

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF DODOMA

AT DODOMA

PC. CIVIL APPEAL NO. 34 OF 2023

(Arising from judgment and decree of the District court of Iramba original Probate
Case No. 2/2022 before Shelui PC)

FATUMA ALPHANY SHAMSIAPPELLANT

VERSUS

GADAFI KHALFN SHAMSI.....RESPONDENT
RESPONDENT

JUDGMENT

Date of last Order: 27th March, 2024

Date of Judgment: 2nd May, 2024

MASABO, J:-

This is a second appeal. The appellant is aggrieved by a decision of Iramba District Court which allowed the respondent appeal. In particular, she is aggrieved by the fact that the district court reversed the decision of Shelui Primary Court that recognised her as one of the heirs of the deceased's estate.

The background of the matter is that in Probate No. 9 of 2012 before Kiomboi Primary Court, one Hassan Shamsi was, on 18th April 2013, appointed an administrator of the estate of the late Khalifan Ahmed Shamsi who died intestate. Thereafter, he never filed an inventory until on 9th June 2021 when he resurfaced filed an inventory and had the probate closed on the same date. On 7th August 2021, the respondent filed a revision before Iramba District Court praying for restoration of Probate Cause No. 9 of 2012 alleging that the inventory was faulty as it left out several assets of the deceased. The applicant ended successful.

At the end of the revision. The inventory filed was nullified and the letters of administration were subsequently revoked.

Thereafter, the respondent filed Probate Cause No. 02 of 2022 before Shelui Primary Court seeking letter for administration of the estate. The appellant and one Pilli Martin Kiula filed an objection challenging the grant of letters to the respondent. They argued that no family meeting was held to propose the appointment of the respondent as the administrator of the deceased estate, that, they have been unfairly excluded as beneficiaries and heirs of the deceased estate, and that they did not trust the respondent.

The trial court determined the objection and appointed the respondent as a new administrator of estate. The appellant was subsequently recognised as one of heir of the deceased's estate. Her fellow caveator, not subject to this appeal, was adjudged to be not among the heirs and so was her son as they were found to have failed to prove that she was the wife of the deceased. Aggrieved by recognition of the appellant as one of the heirs of the deceased's estate, the respondent appealed to the first appellate court which held that the trial court had no jurisdiction to determine who are the legal heirs of the deceased's estate. The appellant was aggrieved by the decision of the first appellate court. She has fronted the following three grounds of appeal:

1. That, the appellate court erred in law and fact for failure to take into account that the appellant proved that she was the lawfully child of the deceased Khalfan Ahmed Shamsi.
2. That, the appellate court erred in law and fact by failure to consider that in the Original Probate Cause

No. 02 of 2022 the appellant was recognised as one of the beneficiaries of the estate of the late Khalfan Ahmed Shamsi.

3. That, the appellate court erred in law and fact by disregarding the judgment of the first probate cause whereby the uncle of the appellant and the respondent was the administrator of the estate of the late Halifani Ahmed Shamsi who recognized and included the appellant as one of the beneficiaries.

Hearing of the appeal proceeded by way of written submission as ordered on 19th February 2024. Both parties enjoyed the service of legal minds. Submissions by the appellant were drawn and filed by Mr. Hemed Kulungu while those for the respondent were drawn and filed by Mr. Godwell Lawrence, both learned counsels.

Submitting in support of the appeal, Mr. Kulungu, submitted that the first appellate court erred in not deciding that the appellant was the lawful heir of the deceased's estate whereas she produced a birth certificate which bears the names of the late Khalifani Ahmed Shamsi as her biological father. Also, the relatives of the deceased recognized her as one of the heirs. That, Hassan Shamsi who was the deceased's brother and the first administrator of the deceased's estate recognized the appellant and included her in the first probate matter as one of the heirs of the deceased's estate. It was submitted further that denying the appellant the right to inherit her father's estates is an infringement of her rights to enjoy the estate of her parent. In fortification of his submission, Mr. Kulungu cited the case of **Kristantus Msigwa vs. Marry Andrew Masuba**,

Probate and Administration Appeal No. 06 of 2019 [2020] TZHC 2380
TanzLII.

