IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

PC CIVIL APPEAL NO. 129 OF 2019

(Arising from the decision of the District Court of Ilala in Civil Appeal No. 32 of 2019 and originating from the decision of Kariakoo Primary Court in Probate and Administration Cause No. 109 of 2007)

SALUM SAID MTIWE ---------- 1ST APPELLANT

HADIJA SAID MTIWE ---------- 2ND APPELLANT

VERSUS

NURDIN MOHAMED CHINGO ---------- RESPONDENT

JUDGMENT

L. M. MLACHA, J.

This is a decision in respect of the right to administer and inherit the estate of the late Mariam Salum Mtiwe. The deceased owned half (½) of house No. 49 Plot No. 11, Block 18, Agrey Street, Kariakoo, Dar es Salaam. The other half (½) of the house is owned by the appellants, Salum Saidi Mtiwe and Hadija Saidi Mtiwe. They got the right to own the 50% share of the house through inheritance form their mother, the late Ayeshi Salum Mtiwe who was a sister of Mariamu Salum Mtiwe. Mariamu and Ayeshi were daughters of

the late Salum Said Mtiwe who died in 1950. The appellant's case is that they were under the care of Mariamu Salum Mtiwe following the death of their mother who later sworn an affidavit at the primary court giving ownership of the house to them. They argue that they are the sole owners of the house.

The respondent, Nurdin Mohamed Chingo is the administrator of the estate of the late Mariamu Salum Mtiwe. He is grandson of Ally Said Mtiwe who is a brother of the late Salum Said Mtiwe. Ally is also dead. While recognizing that the appellants own half (½) of the house arising from the share of their late mother, the late Ayeshi Salum Mtiwe, he does not recognize the claim of the other half. His case is that the other half should go to the grand children of Ally Said Mtiwe because Mariamu had no children. He does not recognize the affidavit of Mariam which gave right of the house to the appellants. He calls it illegal under both Law of the Land and Islamic Law. He has a list of 11 heirs who are his brothers and sisters whom he calls the lawful heirs of the late Mariam Mtiwe. It is apparent that he has already sold the house and distributed the estate to the 11 heirs. This caused unrest to the appellants hence the return to the primary court. The record indicates that there have been several litigations over the estate in the primary court, district court and this court. The solution is yet to be obtained.

What then prompted the current dispute? It all started on 09/08/2018 when the appellants moved to Kariakoo Primary Court to seek for orders of the court to compel the respondent to account for his administration. The record of Mirathi No. 109/2007 could not be traced when called for revision. They had to operate through a Duplicate File. They then made the following statement: -

> ***"Salum Saidi Mtiwe**: Naomba aitwe Ndugu Nurdin Mohamed Chingo ili aje aeleze jinsi alivyogawa mali za mamrehemu Mariamu Salum Mtiwe. Tangu ateuliwe warithi hatujapata haki".*

This literally means that they requested the court to call the respondent to make an account of the estate of the late Mariamu Salum Mtiiwe for they had received nothing as heirs of the estate of the late Mariamu Salum Mtiwe. The court responded positively and issued a summons to call him. He came. The appellants were given a chance to give evidence. The respondent responded on equally force denying the claim. The court ruled out that the appellants had no right to inherit through the affidavit of Mariamu Salum Mtiwe under Islamic Law arguing that a Muslim has no right to pass all his estate through a WILL. It also found them to be distant relatives compared to the heirs brought by the respondent. It gave the right of inheritance to

the respondent and his brothers and sisters. Their appeal to the district court could not be successful. They thus came to this court armed with six (6) grounds of appeal.

The grounds of appeal read thus: -

1. That, the Honourable Resident Magistrate Court grossly erred in law and in fact for failure to find that the decision of the District Court in Civil Revision No. 13 of 2013 had the effect of nullifying the appointment of the Administrator in Primary Court Probate and Administration Cause No. 109 of 2007.
2. That, both the trial primary court and the appellate district court grossly erred in law and fact by accepting the respondent to act and address himself as the administrator of the estates of the late Mariam Salum Mtiwe since the appointment of the administrator of the estate of the late Mariam Salum Mtiwe was nullified in Revision No. 13 of 2013.
3. That, both the trial primary court and the first appellate district court grossly erred in law and fact by not finding that the respondent did not qualify for the appointment as administrator of the estates of the late Mariam Salum Mtiwe.

