

**THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY OF MBEYA
AT MBEYA**

PROBATE & ADMINISTRATION APPEAL NO.91 OF 2018

(Originating from Probate & Administration Appeal No. 05 of 2017 of the District Court of Mbeya from Original Probate & Administration Cause No. 10 of 2017 and Civil Cause No. 124 of 2014 of Mwanjelwa Primary Court)

**NAOMI D/O LUOGA (Administratrix
of the Estate of Tasilo Malos Luoga)APPELLANT**

VERSUS

SALOME D/O DAISON SWILA RESPONDENT

Last Order: 09/11/2018

Final Written Submissions: 03/12/2018

Judgment: 20/12/2018

JUDGMENT

MAKARAMBA, J.:

The Appellant, **NAOMI D/O LUOGA** (*Administratrix of the Estate of Tasilo Malos Luoga*) has come before this Court to contest the decision of the District Court of Mbeya in ***Probate and Administration Appeal No. 05 of 2017 (Hon. kW. Chaungu – SRM)*** dated **16.01.2018**. The Appellant is complaining that, the Appellate District Court erred in law and in facts in founding **Probate Cause No. 01 of 2017** of the Mwanjelwa Primary Court to be *res judicata* **Civil Case No. 124 of 2011** also of the Mwanjelwa Primary Court, and in ordering the Appellant as administratrix of the estate of **Tasilo Malos Luoga**, the

deceased, to pay **Tshs. 360,000/=** to the Respondent as being compensation emanating from **Civil Case No. 124 of 2011** in the fresh case in **Probate Cause No. 01 of 2017**, and the Appellant to give to the Respondent **Tshs. 40,000/=** each month towards the maintenance of the Respondent's children.

The Appellant lodged six grounds of appeal, which I do not intend reproduce them, but I will traverse them in this Judgment. The appeal by consent of the parties was disposed of by way of written submissions. The Appellant was represented by M/s Juliana Marunda, learned Counsel. The Respondent appeared in person and fended for herself in this appeal. In the course of her submissions on the grounds of appeal however, the learned Counsel for the Appellant elected to abandon the **5th ground of appeal**. She submitted on the **1st, 2nd & 3rd** and **6th grounds of appeal** jointly, and on the **4th ground of appeal** separately.

The background to this appeal briefly is that, the Appellant, **Naomi d/o Luoga** is the administratrix of the estate of one **Tasilo Malos Luoga**, deceased, who died on **30th day of August 2015**. The Respondent, **Salome d/o Daison Swila**, claims to be the wife of the deceased with whom she also claim to have had children and for whose she claims maintenance from the estate of the deceased and compensation for herself. The Appellant maintains that she is the only legal wife of the deceased with whom they underwent a marriage according to Christian rites, which recognizes marriage of only one wife, The Appellant insists that, the Respondent is just a concubine and the Respondent's children, one of whom was born after the death of the deceased, and the other was born during the lifetime of the deceased

but also out of wedlock, and hence they are all illegitimate children. The Appellant maintains that as administratrix of the deceased's estate, she does not have any responsibility towards the maintenance of the Respondent's children and to pay compensation to the Respondent from the estate of the deceased.

The Appellant, **Naomi Luoga**, is the court appointed administratrix of the deceased's estate. This is not being disputed. Furthermore, that Naomi Luoga is the only legal wife of the deceased, having underwent a Christian marriage with the deceased, has also not been contested by the Respondent. The fact of there being an adultery claim brought by the Appellant against the Respondent is also not being disputed. This being the case therefore, I am at one with the submissions by the Appellant's Counsel that, since the estate of the deceased has already been distributed to the legal heirs of the deceased, the only recourse the Respondent had was to have executed **Civil Case No. 124 of 2011** when the deceased was still alive but not to wait until his demise to bring a fresh case against the administrator of the estate of the deceased.

In her reply submissions, the Respondent argued that in the former suit, that is, **Civil Case No. 124 of 2011**, which was before the Mwanjelwa Primary Court, the Respondent was claiming Tshs. **360,000/=** for the care of the Respondent's child. I have noted however that, throughout her submissions, the Respondent has kept on referring to **Civil Case No. 124 of 2016** between **Salome Swila versus Tasilo Luoga** where the Respondent was claiming **Tshs. 360,000/=** from the deceased and that the trial Court awarded her the claimed amount of **Tshs. 360,000/=** as compensation for unpaid

maintenance costs plus **Tshs. 40,000/=** each month for the maintenance of the children. It is the submission of the Respondent that, the Respondent's children are entitled to reasonable enjoyment out of the estate of their parent, the deceased, and that, the Appellant as administrator of the estate of the deceased has that responsibility. The Appellant's Counsel submitted that, the estate of the deceased having been distributed to the legal heirs, the Appellant does bear any responsibility towards the maintenance of the Respondent, who is a concubine, or her children who are illegitimate children. The record shows that the Respondent lodged Probate and Administration **Case No. 01/2017** claiming for the maintenance of the Respondent's children from the estate of the deceased.

