THE ROLE OF THE JUDICIARY IN DEVELOPING JURISPRUDENCE IN PROBATE AND ADMINISTRATION OF ESTATE CASES: A CRITICAL REVIEW OF BEATRICE BRIGHTON KAMANGA & AMANDA BRIGHTON KAMANGA VERSUS ZIADA WILLIAM KAMANGA[i]

Written by ***Zakayo Lukumay* & Nichodemus N. N. Nditi*****

** Senior Lecturer, The Law School of Tanzania, Dar es Salaam, Tanzania*

*** Assistant Lecturer, The Law School of Tanzania, Dar es Salaam, Tanzania*

INTRODUCTION

This case review focuses on the High Court judgment in the above cited decision. In doing so, we are guided by two critical statements from renowned contemporary jurists. Firstly, the statement by Prof. Sandra Liebenberg, who holds the view that: 'as academic and civil society we should not be afraid of criticising court judgments or advocating different interpretations and responses (to court judgments)'.[ii] Secondly, Hon. James Mwalusanya (the late Tanzanian High Court Judge) once remarked that:

> *Judgments or sentences of the Court are matters of public interest and so should be (subjected) to comment. The days have gone when a judge's pronouncements were accepted as the product of an arcane process of reasoning supposedly beyond the comprehension of lesser mortals.*[iii]

It should, however, be noted that, although we have the right to discuss and comment on the decision of the High Court of Tanzania in the case under review, our comments cannot invalidate what the Court adjudicated thereunto.

PROCEDURAL HISTORY

In this case, the Administratrix was given letters of administration in 1989. During this time, the Applicants were still young. Circumstances show that there was no peaceful atmosphere between them. Since then records show that there was nothing which was done up to 2001 when a series of applications were made. Two detailed rulings from the primary court recognized the applicants as children of the deceased but the administratrix did not want to recognize them as such. She was reluctant and is still reluctant to release the assets to them. She has remained with the assets for all the years and wants to convert them to her personal assets something which is being resisted seriously by the applicants.

The matter remained pending for more than 30 years and which have been the subject of several other litigations, complaints to various authorities and the source of hatred between the parties and the family as a whole. The complaints to the High Court were lodged orally but later reduced in writing by the applicants. The applicants sought the Court's guidance, among other, misappropriation of the deceased's estate by the Respondent.

The court reinforced the appointment of Amanda Brighton Kamanga as the administratrix of the estate of the late Brighton William Kamanga which include the three (3) houses in Sinza Dar es Salaam. The respondent was directed to handle the estate to Amanda Brighton Kamanga who should administer the estate and file her inventory and the statement of account within 4 months.

OBSERVATIONS

The Judge gave guidance to the lower courts on four areas of repeated mistakes and complaints. These are: The Law, practice and procedure of probate and administration in primary courts, inheritance of children born out of wedlock under customary law, the legality and propriety of the proceedings and decisions of the lower courts, and lastly on the status of the respondent as an administratrix of the estate

JURISDICTION OF PRIMARY COURTS ON PROBATE AND ADMINISTRATION MATTERS

The Court observed that the law, practice and procedure in probate and administration of estate in Primary Court is very unique, as it is regulated by its own laws other than the Probate and Administration of Estates Act.[iv]Thus, Magistrates in the Primary Court are bound to adhere to the rules and procedures. As stated by the Court, the Primary Court has jurisdiction in all matters related to Customary Law and Islamic Law.

The Court observed further that the Primary Court has jurisdiction in all customary and Islamic matters pertaining to probate and administration of estate, subject to the exception, where the probate involves registered land.

The critical question this decision raises is whether the Primary Courts have jurisdiction in relation to probate where registered land is involved. It must be pointed out that the limitation of the primary courts to entertain probate and administration matters involving registered land has been controversial for so long. There are two lines of thinking among the Judges in the High Court. There are those who believe that primary courts do have jurisdiction. The good example is *Munungwa Lutala & Two Others vs. Marth Lutalamila*.[v] On the other hand, there are those who believe, the primary courts do not have jurisdiction. This line of thinking was stated in *Salmin Mohamed vs Abdu Mohamed,*[vi]*Mohamed Yusuf vs Tunda Kassim*[vii] and *Bibi Makomgoro vs. Issa*.[viii]

The current position on the limitation of the primary courts in administering probate and administration matters involving registered land was stated in *Scholastika Benedict vs. Martin Benedict,*[ix] where Nyalali C. J., (as he then was) stated *inter alia* that:

> Section 18(1)(c) of the Magistrates' Courts Act does not limit the jurisdiction of Primary Courts to entertain matters of registered land because subsection (2) is the relevant provision which does not house any limitation. Hence, Primary Courts have jurisdiction in administration of estates involving registered land.

