IN THE HIGH COURT OF TANZANIA

TEMEKE SUB-REGISTRY

(ONE STOP JUDICIAL CENTRE)

AT TEMEKE

CIVIL APPEAL NO. 10 OF 2023

(Originating from Misc. Application No. 27 of 2021 at Kinondoni District Court)

NORBERT MAFWELE BUHATWA .....APPELLANT

VERSUS

THERESIA MISOJI BUHATWA.....RESPONDENT

JUDGMENT

Date of last order: 29/09/2023
Date of Ruling: 02/10/2023

OMARI, J.:

The Appellant is seeking to appeal against the Ruling and Drawn Order of the District Court of Kinondoni on five grounds to wit:

1. The trial Magistrate erred in both law and fact by applying the Indian Succession Act in regards to the distribution of the deceased intestate bank account on a probate of a customary nature.
2. That the trial Magistrate erred in both law and fact by ignoring and abandoning the family meeting minutes in distribution of the deceased intestate bank account at Azania Bank.

3. The trial magistrate erred both in law and fact by failing to apply the *pari pasu* principle of distribution (even distribution) towards all the beneficiaries in relation to the deceased intestate bank account.
4. The trial court magistrate erred in fact and law by considering an unauthentic church certificate of the deceased and the Respondent that declared them Christians while they were not.
5. The trial magistrate erred in both fact and law by ignoring the deceased and the Respondent's Will that stated they had a customary marriage and not a Christian marriage.

It is on the basis of those grounds that he seeks this court to quash the Ruling and Drawn Order of the District Court of Kinondoni and to apply the *pari pasu* principle of distribution towards all heirs of the deceased in regards to the deceased's Azania Bank account based on what was agreed at the deceased's family meeting.

For background and context, one Nicas Lyangombe Buhatwa died partially intestate for the Will he left did not include an FDR bank account he held at Azania Bank. Norbert Mafwele Buhatwa and John Chrisostom Buhatwa were appointed as co-Administrators of the estate, that is the FDR account vide Probate and Administration Cause No. 36 of 2018.

Subsequently, vide Miscellaneous Application No. 27 of 2022 the Respondent herein applied for direction to the co-Administrators. In the said Application filed under Rule 65 and Rule 105 of the Probate Rules the Respondent sought the district court to order as follows:

1. The applicable law in respect of the distribution of the undistributed deceased estate is reckoned to be the Indian Succession Act as customized in Tanzania by the relevant law.
2. That according to the law the Applicant being the deceased's widow is entitled to 1/3 while lineal descendants are entitled to *pari passu* distribution of the reminder of the cash monies saved in Azania Bank Masdo Branch vide FDR account number 005709 forming the only distributed estate of the deceased.
3. That all monies and accretion thereof currently held in Azania Bank Masdo Branch vide FDR Account 005709 in the name of the deceased be deposited into court for distribution to the beneficiaries.

Upon considering the Application the learned magistrate gave the following directions:

> *'1. All monies and accretion thereof currently held at Azania Bank vide FDR account No. 005709 in the name of the deceased be deposited into the Judiciary*

Mirathi account for purposes of distribution to the beneficiaries .2. The applicable law to the distribution is the Indian Succession Act.'

The Appellant is not satisfied with the directives and has approached this court vide this Appeal.

The Appellant had the services of Aviti Bakuza and the Respondent enjoyed the services of Michael Kariwa both learned advocates. Upon request by counsel for the Appellant the matter was disposed by way of written submission to wit the parties filed their submissions as per the courts order.

Mr. Bakuza commenced his submission by stating that the major issue in this Appeal is the mode of distribution of the money in regards to the intestate bank account held at Azania Bank between beneficiaries of the deceased. On the first ground, which he consolidated with the fourth and fifth grounds he submitted that the deceased and the Respondent were married in the customary form as it is stated in their Will. Counsel argued that the trial magistrate ignored this and ordered the Indian Succession Act, 1865 (the ISA 1865) on a customary marriage was not right in the probate matter in regards to the estate of the late Nicas Lyang'ombe Buhatwa. He argued that the Respondent has attached a copy of the baptism certificate and a receipt as proof of her being Christian as well as the deceased which is untrue and

misleading the court for they can not be authenticated. He additionally stated that the documents were not tendered before the trial court during appointment of the Administrator. He concluded on the first ground by stating that it is disingenuous to bring this matter at the Appeal stage.

