IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF BUKOBA
AT BUKOBA

PROBATE APPEAL NO. 04 OF 2018
(Arising from probate appeal No. 4/2017, originating from Katoma Primary Court in probate case No.7/2016)

HYASINTHA KOKWIJUKA FELIX KAMUGISHA.....APPELLANT

VERSUS

DEUSDEDITH KAMUGISHA.....RESPONDENT

JUDGMENT

Date of last order 12/05/2020
Date of judgment 22/05/2020

N.N. Kilekamajenga, J.

The appellant appeared before this Court challenging the decision of the District Court of Bukoba in probate appeal No. 4 of 2017. The gist of the case is as follows: The respondent applied before Katoma Primary Court to be appointed the administrator of the estates of the late Felix Kamugisha. It is alleged that the deceased died on 21st December 1996 leaving behind four children namely Yasintha Kokwijuka (the appellant), Lucia Mukaruhitwa, Adventina Kokusiima and Wilbard. It was however contested whether Wilbard was the son of the deceased. The deceased also left behind two impugned wills. The first will was

dated 9th January 1987 while the second was dated 7th August 1994. The clan meeting convened on 18th December 2015 and proposed the respondent to administer the estates of the deceased. Nonetheless, when the clan meeting convened, the two children of the deceased, namely Lucia and Adventina, had died. The only surviving child was the appellant who also did not attend the clan meeting to propose the respondent as the administrator of estates her late father.

Thereafter, the respondent was appointed to administer the estates. He proceeded further to distribute the estates of the deceased according to the 1994 will. According to that will, the deceased never bequeathed anything to the daughters; instead, all the estates were bequeathed to the son of the deceased's brother called Valentini Rugambwa. Therefore, following the 1994 will, the respondent distributed the estates as follows:

1. Valentini Rugambwa was allocated a quarter of an acre where the deceased had a residential house;
2. The three daughters who were adults and old women were placed under the care of Valentini Rugambwa. Before the distribution process, Valentini Rugambwa also died. So the deceased's plot of land was given to Valentini Rugambwa's son called Gonzaga Rwehumbiza;

3. One acre of trees was allocated to Yasintha Kokwijuka (the appellant);
4. Lucia Mukaruhitwa was allocated half an acre of land;
5. Adventina Kokusiima was also allocated half an acre of land;
6. The administrator of the estates further directed the appellant to supervise the distribution of the land to other sisters.

Aggrieved by the above distribution of the estates, the appellant filed an objection before Katoma Primary Court. The appellant contended that the respondent distributed the estates to persons who were not the deceased's legal heirs. She further alleged that other estates were not included in the estate. She further alleged that some of the deceased's estates were possessed by the respondent; she cited an example of a *shamba* at Bigege within the village of Kashenge. The Katoma Primary Court approved the distribution and dismissed the appellant's objection. Still dissatisfied, the appellant appealed to the District Court of Bukoba. The major ground in her appeal was coined around the dissatisfaction on how the distribution of the deceased's estates was done. The thrust of the argument aligned towards the fact that some of the estates were distributed to persons who were not the biological children of the deceased. Finally, the District Court decided in favour of the respondent and approved the distribution of estates.

The appellant appealed to this Honourable Court seeking for further justice. In the memorandum of appeal, she coined eight long grounds of appeal which, in my view, do not worthy to be reproduced in this judgment because they revolve around the grievances on the distribution of the deceased's estates and the essence of considering the 1994 will while side-lining the contents of the 1987 will.

The parties finally appeared to argue the appeal. The appellant was absent but enjoyed the legal services of the learned counsel, Mr.Mswadick while the learned advocate, Mr.Bengesi appeared for the respondent. During the oral submission, the counsel for the appellant argued that the deceased's children, including the appellant, who were legal heirs, were not involved in proposing the administrator of the estates of their father. According to the appellant and also by following the 1987 will, the legal heirs in the deceased's will were Wilbard Kamugisha, Yasintha Kamugisha, Lucia Kamugisha, Adventina Kamugisha and Teonistina Kamugisha. Mr.Mswadick further challenged the 1994 will which named Valentini Rugambwa as the sole heir and denied the Yasintha Kokwijuka, Lucia Mkaruhitwa and Adventina Kokusiima the right to inheritance. According to the counsel for the appellant, the 1994 will was uncertain and marred with irregularities. It ought not to be followed in the distribution of the estates. The

appellant wanted the distribution to be done according to the 1987 will but the trial court rejected it without giving reasons.

