IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SONGEA DISTRICT REGISTRY)

AT SONGEA

PROBATE APPEAL NO 2 OF 2020

(Arising from Probate Cause No. 10 of 2019 of Mbinga District Court at Mbinga)

FARAJA ADOLF KAWONGA ..... APPELLANT

VERSUS

MARIA NDUNGURU ..... RESPONDENT

Date of last Order: 24/09/2020

Date of Judgment: 03/11/2020

JUDGMENT.

I. ARUFAN, J.

This is an appeal by Faraja Adolf Kawonga against the judgment and orders of the District Court of Mbinga at Mbinga (hereinafter referred as the trial court) in Probate and Administration Cause No. 10 of 2020. She is asking the Court to quash and set aside the judgment and orders of the trial court which appointed the respondent, Maria P. Ndunguru as an administratrix of the estate of the late Gido Moses Nkolela (hereinafter referred as the deceased) who died intestate on 7th October, 2019 at Mbinga.

The brief facts leading to this matter are to the effect that, the respondent alleged she married the deceased in 1986 through Christian marriage which was celebrated at Litembo Parish and were blessed to have one issue. On the other hand the appellant alleged she married the deceased through customary law in 2001 and blessed to have six issues and they acquired different properties. After the death of the deceased the respondent was appointed through the deceased's family meeting to petition for letters of administration of the estate of the deceased.

The respondent filed the petition for being granted letters of administration of estate of the deceased before the trial court. However, before hearing of the petition the appellant filed a caveat before the trial court to oppose the respondent to be appointed administratrix of the estate of the deceased. The major ground used by the appellant to oppose the appointment of the respondent as an administratrix of the estate of the deceased is that, if the respondent will be appointed administratrix of the estate of the deceased her interest and those of her children will be prejudiced because of the hostility relationship which is between her and the respondent.

After full hearing of the matter the appellant's caveat was dismissed after being found the grounds raised by the appellant to oppose the respondent to be appointed administratrix of the estate of the deceased would have not stand on its own feet. The appellant was aggrieved by the decision of the trial court and filed in this court the memorandum of appeal containing three grounds which are as follows:-

1. *That the trial court erred in law and in fact when appointed the respondent an administratrix of the estate of the deceased.*
2. *That the trial court erred in law and in fact to dismiss the appellant's caveat.*
3. *That the trial court erred in law and in fact when disregarded the interests of the appellant and her children when appointed the respondent as an administratrix of the estate of the deceased.*

When the appeal came for hearing the appellant was represented by Mr. Kitara Mugwe, learned advocate and the respondent enjoyed the service of Mr. Eliseus Ndunguru, learned advocate. The counsel for the appellant prayed to abandon the second ground of appeal and argued the rest of the grounds.

The counsel for the appellant told the court in relation to the first ground of appeal that, if you look the decision of the trial court you will find the respondent was appointed to administer the estate of the deceased as she was married by the deceased through Christian marriage. The appellant's counsel argued that, they have stated the trial court erred in law to appoint the respondent to administer the estate of the deceased as it did so without being satisfied itself it had jurisdiction to entertain the petition and to appoint the respondent to administer the estate of the deceased.

He argued that, if you read at page six of the judgment of the trial court you will find the respondent failed to prove she married the deceased through Christian marriage as she didn't produce marriage certificate in the trial court to prove she had Christian marriage with the deceased to ascertain

where the deceased's matter would have been entertained. He went on arguing that, as the respondent failed to prove she had Christian marriage with the deceased and what was proved is that the respondent had child with the deceased then their marriage was customary marriage and they have not contracted a Christian marriage.

He argued that, the marriage entered under customary law is governed by Fifth Schedule to the Magistrates' Courts Act, Cap 11 R.E 2019. He submitted that, under paragraph 1 of the mentioned Schedule the respondent's petition was supposed to be taken to Mbinga Urban Primary Court and not in the trial court. He referred the court to the case of **Hadija Saidi Matika V. Awesa Saidi Matika**, PC Civil Appeal No. 2 of 2016, HC at Mtwara, (unreported) where the court insisted that, courts are required to be certain and be assured it has jurisdiction to adjudicate a particular case before commencement of the trial.

