

TANZANIA / JUDGMENT

mwile mugisha mgallah administrator of the estate of the late daniel g mgallah vs bertha j wandi another 2021 tzhc 9416 17 december 2021

COURT
TZHCDECIDED
17 December 2021

Source: media.tanzlii.org · Research copy typeset by Esheria. Not court-issued or certified.

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA IN THE DISTRICT REGISTRY OF MBEYA AT MBEYA PC. CIVIL APPEAL NO. 16 OF 2020 (Arising from Civil Revision No. 3 of 2020 in the District Court of Mbozi of, Vwowa, Originated in the Primary Court of Mbozi District, at Vwawa Urban in Probate and Administration Cause No. 41 of 2019) MWILE MUGISHA MGALLAH..... APPLICANT (Administrator of the Estate of Daniel G. Mgallah) VERSUS

1. BERTHA J. WANDI.....Ist RESPONDENT
2. IDDA DANIEL MGALLAH..... 2nd RESPONDENT (Administratrix of the Estate of Daniel G. Mgallah)

JUDGMENT

Date of last Order: 26.10.2021 Date of Judgment: 17.12.2021 Ebrahim, J. The appellant MWILE MUGISHA MGALLAH preferred the instant appeal based on the following grounds:

1. That the trial Magistrate erred in law and fact by making determination of the revision filed by the 1st respondent as matrimonial cause instead of the probate and administration Page 1 of 12 cause through the Magistrate's reason for decision and authority cited.
2. That the learned trial Magistrate erred in law and fact by not considering requirements of the [Local Customary (Declaration) No. 4 Order, Government Notice No. 436 of 1963] in which the 1st Respondent has neither had a share of inheritance nor qualify to be a beneficiary due to her bad behaviour against the deceased.
3. That the trial Magistrate erred in law and fact to impliedly nullifying and declare the provisions of the Law [Rules TJ of the Second Schedule Local Customary (Declaration) No. 4 Order, Government Notice No. 436 of 1963] unconstitutional while the District Court has no jurisdiction to do same, the revision filed is not constitutional matter and with no legal justification at all.

4. That the learned trial Magistrate erred in law and fact by determining the issue of joint effort which was raised by the 1st Respondent after commencement of the matter in trial/revision [during rejoinder] the situation which denied the appellant right to be heard. Page 2 of 12
- Consequently, the appellant prayed for this court to quash and set aside the decision of the District Court and uphold the decision of the Primary Court. The facts of the case can be briefly narrated as follows: in 2019, the appellant having made the application before the Primary Court at Vwawa Urban, was appointed as an administrator of the estates of the late Daniel G. Mgallah. His appointment was later on challenged by the 2nd respondent and another person, one Godfrey Mgallah by way of objection. After hearing the objection, the Primary Court appointed the 2nd respondent as the co-administrator with the appellant. The Primary Court also directed the two administrators to distribute the estate among the deceased's heirs. It thus directed them to exclude the 1st respondent who claimed to be the wife of the deceased. When the 1st respondent became aware of the order for her to be excluded from the beneficiaries of the deceased estates, applied for revision before the District Court. The District Court found that the 1st respondent was the deceased's wife. It ordered the two administrators to include her in the list of the beneficiary in the Page 3 of 12 deceased's estates. Aggrieved, the appellant preferred the instant appeal. During the hearing of the appeal, the appellant appeared in person, unrepresented. The 1st respondent was advocated for by Advocate Isack Chingilile while the 2nd respondent appeared in person, unrepresented. It was argued orally by the appellant and the 1st respondent while the 2nd respondent preferred her argument by way of written submission. Arguing in support of the appeal, the appellant prayed for this court to consider all grounds of appeal and to allow it. He argued regarding the 4th ground of appeal that the District Court erred when it ordered the 1st respondent to be included in the list of beneficiaries of the deceased's estates while she had divorced with the deceased back in 1980. He also contended that the 1st respondent did not assist his late father (the deceased) to build the house. Regarding the 2nd ground of appeal, the appellant contended that the District Court erred when it disregarded the Nyiha custom which requires a wife to inherit the estate of her husband through the inheritance of her children. For that case, he argued that the Page 4 of 12 1st respondent was supposed to inherit through her children Idda Mgallah and Azore Mgallah. In reply, counsel for the 1st respondent argued in regard to the ground 1 of appeal that the District Court was correct when it determined the share of the 1st respondent because she was alive. As to ground 2 and 3 of the appeal, she submitted that the District Court did not decide on the constitutionality of the Local Customary Law, but it considered it in relation to the rule of non-discrimination as enshrined under Article 12 (1) (3) and 13 (1) and
- (4) of the Constitution of the United Republic of Tanzania. Moreover, advocate Chingilile raised a legal issue that according to the case of Hyasintha Kokwijuka Felix Kamuqisha v. Deusdedith Kamugisha, Probate Appeal No. 4 of 2018, the Primary Court was required to firstly determine the applicable law in appointing the administrator. In the case at hand therefore the court committed an error when it appointed the two administrators without identifying the applicable law on the estate of the deceased. He urged this court to find that

