

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DISTRICT REGISTRY

AT MWANZA

PC PROBATE AND ADMINISTRATION CAUSE APPEAL NO. 13 OF 2020

(Arising from the decision of the District Court of Sengerema in Pc Probate and Administration Cause Appeal No. 34 of 2019 originating from Probate and Administration Cause No. 18 of 2018 of the Nyakarilo Primary Court)

ELIAS JEREMIAAPPELLANT

VERSUS

PAULO JEREMIA RESPONDENT

JUDGEMENT

Date of Last order: 14/12/2020

Date of Judgement: 1/03/2021

F. K. MANYANDA, J.

The Appellant named above, being aggrieved by the entire decision of the District Court of Sengerema at Sengerema in Pc Probate and Administration Cause Appeal No. 34 of 2019 originating from Probate and Administration Cause No. 18 of 2018 of the Nyakarilo Primary Court delivered on 13/05/2020 by Honourable N. A. Salehe, RM appealed to this Court on the following grounds: -



1. That, the Appellate District Court erred in law and facts for failure to recognize the Appellant as the child of the deceased despite the Respondent and the widow of the deceased recognizing him at the trial court during (sic) their testimony
2. That, the Appellate District Court erred in law and facts by deciding the case without considering the testimony and proceedings of the trial primary court in which the Appellant was recognized as the legal child of the Late Jeremia Luchagula.
3. That, the Appellate District Court erred in law and facts by deciding the case in favour of the Respondent basing on the reason that the Appellant was born out of wedlock while even those who were distributed (sic) the deceased estates did not prove as to whether they were legal children of the said Late Jeremia Luchagula.

Before I embark into the nitty-gritty of the appeal let me narrate the facts giving rise to this matter albeit in a nutshell. On 17/01/2017 a person known as Jeremia Luchagula who lived at Mtakuja Hamlet in Lumeya Village, Sengerema District passed on to his next eternal life intestate. He



was survived by one widow and 11 children and left a farm land measuring about 37 acres and one residential house.

Following his death, a clan meeting was convened on 03/06/2017 for purposes of selecting a person to apply for letters of administration of the estate of Late Jeremia Luchagula. One of the children of Late Jeremia Luchagula namely, Paulo Jeremia was selected and he successfully petitioned for letters of administration of the estate at the Nyakaliro Primary Court in Probate and Administration Cause No. 02 of 2017 in which he was appointed him as such on 20/10/2017.

It turned out that when the said Paul Jeremia was executing the administration of the estate he refused to distribute inheritance to the Appellant on reasons that there was no proof that he was a biological son of Late Jeremia Luchagula. Seeing this, the Appellant filed objection proceedings in Probate and Administration Cause No. 02 of 2019 at the Nyakarilo Primary Court to the appointment of Paul Jeremia requesting revocation of his appointment as administrator of the estate of Late Jeremia Luchagula. On 22/10/2019, the Court sustained the objection and directed redistribution of the estate including the Appellant and other children born out of wedlock.



This decision did not amuse the Respondent, hence he appealed to the District Court in Probate and Administration Appeal No. 34 of 2019 which on 13/05/2020 overturned the decision of the Primary Court and ordered that the Appellant being a child born out of wedlock is not entitled to any distribution from the estate of Late Jeremia Luchagula.

At the hearing of the appeal the Appellant appeared in person unrepresented while the Respondent enjoyed the services of Mr. Yona Shekifu, learned Advocate.

In his submissions, the Appellant challenged the Appellate District Court on ground that its decision was wrong in that it failed to hold that there was enough proof that he was a child of Late Jeremia Luchagula. That even if he was born out of wedlock but his father legitimized him by paying dowry. Further to that, it was argued by the Appellant, that he was entitled to distribution of the estate just like the other children.

On his side, Mr. Shekifu for the Respondent, submitted opposing the appeal on grounds that the Appellate District Court was right in overturning the trial court's decision in that it violated the Law of Declaration of Local Customary Law, GN No. 436 of 1963 commonly known as 'Sheria ya Hali ya

Watu". He submitted in the Second Schedule to that GN in item number 43 prohibits illegitimate children from inheritance in intestate estates. It reads that: -

"Watoto wasio halali hawawezi kurithi upande wa kiume katika urithi usio na usia."

