THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF DAR ES SALAAM)

AT DAR ES SALAAM

CIVIL APPEAL NO 1 OF 2021

(Arising from Miscellaneous Application No. 36 of 2020 before Morogoro District Court)

MIRAJI SALIMU NYANGASA ..... APPELLANT

VERSUS

RAMADHAN OMARY SEWANDO (administrator of estate of late Husein Omary Sewando)..... **RESPONDENT**

JUDGMENT

Hearing date on: 19/11/2021

Judgment date on: 29/11/2021

NGWEMBE, J.

This appeal originates from Probate No. 217 of 2020 involving appointment of an administrator of the estate of Hussein Omary Sewando who passed away on **01/5/2020**, surviving children and a wife (Wives). According to the available records, the appellant Miraji Salimu Nyangasa claimed to be the first and only wife of the deceased whose marriage was contracted on 26 November, 1991. It is on record that the deceased contracted another marriage with Nusrati John Masasi on 03/07/1999. None of the married wives either by design or default challenged the other marriage or raise an

alarm on the existence of the first marriage. It appears both marriages subsisted until demise of their husband.

On **21/10/2020**, Ramadhan Omary Sewando was appointed an administrator of the deceased estate. However, in the process of appointment of an administrator, the trial court was encountered with two serious issues, one is on the alleged will of the deceased, which same did not qualify to be a legally acceptable will. Hence the trial court dismissed it forthwith. The second issue was the question of who was a true wife among the two namely; Miraji Salumu and Nusrati (Flora) John Masasi. The two competing women have been in corridors of these courts each one alleging to be the true wife of the deceased, thus having rights to inherit properties of their husband.

It is on record that the trial court, ruled that the appellant herein deserted matrimonial home, leaving the deceased alone for more than twenty-five (25) years. Therefore, she is estopped from referring her as a wife of the deceased. The reasoning of the primary court as per page 3 is:-

> *"Miraji Salum ni kweli alikuwa mke wa marehemu lakini walitengana kwa takribani miaka 25 ni sawa na kusema ndoa hii ilishakufa zamani kwani moja ya sababu za ndoa kuvunjika ni utengano wa muda mrefu ..... kama Miraji Salumu alikuwa ni mke wa marehemu aliachaje marehemu akaoa mke mwingine na kuishi nae kwa kipindi chote hicho mpaka mauti yana mkuta ni wazi kwamba ndoa hiyo haikuwepo na ndio maana hakuwahi kupinga juu ya ndoa ya pili"*

Based on that reasoning the trial court ruled that the deceased had only one wife that is Nusrati John Masasi while the marriage of Miraji Salumu extinguished by operation of long separation.

Being dissatisfied with that decision of the trial court, the appellant exhausted her rights to call for revision before the District Court. Unfortunate may be to her, the District Court, after citing the judgement of this court in **Rodrey Baraka 4 Lavian, Ngaize Vs. Daniel Maraus Ntanga, PC Civil Appeal No. 109 of 2019** held as follows:-

> *"It is absurdity to let the spouse to benefit from his/her own wrongs. The administration of the estate of the late Hussein Omary Sewando, remains to Ramadhan Omary Sewando"*

Such decision triggered the appellant to institute this appeal clothed with four (4) grounds namely:-

1. *The district court erred in law and in fact in reaching to a a conclusion that the appellant was not a lawful widow and consequently not a lawful heir of the deceased estate without regard to the evidence on record that failed to establish that the appellant was divorced;*
2. *The district court erred in law and in fact for failure to determine the issue before it on the legality of Nasra Hussein Sewando to be recognized as a lawful heir of the estate without regard to the evidence on record that clearly shows that she is not the issue of the deceased;*

3. *The district court erred in law and in fact for failure to determine the issue before it on the legality of exclusion of the house located at Kihonda in Morogoro Municipality from the estate of the deceased on the ground that it was given away as a gift intervivos to Habiba Hussein Sewando without any proof whatever to that effect; and*
4. *The district court erred in law and in fact for failure to pronounce the lawful heirs of the deceased's estate.*

In this appeal, both parties are represented by learned counsels, while the appellant is represented by Mr. Marwa Masanda, the respondent is represented by Advocate Kisawani Mandela. In arguing these grounds, Mr. Marwa argued the first ground just briefly, that the appellant was the lawful and true wife of the deceased. Since the two were lawfully married thereafter they never divorced as required by law. Separation for 25 years was not established by evidence.