By virtue of the above case of the Court of Appeal, with all due respect the Judge misdirected himself by not taking into consideration the current position of the law as stated in the captioned case, *to wit*, primary courts have jurisdiction to entertain any probate and administration of estate cases involving registered land.

PROCEDURES IN THE PRIMARY COURT

The Court pointed out important matters for consideration before instituting probate and administration cases in the primary courts. The following questions should be carefully answered in the affirmative before instituting probate and administration cases in the primary court, namely, first, when should a person go to court? And secondly, what are the procedures to be followed? The following should be considered when responding to the above questions:

Time Limits

The Court pointed out that there is no specific time set within which a probate or administration matter should be filed at the primary court. However, where the matter is filed after a long time, let's say after 3 years, the petitioner must explain the delay.[x] If no proper explanation is offered, the court has discretion to reject the matter. It is thus important to file the proceedings at an early stage or if delayed for a considerable period, offer explanation to the effect.

This is a very important observation made by the Court for the good reason that there is no statutory time limit stated by the laws regulating probate and administration of estate. The time limit to institute probate and administration matters is stated by the Probate and Administration of Estate Act to be three years. It should be, however, noted that, the Probate and Administration of Estate Act is not applicable to the primary courts.

Initiating Proceedings in the Primary Court

The court pointed out that proceedings in a Primary Court are initiated by presentation of Form No. 1 duly filed, which, is usually accompanied by minutes from the clan/family and a death certificate. The minutes from the clan/family are essential because they establish proof that a person who is named therein has the support of the majority members of the clan/family. It is a process of filtration which was developed through practice. The process is encouraged because it narrows the dispute. There is no rule prescribing for their existence but they are encouraged for that purpose.

Equally, there is no rule requiring the existence of a death certificate in the primary court but it is encouraged to prove that the person named therein is really dead. It is a practice borrowed from Probate Rules which apply in the High Court and District Court. But if the primary court is located in a remote area so as to make it difficult to obtain a death certificate, in our view, it

will not be offensive, if the court receives just a letter from the Village or Ward Executive Secretary informing the court that the person named therein is dead.

Hearing of the Petition

The Court gave a detailed description of the procedure to be followed after filing a petition. The petitioner is required to make an appearance to the court and request for orders of citation. This is usually done *ex-parte*. The court will then make an order for citation advertising that someone has petitioned for probate or letters of administration. It is important to advertise in Newspapers which are issued daily, with a wide circulation. Copies of the advertisement must be fixed at the court premises and on all key public places around the place of domicile of the deceased. Citation is done in probate form No. 2 and practically, there must be a gap of at least 4 weeks in between to allow the information to circulate in the society widely. The usual practice is 90 days but it is discretionary. Going below 4 weeks amounts to quick appointments. It is dangerous and must be discouraged.

Thereafter, the court will then sit on a date fixed in the citation to consider the matter. All interested parties must attend. The petitioner must appear in person. He will then take an oath and give evidence on matters of the probate and or administration expressing his willingness to administer the estate. He must express his relation with the deceased and why he wants to be appointed an administrator of the estate. He must declare his good intentions and commit himself to be faithful. Some people who attended the family meeting must come and give evidence in recognition of the meeting and in support of the petitioner.

If there is an objection to the appointment, the court will hear the objection first or combine the petition and the objection and hear them together. If it opts to combine them, there must be an order in the record to that effect. The objection must be filed in writing and if made orally, it must be reduced to writing by the magistrate who must record the exact words of the objector in Kiswahili language. The magistrate must record the proceedings in full and precisely. The court will then make its decision appointing the petitioner and dismissing the objection or dismissing the petition and appointing the objector. The court can appoint the petitioner or any fit person to be the administrator but, in our view, the best interests of justice are saved if he comes from the family (the spouse or children of the deceased). Where circumstances demand that a person outside the family must be appointed an administrator, there must be good reasons

on record supporting the move. These reasons must be recorded properly and explained to the petitioner and any person who is present.