He also referred to section 18A of the Declaration of Customary Law of 1963 which provides that, a father may legitimize his children by marrying their mother. Under section 18B thereof, a father may also legitimize his children born out of wedlock by paying some dowry. It was the views of Mr. Shekifu that inheritance is not automatic in this land, it must be proved that the concerned person was in fact a legitimate child of the estate.

Mr. Shekifu added that the Appellate District Court adequately evaluated the evidence and rightly found that the Appellant was not entitled to inheritance because he failed to prove that he was a legitimate son of Late Jeremia Luchagula.

In this appeal the issue is whether the Appellate District Court was correct in law to hold that the Appellant was not entitled to distribution of

estate of Late Jeremia Luchagula merely because he was a child born out of wedlock.

Before answering this question it is important to observe a principle that this case was decided by the subordinate courts herein basing on customary law. Customary law is recognized by our law. Section 18(1)(a)(i) of the Magistrates' Courts Act, [Cap 11 R. E. 2019] provides that a primary court may apply customary law or Islamic law, it reads:-

18.(1) A primary court shall have and exercise jurisdiction—

(a) in all proceedings of a civil nature—

(i) where the law applicable is customary law or Islamic law:

Thus customary law is applicable in our courts of law and their status is equal with that of parliamentary legislations before the constitution as was held in the case of **Maagwi Kimito vs. Gibeno Werema** [1985] TLR 132 the Court of Appeal held that:-

"The customary laws of this country now have the same status in our courts as any other law subject only to the Constitution and any statutory law that may provide to the contrary."

Mr. Shekifu argued a point of law, to which the Appellant had nothing to say, that the Appellate District Court was right in overturning the trial court's decision in that it violated the Law of Declaration of Local Customary Law, GN No. 436 of 1963 commonly known as 'Sheria ya Hali ya Watu'. He submitted in the Second Schedule to that GN in item number 43 prohibits illegitimate children from inheritance in intestate estates. It reads that:-

"Watoto wasio halali hawawezi kurithi upande wa kiume katika urithi usio na usia."

It is my understanding that GN No. 436 of 1963 is a codification of customary laws which were made applicable in our courts. In the light of the decision of the Court of Appeal in **Maagwi Kimito's case (supra)** the GN No. 436 of 1963 is subjected 'to the Constitution and any statutory law that may provide to the contrary'.

Whether this is good law as suggested by Mr. Shekifu, in my strong conviction, is in negative. I will clarify by referring to the current position of the law as interpreted by the court.



My Brother, Hon Mlyambina, J. considered the provision of the customary law in issue and gave a position, which I agree is the right one, in the case of **Judith Patrick Kyamba vs. Tunsume Mwimbe and 3 Others**, Probate And Administration Cause No. 50 of 2016 (unreported) and held that:-

"In fact, such argument is barbaric and discriminative in nature. The Constitution of the United Republic of Tanzania, 1977 guarantees equality of all human being under its Article 12(1) and equality before the law under its Article 13(1) and (2). For reference, Article 12(1) and 13(1) and (2) of the Constitution of the United Republic of Tanzania provides:

'12.-(1) All human beings are born free, and are all equal.'

13.-(1) All persons are equal before the law and are entitled, without any discrimination, to protection and equality before the law.

(2) No law enacted by any authority in the United Republic shall make any provision that is discriminatory either of itself or in its effect."

The provisions of the Constitution cited above makes it unconstitutional any discriminatory law or having effects of discrimination.

Apart from the Constitution, the Law of the Child Act, 2009, which domesticated the International Human Rights Instruments that guarantee the rights of the child which Tanzania has ratified including the **United Nations Convention of the Rights of the Child of 1989** and the **African Charter on the Rights and Welfare of the Child of 1990**, expressly prohibit any forms of discriminations in laws applied by our courts.

Section 5(2) of the Law of the Child Act, which embodies Article 2(1) of the Convention of 1989 prohibits Discrimination of any kind against a child on the grounds of gender, race, age, religion, language, political opinion, sex, disability, health status customs ethnic origin, birth and others. This entails that all children are equal, they must enjoy equal rights.

