

Protection of succession rights of the unborn child under customary law in Tanzania

***Paul Robert Sayi**

Paul.sayi@out.ac.tz

ABSTRACT

Succession rights of the foetus in the mother's womb conceived before the death of his father and born after the death of his father is a contentious matter in the contemporary law of succession and property law. Often individuals tend to ensure that their children are protected and catered for in their Last Will and Testaments. But what is the position when it comes to unborn children? Are they qualified to inherit? What is the position when there is no Last Will and Testament? In Tanzania, the position is not clearly and expressly provided in the customary law of succession. This study is centred on examining the customary law and succession rights accorded to unborn child in Tanzania. In this regard, the author finds that customary succession law applicable in Tanzania Mainland does not expressly recognize and or guarantee succession right of the foetus in the mother's womb until is completely proceeded in a living state. The study recommends that if a person dies while his wife is pregnant, the distribution of estate should be postponed, if possible, till childbirth; otherwise, a share will be withheld for the child under the nominated guardian

Key words: Succession rights; customary law; Unborn Child; Nasciturus.

1.0 Introduction

The term unborn child literary means a foetus in the mother's womb. It is therefore referring to the child who is not in existence as of now but expected to come into existence in near future. From the perspective of biologists, the foetus is an independent creature and is considered a human being, but legally, until he is born alive would not be considered as an independent human and, therefore cannot have any right or duty. In some exceptional cases, foetus can possess rights even prior to his birth, provided that he is born alive.⁴¹ However, in some countries like Kenya,⁴² Norway and Canada, existence of human being is recognized from the moment of conception.

Historically, the property law of the Roman Empire granted foetus inheritance rights. As long as the foetus was conceived before the testator's death (usually, the father) and then born alive, his or her

*Assistant Lecturer, Faculty of Law, The Open University of Tanzania.

⁴¹ Mohammad Reza Mohammadzadeh Rahni, Peyman Kavousi, Reza Emami Rad (2014). "Investigating the Inheritance of Fetus in the Civil Law of Iran and France" (PDF). *Journal of Applied Environmental and Biological Sciences*, retrieved 17 October 2019

⁴²Section 26(2) of the Kenyan Constitution, 2010 provides that the life of a person begins at conception.

inheritance rights were equal to those born before the testator's death.⁴³ Even though under the Roman law the foetus was not a legal subject, it was a potential person whose property rights were protected after birth.⁴⁴

Roman jurist Ulpian noted, that "in the Law of the Twelve Tables he who was in the womb is admitted to the legitimate succession, if he has been born".⁴⁵ Another jurist *Julius Paulus Prudentissimus* similarly noted, that "the ancients provided for the free unborn child in such a way that they preserved for it all legal rights intact until the time of birth".⁴⁶ The inheritance rights of the foetus were means of fulfilling the testator's will.⁴⁷ The interests of the foetus could be protected by a custodian, usually a male relative, but in some cases a woman herself could be appointed the custodian.⁴⁸

In Tanzania, the position is not well clear as the customary succession law does not express provide for succession right of unborn child. It is not clear whether unborn child who is conceived before the death of father can inherit estate of his deceased father. If yes, the question that subsequent arise is whether the existing property related law allows the transfer of property to unborn child and to what extent. Therefore, this paper analyses the protection of succession rights of an unborn child under customary law in Tanzania. The study is limited to unborn child who are conceived before and born after the death of the father. Unborn child who scientifically conceived after the death of the parent are not subject of this study. Customary law of succession was a focal point of analysis.

The Concept of Succession rights and Unborn Child

The concept of succession right of unborn child is based on the Latin Maxim that state "*Nasciturus pro iam nato habetur, quotiens de commodis eius agitur.*" This legal maxim means that a law that grants or protects the right of a foetus to inherit property. In principle, unborn child is deemed to have been born to the extent that his own benefits are concerned. "*Nasciturus*" literally translates to "one who is to be born" and refers to a conceived foetus that is to mean a living child who has not yet been born.⁴⁹ Pursuant to this legal principle, the foetus is presumed to have been born for the purposes of inheritance. The principle

⁴³ Jean Reith Schroedel (2000). *Is the Fetus a Person? A Comparison of Policies Across the Fifty States*. Cornell University Press, p. 31, ISBN 0801437075

⁴⁴ *Ibid.*

⁴⁵ Judith Evans Grubbs (2002). *Women and the Law in the Roman Empire: A Sourcebook on Marriage, Divorce and Widowhood*, Psychology Press, p. 264.