The procedure explained above is very important because if they are properly followed it helps courts to dispose of the matter within a short period of time. In *Hyasintha Kokwijuka Felix Kamugisha vs Deusdedith Kamugisha*,[xi] it was stated *inter alia* that:

> *Probate and administration cases oftentimes lead to family conflicts. In some cases, complaints concerning these disputes backfire to decision-makers (magistrates). In my view, such anomalies and complaints may be avoided if parties are well guided and the law is properly followed. If the procedures are properly observed and parties involved, such cases may be expediently disposed of and grievance and complaints reduced.*

The Court concluded on the need to follow the procedures as follows:

> *… At this stage, I feel an obligation to remind Primary Courts on the law applicable on probate and administration of estates. These laws should be in the fingertips of every primary court magistrate before entertaining a case on probate and administration of estates. I feel this obligation after noticing that most of probate and administration cases present similar issues. I have encountered several disputes of this nature, which are characterised with similar irregularities committed by primary courts…*

Powers and Duties of the Administrator

The court observed that the administrator is appointed in form No. 4 but must file the administrator's bond (form No. 3).[xii]The bond is an undertaking that he/she will administer the estate faithfully at the great advantage of heirs, debtors and creditors of the deceased and not his. He is not expected to take anything other than his share as an heir (where applicable) and the administration costs. The costs of administration must be presented to the heirs for approval and where there is a dispute between them, the matter must be referred to the Primary Court for taxation.

According to the Court, the administrator is an independent person. He is independent from any person including the magistrate who appointed him. He works independently from

everybody though at times, where the need arises, he can receive advice and guidance from the court. He can also receive advice from heirs and relatives. It is an advice not a directive. The forum for advice should not be used as a room to grab his powers or force him to do anything.

The administrator is charged with the following functions: First, collecting the assets of the deceased. Assets include both fixed and movables. It also involves going to the bank and collecting what might be there. He can also sue people who may refuse the requests. Second, to identify the heirs. It is now generally accepted that the heirs under customary law are the spouse or spouses of the deceased and his or her children. Uncles, aunts, sisters and brothers are not heirs. In the absence of a WILL, they should not be given anything save at the free will of the heirs. The third function is to identify and pay the debts of the deceased.The fourth function is to distribute the assets to the heirs and lastly, to file to the court inventory and statements of accounts (forms V and VI).[xiii]

Another duty of the administrator is to file an inventory and the statement of Accounts (forms V and VI) within the time prescribed by the law. Rule 10 of GN 149 of 1971 state that, within four months of the grant of administration or within such further time as the liabilities court may allow, the administrator shall submit to the court a true and complete statement, in form V, all the assets and liabilities of the deceased persons' estate and at such intervals thereafter as the court may fix, he shall submit to the court a periodical account of the estate in form VI showing therein all the moneys received, payments made, and property or other assets sold or otherwise transferred by him.

The word used is shall meaning that the duty to submit the statements of account within 4 months is mandatory. He is also charged with submitting periodical accounts to the court. This is what is done by Forms Nos. V and VI in the actual practice. The law has fixed the matter on a timetable to control the process and prevent an abuse of power. It also aims at putting the matter to an end. Heirs, creditors and debtors may seek to peruse the statements of accounts and inventories. If they do so the court must allow them.

In practice, in a good system of administration of justice, once they are filed, the court must cause the same to be known to heirs, debtors and creditors and ask them to file objections against them, if they so wish. If there is an objection, the court will be at liberty to return them to the administrator for rectification. On good reasons being established and in the great interest

of justice, the court can change what was done by the administrator and substitute thereof with what it considers to be the best division or make a directive accordingly.

It is, however, important to hear the administrator and all interested parties fully before making the decision. Otherwise, the court has no power to question an act or omission of the administrator contained in the statement of accounts and inventories. That is to say, if there is no objection to the statement of Accounts and inventories, the decision of the administrator is final and the court must make an order closing the matter.

Termination of probate and administration matters

The Court pointed out that there should be an end in probate and administration matters. The matter comes to an end on filling of Forms No. V and VI and after the order of the court closing the matter. The emphasis here is that, the administrator must present his reports to the court in time which will proceed to put the matter to an end. The judge was of the view that an administrator who does not file an inventory for 3 years should be replaced by another person.

The question we may ask ourselves from the above position of the Court is: which law provides that *the administrator who does not file an inventory for 3 years should be replaced by another person*? The important thing to be noted from the above position of the law is that, it is true that probate and administration cases come to an end once the personal representative has filed both inventory and accounts.