The counsel for the appellant assailed the 1994 will by pointing out some of the irregularities. For instance, on the top cover, the will is dated 07/08/1994 but there is another date on the same page (21/12/1996). On the first page of the will, it was written 1996 but later corrected to 1994. On the last page, the will is dated 24/12/1996. Besides, the 1994 will did not nullify the 1987 will. Mr.Swadick was of the view that the 1994 will might have been written by some clan members. He urged the Court to allow the appeal and follow the 1987 will in the distribution of the estates.

In response, the counsel for the respondent submitted that when the appointment of the administrator of the estates was done in 2015, the only surviving deceased's child was Yasintha (appellant) and Wilbard. However, Wilbert was not around when the respondent applied for the appointment of the administrator. The appellant was invited to the clan meeting but never attended. He further argued that the 1987 will is invalid, not known to clan members, and was not submitted in court as an exhibit. The 1994 will was chronicled by Alexander Kagaruki and kept by Samson Nyitwa who is still alive until now. It was witnessed by three persons namely, Vedasto Kamugisha, Samson Nyitwa

and Laurent Temaligwa. The 1994 will was read at the clan meeting by Leonard Kajanangoma two days after the deceased's funeral. He finally urged the Court to approve the distribution of the estates done by the respondent.

When rejoining, the counsel for the appellant argued that the 1987 will was submitted in the trial court and marked exhibit B. The same was witnessed by four witnesses. He further insisted that the 1987 will is valid and should be considered in the distribution of estates.

Before embarking on the major ground of appeal advanced by the appellant, I am aware of the established principle that '*a higher court will not normally interfere with a concurrent finding of fact of the courts below unless there are sufficient grounds.*' See, **Maulid Makama Ali v. Kesi Khamis Vuai, Civil Appeal No. 100 of 2004, CAT at Zanzibar (unreported)**. At this stage, I feel an obligation to remind Primary Courts on the law applicable on probate and administration of estates. These laws should be in the fingertips of every primary court magistrate before entertaining a case on probate and administration of estates. I feel this obligation after noticing that most of probate and administration cases present similar issues. I have encountered several disputes of this nature, which are characterised with similar irregularities committed by primary courts.

Probate and administration cases oftentimes lead to family conflicts. In some cases, complaints concerning these disputes backfire to decision-makers (magistrates). In my view, such anomalies and complaints may be avoided if parties are well guided and the law is properly followed. If the procedures are properly observed and parties involved, such cases may be expediently disposed of and grievance and complaints reduced.

The primary court has jurisdiction to determine probate and administration cases in matters where the law applicable is customary or Islamic. The primary court has no jurisdiction on probate and administration cases where the law applicable is **the Probate and Administration Act, Cap. 445 RE 2002** or where the administration is undertaken by the Administrator-General under the **Administrator-General's Powers and Functions Act**. See**, Rule 1(2) (a) of the Fifth Schedule to the Magistrates' Courts Act**.

The administration of estates normally commences with the appointment of the administrator/administratrix of estates. It is therefore pertinent for the primary court magistrate to understand, at an earlier stage, whether the administration of the estate may lead to the application of customary or Islamic law. Several yardsticks may guide the magistrate in identifying the law applicable. For instance, the magistrate may inquire the following information: the deceased's

name, tribe and religion; whether the deceased abandoned his customary lifestyle. See, the case of **Hadija Said Matika v. Awesa Said Matika, PC Civil Appeal No. 02 of 2016, HC at Mtwara**. This factor is necessary for gauging whether the deceased followed the norms of his community. The magistrate may also wish to know the last place of the deceased's fixed abode. The deceased's fixed abode is pertinent in understanding whether the primary court has jurisdiction to entertain that matter or not. I would like to bring to attention the provisions of **Rule 1 of the 5th Schedule to the Magistrates' Courts Act, Cap. 11 RE 2002** where the law provides thus:

> *'The jurisdiction of a primary court in the administration of deceased's estates, where the law applicable to the administration or distribution of 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.'*

The geographical jurisdiction of the primary court is stipulated under **section 3(1)(2) of the Magistrates' Courts Act**. The law states that:

> *'3 (1) There are hereby established in every district primary courts which shall, subject to the provisions of any law for the time being in force, exercise jurisdiction within the respective districts in which they are established.*

(2) The designation of a primary court shall be the primary court of the district in which it is established.'