Also argued quite strongly that the will of the deceased was nullified by the trial court *suo motto*. Therefore, concluded on this ground by submitting that, the whole decision of the trial court and of the district court faulted the law.

Arguing on the 2nd ground, Mr. Marwa challenged Nasra Hussen Sewndo as not a daughter of the deceased, rather is a step daughter of the deceased. Therefore, she should not be treated as among the heirs.

On the third ground, the learned advocate argued that the house at Kihonda was not decided by the district court, though was raised and argued.

The last ground was argued briefly, that the District Court failed to pronounce list of heirs of the deceased estate. Thus, invited this court to quash the whole decision of the district court and decide according to law.

In response, the learned advocate Mandela, insisted that the appellant is no longer wife/widow of the deceased for they separated long time ago. The decision of the district court was concurrent with decision of the trial court. Pointed rightly that when two concurrent decisions of subordinate courts on point of fact, the appellate court is unlikely to decide otherwise. In support to his argument, he referred this court to the case of **Rodney Baraka & Another Vs. Daniel Ntanga, Pc Civil Appeal No. 109 of 2019** at page 13, thus invited this court to dismiss this ground of appeal for lack of merits.

Arguing on the second ground, the learned advocate responded strongly that the Nasra Hussein Sewando is a daughter of the deceased. Thus, difficult to proof today that, she is not one of the deceased children.

Responding on the third ground, Mr. Mandela contented that, the appellant during trial agreed that, the suit house at Kihonda is no longer among the properties of the deceased. To deny such fact which was admitted during trial at the level of appeal is contrary to section 123 of the Evidence Act.

Submitting on the last ground, the learned advocate argued that it is a new ground. Since it was not raised and determined by the district court, the appellant should not be allowed to raise new issues on appeal. To support his argument, he cited the case of **Raphael Mngazija Vs. Abdallah Kalonjo Juma, civil appeal No. 240 of 2018** at pages 7 to 8. In totality, he rested by inviting this court to dismiss the whole appeal with costs.

In brief rejoinder, Mr. Marwa insisted that the ending of marriage is by way of divorce or death of one of the spouses. Long time of separation does not constitute divorce.

More so, insisted that Nasra is not a daughter of the deceased and that same was not decided by the district court. Above all, the district court, failed to decide on the fate of house at Kihonda. Mr. Marwa stood firm that the last ground was raised in the district court and is not new at all.

I have taken pain to read each piece of paper related to evidences and arguments advanced by learned counsels with a view to grasp the essence of this appeal. Considering critically, the grounds of appeal, obvious the first ground is more interesting which require deep thinking on the real meaning of marriage.

May be I should air my understanding of sanctity of family institution. Family begins with marriage and marriage is an institution which out of it new life in the world is brought. Due to uniqueness of marriage, every reasonable person must treat it as the most sacred institution in the world

which touches proof and rich, short and tall, thin and heavy. In other words, marriage covers every human being unless he/she is incapable of having a family. Therefore, whoever enters therein must be serious that he/she is entering into a bondage for life. It is a holy communion because through marriage new life comes to the World. Such new borne out of bondage of marriage require nursing by both parents in order to grow to maturity and be responsible citizen in his/her country and the world. Therefore, marriage is a serious and respectable institution.