The second and third ground of appeal was consolidated and submitted as one. In these two grounds, the counsel reiterated the submissions made in support of the first ground of appeal that the first appellate court erred in not holding that the appellant was the lawful heir of the deceased's estate. Further, he argued that the refusal to include the appellant as heir amounts to deprivation of her right. It is discriminatory and an infringement of the constitutional right to equality before the law as enshrined under Article 13 of the Constitution of the United Republic of Tanzania of 1977. Resting his submission he prayed the appeal to be allowed.

In reply, Mr. Lawrence submitted that the first appellate court was right in reversing the decision of the trial court as regards the status of the respondent as the deceased's heir because: *one*, the name of the deceased was different from the name of the father of the appellant appearing in the documents tendered before the trial court to prove that the deceased was the appellant's father. For instance, on the birth certificate the name appears as Alphan Ahmed Shemsa instead of Khalfan Ahmed Shamsi. Also, the affidavit of the names shows that the appellant interchangeably uses the names of Fatuma Alfany Shemsa, Fatuma Alfany Shemsa and Fatuma Khalfan Shams. But, it was deposed on 27th December 2019 which was eleven years after the death of the deceased. This, casts a serious doubt on the truthfulness of the affidavit and its intent.

He argued further that it is uncertain whether the appellant was a Muslim like the deceased as the proceedings show that while testifying in court, she stated that she was a pagan. On the fact that the appellant was recognized by the deceased's relatives as the lawful beneficiary/heir, he argued that such argument has no merit because the said Hassan who was the former administrator did not come to testify in court to that effect. It was his conclusion that the appellant miserably failed to discharge her duty under section 110(1) (2) of the Evidence Act which requires a person who alleges the existence of a certain fact to prove the same.

Submitting on the second and third ground of appeal, he argued that the appellant did not prove that she was the heir of the deceased's estate and therefore the first appellate court was right to reverse the decision of the trial court which recognized the appellant as a lawful heir of the deceased's estate.

Having considered the rival submissions by the counsels for both parties and the lower courts' records, I will now proceed to determine the appeal. From the submissions, the parties do not dispute the appointment of the respondent as administrator of the deceased's estate. Their point of dispute is whether the appellant is the lawful heir of the deceased's estate. The probate court held that the appellant is the lawful heir a decision which was reversed by the first appellate court which held that the probate court surpassed its jurisdiction by entertaining and determining the question as to whether or not the appellant is a lawful heir of the deceased. Accordingly, the issues that awaits determination is whether

the first appellate court erred in its finding that the probate court had jurisdiction to determine whether or not the appellant herein is lawful heir of the deceased.

The question of jurisdiction is of paramount importance and courts are enjoined to first ascertain if they have jurisdiction before entertaining any judicial matter. The Court of Appeal instructively held so in **Richard Julius Rugambura vs. Issack Ntwa Mwakajila and Tanzania Railways Corporation**, Civil Appeal No. 2 of 1998 (unreported), when it stated that -

The question of jurisdiction is paramount in any proceedings. It is so fundamental that in any trial even if it not raised by the parties at the initial stages, it can be raised and entertained at any stage of the proceedings in order to ensure that the court is properly vested with jurisdiction to adjudicate the matter before it.

It is also trite that, the jurisdiction of a court being a creature of statute can neither be assumed nor conferred on the court by the parties as stated in **R.S.A Limited vs. Hanspaul Automechs Limited Govindarajan Senthil Kumal**, Civil Appeal No. 179 of 2016 [2020] TZCA 282 (8 June 2020) (TanzLII) where it was held that:

The jurisdiction to adjudicate any matter is a creature of the statute, an objection in that regard is a point of law and it can be raised at any stage.