This section establishes one primary court in every district. The other primary courts within the same district are just primary court centres. See the case of **Hadija** (*supra*). Therefore, the primary court established within the district has geographical jurisdiction within the whole district where it is established. It follows therefore that a person may institute a case in any primary court within the district where the deceased at a fixed abode at the time of his death.

However, for the interest of justice and easy access to the court, it is advisable to institute a case closer to the place where the deceased had a fixed abode at the time of death. In my view, the magistrate may inquire about the place of the deceased's fixed abode at the time of death and advise the applicant accordingly. This approach is necessary because some people wishing to administer estates may file probate and administration cause far from the deceased's family. The person applying for appointment far from the deceased's fixed abode may be trying to hide other family members from his appointment. I, therefore, urge magistrates to be watchful on this to avoid unnecessary and unwarranted objections thereafter. A person who applies for administration without informing other interested parties normally meets objections after his appointment is

known. The ordinary citizens who do not know the geographical jurisdiction of primary courts may also be wondering why the court allowed the applicant to apply far from the deceased's fixed abode. In my view, unless there are compelling reasons, a person should be advised to file the probate and administration cause to the primary court which is closer to the deceased's fixed abode and other interested parties.

Concerning the law governing probate and administration of the estate in primary courts, the same is scattered in several documents. The main document being the Magistrate's Courts Act and its subsidiary legislations. The jurisdiction of the primary court in the administration of estates is provided under **section 19(1)(c) of the Magistrates' Courts Act**. The section provides:

> *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)...*
> *(b)...*
> *(c) in the exercise of their jurisdiction in the administration of estates by the provisions of the Fifth Schedule to this 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 the regulation of such other matters as are provided for therein.

The above provision of the law points towards the fifth schedule to the Magistrates' Courts Act which is significant in probate and administration cases. Another law that governs the administration of estates in the Primary court is the **Primary Courts (administration of Estates) Rules G.N. No.49 of 1971**. Now, probate and administration case is a civil dispute. So, it is governed by the **Magistrates' Courts (Civil Procedure in Primary Courts) Rules G.N. No. 310 of 1964 and G.N. No. 119 of 1983** and the **Magistrate's Courts (Rules of Evidence in Primary Courts) Regulations G.N. 22 of 1964 and G.N. No. 66 of 1972**. Most of these documents are either the schedule to the Act or subsidiary legislation of the Magistrates' Court Act, Cap 11 RE 2002.

Now, depending on the law applicable, where the case requires the application of customary law and the deceased died intestate, the **Local Customary Law (Declaration) Order G.N. No. 4 of 1963 G.N No. 436 and 219 of 1967** comes into play. However, it does not apply to every part of Tanzania; hence its application must be carefully applied. It guides to areas where it applies. The local customary law declaration is an old document but it can be easily found

under the subsidiary legislation of Cap. 358 RE 2002. Where the law applicable is Islamic law, then principles of governing inheritance under Islamic law will apply.

The administration of estates begins with the appointment of the administrator of estates. The appointment may start with a clan meeting which proposes the name of the administrator. It should be understood that the clan meeting does not appoint an administrator but simply proposes the person suitable to be appointed the administrator/administratrix of estates. Only the primary court has the mandate to appoint the administrator of the estate. However, the minutes of the clan meeting informs the court that the clan has a common understanding of who might be the administrator of the estate. The court is not prevented from appointing an administrator of estates where there is a dearth of minutes of the clan meeting. But, it is always prudent to require the production of minutes of the clan meeting to avoid dealing with a person who has no interest in the estates.