Divorce is an anti-thesis of marriage; it is an accident to the real meaning of marriage. Divorce does not only affect the disputants, but mostly affects the welfare of the issues borne out of that union; properties found during subsistence of that marriage and affects the general public. That may be the reason why the drafters of the Law of Marriage Act in year 1971, discouraged divorce by putting discouraging long procedures towards actualization of divorce.

Notably, the best judges on what exactly happened, until the two loving married couples decide to put asunder their love, is within the knowledge of the disputants, in respect of this appeal, is between the deceased and the appellant.

Having so said, this appeal and according to the available documents, the appellant and the deceased took vow of husband and wife before the Area Commissioner (Ndoa ya Kiserikali) in year 1991. However, the two are the best judges of exactly what happened, but it is an outright truth that, their marriage did not last longer before it was put asunder. The truth of this

fact is vividly seen on the conduct of the deceased on 3/7/1999 when he contracted another marriage under Islamic faith with Nusrati John Masasi.

The two marriage certificates were tendered during trial. Undisputed, since then to the death of the husband, there was neither suit in any court of law by the appellant to nullify the second marriage nor quarrel or disputes between the appellant and the deceased or the second wife. Moreover, the second wife testified during trial that she never knew that the deceased had marriage prior to her. Even parents of the deceased or relatives never disclosed if at all the deceased had marriage with the appellant for the whole period of twenty years since they entered into that institution of marriage.

Counting from 1999 (when the deceased contracted marriage with Nusrati) to the demise of their husband (01/05/2020) was equal to 21 years, equally important to take note, that since the marriage of the appellant in year 1991 to the death of her husband (01/05/2020) is equal to 29 years. These years tells a lot on this appeal. For all those years the appellant never raised any alarm over her marriage with the deceased. Under normal circumstances, it was expected from her to complain an interference in her marriage. That Nusrati John Masasi interfered their marriage with the deceased. The current dispute arose after demise of Hussein Omary Sewando. Presumably the purpose is nothing but inheritance of the deceased properties.

Considering the arguments of learned advocate for the appellant, I think he was right that divorce is a legal process ending up in a competent court of law which is capable to dissolve it. Considering the other way round, even if the spouses separate for a century, yet the marriage will still subsist, unless one dies or legally divorced.

I think such rigidity of law will bring absurdity in the society. Keeping certificate of marriage for 25 years, while the two are no longer in the marriage bondage, while waiting for the death of the husband is absurd, unacceptable and may end up bring chaos in any civilized society.

It is a trite law that no one may claim ignorance on his/her own rights. The appellant cannot claim ignorance of not knowing what her husband was doing for the whole period of 25 years or let us say 20 years since he married Nusrati John Masasi. Once a person sleeps on her own rights, (25 years) she cannot later claim protection from the court of law, rather may be allowed to continue sleeping forever.

Perusing deeply on the Law of Marriage Act, I found no assistance to the appellant. If the appellant left matrimonial home for all those years waiting for demise of the alleged husband to claim inheritance, I think the law should speak itself. Section 107 (2) (e) & (f) of the Law of Marriage Act provide:-

> **Section 107 (2)** *"Without prejudice to the generality of subsection (1), the court may accept any one or more of the following matters as evidence that a marriage has broken down*

but proof of any such matter shall not entitle a party as right to decree-

(e) *desertion of the petitioner by the respondent for at least three years, where the court is satisfied that it is willful;*

(f). ***voluntary separation*** *or separation by decree of the court,* ***where it has continued for at least three years;***

The records are clear that the former loving husband and wife separated for more than 25 years. In between the husband married another wife and he stayed with her for more than 20 years, whether in law the former marriage still existed? With a help of the cited subsection, I am settled in my mind that *defacto* and *dejure* such marriage ceased to exist or was voluntarily dissolved. Accordingly, I find the marriage of the deceased and the appellant ceased to exist after separation for all those years. This reasoning is supported with the fact that, the deceased married another wife, while the appellant was aware or presumed to know that new marriage.

In totality, the alleged marriage between the deceased and the appellant ceased to exist, thus dissolved voluntarily by the two couples.