The counsel for the appellant submitted that, as the trial court stated at page 3 of its judgment that PW2 said the appellant had six children with the deceased and the respondent had one child and as the deceased had two wives it shows the deceased's way of life was customary life. He argued that, under that circumstance the deceased's estate was supposed to be administered under customary law. He said the trial court failed to consider the caveat of the appellant which was in respect of the above argued ground.

He argued in relation to the third ground of appeal that, the appellant objected the respondent to be appointed administratrix of the estate of the deceased as she had no marriage with the deceased. He argued that,

although the trial court stated at page 7 of its judgment that the respondent had no Christian marriage with the deceased but it appointed the respondent to be administratrix of the estate of the deceased while there was an objection about her appointment and without showing which criterion was used to appoint her.

The counsel for the appellant argued that, as the appellant had five children with the deceased and the respondent had one child with the deceased and the appellant and respondent are in hostility relationship if the respondent will be appointed administratrix of the estate of the deceased the interest of the appellant and her children will be prejudiced. It is because of the above stated reason the counsel for the appellant prays the court to allow the appeal and quash the judgment of the trial court. He also prays the court to nullify and set aside the order of granting letters of administration of the estate of the deceased to the respondent and the appellant be awarded costs of the appeal.

In reply the counsel for the respondent said the counsel for the appellant has not read the pleadings and caveat filed in the trial court, death certificate and minutes of the family meeting which appointed the respondent to petition for letters of administration of the estate of the deceased. The respondent's counsel argued that, if you read paragraph 6 of the petition filed in the trial court you will find it states the deceased was a Christian before his death and the caveat filed in the trial court was not contesting the deceased was a Christian and he was living Christian life. He stated that, the appellant deposed at paragraph 4 of her affidavit supporting the caveat that, the respondent was the deceased's first wife and the respondent stated at

page 18 of the proceedings of the trial court that she married the deceased through Christian marriage.

He stated further that, the appellant stated at page 9 of the proceedings of the trial court that she is in a Catholic sect and the deceased was in a Catholic sect and they married through Christian marriage which was celebrated at Litembo Parish. He also said the appellant said she was told by the deceased he wanted to live Christian life. He went on arguing that, exhibit D1 which is the minutes of the family meeting shows the appellant attended the meeting as a co-parent of the deceased and all those evidence shows the argument by the counsel for the appellant is an afterthought and it was not one of the issues framed for determination at the trial court.

He said the issues framed at the trial court on 13th February, 2020 were whether the appellant was lawful wife of the deceased and whether the appellant was involved in the family meeting which appointed the respondent to petition for letters of administration of the estate of the deceased. He contended that, even if it would have been established the deceased was living customary life but the counsel for the appellant has not stated he was living under which customs. He said as the evidence shows the deceased was living Christian life and he was buried under Christian practice it cannot be said as he sired six children out of his marriage he was not a Christian.

He argued that, as the appellant recognized the deceased was a Christian the law which was supposed to be followed in administration of his estate is Indian Succession Act which do not segregate child born out of wedlock. He stated that even section 36 of the Law of the Child Act, Cap 13 R.E 2019

states a child has a right to inherit the estate of his father. He went on arguing that, as the respondent was aware the deceased had children out of marriage she included them in the petition as the heirs of the deceased's estate. He said all that shows there is nothing suggesting the deceased was not a Christian and he was living and practicing Matengo Customary way of life as argued by the counsel for the appellant.

He referred the court to the case of **Re Innocent Mbilinyi** [1969] HCD 283 where the deceased who was found he was a Christian it was held his estate was supposed to be administered under Indian Succession Act. He said the case of **Hadija Saidi Matika** (supra) cited by the counsel for the appellant is supporting what he has argued as it was stated what is supposed to be looked at in determine whether a court has jurisdiction to entertain a matter is the name, tribe and place of abode of the deceased. He said what was required is the evidence to show the deceased was not a Christian but purely a Matengo whose estate was supposed to be administered under Matengo Customary law.