In my view, even where the court receives the minutes of the clan meeting, it is important to know if the interested persons in the estates were involved. For instance, the court may ask whether the children of the deceased were involved in the meeting. If not, then there must be sufficient reasons why they did not attend the meeting. The other important group in the deceased's estate is the

widow(s) and other beneficiaries. If the heirs are involved from the early stages in the administration of estates, including in proposing the administrator of estates, unnecessary complaints and objection may be trimmed-down. It does sound well for the clan meeting to be held in absence of the heirs unless there are justifiable causes. The appointment of the administrator of estates must follow all the prescribed procedures under the law, which includes the filling-in and filing of necessary forms as provided in the **Primary Courts (administration of Estates) Rules G.N. No.49 of 1971**.

When the administrator of estates is appointed, he/she is obliged to collect all deceased's estates; collect all debts due to the deceased (if any); pay all debts owed by the deceased and the cost of the administration; distribute the deceased's estates to the persons entitled. In undertaking the duties, the administrator shall act diligently and give effects to the directions of the primary court. See, **Rule 5 of the Fifth Schedule to the Magistrates' Courts Act**. Therefore, the administrator should be a trustworthy person able to handle the estates with diligence. He/she must be an impartial person who can distribute the estates fairly. Of course, the primary court may appoint one among the heirs to be the administrator of the estates. See, **Rule 9(2)(e) the Primary Courts (Administration of Estates) Rules**.

Now back to the instant case, the respondent who was the administrator of the estates distributed the estates according to the 1994 will. As stated earlier, there were two contested wills; the 1987 and 1994 will. The appellant wished the estates to be distributed according to the 1987 will. I have carefully examined the two contested wills and observed the following: The deceased did not know to write so the wills were written some other persons. The deceased signed the will by writing his name. The 1987 will was witnessed by four persons. In the will, the deceased bequeathed the estates to Wilbard Kamugisha, Jasinta Kakwijuka, Lusia Mukaruhitwa, Adventina Kokusiima and Teonestina.

On the other hand, the 1994 will was witnesses by three persons. Like the 1987 will, it was written by another person and the deceased endorsed it by writing his name. When the deceased died on 21st December 1996, the will was retrieved. On 24th December 1996 other words were added on the last two pages of the will. Three persons seemed to witness that the will was read before the clan meeting. According to the 1994 will, all the deceased's properties were bequeathed to 'Valantini Rugambwa' who was the son of the deceased's brother. All the deceased's daughters were excluded from the inheritance.

There are five anomalies in the two wills which deserve the attention of this Court. **First**, as stated above, the wills were written by some persons and

endorsed by the deceased who did not know to write. He signed the will by writing his name. In my view, this was contrary to **Rule 20 of the Third Schedule of the Local Customary Law Declaration Order, No. 4 of 1963** because the deceased was supposed to punch his right fingerprint on the will. For easy reference, I take the discretion to reproduce the rule thus:

> *(20) Mwenyewe atie sahihi yake katika wosia uliyoandikwa ikiwa anajua kusoma na kuandika: ikiwahajui, aweke alama ya kidole chake cha gumba cha kulia.*

Second, the wills were not witnessed by the deceased's wife contrary to **Rule 5 and 6 of the third Schedule to the Local Customary Law Declaration Order, No. 4 of 1963.** For quick reference, I reproduce the provisions of the law here below:

> *(5) Zaidi ya mashahidi maalum, mkewe (mwenyewe kutoa wosia) au wake zake waliopo nyumbani lazima washuhudie vile vile.*
> *(6)Watu wanaorithi kitu chochote kutoka wosia hawawezi kuhesabiwa kama mashahidi kushuhudia wosia ule-isipokuwa mke au wake wa mwenye kutoa wosia.*

Third, the reasons to exclude the appellant and other daughters were not stated in the will contrary to **Rule 31 of the Third Schedule of the Local Customary Law Declaration Order No. 4 of 1963**. Rule 31 provides thus:

> *(31) Sababu zinazohesabiwa ni nzito za kuwezesha mwenye kutoa wosia kumnyima mrithi urithi wake ni hizi zifuatazo:–*
>
> *(i) Ikiwa mrithi amezini na mke wa mwenye kutoa wosia;*
>
> *(ii) Ikiwa mrithi amejaribu kumuua, amemshambulia au amemdhuru vibaya mwenye kutoa au mama mzazi wake (yaani, wamrithi);*
>
> *(iii) Ikiwa mrithi, bila sababu ya haki, hakumtunza mwenye kutoa wosia katika shida ya njaa au ya ugonjwa.*

Fourth, the deceased was supposed to state in the will the reasons for excluding the appellant and other beneficiaries from the inheritance. **Rule 34 of the Third Schedule of the Local Customary Law Declaration Order No. 4 of 1963** provides:

> *(34) Mtu atakaye kumnyima mrithi urithi wake lazima aseme wazi katika wosia wake na aeleze sababu zake.*

Fifth, the heirs who were excluded from the inheritance, including the appellant, were not afforded the right to be heard contrary to **Rule 35-39 of the Third**

Schedule of the Local Customary Law Declaration Order, No. 4 of 1963.

I take the discretion to reproduce the relevant rules for reference.

> *(35) Mrithi aliye nyimwa urithi wake apate nafasi kujitetea mbele ya mwenye kutoa wosia au mbele ya baraza la ukoo.*
> *(36)Mtua mbaye alijua kwamba amenyimwa urithi na ambaye hakushughulika kujitetea hawezi kupinga wosia baada ya kufa mwenye kutoa wosia.*
> *(37) Ikiwa mtu aliyenyimwa urithi hakuwa na habari kabla ya kifo cha mwenye kutoa wosia, atasikilizwa na baraza la ukoo-litakalokuwa na haki ya kukubali au kukataa madai yake.*
> *(38)Kama inaonekana kwamba mtu amenyimwa urithi katika wosia pasipokuwepo sababu ya haki, wosia unavunjwa na urithi utagawanyiwa kufuata mpango wa urithi usiona wosia.*
> *(39) Shauri kama hili huamuliwa na baraza la ukoo, ila mtu anaye husika asiporidhika anaweza kufika barazani kwa hakimu.*

Based on the above brief analysis, both the two will are invalid and do not worthy to be applied in the distribution of the deceased's estates. For that reason, therefore, the distribution was supposed to be done as if the deceased died intestate.

Also, I have noticed some sentiments of discrimination of against women in the administration of the deceased's estates. While we respect the customs of our

communities, those that are contrary to the Constitution of the United Republic of Tanzania and other laws should not be given the place in the administration of justice. On this point, I wish to insist on the equality before the law stipulated by **Article 12 and 13 of the Constitution of the United Republic of Tanzania.** The articles provide:

> ***12.****-(1) All human beings are born free* ***and are all equal.***
> *(2) Every person is entitled to recognition and respect for his dignity.*

> ***13.****-(1) All persons are equal before the law and are entitled,* ***without any discrimination,*** *to protection and* ***equality before the law.***
> *(2)* ***No law enacted by any authority in the United Republic shall make any provision that is discriminatory either of itself or in its effect.***
> *(3) The civic rights, duties and interests of every person and community shall be protected and determined by the courts of law or other state agencies established by or under the law.*
> *(4)* ***No person shall be discriminated against by any person or any authority acting under any law or in the discharge of the functions or business of any state office.***
> *(5) For the purposes of this Article the expression "discriminate" means to satisfy the needs, rights or other requirements of different persons on the basis of their nationality, tribe, place of origin, political opinion, colour, religion,* ***sex*** *or station in life such that certain categories of people are*

regarded as weak or inferior and are subjected to restrictions or conditions whereas persons of other categories are treated differently or are accorded opportunities or advantage outside the specified conditions or the prescribed necessary qualifications except that the word "discrimination" shall not be construed in a manner that will prohibit the Government from taking purposeful steps aimed at rectifying disabilities in the society (emphasis added).

