mode of life test of the deceased that he did not live his Christianity. Secondly, it treated the objection issues separately as suits instead of interlocutory proceedings, thus vitiated the proceedings. All this said and done, I hereby nullify the whole proceedings of the two lower courts below, and in its place, I order retrial before another magistrate with competent jurisdiction to handle the matter expeditiously and determine the real issues in controversy as per law. As the matter involves family members, parties shall bear their own costs. Right of further appeal is hereby explained. DATED at SHINYANGA this 21st March 2025. F.H. Mahimbali Judge 17

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