⁴⁶ *Ibid.*

⁴⁷ Jean Reith S, above at note 4, p. 31

⁴⁸ Judith Evans Grubbs, above at note 6, p. 264.

⁴⁹ Paisley R. M, (2006), Succession right of the Unborn Child; *Edinburgh Law Review*, Vol. 10, p. 50

was initially developed in Roman law and continues to be implemented today in most European nations, in the Americas (where the foetus is sometimes legally considered to be a person) and in South Africa.⁵⁰

Nevertheless, In Tanzania the position is not clear regarding legal recognition and protection of succession rights of the foetus in the mother's womb who was conceived prior to the death of his father. It is not easy to point out the legal position on this concern in Tanzania probably due to existence of four different regimes governing succession issues namely customary law, statutory law, Islamic law and Hindu law. However this study is focusing on analysis customary law in regard to protection of succession rights of the so called unborn child.

Legal Personality of the Unborn Child in Tanzania

The legal understanding of the concept of 'person' or 'personality' revolves around possession of rights and capacity to discharge legal duties.⁵¹ Hence, natural persons, that is, human beings are the prime claimants of legal personality.⁵² The general rule is that, legal personality of natural persons begins at birth and extinguishes at death with the result that pre-birth, post death stages are devoid of any legal person.⁵³ Understanding absence of personality in the pre-birth stage (foetal stage) poses problems as the unborn being understood as incapable of exercising any legal rights and not being duty bound towards anybody, gets a raw deal when it comes to succession rights.⁵⁴

However, it may be possible that an unborn (nasciturus) may, as an exception to the general rule that legal personality begins at birth, in some instances, be recognised before its birth as a legal subject with human rights.⁵⁵ This is the position under common law that was developed to protect the interest of unborn child so that his rights should not be deliberately disregarded in the will or intestate rule. Thus, the child in the womb is held as already born in any question which arise concerning its rights or interest.⁵⁶ The 'rule' essentially deems the law to recognise an unborn as a legal subject with legal personality from the date of its conception, and not only from birth, as an exception in some instances, when this may be to its benefit.⁵⁷

⁵⁰*Ibid.*

⁵¹Jelana J, Protection of Nasciturus within the Civil Law, Pravin Zapisi, *Godina IX(2)* 255-270, p. 255

⁵²Jelana, *Ibid.*

⁵³Paisley R. M, above at note 9 p. 50

⁵⁴*Ibid.*, at p. 30

⁵⁵ Moosa, N (2016), An argument for foetal Protection within a Framework of Legal Abortion, *South Africa. Medicine and Law*, 35:605-624, p. 5

⁵⁶Paisley R.M,above at note 9, p. 30

⁵⁷ Moosa, N, above at note 15

In Tanzania, legal personality of a child can be derived from the Penal Code⁵⁸ where it provides that a child becomes a person capable of being killed, when it has completely proceeded in a living state from the body of its mother, whether it has breathed or not, and whether it has an independent circulation or not, and whether the navel-string is severed or not.⁵⁹In this regards, a child is considered as a person or human being when it has *completely proceeded in a living state from the body of its mother*(emphasis added).This legal personality of unborn child is defined in the context of penal law and for the purpose of murder. The child in the mother's womb can be capable of being beneficiary of succession right but not of being killed as provided. This provision was purely drafted for the purpose of criminal law specifically the act of killing.

The Law of the Child Act (LCA)⁶⁰ defines a child as any person being below the age of eighteen (18) years.⁶¹ For the purposes of this Act, childhood ends at the age of 18 years but its wording leaves the starting point of childhood open. What is the starting point of childhood? Is it birth, conception, or somewhere in between? When does the foetus or unborn child start to enjoy the child's right and protection as accorded by national and international instruments?