In the first ground of appeal that, the Appellant stated that the Appellate Magistrate erred in law and in facts in finding that **Probate Cause No. 01 of 2017** of Mwanjelwa Primary Court was res judicata **Civil Case No. 124 of 2011** of the same Court. I find that this ground has merits. I uphold it for reasons which I shall state shortly in this Judgment.

In the **2nd ground of appeal**, the Appellant stated that, the Appellate Court erred in law and in fact in finding that the Appellant as administratrix of the estate of **Tasilo Malos Luoga** ought to pay compensation of **Tshs. 360,000/=** emanating from **Civil Case No. 124 of 2011** in the fresh case **No. 01/2017**, which had nothing to do with **Civil Case No. 124 of 2011**. I also find this ground with merits and accordingly I uphold it as well for reasons stated in this Judgment.

In the **3rd ground of appeal**, the Appellant stated that the Appellate Court erred in law and in fact in ordering the Appellant to give

the Respondent **Tshs. 40,000/=** each month towards maintenance of the Respondent's child, who was illegitimate, and the Respondent who is a concubine, since the deceased underwent a Christian marriage of only one wife, being the Appellant. I also find that this ground has merits. I accordingly uphold it for the reasons stated in this Judgment.

In the **6th ground of appeal** the Appellant stated that, the Appellate Court erred in law and in fact in awarding costs to the Respondent without considering the circumstances of the case, that, it was the Respondent who filed **Case No. 01 of 2017**. I also find this ground with merits. I uphold it for the reasons stated in this Judgment.

I have traversed the rival submissions. This appeal has merits and I have upheld the grounds of appeal as stated and argued by the parties. In ***Probate and Administration Appeal No. 05/2017***, the Appellate Magistrate found that, the lower court had been wrong in deciding the same case twice since it was *res judicata* and hence the decision was wrong. This finding was wrong. Furthermore, the Appellate Court upheld the appeal and ordered the Appellant to pay the Respondent **Tshs. 40,000/=** each month towards the maintenance of the Respondent's children. This was also a wrong finding. The record shows that, one of the children was born after the death of the deceased. There was no medical evidence or otherwise which established conclusively that the deceased was the father of the child.

On the issue whether the matter was not ***res judicata***, as the Appellant's Counsel rightly submitted, the fresh case **Probate and Administration Case No. 01/2017** had nothing to do with **Civil Case No. 124 of 2011**, both of which dealt with different issues and matters and hence not substantially the same issues. In any case, as the

Appellant's Counsel rightly submitted in rejoinder, since the Appellate Magistrate found that the matter was *res judicata*, which as I said it was not, he ought to have dismissed the appeal without costs, Strangely, the Appellate Magistrate ordered costs without giving any reasons and without considering the nature of the matter which was a probate case.

However, since the matter was not ***res judicata***, as the Appellant's Counsel rightly suggested, the Respondent had two options. One, the Respondent should have executed the judgment in ***Civil Case No. 124 of 2011*** of the Mwanjelwa Primary Court, when the deceased was still alive instead of waiting until the deceased passed away, to open a new case against the Appellant who had no knowledge of the existence of the said two children and there is no evidence which was tendered before the trial Court to prove that the purported children of the Respondent were sired with the deceased. The judgment in ***Civil Case No. 124 of 2011*** of Mwanjewa Primary Court was pronounced on the **7th day of October 2011**. The deceased passed away on the **30th day of August 2016**. The second option was for the Respondent to claim an interest in ***Probate Cause No. 1 of 2016*** of Mwanjelwa Primary Court when general citation was issued on **21st January 2016**.

It is worth noting here and as the Appellant's Counsel rightly submitted that, the Respondent lodged her claims on **1st August, 2017**₁ which was one year after the Appellant had been granted letters of administration of the estate of the deceased. In ***Probate Cause No. 1 of 2016***, as the Appellant rightly submitted the Respondent's claims were found to be baseless and without merit as could be gathered in pages 22 & 23 of the Judgment. There is no evidence that the Respondent ever appealed against the Judgment. Instead the Appellant

opened a fresh suit against the Appellant in ***Probate Cause No. 1 of 2017 of*** Mwanjelwa Primary Court.