Civil Revision No. 13 of 2013 was to nullify the proceedings and appointment of the respondent. He argued the court to make a finding to that effect and declare that there was no administrator of the estate from that date since the former administrator, Ibrahim Mohamed Chingo had already died.

Submitting on ground two, counsel for the respondent said that both the primary court and district court erred in Law when they accepted the respondent as administrator and allowed him to act as the administrator of the estate while the proceedings upon which his appointment was based had already been nullified.

Submitting on ground three counsel had the view that the respondent did not qualify to be recognized as an administrator of the estate. He argued that his appointment ceased to exist on the date of nullification of the proceedings. He went on to submit on ground four and said that the lower court erred in failing to value the weight contained in the affidavit of the deceased. He said that Islamic Law is not based on writings. What matters is the intention of the deceased. It can be written or unwritten. There are no modalities or forms, he said. He cited **Naima Ibrahim V. Isaya Tsakiris Aespon**, Civil Case No. 151 of 2007 and **Asha Shemzigwa vs Halima A. Shekigenda [1998] TLR 254** as his authority. He submitted that going through the affidavit it is clear that the intention of the deceased

person was unambiguous. She wanted the appellants to inherit the property, he submitted. He added that the property was owned jointly by the appellants and the deceased. He stressed that the affidavit expressed the intension of the deceased and therefore legal owners under Islamic Law.

Submitting on ground five, Counsel said that the lower courts failed to recognize the appellants as lawful owners of the estate of the late Mariamu Salimu Mtiwe. Quoting from Chapter 4:11 of the Koran, he said that if the man and woman whose inheritance is in question has left neither ascendants nor descendants, but has left a (uterine) brother or a sister each of the two gets sixth. He argued that the deceased Mariam Salum Mtiwe was survived with neither child of her own not parents or her uterine sister Ayeshi Salum Mtiwe. The appellants are thus the only surviving heirs of the estate, he argued. He challenged the holding that the appellants are not entitled to inherit simply because they come from the mother side. He called it discriminatory and unconstitutional. It contradicted article 13(4) of the Constitution, he said. He argued the court to follow its decision in **Ephraim V. Holaria Pastory and Another**, (PC) Civil Appeal No. 70/1989. Lastly, on ground six, counsel had the view that the district court did not analysis the evidence properly leading to a failure of justice. He observed that the finding of the two courts below that the appellants are not entitled to inherit

the other ½ share of the house is erroneous. He referred the court to what he had said in the earlier grounds of appeal and argued it to find that there was a failure in the analysis of evidence. Counsel argued the court to allow the appeal.

Submitting in reply, counsel for the respondent opted to argue ground number 1 and 2 together. She said that the ruling in Revision No. 13 of 2013 has no relationship with Mirathi No. 109 of 2007 on 4 points. **One**, the court had no power to revoke the appointment of the respondent which could only be revoked by the primary court. **Two**, the district court was not dealing with Mirathi No. 109/2007 in the Revision but Mirathi No. 77/1999. **Three**, the magistrate could not revise Mirathi No. 109 of 2007 in 2013, six years latter without extension of time for an application for revision ought to have been filed within 60 days. **Four**, the magistrate did not make an order for trial denovo. He just made an opinion that the case was a fit case for retrial. She proceeded to say that the district court was not functus officio because what it decided ws quite different from what was said in the revision. She argued in ground three that the appointment of the respondent is still valid because it was never vacated by the district in the revision on reasons said in grounds 1 and 2.