On the second ground counsel submitted that the trial magistrate erred in both law and fact to ignore the minutes of the family meeting which among others discussed the money in the said bank account as the only asset the deceased that was intestate and required the administrator and that its distribution should be on a *pari pasu* principle. Counsel went on to argue that there were a lot of beneficiaries all of whom agreed that the distribution to be equal and the Respondent albeit being at the meeting Respondent changed this position which in his opinion is unnecessary and unfair. He further argued that since the law recognizes the minutes of the family meeting as an essential part of appointing an Administrator, then the family agreement as regards the distribution is the blue print in distributing the assets as per the wishes of the heirs.

Submitting on the third ground of appeal counsel for the Appellant stated that by failing to apply the *pari pasu* principle the trial court had erred in both law and fact because all the family members including the Respondent

had agreed on this, therefore it was not fair on the family members to apply the ISA 1865 since the same has no relevance because the Respondent and the deceased had a customary marriage.

In concluding his submission counsel argued that the Respondent was only trying to mislead this court and get a large share of the money by using the ISA 1865 which does not apply in this matter because the deceased had a customary marriage with the Respondent. He prayed for this court to adopt a *pari pasu* on mode of distribution of the deceased intestate money at Azania Bank.

In reply the Respondent's counsel submitted that the first, fourth and fifth grounds appeal as consolidated by the Appellant allude that this matter is customary in nature. He argued that this assertion is in fact misconceived and misleading because the Appellant being a co – Administrator and a step child of the Respondent and son of the deceased knows that the two are Christians. And, according to the Respondent's counsel that is why he applied for letters of administration at the district court and not at the primary court which would have been the appropriate forum if he were not Christian. Mr Kariwa argued further that the trial magistrate was correct to consider the baptism certificate and the receipt in respect of payment of tithe as one proof

that the deceased and the Respondent were Christians. What's more, according to counsel, the Appellant did not even attempt to contradict this by adducing evidence. On the contention that the two documents were not produced at trial the Respondent's counsel argues that there was no dispute as regards the forum and that it is the Appellant who applied for letters of administration. Counsel concluded that though the two had a marriage in customary form overtime they were converted and admitted into Christianity by way of baptism.

As for the consolidated second and third grounds of appeal the Respondent's advocate argued that first not all members including the Respondent were present and appended signatures to the said minutes. Therefore, the connotation of all members agreeing on equal distribution is unfounded. Furthermore, Counsel argued that the said *pari pasu* distribution formula the Appellant was insisting on is contrary to section 27 of the ISA 1865. Counsel added that the Counter Affidavit of the 2nd Respondent as a Co – Administrator is not in dispute with the application of the ISA 1865. He then concluded by praying that the appeal be dismissed for being devoid of merit and that the decision of the trial court be upheld and this court confirms that the deceased's estate be distributed according to the ISA 1865.

In rejoinder Mr. Bakuza argued that the Respondent's submission is contradictory because while the said baptism certificates are of 14 December,2011 the Deceased's Will of 30 November,2015 declared their marriage was of customary form. He argued further that the said certificate is difficult to authenticate for it was brought under suspicious circumstances. He stated further that the Respondent was the second wife of the deceased who was Catholic and had married his first wife under Catholic rituals and no divorce was ever issued thus, the customary marriage to the Respondent. Counsel further argued that because the deceased was already baptized then it does not make sense for him to be baptised again in 2011.

On the reply to the second and the third grounds of appeal the Appellants counsel went on to argue that the Respondent never disagreed or contested about what was agreed at the family meeting. He then went on to state that the ISA 1865 is applicable to small estates as stipulated under the Probate and Administration of Estate Act Part VIII therefore, the money that is in the bank being TZS 301,770,000 is greater than TZS 10,000 thus, cannot be a small estate and be distributed by the ISA 1865. The Appellant's counsel then concluded by reiterating his plea for the *pari pasu* distribution as the ISA 1865 does not apply to this matter.

