IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

PROBATE APPEAL NO. 12 OF 2020

(Arising from Probate Appeal No. 03 of 2019 of the District Court of Nyamagana, Originating from Probate and Administration Cause No. 162 of 2019 of Urban Primary Court)

GIBSON KABUMBIRE .....APPELLANT

VERSUS

ROSE NESTORY KABUMBIRE .....RESPONDENT

JUDGEMENT

Date of last order:30/07/2021

Date of judgement:13/08/2021

F. K. MANYANDA, J.

This is a Probate Appeal by Gibson Kabumbire, who is distressed by the decision of the District Court of Nyamagana in Probate Appeal No. 03 of 2019 dated 29/08/2019 which concurred with a decision of the Urban Primary Court in Probate Cause No. 162 of 2019 dated 25/02/2019. Initially the Appellant raised two grounds of appeal, however on 09/02/2021, with leave of the Court, he filed an amended petition of appeal with three grounds of appeal as follows: -

1. *That, the trial primary court who appoints (sic) the respondent as administrator of the deceased estates has (sic) no jurisdiction to*

deal with the estates as the law applicable was not customary or Islamic law.

2. *That both the learned Magistrates at Mwanza Urban Primary Court and Nyamagana District Court erred in law and facts by ordering the probate of the deceased to be administered in accordance with the will left by the deceased without considering ownership of the property contained in the will; and*

3. *That both the trial court and the first appellate court erred in law and in facts by ordering the properties of the deceased to be administered in accordance with the will of the deceased without considering the legality of the said will.*

Before I dwell into the nitty-gritty of the appeal, let me narrate the facts albeit in a nutshell. On 31/10/2016 the Respondent Rose Kabumbile, who was a wife of Late Nestory Rwechungura Kabumbile, filed a Probate and Administration Cause No. 162 of 2016 at the Urban Primary Court of Mwanza intending to be appointed the administratrix of the estate of her late husband who passed on to his next eternal life on 11/07/2016, testate. The Appellant, who is a son of the Late Nestory Rwechungura Kabumbile, objected. Both the trial Primary Court and the

Appellate District Courts decided in favour of the Respondent who was appointed the administratrix. Undaunted, the Appellant chose to come to this Court on appeal based on the three grounds stated above.

Hearing of this appeal was conducted by way of written submissions, Mr. Inhard E. Mushongi, learned Advocate, drew and filed the submissions for the Appellant and Mr. Mussa J. Nyamwelo, learned Advocate, drew and filed submissions for the Respondent.

Mr. Mushongi argued the grounds of appeal seriatim. In respect of ground one he submitted that the trial court lacked jurisdiction on two reasons.

First, he stated that some of the properties included in the will is a landed property located at Plot No. 50 Block "W", Capir Point, Mwanza. It was his views that by virtue of the provisions of section 18(1)(a)(i) of the Magistrates' Courts Act, [Cap. 11 R. E. 2019], hereafter the "MCA" ousts jurisdiction of primary courts in probate matters involving registered landed properties. He cited the case of **Christina Alexander Ntonge vs. Limi Mbogo**, PC Civil Appeal No. 11 of 2017 (unreported) where this Court (Hon. Munisi, J. as she then was) held: -

> *"From the clear wording of the above provision, I am in agreement with Dr. Lamwai that, had the primary court*

directed itself properly to the position of the law and the facts regarding the properties involved in the deceased estate, it ought to have found that it lacked the requisite jurisdiction to entertain the cause."

Second, Mr. Mushongi submitted that the trial court had no jurisdiction to entertain the Probate Cause because the Late Nestory Rwechungura died while professing Christianity. He relied on the provisions of section 18(1)(a)(i) of the MCA and item 1(1) of the 5th Schedule to the MCA which vests jurisdiction onto primary courts where the applicable law is customary or Islamic law. He cited the case of **Rev. Florian Katunzi vs. Goodluck Kulola and Others,** PC Probate Appeal No. 02 of 2014 (unreported) where this Court (Hon. Makaramba, J. as he then was) held inter alia that: -

"It is now settled law, in granting letters of administration of estates, the jurisdiction of a primary court is limited where the law applicable is customary and Islamic law. A primary court therefore has no jurisdiction where the estate is that of a person who professed Christian religion as the case presently, where the deceased died professing Christianity.