The counsel for the respondent argued that, despite the fact that the counsel for the appellant argued the first ground of appeal as the point of law but that is a point of fact which need evidence to prove it and said that is an afterthought. He stated that, section 112 of the Evidence Act, Cap 6 R.E 2019 states clearly that the burden of proof lies on a person wish a fact to be found is in existence. He said it is because of the above stated reasons is praying the court to find the first ground of appeal has no merit and dismiss it.

He argued in relation to the third ground of appeal that, the argument that the interest of the appellant and her children will not be taken into consideration has no merit because the children of the appellant were listed in the petition as the heirs of the estate of the deceased. He argued that, to say the interest of the children of the appellant will not be taken into consideration is premature. He said the law is very clear and specifically section 49 of the Probate and Administration of the estate Act Cap 352 R.E 2002 which gives the court power to revoke grant of letters of administration granted to anybody and failed to administer the estate of the deceased in accordance with the law.

He went on arguing that, the interest of the appellant was not disregarded because the decision to dismiss her caveat has not been challenged in any court. He said the ground to challenge the same was withdrawn by the counsel for the appellant after seeing the decision was fair and equitable. He said the appellant failed to establish her interest before the trial court. He said section 55 of the Law of Marriage Act, Cap 29 R.E 2019 states that, existence of marriage is proved by way of certificate of marriage, its copy, any entry or copy of entry in the Register of marriage. He stated that, as the appellant failed to prove she was a lawful wife of the deceased that does not mean the respondent was not lawful wife of the deceased.

He argued that, although the appellant stated she attended the family meeting but it was indicated in the minutes of the family meeting that she attended the meeting as a co-parent of the deceased and it has not been stated her status was changed. He added that, when the minutes of the family meeting was tendered in the trial court it was not disputed by the

appellant. He submitted it is because of the above stated reasons he has seeing the appellant's appeal has no merit and the trial court was right in arriving to the decision which the appellant is challenging before this court and prayed the appeal to be dismissed with costs.

In his rejoinder the counsel for the appellant told the court that, the fact that the deceased had two wives which is polygamous marriage it proves his mode of life was customary. He said under that circumstance the appellant has the same status with the respondent to the deceased. He said as the appellant said she was the deceased's co-parent as she had no marriage with the deceased the same status applies to the respondent. He argued that, the respondent's counsel's argument that the respondent stated at paragraph 6 of the petition that she contracted Christian marriage with the deceased at Litembo Parish is not true as she failed to prove the said assertion.

He argued that, even if it will be taken the respondent had a right of being granted letters of administration because she had a child with the deceased but the appellant also had children with the deceased. He said the argument by the counsel for the respondent that he didn't read the proceedings of the trial court has no merit as the appellant is not appealing against the proceedings but against the judgment of the trial court. He said he argued the trial court failed to consider her interest and those of her children as the appellant was not listed as a beneficiary of the estate of the deceased in the petition filed in the trial court by the respondent while the respondent who is in the same status with the appellant is listed in the petition as the heir of the estate of the deceased.

He said is praying the judgment of the trial court to be quashed as the caveat filed in the trial court was not considered. He submitted that, as there was no marriage between the deceased and either the appellant or respondent it is obvious that there was no child born out of wedlock. In fine he prayed the court to allow the appeal as prayed in his submission in chief.

Having carefully considered the rival submissions made to the court by the counsel for the parties the court has found proper to start with the first ground of appeal which states the trial court erred in law in appointing the respondent to administer the estate of the deceased. The court has considered the argument by the counsel for the appellant that the respondent was appointed to administer the estate of the deceased as she had a Christian marriage with the deceased but after going through the judgment of the trial court it has found that, the said argument is not supported by the judgment of the trial court. The court has arrived to the above finding after failing to see anywhere the judgment of the trial court states the reason for appointing the respondent to administer the estate of the deceased is because the respondent had a Christian marriage with the deceased.