As the Appellant's Counsel noted and rightly so in my view, the deceased died intestate. The deceased therefore did not leave a WILL, where he could have mentioned about the Respondent being pregnant before his death; besides, as the Appellant rightly submitted there is no any medical proof or statement by the deceased to establish the Respondent's claims. I am enthused by the case cited by the Appellant that of ***Violet Ishengoma Kahangwa vs. Administrator & Mrs Eudokia Kahangwa [1990] TLR 72***, where it was stated that;

"Putative father's obligation to his illegitimate children is personal and ends with his death; it does not survive him and cannot attach to his estate upon his dying intestate."

In the instant case, the Respondent's children having been born out of wedlock, the obligation of their putative father being personal did not survive him and as the Appellant rightly submitted, the administrator of the deceased estate has no obligation to maintain them from the estate of the deceased.

Before the trial Court it is the Respondent who asserted that the deceased was the father to the Respondent's children. This being the case therefore, under ***Rule 6 of the Magistrates' Court (Rules of Evidence in Primary Courts) Regulations GN No 66 of 1972***, which provides among other things that, *"the weight of the evidence of the one party is greater than the weight of the evidence of the other*, the Respondent is the one who had a duty to prove to the trial Court

that, the Respondent's children belong to the deceased, which duty the Respondent has failed. As the Appellant's Counsel rightly submitted, in terms of **Section 36 of the Law of the Child Act**, the conduct of medical test (DNA) is among the surest way of proving the paternity **(biological parent)** of a child and not by mere words as the Respondent has always been asserting that the deceased is the biological father of the children. This is not sufficient.

I am at one with the submissions by the Appellant's Counsel that, the lower court was wrong to award costs and to order the Appellant to give the Respondent **Tshs.40,000/=** each month towards maintenance of the Respondent's child and to pay **Tshs 360,000/=** as compensation emanating from **Civil Case No. 124 of 2011**. Much as the Law of the Child of 2009 bars discrimination against children born out of wedlock, but as the Appellant's Counsel rightly submitted, allowing a child born out of wedlock and another born after the death of the deceased to inherit or benefit from the estate of a deceased person, without there being any evidence to prove that they belong to the deceased, is opening the **Pandora's box** for anyone to claim maintenance of children not proved to the satisfaction of the court that they are biologically related to the deceased.

As to the **4th ground of appeal** that, the Appellate Court erred in law and in fact in quashing the decision of the Primary Court without considering the evidence adduced by the Appellant before the Primary Court, I find this ground to be with merits. I uphold it.

The trial Court, as the Appellant rightly submitted ignored the Appellant's prayer in **Probate and Administration Cause No. 05 of 2012** for medical test to be conducted in order to establish the

paternity of the child. This requirement is found under Section 36 of the Law of the Child of 2009, which the Appellant's Counsel referred to, which provides as follows:

"(1) The court may order the alleged parent to submit to a medical test and shall, on the basis of the evidence before it, make such order as it considers appropriate.

(2) Without prejudice to subsections (1), where the evidence of a mother or independent evidence cannot be corroborated by other evidence available to the satisfaction of the court, the court may, upon request or suo motu, order DNA test to be conducted for the purpose of proving the biological father of the child"

On the strength of Section 36(1) & (2) of the Law of the Child Act of 2009, in the absence of any evidence or medical test adduced by the Respondent before the trial Court to prove that the deceased was the biological father of the purported children of the Respondent, I am at one with the submissions by the Appellant's Counsel that the Appellant cannot be liable to provide maintenance to the children of the respondent.

It is worth noting here, and as the Appellant's Counsel rightly submitted, that in **Civil Case No. 124 of 2011**, the deceased denied to have had a child with the Respondent. This being the case therefore, as the Appellant's Counsel rightly submitted, it was the duty of the trial court *suo motu* to require the parties to undergo a medical test to

ascertain whether or not the deceased is the father of the purported children of the Respondent. The Law of the Child Act provide for what is to be considered by the court where there is disputed paternity. According to the Appellant's Counsel among the factors to be considered when there is disputed paternity include; **(a) any marriage performed in accordance with the Law of Marriage Act, (b) the name of the parent entered in the Register of Births kept by the Registrar-General; (c) performance of customary ceremony by the father of the child; (d) public acknowledgment of parentage; or (e) DNA results.** I have examined the record of the trial Court. Considering that, the respondent had failed in her duty to prove that the children she purports to have had with the deceased were the biological children of the deceased, it was wrong for the Appellate Court to have accepted the mere words of the Respondent and proceeded to award her compensation and maintenance from the deceased's estate.

In the whole and for the above reasons, the Appeal is hereby allowed. The decision of the District Court of Mbeya in **Probate and Administration Appeal No. 05 of 2017** is hereby quashed and set aside. The nature of this matter being probate, I shall not make any order for costs. Each party shall bear its own costs. It is so ordered.

Delivered at Mbeya and dated this 20th day of December, 2018.

..... CVK-----
R.V. MAKARAMBA
JUDGE