The Local Customary Law (Declaration) Order or any customary law albeit may be discriminatory cannot override the Constitution of the country. Every law must abide by the constitution and other laws otherwise it does not worthy to be considered for application. I understand, under old Haya customary law, women were not allowed to inherit clan land. This is an old customary law. See, the cases of **Angelo Bisiki v. Antonia Bisiki and others [1989] TRL 225** and **Bilimbasa Zacharia v. Jarves John [1983] TLR 67**. 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. When the wave of change began in 1980s, this Court was confronted with a case of similar nature in the case of **Leonance Mutalindwa v. Mariadina Edward [1986] TLR 120**, and Hon. Katiti J. observed the following:

The first issue, whether a female has legal competence to dispose of clan land, is to both professional and lay members of this zone, susceptible to easy answer, an answer that is particularly attractive, covetously and jealously guarded by chauvinistic males but the envy of females from Kagera Region. The answer as expected is that para 20 of the Customary Law Declaration G. N.536, does operate to deprive the first respondent a female the power to sell clan land. The first issue is therefore answered positively. But I would like to add, may be in passing, that at any one time, we may have bad as well as good law, and ***I venture to say, without qualms, that this piece of customary law is bad, it discriminates against women, encourages expansionist greed on the part of males against female relatives, and deprives females, important resources for self – assistances,*** *when as in this case, they are in serious trouble, while like wild birds of prey, men, greedily look on, or however, either for the woman to expire, or die, or abandon that shamba, - in this case, this case, this ugly position is with clarity put by the appellant's witness, P.W.4 thus: ...So much for the ugly aspects,* ***but what is encouraging is all that the grave for the same is being dug, for the contemptuous burial of the same for the sake of equality, when the Fifth Constitutional Amendment 1984, takes its rightful place, in 1988.***

Even before the incorporation of Bill of Rights in our Constitution, the judiciary has departed from the discriminatory customary law. In the celebrated case of

Ndewawiosia Ndeamtzo v. Imanuel Malazi (1968) HCD 127, the Court stated that:

> *'It is quite clear that this traditional custom has outlived its usefulness. The age of discrimination based on sex is long gone and the world is now in the stage of full equality of all human beings irrespective of their sex, creed, race or colour. On grounds of natural justice daughters like sons in every part of Tanzania should be allowed to inherit the property of their deceased fathers whatever its kind or origin, based on equality.'*

In the case of **Leonance** (*supra*) Judge Katiti contemplated the abolition of this discriminatory customary law through the Constitutional amendment of 1984 which is currently part of our law. In other words, any discriminatory law is contrary to the Constitution. The principle of equality before the law in the Constitution has transcended into other laws of the country. For instance, **section 56 of the Law of Marriage Act, Cap. 29 RE 2002**, the law provides:

> ***A married woman shall have the same right as has a man to acquire, hold and dispose of property, whether movable or immovable****, and the same right to contract, the same right to sue and the same liability to be sued in contract or in tort or otherwise.*

The Land Act, Cap. 113 RE 2002 and the Village Land Act, Cap. 114 RE 2002 have provisions which guarantee the right of women to own land just like men. **Section 3(2) of the Land Act** provides:

3(2) The right of every adult woman to acquire, hold, use, and deal with land shall to the same extent and subject to the same restrictions be treated as a right of any man.

Also, **section 3(2) of the Village Land Act** has a similar provision thus:

3(2) The right of every adult woman to acquire, hold, use, deal with and transmit by or obtain land through the operation of a will, shall be to the same extent and subject to the same restrictions as the right of any adult man.

See, also the **Mortgage Financing (Special Provisions) Act of 2008**.

In conclusion, this Court is not obliged to distribute the estates but the administrator should distribution the same fairly to all legal heirs. The appellant who is the only surviving heir, in my view should be given the priority and other heirs as well, including the grandchildren. Therefore, all the deceased's estates should be collected and be redistributed accordingly. The overriding principles should be fairly distribution and equality. The appeal is allowed. No order as to costs. Order accordingly.

Ntemi N. Kilekamajenga
Judge
22nd May 2020

Court:

Judgment delivered in the presence of the counsel for the appellant, Mr. Mswadick; the counsel for the respondent, Mr. Bengesi; the appellant and respondent present in person. Right of appeal explained to the parties.

Ntemi N. Kilekamajenga
Judge
22nd May 2020