To the contrary the court has found the judgment of the trial court states the respondent was appointed to administer the estate of the deceased after seeing all the reasons given by the appellant to object the appointment of the respondent to administer the estate of the deceased would have not stand on its own feet. The court has also found the judgment of the trial court shows clearly at the last paragraph of its page 7 that, the respondent was appointed to administer the estate of the deceased after seeing she was

not a bad person and it was not stated how she would have not do justice to the appellant and her children. In the premises the court has found the argument by the counsel for the appellant that the reason for the respondent to be appointed to administer the estate of the deceased is because she had Christian marriage with the deceased has no merit.

The counsel for the appellant came up with another argument that, the trial court had no jurisdiction to entertain the petition and to appoint the respondent to administer the estate of the deceased. He said there is no proof that the respondent was married to the deceased through Christian marriage which would have given the trial court jurisdiction of entertaining the matter. It is the views of the counsel for the appellant that, as there is no proof that the respondent married the deceased through Christian faith then the estate of the deceased was supposed to be governed by customary law and the court with jurisdiction to entertain the matter of that nature as provided under paragraph 1 of the Fifth Schedule to the Magistrates' Courts Act is a Primary Court.

The court has considered the above argument and after going through the proceedings and judgment of the trial court it has found one of the issues framed by the trial court for determination was whether the caveator who is the appellant in this appeal was lawful wife of the deceased and there was no issue framed to require the respondent to prove she was a lawful wife of the deceased. To the view of this court to say the respondent failed to prove she was a lawful wife to the deceased while the issue was for the appellant to prove she was a lawful wife to the deceased was to shift the burden of proof from the appellant to the respondent.

The court has found that, as the appellant was the one alleged she was a lawful wife of the deceased then as rightly argued by the counsel for the appellant and as provided under section 112 of the Evidence Act the appellant was the one who had a duty to prove she was lawfully married to the deceased. The court has found in proving she was lawfully married to the deceased the appellant deposed at paragraph 3 of the affidavit supporting her caveat that she married the deceased customarily in 2001. She also stated in her evidence she adduced before the trial court that, she married the deceased under customary law and said all the customs were followed. The appellant evidence that she married the deceased under customary law was supported by the evidence of her father, Adolf S. Kawonga who testified as PW3 and said the deceased went to his home to complete the customary law procedures of marrying the appellant.

The court has considered the argument by the counsel for the appellant that the respondent failed to prove she contracted Christian marriage with the deceased as she failed to produce to the trial court a certificate of marriage and find it is true that, the trial court stated at page 6 of its typed judgment that the respondent failed to prove she had a Christian marriage with the deceased as she did not produce certificate of marriage before the trial court to establish she entered into a Christian marriage with the deceased. The court has found the trial court was of the view that, the certificate of marriage would have assisted it to ascertain whether the marriage between the respondent and the deceased was polygamous or monogamous so as to know whether the deceased would have entered into a legal marriage with the appellant.

The court has found that, although it was rightly argued by the counsel for the respondent that under section 55 of the Law of Marriage Act existence of marriage can be proved by certificate of marriage, certified copy of the certificate of marriage, entry in a register of marriage or its copy but to the view of this court that is not only the evidence which can be used to prove existence of marriage. The court has found the said provision of the law states clearly that, those documents are admissible in evidence without proof that they are prima facie evidence to prove the facts recorded therein.

That provision of the law is not stating those documents are the sole evidence which can prove existence of a marriage. To the view of this court marriage can also be proved by using other evidence recognized by the law. The evidence adduced by the respondent to prove she entered into a Christian marriage with the deceased is her own testimony as she said she entered into a Christian marriage with the deceased which was celebrated at Litembo Parish in 1986. The court has found as rightly argued by the counsel for the respondent even the appellant recognized the respondent as the first wife of the deceased as she deposed so at paragraph 4 of the affidavit supporting her caveat and she admitted so when she was cross examined by the counsel for the respondent as she said the respondent was the deceased's first wife.