Mr. Mushongi argued further that since in the instant matter, the respondent's testimony is to the effect that she married Late Nestory

Rwechungura in 1978 under civil marriage ceremony and cerebrated their marriage in Christian rituals in 1996, therefore, customary law became inapplicable.

In respect of the second ground, Mr. Mushongi challenged the propriety of the "will" arguing that the same lists properties which do not belong to the testator such as clan properties. He was of the views that the testator has no power to distribute such properties.

In ground three Mr. Mushongi attacked the validity of the "will" pointing three defects namely: -

a. *Failure of witnessing by the wife which violates Rules 5 and 6 of the Third Schedule to the Local Customary Law Declaration Order, GN No. 4 of 1963. He relied on the case of* ***Hyasintha Kokujuka Felix Kamugisha versus Deusdedith Kamugisha,*** *Probate Appeal No. 04 of 2018 (unreported) where this Court emphasized on the mandatory requirement of a wife or wives of the testator to witness the "will";*
b. *The will was not witnessed in accordance with the law as provided under Rule 19 of the Third Schedule to the Local Customary Law*

Declaration Order, GN No. 4 of 1963 which require a "will" to be witnessed by two witnesses one of them must be a relative; and

c. *Some lawful heirs were excluded from inheritance in the "will" with no reasons and were not given opportunity to be heard. This violated Rules 35 to 39 of the Third Schedule to the Local Customary Law Declaration Order, GN No. 4 of 1963. He again relied on the case of* ***Hyasintha Kokujuka Felix Kamugisha (supra).***

Mr. Nyamwelo, the Counsel for the Respondent, on the other hand raised two issues which are not related to any ground of appeal and against which the Respondent did not cross appeal.

I have gone through the same and found that the same have been raised by the Respondent while composing his written submissions in reply. The complaint in those two issues is that the appeal in the first appellate court was incompetent because it was in respect of execution order and secondly, that the submissions by the Respondent in that appeal were filed out of time fixed by the said court. This Court will not act on the same as they are nothing but afterthoughts.

It is trite law that matters not raised in the first appellate court cannot be raised in subsequent appeal. There is plethora of authorities on this position of the law. The Court of Appeal in the case of **Halid Maulid and Another vs. Republic,** Criminal Appeal No. 342 of 2020,(unreported) said at page: -

> *"As shown above, it was the DPP who appealed against that decision and therefore, the appellants who did not exercise their right of appeal before the first appellate court, cannot raise issues which were not dealt with by that court. That amounts to an afterthought."*

Other cases on point include **Godfrey Wilson vs. Republic,** Criminal Appeal No. 168 Of 2018 **Galus Kitaya vs. Republic,** Criminal Appeal No. 196 of 2015, **Emmanuel Josephat vs. Republic,** Criminal Appeal No. 323 of 2016 and **Hassan Bundala @ Swaga v. Republic,** Criminal Appeal No. 385 of 2015, (all unreported), to mention a few.
In the latter case, the Court of Appeal stated as follows:-

> *"Mr. Ngole, for obvious reasons resisted the appeal very strongly. First of all, he pointed out that the first and third grounds were not raised in the first appellate court and have been raised for the first time before us. We agree*

with him that the grounds must have been an afterthought. Indeed, as argued by the learned Principal State Attorney; if the High Court did not deal with those grounds for reasons of failure by the appellant to raise them there, how will this Court determine where the High Court went wrong? It is now settled that as a matter of general principle this Court will not look into matters which came up in the lower court and were decided; not on matters which were not raised nor decided by neither the trial court nor the High Court on appeal."

