

A DIGEST OF PROBATE CASES

By

Mtembeioscar5@gmail.com

1. ABDUL SADIKI v WILFRED RUTAKUNIKWA 1988 TLR 167 (HC)

High Court of Tanzania - Mwanza by Judge Moshi J

Fly note: Administration of Estates - Inheritance - A will by an illiterate person - Conditions for validity thereof.

Headnote: Upon death of one Miria Nsheke, the respondent presented to the administrator of her estate a will purportedly executed by the deceased, who was illiterate, witnessed by two clan members and two non-clan members. Later, the appellant too came up with yet another will purportedly have executed by the deceased and witnessed by two clan members and one non-clan member.

Held: Rules 19 and 21 of the Local Customary Law (Declaration) (No. 4) Order of 1963 clearly provide that if a testator is illiterate, a will executed by him must be attested by a minimum of two clan members and two non-clan members. As the testator in this instance was illiterate, the will presented by the appellant was not properly attested.

2.CELESTINA PAULO v MOHAMED HUSSEIN 1983 TLR 291 (HC)

Court High Court of Tanzania - Bukoba by Judge Mushi J

Fly note: Probate and Administration - Religion - Whether the difference of religion can affect an ascertained will in appointing an administrator of an estate.

Probate and Administration - Clan linkage - Whether the difference in clan linkage can prevent a person from administering the property of a deceased person of another clan. E

Headnote: The appellant appealed against the decision of the District Court of Bukoba which reversed the decision of the Primary Court which appointed the appellant the administrator of the estate of Sawia d/o Balegu on the basis of oral evidence and a written will. The District Court had reversed the Primary Court's decision purportedly because the appellant was of different religion and clan from that of the deceased.

Held: (i) Where there is an ascertained will the same must be respected in letter and spirit notwithstanding the difference of religion between the deceased and the appointed administrator;

(ii) where personal property is bequeathed the person bequeathing the property has an absolute right to choose an administrator of her own choice and the clan has no right to interfere with the same.

Appeal allowed.

3.HAMSON D. GHIKAS v LUDWINA G. GHIKAS 1992 TLR 288 (CA)

Court of Appeal of Tanzania - Arusha by Judge Mfalila JJA, Kisanga JJA, Mapigano Ag. JA

Fly note: Administration of Estates - Grant of probate - Conditions for grant - Necessity of a will.

Headnote: The respondent petitioned for, and was granted, probate by the High Court in respect of the estate of her late father. The appellant, also the child of the same deceased father applied for a revocation of the grant of the probate to the respondent but the High Court refused the application. The appellant appealed to the Court of Appeal. In the course of hearing and upon perusal of the High Court proceedings, the Court

noted a number of irregularities whose details are found in the order of the Court.

Held: The petition for probate by the respondent was misconceived as the deceased died intestate and the purported grant of the same was null and void.

Order accordingly.

4. IBRAHIM KUSAGA v EMANUEL MWETA 1986 TLR 26 (HC)

Court High Court of Tanzania - Tanga by Judge Kapoor Ag J

Fly note: Administration of Estates - Jurisdiction - Powers of Primary Courts in administration of estates matters - S.15(1)(c) of the Magistrates Courts Act, 1963.

Headnote: A primary court heard matters relating to grant of administration of estates and proceeded to distribute the property of the deceased. Among the properties concerned was a partnership property. On appeal the High Court stated the law concerning administration matters before Primary Courts.

Held: (i) A Primary Court may hear matters relating to grant of administration of estates where it has jurisdiction, i.e., where the law applicable is customary law or Islamic law;

(ii) a Primary Court ought not to distribute the estate of the deceased; that is the job of an administrator appointed by court;

(iii) partnership property is not covered under customary law or Islamic law.

Order accordingly.

5. JOHN NGOMOI v MOHAMED ALLY BOFU 1988 TLR 63 (HC)

Court High Court of Tanzania - Dar Es Salaam Judge Msumi J

Fly note: Administration of Estates - Execution of a will - Whether proper to choose any person to witness the execution under customary law- Essence of witnesses especially when the testator is old and illiterate.