Primary Courts are governed by the Fifth Schedule to the Magistrates Courts Act, Cap. 11 R.E. 2002, GN.49/1971 and the Customary Law Declaration Order. Rule 11 of Fifth Schedule to the Magistrates Court Act, requires the administrator who has completed the administration of the estate and, if the primary court orders, at any other stage of the administration, to account to the primary court for his administration. Rule 10 of GN 49/1971 requires administrator or executor to file inventory within four (4) months from appointment and periodical final accounts.

Section 107 of the Probate and Administration of Estate Act, Cap 352 requires the executor or administrator, within six months from appointment, to exhibit in the High court or District Court or District Delegate an inventory containing a full and true estimate of all the property in possession, and ail the credits, and also all the debts owing by any person to which the

executor or administrator is entitled in that character. Also, within one year from the grant exhibit an account of the estate, showing the assets which have come to his hands and the manner in which they have been applied or disposed of.

As observed above, the duration for filing inventory and statements of accounts is four months. In other courts other than primary courts, the personal representative is required to administer the estate within one year. The first six months period is for filing an inventory and within the remaining six months a statement of account should be filed. Once the two documents are filed the order for closure of the matter should be entered. Apparently, there are disparities of time limit between the laws regulating probate and administration matters in primary courts and those courts guided by the Probate and Administration of Estates Act. This state of the law should be carefully taken into consideration because most of the probate and administration matters entertained by the primary courts are complex one which need enough time for administration of the same.

In this regard, it is our strong recommendation that the law should be amended to reflect the practice in probate and administration matters in the primary courts. This is critical because, as we have observed earlier, primary courts have jurisdiction to entertain all probate and administration matters of Islamic or customary nature regardless the pecuniary amount except for small estates which are entertained by the District Court. We are of the view that it is unfair for the personal representative appointed by the primary court to be given a relatively shorter period compared to the one appointed by other courts in view of complexities presented in the course of administration of the estates.

Inheritance of Children Born out of Wedlock under Customary Laws

Previously, children born out of wedlock were not considered as children. The relationship was with their father and it ended upon the father's death. The position was set by the case of *Violet Ishengoma Kahangwa and Jovin Mutabuzi v. V The Administrator General and Mrs. Eudokia Kahangwa*[xiv] where the Court of Appeal *inter alia*, stated that:

> (ii) under paragraph 43 of the Local Customary Law (Declaration) (No.4) Order, 1963, G.N. No.436 as applied to the Bahaya tribe vide G.N.No.605 of 1963, an illegitimate child cannot inherit from the father's side E upon his dying intestate;

(iii) a child as defined under the Law of Marriage Act, 1967 does not include an illegitimate child, thus the word "children" in section 129 (1) of the Law of Marriage Act does not include illegitimate children;

(iv) a 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.

As time passed by, courts held the position that where there is credible evidence showing that the deceased took a positive step to take care and or introduce his child to his relatives, it should be taken that he intended the child to be known as his child under customary law. In the case under review, the Judge ruled that para (43) of the second schedule to the Local Customary Law (Declaration) (No. 4) Order, GNs 436 of 1967 and 219 of 1967 is no longer a valid law in view of the coming into force of the Law of the Child Act[xv]. The concept of "illegitimate child", children born out of wedlock, has no room in this country any more. The Act which came in compliance with the provisions of the United Nations Convention on the Rights of the Child 1989 to which Tanzania is a signatory, has banned that concept.

Article 2 (1) of the UN Convention requires state parties to respect and ensure rights set forth in the convention are observed in the country without discrimination of any kind, i.e. in respective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, birth or other status. Sub article (2) requires State parties to take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions or beliefs of the child's parents, legal guardians or family members. The Law of the Child Act, 2009 was enacted in compliance with this requirement.

Section 5(2) of the Law of Child Act prohibits any type of discrimination against a child. It provides thus "A person shall not discriminate against a child on the grounds of gender, race, age, religion, language, political opinion, disability, health status, customs ethnic origin …. birth…." The word birth, there, represent the status of the child at the time of birth. Whether he was born with or without a valid marriage is covered there. He is not expected to be discriminated on that basis. All children are equal so to say and must enjoy equal rights.