The ground on whether Nasra is a child of the deceased or otherwise, I think I should not labour much on it. If the rest of the family accept that Nasra is a family member of the deceased Hussein Omary Sewando, who else to prove otherwise? I have carefully perused the records of subordinate courts, but failed to find any document, like DNA report or any other relevant document to that effect, that Nasra is not a child of the

deceased Hussein Omary Sewando. In the absence of any document or viable evidence to that effect, I find this ground must be dismissed.

For the sack of argument, assuming that daughter is not a blood child of the deceased whether that fact will exonerate her from inheriting the deceased properties. I think not because none of the witnesses who testified during trial objected the list of family members of the deceased. The family members of the deceased recorded during trial are; one wife Nusrati John Masasi); Habiba Hussein; Sabrina Hussein; Nasra Hussein; and Nuru Hussein, all using Sewando as their sir name.

In totality this ground lacks merits same is dismissed.

The third ground is related to the landed property at Kihonda. The appellant is disputing that such house should be among the list of properties subject to inheritance. However, perusing the minutes of family meeting held on 8/6/2020, which meeting the appellant was present and she signed against her name, they agreed that the deceased had two (2) houses, three (3) vehicles and other properties. Also the same testimony is recorded in the judgement of the trial court, recording two houses one being at Msamvu and another at Kihonda. This issue was also raised during trial when the appellant raised the issue of another house at Kihonda but the answer in page 4 of the trial court's judgement was to the effect that; *"tangu zamani marehemu alimpatia nyumba hiyo Habiba mtoto wake mkubwa na familia inajua hivyo naye aliafiki juu ya hilo na baada ya hapo alikubali muombaji kuwa msimamizi wa mirathi hii"* If the issue of that

house was settled during trial why again is coming up on appeal as a ground of appeal?

I think the fundamental statutory duty of an administrator is provided for in section 100 of Probate and Administration of Estates Act Cap 352 R.E. 2019 which same is quoted hereunder:-

> *"An executor or administrator has the same power to sue in respect of all causes of action that survive the deceased, and may exercise the same powers for recovery of debts due to him at the time of his death, as the deceased had when living."*

In probate cases the administrator acts as if is the deceased himself. His statutory duties are to collect all properties of the deceased; identify heirs; pay outstanding debts; and the balance are distributed to the lawful heirs. In order to perform that noble duty, the administrator has to comply with all legal requirements as prescribed in different forms until closure of that probate.

That being the legal position, I find this ground is premature. The appellant will have right time to raise that ground at primary court. Otherwise, this ground is raised prematurely.

The last ground on the list of lawful heirs, was well argued by the learned advocate for the appellant, while the learned advocate for the respondent contradicted it as new issue being wrongly raised on appeal for the first time.

Much as I would agree with the learned advocate for the appellant, yet I am surprised whether the district court was duty bound to pronounce list of heirs? I think not because the list of heirs is usually prepared by an administrator and filed in the respective primary court. I find this ground is unfortunate and misplaced.

In this appeal, I find compelled to remind all advocates to observe their noble duties of assisting the court to the ends of justice. Advocates are prohibited to mislead the court, but to defend to the best of their knowledge and ability their clients without misleading the court. The learned advocate for the appellant had a duty to advice properly his client.

In conclusion and for the reasons so stated, I proceed to uphold the decision of the trial court which same was upheld by the 1st appellate court. Consequently, this appeal lacks merits same is dismissed with no order as to costs.

Order Accordingly.

Dated at Dar es Salaam this 29th November, 2021

NGWEMBE J
JUDGE
29/11/2021

Ruling is delivered on 29th November, 2021 in the presence of Mr. Jackson Masharkara for Marwa learned advocate for the appellant and Mr. Kisawani Mandera learned advocate for respondent.

Right of appeal to the Court of Appeal explained.

NGWEMBE J,

JUDGE

29/11/2021