Having considered the parties submissions for and against the Appeal it is now opportune to determine whether the Appeal before me is meritorious and the way forward. At dispute is the TZS 301,770,000 that is not distributed by the deceased's Will. The Appellant is alleging the deceased being a person who married the Respondent in the customary form then his estate should not be distributed in accordance to the ISA 1865 rather it should be distributed equally amongst the heirs, however, not stating that is under which law of distribution. The Respondent on the other hand is contesting that it is the ISA 1865 that is to be applicable since she and her deceased husband are Christians.

Before going into the grounds of appeal I would like to first comment on the Appellant counsel's version that the ISA only applies to small estates. The applicability of the ISA 1865 in Tanzania is through section 14 of the Judicature and Application of Laws Act CAP 358 R.E 2019. However, section 165 of the Probate and Administration of Estates Act, CAP 352 R.E. 2019 (the PAEA) disapplies the ISA to the extent of Parts XXIX to XL inclusive and section 333; in other words, the rest of the ISA 1865 is applicable in Tanzania. As to the contention that it only applies to small estates is not clear where the Appellant get this since in the whole of Part III of the PAEA

there is nowhere it provides that the ISA 1865 is only applicable to small estates. The ISA 1865 was made applicable in Tanzania by the Indian Acts (Application) Ordinance CAP 2 as the law that applies to Christians and all those that are not Muslim or under customary law. Even if one is to assume what counsel for the Appellant wanted this court to interpret the law the way he has read it he has not told this court what law is then applicable in an estate that is other than small estate to which neither Islamic nor customary law applies.

Segueing back to the grounds of appeal which as argued Mr. Bakuza basically centre on the law applicable to the distribution of the money in the deceased's FDR account and the court ignoring the minutes of the family meeting. The only issue for this court's determination is whether the appeal is meritorious. In doing so I laboured to meticulously comb the record of Probate and Administration Cause No.36 of 2018 for it is the core of Miscellaneous Application No. 27 of 2022 which catapulted this Appeal.

In Probate and Administration Cause No. 36 of 2018 the Appellant herein and his sibling John Chrisostom Buhatwa applied and were granted with letters of administration for the estate of their late father. On paragraph 4 of the Petition for the grant of letters of administration they stated that the

deceased was male and professed Christianity. There is no amended Petition in the court's record that sought perhaps correct this if the Appellant had stated so erroneously.

I have also gone through the record of the district court to see whether there was any dispute as regards the deceased's religious beliefs and or any other contention that would have rendered the court to inquire into the same. There is none. It is my considered view that since the Appellant was the co-Petitioner in the said Application for letters of administration and he had verified that what he had written in the Petition is true. Then he cannot now seek to elude his own Petition at this stage. It is a principle of law that parties are bound by their pleadings. The Court of Appeal decisions in **Maria Amandus Kavishe v. Norah Waziri Mzetu (Administrator of the Estate of Silvanus Mzeru) and Majembe Auction Mart,** Civil Appeal No. 365 of 2019 and of **Samwel Kimaro v. Hidaya Didas,** Civil Appeal No. 271 of 2018 all speak to this principle.

Likewise, it is a trite principlethat courts records are a representation of what happened therefore should not be disregarded or impeached lightly as held by the Court of Appeal in **Alex Ndendya v. The Republic,** Criminal Appeal No. 207 of 2018 and **Hellena Adam Elisha @Hellen Silas Masui**

v.Yahaya Shabani and Rashid Juma, Civil Application No. 118/01 of 2019.