Even though the cases cited above concern criminal cases, the principles therein are also applicable in civil cases

As regard to the first ground, Mr. Nyamwelo submitted that the trial court was seized with the requisite jurisdiction to try the probate cause because there was no evidence which reveals that the deceased professed Christian religion. Secondly, there is no evidence that the Late Nestory Rwechungura Kabumbile cerebrated marriage with his wife, the Respondent, in Christian religion rituals. Moreover, he argued that there is no evidence that Late Nestory Rwechungura Kabumbile lived a different mode of life other than his customary mode of life. He distinguished the **Rev. Florian Katunzi vs Goodluck Kulola case, (supra)** where there was established such evidence. As regard to the

Plot No. 50 Block "W" at Kapir Point a registered land, Mr. Nyamwelo argued that, that Plot is not among the listed properties in the "will". He was of the views that the authority in **Christina Alexander Ntonge's case (supra)** is inapplicable to the circumstances of this case.

As regard to propriety of the "will", Mr. Nyamwelo argued that this issue whether or not the "will" includes properties which are not exclusive properties of the deceased was not canvassed by the trial court. He was of the views that this issue cannot be raised in this appeal, been a second appeal. He cited the case of **Richard Majenga vs. Specioza Sylivester,** Civil Appeal No. 208 of 2018 CAT (unreported) which followed the authority in **Hotel Travetine Limited and 2 Others vs. National Bank of Commerce Limited** [2006] TLR 133 in which the Court of Appeal of Tanzania *inter alia* said: -

> *"As a matter of general principle an appellate court cannot consider matters not taken or pleaded in the court below to be raised on appeal."*

In respect to the validity of the will, Mr. Nyamwelo argued that the same was not raised and argued in the first appellate court. He was of the views that this ground cannot be raised at this stage of a second appeal. He cited the case of **Ally Patrick Sanga vs. Republic,** Criminal Appeal

No. 341 of 2017 where the Court of Appeal of Tanzania following the authority in its earlier case of **Bundala @ Swaga vs. Republic,** Ciminal Appeal No. 416 of 2013 (both unreported) stated *inter alia* that:-

> *"It is trite law that as a matter of general principle, this Court will only look into the matter which came up in the lower courts and were decided, not new matters which were not raised nor decided by neither the trial court nor the High Court on appeal."*

Back to the case, I have dispassionately considered the rival arguments by the learned counsel. In respect of the first ground, the issue for determination is whether the trial court lacked jurisdiction to entertain the probate cause.

It was submitted by Mr. Mushongi in respect of ground one arguing that the trial court lacked jurisdiction due to the fact that some of the properties included in the will is a registered landed property located at Plot No. 50 Block "W", Capir Pointy, Mwanza.

The Respondent countered this argument that the will does not contain the said property which was already declared by Hon. Matupa, J.

as he then was, that the Appellant was invited by the deceased on it, therefore it belonged to him (Appellant).

First of all, literally, section 18(1)(a)(i) of the MCA appears to oust jurisdiction of primary courts in probate matters involving registered landed properties. The said provision reads: -

> *"18. Jurisdiction of primary courts Act,*
>
> *(1) A primary court shall have and exercise jurisdiction–*
>
> *(a) in all proceedings of a civil nature–*
>
> *(i) where the law applicable is customary law or Islamic law:*
>
> *Provided that* ***no primary court shall have jurisdiction in any proceedings affecting the title to or any interest in land registered under the Land Registration Act****".*
>
> (Empasis added).

The Counsel for the Applicant relied on the interpretation of this section by this Court (Hon. Munisi, J. as she then was) in the case of **Christina Alexander Ntonge vs. Limi Mbogo (supra)** where it said at page 4 as follows: -

> *"From the clear wording of the above provision, I am in agreement with Dr. Lamwai that, had the primary court directed itself properly to the position of the law and the*

facts regarding the properties involved in the deceased's estate, it ought to have found that it lacked the requisite jurisdiction to entertain the cause".