the administrator was illegally appointed. Page 5 of 12 On the 4th ground of appeal, advocate Chingilile submitted that it was not true that the appellant was denied his right to be heard since the matter considered by the district court was raised in the affidavit of the 1st respondent and countered by the appellant in his counter affidavit. He thus prayed for this court to either nullify the proceedings since the Primary Court did not identify the law applicable or dismiss the appeal. The 2nd respondent in her written reply, submitted regarding the 2nd and 3rd ground of appeal that, in Nyiha customary law there in no custom which prohibits a widow to inherit the estate of her late husband. She added that even if there existed such custom, the same would have been discriminating and humiliating to a woman hence contrary to Article 12 and 13 of the Constitution. The 2nd respondent also argued that the appellant's contention that the deceased and the 1st respondent had divorced was misleading the court since there was no evidence to prove the contention, she urged this court to decide the matter justly. I have deeply followed the rival arguments by the parties. Counsel for the 1st respondent tried to raise the matter that the Primary Court did not identify the law applicable before resorted into Page 6 of 12 appointing the administrator. I am convinced that advocate Chingilile complaint was based on Rule 1 of the 5th Schedule to the Magistrate Courts Act, Cap. 11 R.E 2019 which requires a Primary Court to exercise its jurisdiction in the administration of the deceased's estates, where the law applicable to the administration or distribution of the succession to the estate is customary law or Islamic law. In the case of Hadija Said Matika v. Awesa Said Matika, PC. Civil Appeal No. 02 of 2016, HC at Mtwara, Hon. Mlacha, Judge observed that it is necessary for the Primary Court to make quick inquiry on whether or not the deceased followed the custom and norms of the community in order to determine if the primary court is seized with jurisdiction. In the instant matter the same question was asked and answered positively. This is justified by the observation made by the District Court at page 4 of the typed ruling when it said that: "The applicable law is mainly ascertained relying on the mode of life of the deceased during his life time..... From the basis on how the matter at hand was handled and bear in mind the picture reflected in the Page 7 of 12 submissions that no party disputes on the applicable law, I am ot no doubt that the deceased Daniel G. Mgallah was a customary law compliant as correctly found by the trial court as there is no evidence that he had abandoned his customs. I am confidently saying so because apart from living in Dar es Salaam, he ultimately came back at his home village Igamba within the district of Mbozi and in fact the death found him there at the village." (emphasis is mine) In a nutshell, it is apparent that the Primary Court ascertained the life style lived by the deceased and found that the applicable law was customary law. It was therefore right in appointing the two administrators. That being the case, I proceed with the determination of the appeal on merit. In essence, ground 1 and 2 of the appeal are interrelated and can be conveniently resolved together. The reasons will be apparent as I proceed determining them. When I took time reading the ruling and the record of the District Court, I observed that the 1st respondent pleaded in her affidavit that she contributed effort with the deceased in the acquisition of estates. She contended Page 8 of 12 that she contributed through her salary as she was a Government Employee. The fact was objected by the appellant and he