On the question as to the baptism certificates not being tendered in the trial court, during the appointment of the co-Administrators. I also find this argument as unmerited since other than the Appellant being the one who averred in the Petition that the deceased was Christian, there was no objection and or contention as regards the deceased's religion then there would be no reason for the said certificate to be tendered and or be at issue. Other than the averment that the deceased and the Respondent had a customary marriage, thus cannot be said to be Christians the Appellant had not supplied any material for the trial court in Miscellaneous Application No. 27 of 2022 to work with in terms of determining the applicable law. He is disputing the Respondent's contention that her and her deceased husband had since been baptised and are adherents and were paying tithe to their church but did not adduce any evidence to the contrary. The Appellant is questioning the fact that the alleged baptism was in 2011 and the Will that was executed in 2015 still describes the marriage in the customary form yet the deceased and the Respondent had by then been allegedly baptized and were Christians. While going through the court's file I had a glimpse of a

copy of the Will, other than stating that the two were married according to customary rites in 1961, it nowhere states any religious affiliation of the testators. In my considered view unless the two had celebrated or solemnized another marriage possibly after being baptized into the sect which they are adherents of, then the only marriage they have is the one they celebrated in customary form in 1961, thus, the Will could not have described any other marriage. Perhaps the question would be if one can have a marriage in the customary form and claim to be a Christian in the same breath.

In **Benson Benjamin Mengi and Others v. Abdiel Reginald Mengi and Another**, Probate and Administration Cause No. 39 of 2019 [2021] TZHC 3202 it was *inter alia* observed that a person can have what was termed as "a hybrid way of life" and in such cases, it is the dominant mode that would take precedence, see also **Peter Pantaleo Mtui v. Juliana Pantaleo Mtui**, PC. Civil Appeal 43 of 2021, [2022] TZHC 13163. In this case none of those issues were brought up by any of the parties during the appointment of the co-Administrators, at this point I deem this issue an afterthought on the part of the Appellant and by whatever standard he, the Appellant would be backpaddling from what he had stated in his own Petition. It is in my

considered view there is nothing to fault what the learned trial magistrate concluded as she was issuing the directives to the Administrators.

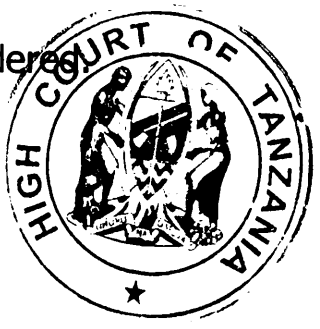
The Appellant is also challenging the decision of the trial court for not considering the minutes of the family meeting. The family or clan meeting and ensuing minutes which is taken as a good practice for when available it assists the court in determining whether or not there are conflicts and other issues regarding the administration. See for example **Masubi Jacob v. Rosemary Bega William**, PC Probate Appeal 17 of 2021 [2022] TZHC 933, however the same is neither a requirement nor binding on the court. See for example **In the Matter of the Estate of the Late John Peter Silveira and In the Matter of Petition for Grant of Probate of the Late John Peter Silveira by Francisca Haruweru Silveira, and In the Matter of Caveat by Gerald Francis Silveira and Solomon John Silveira,** Probate and Administration Cause No. 23 and 24 of 2019 wherein this court decided that the Petitioner for letters of administration needs the consent of the heirs and not minutes from a clan meeting. In **Elias Madata Lameck v. Joseph Makoye Lameck**, PC Probate and Administration Appeal 1 of 2019 [2020] TZHC 654 this court stated there is no legal requirement for a clan meeting, this can by necessary implication be interpreted that there's also no legal

requirement for minutes of the said clan or family meeting and therefore a court cannot be bound by the same.

From the above it is clear that the learned trial magistrate was not forced by any law to be bound by the minutes of the clan/family meeting which in fact the Respondent is disputing having attended and agreed to the resolutions. In any case the Appellant having failed to demonstrate that the deceased was not Christian by among many other reasons himself stating that his late father was Christian renders this line of argument futile.

Consequently, the grounds of Appeal are all dismissed, the decision of the district court is upheld. As this is a probate matter and the parties are members of the same family, I make no orders as to costs.

It is so ordered.



A.A.OMARI

JUDGE

02/10/2023

Judgment delivered on 02nd October, 2023.

A.A.OMARI

JUDGE

02/10/2023