In this reasoning therefore, it is wrong to deny a child his rights to inherit from his father's estate simply because he was born out of wedlock, the act which he had no control himself. This is specifically provided under section 10 of the Act which reads that "A person shall not

deprive a child of reasonable enjoyment out of the estate of parent". The word "Parent" is defined by Section 3 of the Act, to mean "a biological father or mother", the adoptive father or mother and any other person under whose care a child has been committed". It follows that the applicants have a right to inherit from the deceased despite the fact that there was no official marriage between their father and their mothers.

The position stated by the Court concerning children born out of wedlock, is the new development of jurisprudence in probate and administration of estate matters. In *Elizabeth Mohamed v. Adolf John Magesa*[xvi] the Court stated *inter alia* stated 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.*

It appears that even adults have benefitted from this rule. For example in *Judith Patrick Kyamba vs. Tunsume Mwimbe & Others*[xvii]it was stated *inter alia* that section 4 of the Law of the Child has defined a child, and section 10 has stated that a child should not be deprived to enjoy the estate of his parent. In this, case adults aged 36 and 22 were also covered under the Law of the Child, This, in our view, is another jurisprudential development.

Despite the above position, it should be taken into account that in Tanzania, there are main three regimes that regulate probate and administration matters, namely, the statutory law, Islamic law and customary law. These regimes give consideration to religious and traditional beliefs which strictly prohibit children born out of wedlock from inheriting from their father, with exception of customary law which recognizes legitimization of children born out of wedlock.

This position of the law is provided for under section 36(4) of the Child Acts as follows:

> *where the court has made an order on a biological father, such biological father shall assume the responsibility to the child in the same manner as may be in respect of a child born in wedlock and the child shall, subject to religious belief of the biological father, have such other rights devolving from the parent including a right to be an heir.*

Apparently, there is no any religious organization that allows illegitimate children from inheriting from their fathers. Thus, while courts have given full enjoyment of the right to benefit from the estates of their late fathers, the law has restricted such a right on the basis of religious believes. This a contradiction in our view. It is our belief that, with the development of jurisprudence through case law on issues related to children born out of wedlock, the Legislature will, at the opportune moment, amend the law to state expressly that children born out of wedlock are entitled to inheritance irrespective of the religious inclination their fathers.

DELAYS IN PROBATE CASES

As pointed out above, the matter remained pending for 30 years. A series of applications began in 2001 until the date of this revision (2020). Thus, for almost twenty years, parties were subjected to endless court actions causing wastage of time, energy and resources. This is not healthy for administration of justice. We commend the efforts taken by the High Court in the case which is the subject of this case.

CONCLUSION

In conclusion, Beatrice Kamanga's case has shown among other things that the role of the judiciary is pivotal in ensuring the rules and procedures are adhered to. Second, it is a very important decision as it seeks to protect interests of those who are thirsty for justice. As such, notwithstanding our observed critics, still this is a good case from jurisprudential point of view on matters relating to law, practice and procedure in probate and administration matters. It has also cemented the jurisprudence seeking to protect children born out of wedlock in Tanzania,

ENDNOTES

[i](CIVIL REVISION 13 OF 2020) [2020] TZHC 1428; (10 July 2020).

[ii] See, Liebenberg, S., "Socio-Economic Rights under a Transformative Constitution: The Role of the Academic Community and NGOs," Vol. 8 No. 1 ESR Review, May, 2007

[iii]Mwalusanya, J.L., "The Role of a Journalist and Publisher in the Transitional Period to Multi-Party Democracy," Vol. 1, Issue No. 9 The Journalist, November-December 2001, p. 8

[iv] [Cap. 352, R. E 2002]

[v] [1982] TLR 98

[vi] [1986] TLR 250 - 252

[vii] [1968]HCD 487

[viii] [1970] HCD 192

[ix] [1993] TLR 1 (CA)

[x]Mwaka Musa versus Simon Obed Simchimba, CAT Civil Appeal No.140 of 2016. This decision was followed in followed by the court in Musa SongoNyekaji Probate and Administration Cause No. 3 of 2019 H/C Musoma.

[xi] In the High Court of Tanzania, at Bukoba, Probate Appeal No. 04 of 2018 (Unreported)

[xii] See rule 7 GN 49 of 19971

[xiii] See *Hadija Saidi Matika and Awesa Saidi Matika*, H/C Mtwara, PC Civil Appeal No. 2 of 2016.

[xiv] (1990) TLR 72.

[xv] No 21 of 2009.

[xvi] (2016) TLS LR 114.

[xvii] In the High Court of Tanzania, Probate and Administration Cause No. 50 of 2016 (Unreported)