put the 1st respondent to a strict proof. When the District Court was discussing that rivalry by the parties it referred to the decision in the case of *Bi Hawa Mohamed v. Ally Sefu* (1983) TLR 32 which was made in relation to matrimonial disputes. The learned Resident Magistrate reasoned basing on the decision that, if in matrimonial proceedings a legal wife is entitled to a share she had contributed in the acquisition of matrimonial properties, it would seem awkward to decide that a widow will inherit through her children and be cared by them. In that regard the learned Resident Magistrate in the District Court was neither determining the matrimonial cause nor was resolving the matter which was not raised by the parties. Nonetheless, he was resolving the probate matter and it is not a sin for an adjudicator to refer to a decision of another area like matrimonial case in a different area like Probate matter in the course of reasoning. It is also not maintainable that the appellant was not denied of his right to be heard since as I have indicated above, the issue on whether or not the 1st respondent contributed to the Page 9 of 12 acquisition of the deceased's estate was raised by the parties in their respective affidavits. The 1st and 4th grounds of appeal are unsustainable, I thus dismiss them. The 2nd and 3rd grounds of appeal, in my view are also related. They are challenging the decision of District Court for not abiding to the Local Customary (Declaration) Order, G.N. No. 436 of 1963. These grounds should not detain me. It had been declared by this court, which I fully subscribe that, Local Customary (Declaration) Order or any customary law albeit may be discriminatory cannot override the Constitution of the country. See *Hyasintha Kokwijuka Felix Kamuqisha v. Deusdedith Kamugisha*, (supra), *Leonance Mutalindwa v. Mariadina Edward* [1986] TLR 120, *Angelo Bisiki v. Antonia Bisiki and Others* [1989] TLR 225, *Biiimbasa Zacharia v. Jarves John* [1983] TLR 67, *Ndewawosia Ndeamtzo v. Imanuel Malazi* (1968) HCD 127 just to cite a few. It is therefore trite that, law must abide to the Constitution and otherwise it is not worthy to be considered for application. For example, under the old customary law of Haya, women were not allowed to inherit clan land, but in the cases of *Angelo Bisiki* and Page 10 of 12 *Bilimbasa Zacharia* (supra) the same was disregarded and it was decided that: "The application of this discriminatory customary law cannot be entertained because it goes contrary to the provisions of the Constitution of the United Republic of Tanzania." That being the position of our law, considering the complaint by the appellant in the matter at hand, it would be absurd in current era to entertain the custom which in its nature is denying the right to inherit to women. The District Court therefore, did not commit any error when it decided that the 1st respondent was eligible to inherit the estate of the deceased. The appellant was of the view that she could inherit through her children. Still, that was as good as denying her the right to inherit. This follows therefore that in deciding contrary to the Local Customary Order G.N. No 436 of 1963, the District Court was not declaring it unconstitutional. Moreover, it was not assuming the jurisdiction of the Constitutional Court. Page 11 of 12 Furthermore, the appellant's complaint that the 1st respondent had divorced the deceased before his death has no bases. This is because the District Court went through the evidence adduced in the Primary Court and found that no decree of divorce was tendered to prove that they had divorced. It was not disputed that the 1st respondent and the deceased were married. I also visited the record; I did not find any. The appellant is also not claiming to

have tendered the decree of divorce than his account through written submission that they had divorced. The 2nd and 3rd grounds of appeal are thus inconceivable. Owing to the above findings, I hereby dismiss the entire appeal for lack of merits. Being a probate matter, I make no order as to costs. 17.12.2021 Page 12 of 12 Date: 17.12.2021. Coram: Hon. A.E. Temu - DR. Appellant: For the Appellant: Absent. 1st Respondent: 2nd Respondent: Present in person. For the 2nd Respondent. Absent. B/C: Gaudensia. Court: Judgment delivered in open chamber in the presence of the 2nd respondent in person. A.E. Temu ' Deputy Registrar 17/12/2021

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE	https://media.tanzlii.org/media/judgment/235239/source_file/mwile-mugisha-mgallah-administrator-of-the-estate-of-the-late-daniel-g-mgallah-vs-bertha-j-wandi-another-2021-tzhc-9416-17-december-2021.pdf
CASE PAGE	https://chat.esheria.ai/case-law/tanzania/mwile-mugisha-mgallah-inheritancerights-tzhc-2021--6a3ea52b3b1caa9129823d46

Prepared on 14 October 2026 · Esheria