Thus, even if the parties have no contention over the jurisdiction of the court to entertain their dispute, the court can still raise and resolve it *suo*

motu as the parties cannot consent to crown the court with the jurisdiction it does not possess (see **Shyam Thanki and Others Vs. New Palace Hotel** (1971) EA 199 **Commissioner General of Tanzania Revenue Authority vs. JSC Atomredmetzoloto (ARMZ)**, Consolidated Civil Appeal Nos. 78 and 79 of 2018 [2020] TZCA 306 TanzLII.

In the present case, the issue is not whether or not the probate court had jurisdiction over the matter. Rather, it is whether it had the jurisdiction to determine who was the rightful heir of the deceased. This issue was extensively canvassed by the Court of Appeal in **Monica Nyamakare Jigamba vs Mugeta Bwire Bhakome & Another** (Civil Application 199 of 2019) [2020] TZCA 1820 TanzLII where it held that:-

"The probate or letters of administration court has no powers to determine the beneficiaries and heirs of the deceased. Similarly, it has no power to distribute the estate of the deceased. The law has vested that power to the grantee of probate or letters of administration.....

It follows then that the administrator must collect the properties of the deceased and the debts, pay the debts, **identify the rightful heirs of the deceased**, to whom the amount of residue of the proceeds of the deceased's estate should be distributed and at what percentage each heir will be entitled to get depending on the law applicable in the administration of such estate." [Emphasis added]

Just as in the present case, in **Monica Nyamakare Jigamba vs Mugeta Bwire Bhakome** (supra) the probate court had directed that a

certain person be added as a beneficiary. Having made the observation above, the Court concluded that:

"It is our considered view that the High Court went beyond its jurisdiction by directing the administrator of the deceased estate to join the 2nd respondent as beneficiary and by removing one of the deceased estate listed by the administrator that is the house and bestowed it to the 2nd respondent. [Emphasis added]

The Court had a similar view in **Stephen Maliyatabu & Another vs Consolata Kahulananga** (Civil Appeal No. 337 of 2020) [2023] TZCA 132 TanzLII. Reversing the decision of this court which while sitting as a probate court considered such questions as whether the 2nd appellant was the lawful wife of the deceased and whether one of the 2nd appellant's children was a biological child of the deceased hence his rightful heir, the apex court held that:

"Although, the court before which the probate cause is filed has discretion to grant letters of administration, the law requires such discretion to take into account greater and immediate interests in the deceased's estate in priority or more remote interest. This entails appointing an administrator who will diligently and faithfully administer the estate of the deceased in order to achieve the judicious exercise of discretion which facilitates and simplifies the task of appointing the administrator of estate of the deceased. The follow up question is whether the High Court judiciously exercised its discretion to appoint the administrator of estate of the late Elias Rukonga Maliyatabu in accordance with the law.? Our answer is in the negative and we say so because it is unfortunate that the High Court considered extraneous

factors and proceeded to adjudicate on them which dents a judicious exercise of discretion in appointing a person fit to administer estate of a deceased person."

Fortifying its finding, the Court cited with approval its previous decision in **Mariam Juma vs Tabea Robert Makange** (Civil Appeal 38 of 2009) [2016] TZCA 206 TanzLII where while dealing with a similar issue it held that:-

"We are inclined to agree with Mr. Lutema that the High Court Judge went beyond his jurisdiction of handling a caveat filed opposing the appellant's petition for letters of administration. The findings he made that the appellant was not the legal wife of the deceased and that the appellant's children were not entitled to inherit from the deceased's estate were beyond the scope of his mandate in handling the caveat filed by the respondent."

On the strength of these authorities, I am inclined to agree with the first appellate court that the administration court exceeded its jurisdiction by entertaining the appellant prayer for recognition as one of the rightful heirs of the deceased. Such duty ought to have been reserved for the administrator.

Accordingly, the appeal is with no merit and is dismissed. The first appellate court's judgment is upheld. The costs be shared by each of the parties shouldering its costs.

DATED at DODOMA this 2nd day of May, 2024




J. L. MASABO
JUDGE