

TANZANIA / JUDGMENT

naiman lucas mbuki and another vs joseph mbuki and another 2021 tzhc 7503 3 december 2021

COURT
TZHCDECIDED
3 December 2021

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA IN THE DISTRICT REGISTRY
OF ARUSHA AT ARUSHA MISC. CIVIL APPLICATION NO. 32 OF 2021 (Originating from Arusha
Urban Primary Court Probate Cause No. 143 of 2019) NAIMAN LUCAS
MBUKI..... 1st APPLICANT GABRIEL LUCAS MBUKI..... -.....
2nd APPLICANT VERSUS JOSEPH MBUKI.....1st RESPONDENT RAHEL
MBUKI..... 2nd RESPONDENT

RULING

30/ 09/2021 & 03/ 12/2021 MZUNA, J.: This application is for transfer of a probate case No 143 of 2019 from the Arusha Urban Primary Court to this court reasons thereof are stated in the chamber summons and the sworn affidavit of Machwa Hanson, also appearing as the advocate for the above mentioned applicants. The application is strongly opposed by the respondents who filled a counter affidavit deposed by all the respondents. During the hearing of this application which proceeded by way of written submissions, the applicants were represented by Mr. Francis i Walter, the learned advocate while the respondents had no any legal representation, they fended for themselves. As a matter of fact, the respondents were duly appointed as administrators of the estate of the late Lucas Mbuki Kivuyo after filing Probate cause No. 143/2019 at Arusha Urban Primary Court. The applicants challenged the said appointment and the District Court of Arusha on 23/10/2020 issued a judgment nullifying the whole proceedings and appointment and directed that a re trial should be done. In compliance to the above order, the respondents went back at the Arusha Urban Primary court so that the matter could be heard. As expected, the applicant entered appearance but this time around, prayed that the matter should be stayed pending the hearing of this application for transfer of the said probate matter to this court allegedly as per the chamber summons among others that "there are legal issues to be determined" The main issue for determination is whether there are sufficient grounds for the transfer of the aforesaid probate case? Submitting on the substance of the application, Mr. Walter argued that, the law does not forbid the transfer of cases from one court to another as far as reasonable or sufficient grounds to do so are given. That the reasons for the transfer being that this court has exclusive and

concurrent jurisdiction to entertain the matter which is based on a customary way of life of the deceased citing section 63(1) of the Magistrates' courts Act [Cap 11 R.E 2019] herein after MCA. Mr. Walter also stated that there are serious issues of law required to be considered by this court. He pointed the said legal issue to be whether the will tendered before the primary court was a valid will and whether after the deceased who switched from a customary way of life to a Christianity way of life still the customary law would be used in the administration of his estate. To cement his arguments, he stated that issues of law have to be addressed to a person with legal knowledge and since the applicants are layman there is a possibility of miscarriage of justice once the case is heard in Primary court. For that reason, the applicants intend to exercise their right of a legal representation so as to assist them to litigate their rights. This can be accomplished once this application is granted. That there is no miscarriage of justice which will be occasioned if the case is transferred to this court as neither party had been heard. He urged this court to grant this application. Contesting the application, the respondents replied that, section 47(l)(i) of the MCA does not bar the transfer of case from one court to another but there must be sufficient reasons for doing so. That, as per the provision of section 22 of the MCA the supervisory power of the Primary Court is the district court hence the current application ought to have been filed at the District Court for the same to transfer the application to this court instead of filing the application straight to this Court. Further that in the determination of the law applicable it is not the religion affiliation that is considered but rather the life style of the deceased and cited the case of *Re: Innocent Mbilinyi: Deceased*