The court has found the appellant who was required to prove she was the deceased's lawful wife did not adduce any evidence to prove the marriage between the respondent and the deceased was not a Christian marriage so as to establish the respondent's marriage with the deceased was a customary marriage like the one the appellant said she contracted with the deceased.

That makes the court to be of the view that, the argument by the counsel for the appellant that the marriage between the respondent and the deceased was a customary marriage is mainly based on assumption that, as the respondent failed to produce to the trial court a certificate of marriage to show the type of her marriage with the deceased then her marriage was customary marriage. To the view of this court the said assumption cannot be taken to outweigh the evidence given to the trial court by the respondent that she had a Christian marriage with the deceased. Therefore a mere failure to produce a certificate of marriage to the trial court is not enough to establish the respondent had no Christian marriage with the respondent.

Having arrived to the above finding the court has found the next issue to determine in this matter is which law would have been used to govern administration of the estate of the deceased so as to know whether the trial court had jurisdiction of entertaining the petition for administration of the estate of the deceased or not. The court is in agreement with the submission by the counsel for the appellant that, the position of the law as stated in the case of **Hadija Saidi Matika** (supra) where the case of **Fanuel Mantiri Ng'unda V. Herman M. Ng'unda & Two Others**, [1995] TLR 155 CAT is also cited is very clear that, court is required to ascertain if it has a jurisdiction to adjudicate a matter filed in it before commencement of the trial of the case. The court is also in agreement with the counsel for the appellant that, sections 18 (1) (a) (i) and 19 (1) (c) read together with paragraph 1 (1) of the Fifth Schedule to the Magistrates' Courts Act, states the court with jurisdiction to adjudicate matters relating to administration of

estate of a deceased where the law applicable is customary law or Islamic law is Primary Court.

However, the court has considered the submission made to the court by the counsel for the appellant that, as the respondent failed to prove she had entered into a Christian marriage with the deceased then the estate of the deceased was supposed to be administered under customary law and the court with competent jurisdiction to entertain the matter was Mbinga Urban Primary Court and not the trial court but failed to side with his argument. The court has failed to side with the argument by the counsel for the appellant after being of the view that, a mere fact that the respondent failed to produce certificate of marriage before the trial court to prove she had entered into Christian marriage with the deceased is not the only criterion which was supposed to be used to determine administration of estate of the deceased was supposed to be governed by customary law.

To the view of this court the way of knowing the estate of the deceased was supposed to be administered either under customary law or Indian Succession Act as stated in the famous cases of **Re Innocent Mbilinyi** and **George Kumwenda** (Supra) was by looking into the way of life of the deceased and his express intention if any. The court has found that, despite the fact that it is undisputed fact that the deceased had children with the appellant who stated she had a Christian marriage with the deceased and the respondent who stated she contracted customary marriage with the deceased but that alone is not a sufficient reason to establish the deceased's way of life was customary way of life so as to say his estate was supposed to be governed by customary law.

The court has arrived to the above finding after seeing that, although the appellant deposed at paragraph 3 of her affidavit that she married the deceased in 2001 under customary law but it is also stated at paragraph 6 of the petition filed in the trial court by the respondent that, the respondent was a Christian before his death. When the appellant was cross examined by the counsel for the respondent she said the deceased was a Christian and said the deceased told her he wanted to go away as a Christian. The appellant said further that, the deceased baptized all of his children and the respondent said in her evidence that the burial of the deceased was done in accordance with the Christian procedure and it was led by a church Catechist and said there is no custom used in the funeral of the deceased.

All of the above evidence shows it cannot be said the deceased was living a total customary way of life which would have caused his estate to be administered under customary law and not under any other law. To the contrary the court has found the deceased was also living Christian way of life which shows his estate might have also been administered under the Indian Succession Act which governs people who lives Christian way of life. That makes the court to find that, as stated in the case of **George Kumwenda** (supra) which was followed by this court in the case of **Felicia Mbuna & Two Others V. Evelyne Mbuna & Another**, PC Civil Appeal No. 59 of 2015, HC at DSM (unreported), the estate of the deceased can be administered under Indian Succession Act or customary law. In the premises the court has found the argument by the counsel for the appellant that the trial court had no jurisdiction to entertain the matter has no merit.