However, a closer look at the said provision one can find that Primary courts have jurisdiction in probate causes where the applicable law is customary or Islamic law after been conferred with such jurisdiction by the Chief Justice under the provisions of sections 18(2) and 19(1)(c) of the MCA. Section 18(2) reads: -

18(2) The Chief Justice may, by order published in the Gazette, ***confer upon a primary court jurisdiction in the administration of deceased's estates where the law applicable*** *to the administration or distribution of, or the succession to, the estate is* ***customary law*** *or, save as provided in subsection (1) of this section,* ***Islamic law.*** (Emphasis added).

And section 19(1)(c) reads as follows: -

"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) NA;

b) NA; and

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."*

Pursuant to the provisions of the law above, the order of the Chief Justice was published as Government Notice No. 320 of 1964 which conferred jurisdiction on primary courts in matters of administration of estates regardless of whether the subject-matter is land registered under the Land Registration Ordinance, provided the applicable law is customary or Islamic law, other than matters falling under the Marriage, Divorce and Succession (Non-Christian Asiatics) Ordinance.

My understanding of that law contained in the provisions of the law cited above is that since Section 19(1)(c) of the MCA did not specify the particulars relating to the administration of estates, then, it means the said primary courts have jurisdiction to entertain probate causes concerning registered land.

I am not alone on this position, my Brother Hon. Mwenempazi, J. was confronted with a situation akin to this in the case of **Dickson Jimmy Kombe (Administrator of the Estate of the late Jimmy**

Jacob Kombe) vs. Ruwaichi Jimmy Kombe, PC Civil Appeal No. 14 of 2019 (unreported). He relied on the authority by the Court of Appeal of Tanzania in the important case of **Scolastica Benedict vs Martin Benedict** [1993] TLR 1 where it was held inter alia that: -

> *While section 15(1)(c) of the Magistrates Courts Act 1963 (now s. 19 of the Magistrates' Courts Act 1984) did not specify the particulars relating to the administration of estates, the order of the Chief Justice published as Government Notice No. 320 of 1964 conferred jurisdiction on primary courts in matters of administration of estates regardless of whether the subject-matter is land registered under the Land Registration Ordinance, provided the applicable law is customary or Islamic law, other than matters falling under the Marriage, Divorce and Succession (Non-Christian Asiatics) Ordinance.*

From the thread of authorities above, I am of the firm view that the Urban Primary Court was clothed with jurisdiction to try the probate cause in this matter. I am of increasingly firm views that the decision in the case of **Christina Alexander Ntonge (supra)** relied on by the Counsel for the Appellant was given *per incurium*. The complaint in the first part in the first ground has no merit.

The complaint in the second part of Mr. Mushongi's submissions relates to the applicable law. He submitted that the trial court had no jurisdiction to entertain the Probate Cause because, though Late Nestory Rwechungura married Late Nestory Rwechungura in 1978 under civil marriage, they celebrated their marriage in Christian rituals in 1996 and died while professing Christianity. Then, relying on the authority in the case of **Rev. Florian Katunzi vs. Goodluck Kulola** (supra) he contended that customary law is inapplicable.

The Counsel for the Respondent simply contended that the applicable law is customary law because there is no evidence which reveals that the deceased professed Christian religion and cerebrated marriage with his wife, Moreover, he argued that there is no evidence that Late Nestory Rwechungura Kabumbile lived a different mode of life other than his customary mode of life.

It is trite law that Primary Courts have jurisdiction in probate matters concerning Christians where it is proved that they lived customary mode or manner of life in which situation the question of professing Christianity does not interfere with the administration of his or her estate. The reason is that by merely being a Christian does not

mean one has been detached from his or her customary life, there must be evidence to support the same. There is a distinction between Christians who live and practice normal customary life and those who have professed Christian religion and either by a declaration or by his acts or manner of life is evident that they have professed as such and intended that their estate will be administered under the applicable law to Christians.