(1969) HCD 283. The respondents ruled out the reason adduced by the applicants that they intend to afford legal representation which they say is a new issue which did not feature in the applicant's affidavit. They submitted that issues which are not pleaded can not be raised in the submission. They further said that, engaging an advocate is not a reason to transfer the case citing the case of *Abubakari Mohamed Mlenda v Juma Mfaume* [1989] TLR 149. They further stated that the case at the Primary court has never been heard thus it was a surprise for the applicants to state that their rights had been prejudiced. They urged this court to regard that each case should be commenced in the court of lowest grade competent to try it and cited the case of *Parin A. A. Jaffer and Another v Abdulrasul Ahmed Jaffer and two others* [1996] TLR 110. The respondent urged this court to dismiss this application as to do otherwise they will suffer irreparably loss due to the fact that they will have to engage an advocate while they are economically stranded. In his brief rejoinder by Mr. Walter, reiterated his submission in chief putting more emphasis on the life style of the deceased which caused misunderstanding which can best be cleared by this court. On the issue of engaging an advocate he submitted that laymen can not contemplate the law thus it is important to engage an advocate and he prayed that the application be allowed. I have given due consideration to the submissions from both parties. Section 47(l)(a)(c)(i)(ii)(iii) and (3) of MCA to which this application relates, gives factors to be considered on transfer to Primary courts either on application of parties or another court superior to that of the primary court to include among others: - "(V (c)

- (i) it appears that the circumstances or gravity of the proceeding make it desirable that the same should be transferred; (ii) there is reasonable cause to believe that there would be a failure of justice were the proceeding to be heard in the primary court; (iii) the subject matter of the proceeding arose outside the local limits of the primary court's jurisdiction or is not within its jurisdiction; or in any case in which the law applicable is a customary law which is not a customary law prevailing within such first-mentioned primary court's local jurisdiction; or (iv) the proceeding seeks to establish or enforce a right or remedy under customary law or Islamic law, or is an application for the appointment of an administrator of the estate of a deceased person, and the court is satisfied that the law applicable is neither customary law nor Islamic law or that the question whether or not customary law or Islamic law is applicable cannot be determined without hearing or determining the proceedings and the court shall record its reasons for making or ordering such transfer: Provided that...
- (3) Where any proceedings of a civil nature referred to in subparagraph (iii) of paragraph (c) of subsection (1) has been instituted in a primary court, the primary court shall, on the application of either party to such proceedings and on being satisfied that the proceedings involve a question of law at issue between the parties, transfer the proceedings to the district court of the district for which the primary court is established: Provided that..." (Underscoring mine). The filed affidavit purport to say under paragraph 2 to 6 among other reasons for the transfer of this case being that, the will was admitted prior to scrutinizing it if it is a valid will; That there are legal issues to be addressed to this court; That the appointment of administrators was made pursuant to a will which was tendered and admitted in court. The respondents rightly submitted that the case is yet to be heard and there is no any document (will) that has been tendered or admitted by the primary court as alleged. In fact there is a retrial meaning no evidence have been adduced so far. There is no any legal issue raised at the primary court by the parties and also since the will is yet to be tendered before the court then this court being the court of record can not transfer case by anticipation that a legal issue may arise in future. Upon the submissions by Mr. Walter he has in fact raised a new issue that is the desire by the applicants to engage an advocate which has not been deponed in the affidavit supporting the application. There is a cherished principle of the law that parties are bound by their pleadings, and that a relief not found on the pleading will not be given. Both the chamber summons and affidavit which are part of the pleadings, never touched on it instead the issue was introduced in the written submission which is a wrong avenue for introducing the said issue and this court will not accord it any weight. Even if the reason of engagement of an advocate was to be regarded by this court still there are various authorities to the effect that wish and ability to hire the advocate alone is not a sufficient reason to grant transfer of the case. In the case of *Abubakar Mohamed v. Juma Mfaume* [1989] TLR 145 it was held that:- "Wish and ability to engage an advocate alone does not amount to good and sufficient cause to grant an application to transfer a case from primary Court to any other court." Having said so, it is well established law that, where a right is to be exercised by a court on discretion then the same must be exercised judicially. The judicial exercise of discretion must be backed up by

good cause. This court has not been moved by the applicants such that the sought application can be granted for transfer of the probate cause from the primary court to this court. I say so mindful of the fact that this court has a concurrent jurisdiction with the primary court on issues of adjudication of probate matters. These powers however should never be abused or used arbitrarily. I see no failure of justice if the case could be heard in the Primary court. The alleged complexity of legal issues calling for this court's intervention is a mere presupposition. I cannot buy such a story. That said, this application is devoid of merit and is hereby dismissed with costs. It is hereby so ordered.

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