Administration of Estates - Fraud - Whether fraud vitiates the validity of the will. F

Headnote: Respondent petitioned the Primary Court for letters of administration in respect of the estate of the deceased Hadija Manzi. The deceased left a house situated along Uhuru G Street, Dar es Salaam. While the respondent's petition was pending, appellant filed objection claiming that the said house was given to him by the deceased in her will executed before her death in the presence of witnesses who testified before the court in his favor. The genuineness of the will was disputed, hence dismissed in both lower H courts. Hence this appeal.

Held: (i) The requirement that at least half of the number of witnesses to a will executed under customary law must be related to the testator is intended to act as a safeguard against fraud; I

(ii) where a will is surrounded by fraud, it is void.

6.MOHAMED HASSANI v MAYASA MZEE AND MWANAHAWA MZEE 1994 TLR 225 (CA)

Court of Appeal of Tanzania - Dar es Salaam Judge Kisanga JJA, Mnzavas JJA and Mfalila JJA

(From the decision of the High Court of Tanzania at Tanga, Msumi, J)

Fly note: Probate and Administration - Administration of Estate - Powers of the Primary Court to appoint and replace an administrator - Rules I

1994 TLR p226

A 2(a) and (b) of the First Schedule of the Magistrates' Courts Act, 1984.

Probate and Administration - Challenging validity of appointment of an administrator - Onus of proof.

Probate and Administration - Disposition of property - Whether consent from all heirs is necessary before sale of property. B

Headnote: This was an appeal against the decision of the High Court that the appointment of one Mfundo Omari as an administrator of the estate of the late Mzee Risasi was void because it was done under Rule 2(b) and not under Rule 2(a) of the Fifth Schedule to the Magistrates' Courts Act, 1984, and thus he had no power to dispose the property of the deceased's estate and, therefore, his sale of the house to the appellant was null and void. It was argued by the appellant that the appointment was valid under Rule 2(b) because it was a replacement and not a first appointment.

Held: (i) Primary courts are empowered under Rule 2(a) of the Fifth Schedule to the Magistrates' Courts Act, 1984, to make first appointment of administrators of estate and Rule 2(b) of the same schedule for appointment of a replacement. Therefore, the Judge was wrong to restrict the powers of Primary Courts to appoint administrators to Rule 2(a). E

(ii) It is up to the person challenging the validity of appointment of an administrator by the court to show that the person so appointed does not have the required qualifications to administer the estate.

(iii) The administrator is not legally required to obtain consent of all the heirs before disposing of property or sale of a house.

Appeal allowed.

Court of Appeal of Tanzania - Arusha Judge Omar JJA, Ramadhani JJA, Mnzavas, JJA

fly note: Administration of Estates - Probate and Administration - Annulment of grant of letters of administration - Concealment of letter of administration granted by lower court - Effect of such concealment.

Civil Practice and Procedure - Revisional powers - Suo moto - When exercisable. C

Headnote: The appellant applied for and was granted letters of administration by the Resident Magistrates' Court. In that court the respondent was the objector. Despite this grant D the respondent filed a petition for letters of administration in the High Court in respect of the same estate. The respondent deposed in her petition that there had not been any proceedings for grant of probate or letters of administration regarding the estate. The High Court granted letters of administration to the respondent. Dissatisfied with the E grant of letters of administration to the respondent by the High Court, the appellant filed a civil application in the High Court challenging the grant of letters of administration to the present respondent and prayed that the grant of letters of administration to the respondent by the High Court be revoked. This civil application was heard by a F different High Court judge who instead of addressing the issue invoked revisional power suo moto and declared the proceedings in the Resident Magistrates' Court null and void.

The Court of Appeal considered whether the grant of letters of administration by the G High Court was valid. It also looked into the propriety of invoking revisional jurisdiction suo moto by the High Court over the proceedings of the lower court.