This is pursuant to the provisions of Section 88 of the Probate and Administration of Estates Act, [Cap. 352 R. E. 2002] which reads:-

> *"88(1) The estate of every deceased person by virtue of which an order or direction under Part IX applies shall be administered according to the following provisions–*
>
> *(a) The estate of a member of a tribe shall be administered according to the law of that tribe* ***unless the deceased at any time professed Islam religion*** *and the court exercising jurisdiction over his estate is satisfied from the* ***written or oral declarations*** *of the deceased or* ***his acts*** *or* ***manner of life*** *that the deceased intended his estate to be administered, either wholly or in part,* ***according to Islamic law****, in which case the estate shall be administered, either wholly or in part as the case may be, according to that law.*

*(b) The estate of a Swahili shall be administered according to **Islamic law** unless the court exercising jurisdiction over his estate is satisfied from the **written or oral declarations** of the deceased or **his acts** or **manner of life** that he intended his estate to be administered, either wholly or in part, **according to any customary law,** in which case the estate shall be administered, either wholly or in part, as the case may be according to that customary law.*

*(2) If at any time any person to whose estate this Act applies by virtue of an order, or direction under Part IX thereof **professed the Christian religion, and the court exercising jurisdiction over his estate is satisfied in the manner aforesaid that the deceased intended his estate to be administered, either wholly or in part, according to the law applicable in Tanzania to the administration of the estates of persons professing the Christian religion then his estate shall be administered,** either wholly or in part, as the case may be, according to that law. (Emphasis added).*

This provision was visited by Hon. Makaramba, J. as he then was in **Rev. Florian Katunzi vs. Goodluck Kulola's case (supra)** where at page 13 said:

"It is however without dispute that the deceased Moses Samwel Maguha Kulola who was an Archbishop, not only professed the Christian religion but also practised

Christianity. It cannot by any stretch of imagination be expected that by the manner of the life of the deceased he intended that his estate should be administered, either wholly or in part, according to any other law than the law applicable in Tanzania to the administration of the estates of persons professing the Christian religion. This being the case, therefore the Primary Court had no jurisdiction."

See also the case of **Raurent Alberto Mkambo vs. Robert Golden Mkumba,** PC. Civil Appeal No. 82 of 2018 where Hon. B. Mutungi, J. after citing with approval the case of **Ibrahim Kusaga vs. Emmanuel Mweta,** [1986] TLR 26 said:-

"Having gone through the two submissions, the court finds indeed the deceased did prophecy the Christian faith ***as per the evidence in the Primary Court****. In view thereof, his mode of life was regulated by the Christian norms hence his estate was to be administered according to his faith."* (Emphasis added)

From the above provisions, it is clear that it is settled law that the jurisdiction of the primary court in probate matters is limited to where the applicable law is customary law or Islamic law. For Christians whose

mode of life, through evidence, it is established that it was regulated by the Christian norms, their estates are to be administered according to the applicable laws. Therefore, it is the mode of life which determines the applicable law and the same must be established by evidence.

I may add another more recent case decided by Hon. Mlyambina, J, the case of **Benson Benjamin Mengi and 3 Others vs. Abdiel Reginald Mengi and Another,** Probate and Administration Cause No. 39 of 2019 (unreported) at page 16 when was determining the law applicable stated as follows: -

> *"In determining the applicable law, the Court is enjoined by judicial precedents to be guided by the two legal tests as it is reflected by myriad of case law including the famous cases of* ***Re Innocent Mbilinyi*** *(1969) HCD n. 283 and the case of the* ***Re Estate of the Late Suleiman Kusundwa*** *[1965] EA 247 among others."*

Then Hon. Judge the went on listing the two legal tests namely **'Intention of Test'** and **'Mode of Life Test'**. He chose to apply the Mode of Life Test on reasons that: -

> *"This Court is inclined to be guided by Mode of Life Test simply because the intention of the deceased on which*

law should govern his life where the deceased dies without stating expressly this fact"

A question then is whether there is evidence establishing that the Late Nestory Rwechungura Kabumbile abandoned his customary lifestyle. The Counsel for the Appellant says there is; however, he did not point any such evidence. The Respondent's counsel says there in none. This Court has gone through the evidence and found that apart from re-celebrating marriage with the Respondent in Christian rituals after a prior civil marriage, the Late Nestory Rwechungura Kabumbile lived a normal life of his kinsmen, and erected a house at Bukoba where he had intended to be buried under normal Haya customs only that he changed his mind after the Appellant demolished the said house without his consent. This Court is in agreement with the Counsel for the Respondent that there is no cogent evidence revealing that Late Nestory Rwechungura Kabumbile abandoned his customary lifestyle as such.