Moreover, Section 10 of the Law of the Child Act, provides that a person shall not deprive a child of reasonable enjoyment out of the estate of the parent.

Although the instruments and the law referred above, both refer to a child who is defined as a person under the age of majority, it does not mean the law becomes discriminatory after the child attains the age of majority, to hold so will amount to reading the law upside down, which is not correct.

In another case of **Kristantus Msigwa vs. Marry Andrew Masub**, Probate and Administration Appeal No. 06 of 2019 this Court, Hon Ndunguru, J, after making reference to the case decided by Hon. Mlacha, J, a case which is now becoming famous on this position, of **Beatrice Brighton Kamanga and Another vs. Ziada William Kamanga**, Civil Revision No. 13 of 2020 High Court (Unreported) held that:-

"I agree with my learned brother Hon. Mlacha, J who is of the position that the Local Customary Law (Declaration) (No. 4) Order G.N No. 436 and 214 of 1963 is no longer valid with the coming in force of the Law of the Child Act of 2009"

See also the case of **Elizabeth Mohamed v. Adolf John Magesa** (2016) TLS LR 114 where it was *inter alia* held that although there are decisions of the court to the effect that a putative father's obligation to his illegitimate children is personal and ends with his death and that it does

not survive him and cannot attach to his estate, however, with the enactment of Sections 9 and 10 of the Law of the Child Act, such cases are no longer good law.

To this end, I can conclude that the customary law which deprives a child born out of wedlock of his right to inherit from the estate of his parent, is repugnant, unconstitutional and bad law which is no longer in use. In this matter, the Law of Declaration of Local Customary Law, GN No. 436 of 1963 which allegedly denies the Appellant of his right to inherit from the estate is bad law and in effective, the Appellate District Court wrongly applied it.

The Appellant is entitled to inherit from the estate of Late Jeremia Luchagula so long it is established that he was his biological father.

I have gone through the evidence on record and find that the Appellant in his testimony stated that he is a first born son of Late Jeremia Luchagula and started to live with him in 1973, he went to school and got married in 1991 while in hands of his father. He also took care of him when was sick until he passed on. PW3 testified that he knew the Appellant as his brother from a different mother.

On the other hand, the Respondent in his testimony in chief stated that the Appellant was not born by Jeremiah Luchagula, but in cross examination conceded that he is a son of Late Jeremiah Luchagula but not in wedlock. He stated as follows:-

"Ndiyo, mali tulimnyima sababu siyo mtoto wa marehemu ni mtoto wa nje ya ndoa."

DW4 was a chairman of the clan meeting he testified that the Late Jeremiah Luchagula was married to two other wives before marrying the widow Limi Makorosho. He named them as Mariam Joseph and Sophia John. This is a witness whom the trial court referred his evidence at page three in the following words: -

"Na katika kujibu hoja za mahakama mjibu pingamizi alidai mleta pingamizi hakupata mali sababu ni mtoto wa nje ya ndoa mama yake alipigwa mimba na marehemu akazaliwa yeye."

Literally means that in cross examination replied that the Appellant was denied inheritance because he was not born in wedlock he was born after the deceased impregnating his mother.



From the pieces of evidence above, I am satisfied that there is ample of evidence which establish that the Appellant was a blood child of Late Jeremia Luchagula. Therefore, he is entitled to inherit from the estate of Late Jeremia Luchagula.

In the upshot, and for reasons stated above, I find that the Appellate District Court was not correct in overturning the decision of the trial Primary Court in Probate and Administration Cause No. 02 of 2019 dated 22/10/2019.

I hereby allow the appeal and quash the judgement of the Appellate District Court in Probate Appeal No. 34 of 2019 dated 13/05/2020 and set aside the decree thereof. The decision of Nyakarilo Primary Court which ordered redistribution of the estate to all the biological children of the Late Jeremia Luchagula including the Appellant Elias Jeremia and his sister Pili Jeremia (PW3) is upheld. This being a probate cause, I make no order as to costs.

Order accordingly.



[Signature]
F. K. MANYANDA
JUDGE
1/03/2021