Held: (i) Respondent's blatant lies that there had not been previous proceedings H regarding grant of probate or letters of administration while she was in fact the objector in the R.M.'s court when letters of administration were granted to the appellant, amply demonstrated that

she was bent to defraud other interested parties in the estate. Had the High Court (Nchalla, J.) dealt with this issue he would no doubt have found that this was a good reason to annul the grant of letters of administration to the respondent by the High Court (Chua, J.);

(ii) in a proper case the High Court can invoke its powers of revision in a grant of letters of administration by the District Court. Powers of revision are however usually exercised by the High Court suo moto when exercising its supervisory powers over subordinate courts;

(iii) it is wrong, indeed improper, for the High Court to resort to its revisional powers where (as it was in this case) there are specific issues calling for determination by the court.

Appeal upheld.

8.RASHIDI HASSANI v MRISHO JUMA 1988 TLR 134 (HC)

Court High Court of Tanzania - Dar Es Salaam Judge Mtenga J

fly note: Administration of estates - Failure to comply with mandatory legal provisions when filing B probate and administration cause.

Headnote: This was an application to the High Court for revision of proceedings of a lower court in respect of probate and administration, with a request to quash the proceedings in the C lower court and to declare them null and void. The applicant argued that, when filing the cause in the lower court, mandatory legal requirements were not complied with.

Held: (i) Since the Respondent did not comply with the provisions of section 22 of the D Civil Procedure Code and rules 39, 73 and 75 of the Probate rules, there was no petition of probate and administration lodged with the District Court;

(ii) the proceedings in the District court and the resultant appointment of the E Respondent as administrator of the deceased's estate were null and void.

Order accordingly.

9. SEIF MARARE v MWADAWA SALUM 1985 TLR 253 (HC)

Court High Court of Tanzania - Mwanza Judge Katiti J

Fly note: Administration of Estates - Application for appointment of administrator of deceased's estate - Duty of the court in appointing administrators.

Conflict of Laws - Application for appointment of administrator of a deceased's estate - E Conflict between Islamic Law and Customary Law - Primary court has jurisdiction to decide the law applicable.

Headnote: The respondent sought and obtained from the Primary Court her appointment as an administrator of the Estate of the deceased. She maintained that as the sister of the deceased she was entitled to administer the Estate under Islamic Law. The appellant, a nephew of the deceased's husband who had himself died much earlier, disputed the respondent's appointment as administrator. His objections failed both in the Primary G Court and in the District Court, hence this appeal to the High Court.

Held: (i) On application for appointment of an administrator of a deceased's estate, the duty of the court is to appoint as administrator a person who has an interest in the estate, and according to the wishes of the deceased if any are expressed;

(ii) as the applicant in this case could only sustain his claim of having an interest in the Estate through Customary Law and the respondent could only sustain her similar claim through Islamic Law, either party may be

the interested party depending on what law the court decided to be the law applicable;

(iii) the Primary Court (having jurisdiction under both Islamic and Customary Law) applied no wrong principles in appointing the respondent the administrator.

10. SAID AND YUSUF MOHAMED MUSA v AWADH AHMED ABEID & THREE OTHERS 1992 TLR 29 (CA)

Court of appeal of Tanzania - Dar Es Salaam Judge Ramadhani JJA, Mnzavas, JJA, Mapigano Ag. JA

Flynote

Islamic law - Inheritance - Principles of inheritance where a person dies intestate;

Islamic law - Inheritance - Importance of proximity to the deceased person in intestate. -

Headnote

Fatuma d/o Sefu who was a Sunni - Shaffii Moslem died intestate in 1983. After an application in the Kariakoo Primary Court by the could be heirs the Court appointed the fourth respondent as the administrator of the deceased estate. On the same day the court made an order that the assets of the deceased be sold by auction. There was no dispute that under Islamic law Mgeni Hemedi, the surviving husband of the deceased was entitled to take half of whatever fell to be decided.

The issue was the method to be adopted for the distribution of the remaining part of the estate. Several relatives from the uterine and agnate sides competed for a share. The matter was taken to the District Court. **The District Court held that;** since there were no Koranic heirs other than Mgeni Hemedi, heirs on the uterine side are entitled to inherit along with those on the agnate I side. The appellants are aggrieved by this decision and they appealed to the High Court.

The High Court upheld the decision of the District Court. They appealed further to the Court of appeal.