In ground 4, counsel argued that the two courts had justification in not considering the affidavit because it was tented with illegalities. She submitted that they filed numerous cases in different courts including High Court Probate Case No. 63/2013 where they declared that there was no WILL. The said affidavit was never mentioned and they obtained letters of administration which was letter revoked on grounds of misrepresentation of facts and fraud. She argued that they are untrustworthy and the affidavit cannot be relied upon. He went on to submit that there was no proof that it was the affidavit of the deceased.

Counsel proceeded to say that, the submission that the affidavit is a WILL under Islamic Law is baseless in the circumstances of this case. She proceeded to say that it does not contain the intention of the deceased. And that the intension of the deceased is clearly seen when she decided to divide the disputed house by giving the appellants ¼ share each. She retained the other half for her own benefits and the benefits of the children of Mohamed Ally Mtiwe who by then were living under one roof.

Submitting in reply to ground five, counsel said that, we don't have a WILL in this case but an affidavit. She proceeded to say that converting an affidavit to a WILL is a far fetched reasoning. He argued that by the way

the affidavit was itself defective. Further, Mariam had no power to bequeath the whole share to the appellants under Islamic Law.

Submitting in ground six, counsel supported the finding and the decision of the lower court as correct in fact and Law. She argued the court to dismiss the appeal.

Mr. Nazario filed a 9 Page submission in rejoinder. He joined issues with counsel for the appellants in all points.

I had time to go through the records carefully. I have also considered the counsel submissions. I think ground 1, 2 and 3 are related and must be treated together. They are all about Civil Revision No. 13 of 2013 of the District Court of Ilala and the legality of the respondent as an administrator of the estate of the late Mariamu Salum Mtiwe. It is agreed that the administrator of the estate of the late Mariamu Salum Mtiwe was Mr. Ibrahim Mohamed Chingo who upon his death, the administration moved to the respondent. It is also on record that the appellants were not happy with the appointment of the respondent because they had fears that he could not do justice to them. They thus accessed the jurisdiction of the district court by way of revision seeking to get him out of the job.

Now, when the appellants came at the district court by way of revision in Civil Revision No. 13 of 2013, an issue arose that the record of the Primary Court of Kariakoo in MIrathi No. 109 of 1999 was missing. It could not be traced despite all diligent efforts. The counsel for the applicants (now appellants) addressed the court saying;

> *"when circumstances like this comes, **i.e** the original case file is misplaced and it cannot be found, the only remedy is to quash the original proceedings in respect thereof and order retrial of the same."*

The court then said: -

> *"In considering the grounds made by the counsel for the applicants, this court is of the view that; because the original case file is misplaced and cannot be found, such that cannot be called for a record in this court, hence the determination on whether the procedure in granting the letter of administration was proper or improper becomes a bit challenging. On the other hand the arguments of counsel for the defendant were based on defending the legality of the appointment of the administrator,*

which also raise many reasons for the applicants to not be allowed to revise....."

Therefore, this honourable court is of the view that, there is need to order for retrial, (De-novo)". (Emphasis added)

The central issue is whether there was an order for trial de-novo or just an opinion. The counsels are at a fight on this narrow point but delicate. I think that there is something missing in the last paragraph of the ruling of the magistrate. I think that in the absence of a drawn order, one can be faced with difficulties like what is currently facing the counsel for the respondent. While not supporting the work of the magistrate which is a result of a rush work or failure to edit his work, I think it will not be correct if we say that the proceedings were left intact. I have the view that there was an order for retrial because that is what was requested by the counsel for the appellants and what was upheld after hearing both parties. It appears that he was in agreement with counsel for the appellants. If he was in agreement with counsel for the respondent, he could not have accepted the prayer of trial denovo. Further, the order of trial denovo was necessary in my view, to prevent what was behind the loss (the move to defeat justice by selling the house which was actually done).

It is my finding that there was an order for trial denovo which had the effect of nullifying the proceedings of the primary court which had appointed the respondent an administrator of the estate of the late Mariamu Salum Mtiwe. If the respondent ceased to be the administrator of the estate of the late Mariam Salum Mtiwe on the date of the ruling ***i.e*** 8/12/20106, it follows that everything done by him at any date after this date was illegal. This means that even the sale of the house which appear to have been done quickly after being appointed and the report which he filed in court on 09/03/2017 showing the way he had distributed the estate to his brothers and sisters were all illegal null and void. That takes us as far as ground three.