Coming to the third ground of appeal where the counsel for the appellant argued the trial court disregarded the interest of the appellant and those of her children when it appointed the respondent to administer the estate of the deceased the court has found that is mainly based on fears and feeling. The court has arrived to the above finding after seeing that, although counsel for the appellant argued the appellant and the respondent are in hostile relationship but there is no evidence adduced to substantiate the alleged hostility.

To the contrary and as rightly argued by the respondent's counsel, the respondent stated in her evidence that, she is taking care of the children of the appellant and she has listed them in the petition filed in the trial court as the beneficiaries of the deceased. The court has found the objection of appointment of an administratrix which is based on fear and feeling as raised by the appellant in the matter at hand was not supposed to be sustained. The above finding of this court is getting support from the case of **Sekunda Mbwambo V. Rose Ramadhani**, [2004] TLR 439 where when the Court of Appeal was dealing with the similar issue it stated that:-

> *"Her objection was predicated more on her fears and feeling than proven facts. ... If we allow ourselves to play along with fears of the appellant, we shall find ourselves being engaged in endless game, for the respondent or even the children might come up with similar objection."*

Although it is true that the appellant was not listed in the petition filed in the trial court by the respondent as one of the beneficiary of the estate of

the deceased which might cause her to fear her interest might have not been protected but that is not enough to establish her interest will not be taken care of by the respondent who was appointed to administer the estate of the deceased. To the view of this court if the appellant was not listed as the beneficiary of the estate of the deceased the move to take would have not been to object the respondent to be appointed administratrix of the estate of the deceased on the ground that her interest will not be taken care of but to seek for assurance that her interest which is in the estate of the deceased will be protected.

The court has also being of the view that as the appellant has said is in a hostile relationship with the respondent there is no guarantee that if she would have been appointed to administer the estate of the deceased she would have protected the interest of the respondent and her daughter. That makes the court to be of the view that, if the appellant would have been appointed to administer the estate of the deceased the respondent would have also come to the court with the similar fear that her interest will not be taken care of. It is because of the above stated reasons the court has found that, the finding of the trial court that the respondent was a fit person to be appointed administratrix of the estate of the deceased as she was not proved to be a bad person who would have not protect the interest of the beneficiaries of the estate of the deceased was not a wrong decision.

The court has also arrived to the above decision after seeing that, if the appellant's interests will not be taken care of by the appointed administratrix of the estate of the deceased the appellant will have a chance of using section 82 of the Probate and Administration of Estates Act to apply before

the trial court for revocation of letters of administration of the estate of the deceased granted to the respondent and granted to another person who will protect the interest of both sides. In the premises the court has found that, as rightly argued by the counsel for the respondent the caveat filed in the trial court by the appellant was filed in the trial court prematurely and it is not true that it was not considered by the trial court.

It is because of the reasons stated hereinabove the court has found the grounds of appeal filed in this court by the appellant and the arguments made to the court by her counsel to support the appeal have not been able to satisfy the court the trial court erred in appointing the respondent to administer the estate of the deceased. Consequently, the appeal is hereby dismissed in its entirety for devoid of merit. After taking into consideration the nature of the appeal the court has found it is proper for the interest of justice to order each party to bear his own costs in this appeal. It is so ordered.

Dated at Songea this 19th day of November, 2020

I. ARUFANI

JUDGE

19/11/2020

Court:

Judgment delivered today 19th day of November, 2020 in the presence of the appellant in person and in the presence of Mr. Zuberi Maulidi, Advocate who is holding brief of both Mr. Kitara Mugwe, Advocate for the applicant and Mr. Eliseus Ndunguru, Advocate for the respondent. Right of appeal to the Court of Appeal is fully explained.

I. ARUFANI

JUDGE

19/11/2020