From this premise, I am of firm views that, in the absence of evidence that the deceased had abandoned the customary way of life in favour of Christian way of life, the primary court had jurisdiction to entertain the matter because the applicable law is customary law.

I find that the complaint in the second part of the first ground lacks merit. In the result, the whole of first ground has no merit.

In respect of the second ground of appeal, Mr. Mushongi challenged the propriety of the "will" arguing that the same lists properties which do not belong to the testator such as clan properties. He was of the views that the testator has no power to distribute such properties.

In ground three Mr. Mushongi attacked the validity of the "will" pointing three defects that, firstly, it was not witnessed by the wife, secondly, it was not witnessed by two witnesses one of them must be a relative; and thirdly, some lawful heirs were excluded from inheritance in the "will" with no reasons and were not given opportunity to be heard.

Basically, the complaint in these two grounds is about propriety and validity of a "will". This Court has taken pain to navigate through the proceedings and have been unable to trace any "will" in the file of this appeal, which also contains the records from the trial court and the first appellate court. Instead, this Court when going through the proceedings and the judgement of the trial court found that, while the

trial court in its judgement refers to a "will" tendered by SM2, Justus Katto Lukaza, as Exhibit "C", the evidence in the proceedings indicates the said Justus Katto Lukaza tendered a document termed as "wosia" which was admitted and marked as Exhibit "B".

A question that arises is that, in absence of the "will" tendered or any copy thereof, can the "will" referred to by the trial court in its judgement as Exhibit "C" be the same as the "wosia" tendered by SM2 and marked Exhibit "B" in the proceedings? The answer is in negative because, this Court cannot presume a fact to exist and take the same to be true. Moreover, reliance could have been on the court record which is presumed to reflect accurately what happened in trial court. However, in the matter at hand, the record is not consistent as indicated above, hence unreliable. The judgement refers to a different document from the proceedings.

Due to absence of the will in the case file, this Court cannot determine propriety or otherwise and validity of an alleged "will" which cannot be traced and found on the record.

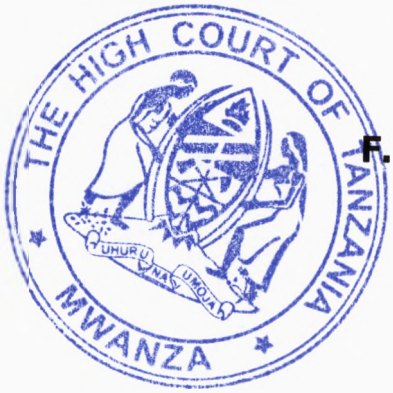
Based on the above analysis and findings, this Court holds that there is no proved "will". Consequently, for that reason, the distribution of the Estate of Late Nestory Rwechungura Kabumbile is supposed to be done as if the deceased died intestate. Ground two and three of the appeal have merit.

In the result, I partly allow the appeal in grounds two and three and dismiss ground one of the appeal for reasons explained above.

Then, the next question is what is the way forward. The first appellate court upheld the decision of the trial court which appointed the Respondent as administratrix. The first appellate court also ordered the administration of the estate of Late Nestory Rwechungura Kabumbile to be done in accordance with a "will" in observance of the judgements of the courts of law which decided on ownership of landed properties.

It follows therefore that, as per findings above, there is no "will". I do hereby order that the estate of Late Nestory Rwechungura Kabumbile will be administered in the manner that the deceased died intestate in accordance with the relevant law, but in observance of the judgements of the courts of law which decided on ownership of landed properties.

Each party to carry its own costs. It is ordered.



F. K. MANYANDA
JUDGE
13/08/2021