I will now move to discuss the rest of the grounds together. It appears that there is no dispute that Salum had two daughters, Ayeshi and Mariamu. Mariamu had no kid. Ayeshi is the mother of the appellants. Following the death of Ayeshi, Mariam took some steps. She took care of the appellants who were still young by then and opened a probate matter to administer the estate of her sister, Ayeshi. Acting under her position as administratrix, she divided the house to two parts. She took one part and gave the other part to the appellants. That is also reflected in the title deed which carry the names of three people; the appellants and Mariamu. Salum had a brother called Ally who had a son called Mohamed. The appellants say that he was

merely invited to live in the house. The respondent says that he was a co-owner. He built the house jointly with his brother. It was their joint property. Mohamed had 11 children. The respondent is one of them. The question now is if the house was owned jointly between Salum and Ally, why did Mohamed who was an adult by then, keep quiet and leave Mariamu to give half of the house to herself and the other half to the appellants? He then allowed the title deed to have the three names without recognizing the shares of Ally? That defeats the sense of logic. Again, if Mariam and Ayeshi were entitled to only ½ of the house while the other half was going to Ally/Mohamed, why did Mariamu give the whole other half to the appellants? In the usual thinking she could give them just a quarter. I think the facts are clear that he house was owned by Salum. Ally was merely an invitee. At least that is what is reflected on the evidence on record on the balance of probabilities.

It is therefore my finding that the house was owned by Salum Saidi Mtiwe and that, the name of Ally was merely brought in to legalize that what was otherwise illegal.

Further, I find that the two courts invited Islamic Law wrongly. Islamic Law is not applied automatically in probate matters involving Muslims. The

application of Islamic Law in the primary courts is done after some tests. It borrows the tests contained in section 88 (1) The Probate and Administration of Estates Act. While describing most of us as members of tribes (referring to tribal customary Law in context), section 88(1) (a) says that 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 Islamic religion and the court exercising jurisdiction over his estate is satisfied from the **written or oral declaration 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**. The Act does not apply in the primary courts but this court has in a number of occasions borrowed the spirit of section 88(1) (a) of the Act to give guidance to the lower court. See, **Beatrice Brighton Kamanga and Amanda Brighton Kamanga vs Ziada William Kamanga**, Civil Revision No. 13 of 2020 and **Hadija Said Matika vs Awesa Sais Matika**, PC Civil Appeal No. 2 of 2016.

Islamic Law is applied after going through three tests; **One**, where there is an intension of the deceased expressed in a **WILL** or otherwise, **two**, where the life style of the deceased was such that if he had a chance to be asked to give his opinion, he should have said that Islamic Law should apply, and **three**, where the heirs have reached an agreement that it should apply. If

any of the tests or a combination of them exists, then the court should apply the Law. Failure of the three tests takes the court to customary Law.

There is no evidence that the two courts had addressed themselves in the above tests. They simply rushed to apply the Law and disqualify the affidavit. With respect, I think that they were clearly in error. It follows that, much as the affidavit did not amount a WILL, but it was wrongly associated with Islamic Law and discredited in this case. It follows that the intension of Mariamu which was contained in the affidavit or document for that matter, so long as there was no evidence of fraud, ought to have been respected.

That said, the appointment of the respondent, which appears to be controversial and all what he did after 08/12/2016, are declared illegal and a nullity. The appellants are declared to be the lawful owners of house No. 49, Plot 11, Block 18, Agrey Street, Kariakoo, Dar es Salaam.

The appeal is allowed with costs.

L. M. MLACHA

JUDGE

21/12/2020

Court: Judgment delivered in open chamber before Hon. J. E. Fovo, DR in presence of the parties as per Coram.

J. E. FOVO

DEPUTY REGISTRAR

21/12/2020