Held: (i) In the Islamic law of succession the principle of proximity is of great importance in that within the limits of each class the nearer of blood excludes the remote; B

(ii) under the Islamic law of inheritance there are three principal classes of heirs - **the "sharers"** or "**koranic heirs**"; "**Reliquaries**" and the "**Distant Kindred**". The rule regarding their right of inheritance prescribes that reliquaries inherit only where there are no koranic heirs or where the inheritable estate is not exhausted by the Koranic heirs and the distant kindred inherit only where there are no sharers of reliquaries;

(iii) as the Koranic heir, Mgeni Hemedi, did not exhaust the estate the only person who has the right of inheritance in the circumstances is a residuary i.e. the second appellant. The rest of the claimants have no right under Islamic law. Case Information Appeal allowed.

11. BILIMBASA ZACHARIA v JARVES JOHN 1983 TLR 67 (HC)

High Court of Tanzania - Mwanza Judge Bahati J

Flynote

Customary Law - Haya - Succession - Inheritance of land by female member of the family. D Customary Law - Guardianship - Maintenance of minor by elder children of same family. -**Headnote**

The appellant was an elder child of deceased entrusted with maintenance of his young sister. Before his death, deceased distributed his land among his children, including female members. One of the daughters was a minor, whose guardianship fell on the appellant.

Appellant failed to maintain the minor and even sold the land that the minor had inherited from their deceased father. On appeal the appellant argued that the minor as a female member was not entitled to inherit the land.

Held:

- (i) No heir can take full possession of a plantation until the death of his wards:
- (ii) A sister may claim maintenance from her full brother whether he inherited property from their father or not. Case Information Order accordingly.

CURRENT CASES

In Re Estate of the Late Professor Hubert Clemence Mwombeki Kairuki. case no.4 of 2005 of late Prof, Kairuki.

Brief facts of the case; That the given case was jointly instituted by two petitioners, namely; John Balilonda and MICHAEL Njumba. they both made application for the probate of the will left by the deceased the late Professor **HUBERT CLEMENCE MWOMBEMI KAIRUKI** (here in after to be named professor Kairuki in this discussion) who died on 6th February, 1999. The will was, therefore, made by the deceased (testator) person to supplement the former will of Prof. Kairuki and his wife one Kokushibila kairuki because of the joint property they have.

In determining the matter at hand the High court of Tanzania, Dar es salaam registry analyzed some issues which were to be settled in solving the dispute before it.

The foremost issue was to check the validity of the will tendered before the court. The court at page three of the ruling provided characteristics of the valid will that is; **it must be in writing, signed by the testator**

in the presence of the two witnesses, who also must sign in it in the presence of the testator and it can be revoked by the maker at any time until his death, expressly or another will (codicil).

The other issue was whether joint will could be accepted in law and the court. The court however attempted that joint will is recognized in law and executable without problem.

Another issue which was also discussed was whether the will attached in petition can legally be admitted to probate as the last will of the deceased in the view of the joint will at page four of the ruling. In solving this question the court resorted to the characteristics of the will written by the maker relates the requirement and principles of law. The attached will missed qualification of laws.

Also there was another issue that whether the will was legally witnessed by the legal minimum number of the witnesses. The court stated that, it is mandatory requirement that the will must be witnessed by at least two people who must sign in it, in presence of the maker.

That whether the petition for probate was verified by petition and at least one witness as the provision of section 57(1) and (2) of the Probate and Administration of Estates Act [Cap, 352, RE 2002] provides for. The court in deciding the matter focused to s.57(2) which states that, where application is for probate the petition shall also verified by at least one of the witness to the will. But in adverse verification of the petition was done by Siima Kairuki Mujemula, one of the deceased beneficiary, hence disqualifies her to be proper witness to the will.

The last issue in this discussion was whether the deceased's will be witnessed by at least two witnesses as mandatory principles of insist, that, it is mandatory feature that the signature of the testator be witnessed by two witness; the supplement was not signed in the presence of the required number of the witness rather it was signed and witnessed

by an Advocate one Kilindu who attested by placing signature and rubber stamp thereon.

.