Therefore, civil rights of the unborn child (foetus) is not statutory guaranteed in Tanzania due to the fact that, the capacity to possess rights begins with the birth of a child as defined under Penal Code⁶² and ends with his death. It is therefore questionable as to whether a foetus in the mother's womb can inherit the father's estate under customary law as there is no express provision stipulate for this concern.

Succession Rights of Unborn Child in Tanzania

Succession or inheritance is the practice of passing on property, titles, debts, rights and obligations upon the death of an individual.⁶³ Succession to property upon death is concerned with the transmission of property as well as rights and obligations associated with that property from the deceased to the living and depends upon death.⁶⁴Succession is classified into two types based on how the person dies in relation to will. These types are testate and intestate succession. These types are well discussed herein later in the next parts. Under common law, any child who is in mother's womb at the time of the death of the property owner is considered to come into existence in the eyes of law. Hence, unborn child under common law inherits in the same manner as if he were born before the death of the property owner if it was conceived

⁵⁸Cap 16 [R.E 2002]

⁵⁹Section 204 of the Penal Code, Cap 16 [R.E 2002]

⁶⁰Act No. 21 of the 2009

⁶¹Section 4 of the Law of the Child Act, No. 21 of 2009

⁶²Section 204 of the Penal Code, Cap 16 [R.E 2002]

⁶³TAWIA, Report by Tawia on Widows Right of Inheritance to a Platform organised by CEDAW-Geneva, 20 September 2015, p. 1

⁶⁴Kafumbe, p. 52

before the death of the property owner, and was born alive.⁶⁵ A foetus that was in existence at the time of a testator's death and that was subsequently born alive was entitled to inherit property equally with its living siblings. If the child is born alive but die subsequently, then shares are distributed amongst his/her heirs. The purpose of recognizing a fetal interest in property law is to ensure that children are not inadvertently omitted from their parent's will.⁶⁶

Unborn Child under Customary Testate Succession in Tanzania

Testate succession is defined as the devolution of estate of person upon the death according to the will or testament.⁶⁷ Testate succession occurs where a person desirous of retaining absolute or limited control over his property after death, arranges to ensure that upon his death then property passes to a person or persons of his choice. These arrangements are made through a valid and enforceable will.⁶⁸ Under customary law, a 'will' is defined as a statement, which is voluntarily made by a person during his lifetime to show his intention and how he decided his property to be distributed upon his death.⁶⁹ The testator under customary law is mandated to change the rule of intestate. In this regard, testator is not barred from bequeathing his or her property to unborn child in Tanzania since there is no express provision of the law providing for or prohibiting such bequeath. Nonetheless, under common law unborn child can therefore inherit by Testate Succession in the case where the deceased has left behind a last Will provided that he or she is born alive. This was so restated by Judge De Villiers in the English case of *Ex Parte Boedel Steenkamp*⁷⁰, where the fact of the case was as following:

*"In Ex Parte Boedel Steenkamp, the testator left the residue of his estate to his daughter and to the first generation. The testator's daughter was pregnant at the time of his (the testator's) death and subsequently gave birth to Paul Johannes. The executor to the estate sought a declaratory order on the issue of whether only the children born at the time of the testator's death would inherit or if Paul Johannes, born after the death of the testator, would also be able to inherit."*⁷¹

Judge De Villiers R held that the *nasciturus* should be able to inherit by means of the *nasciturus* fiction subject to being born alive and it being to the advantage of the *nasciturus*. He further held that Paul

⁶⁵Marc S, (2014), The Nasciturus Non-Fiction; the Libby Gonen Story Contemporary Reflections on the Status of Nasciturus Personhood in South African Law, LLM Dissertation, The University of the Witwatersrand, p. 40

⁶⁶*Ibid.*

⁶⁷Kitime e, (2017), *Law of Succession and Trusts: Student's Companion*, LAP LAMBERT Academic Publishing, Germany, p.3

⁶⁸Musyoka, W, (2010), *Law of Succession*, Law Publishing (T) Ltd, Dar es Salaam-Tanzania, p. 31

⁶⁹Local Customary Law (Declaration) (No. 4) Order, GN 436/1963, Schedule 1, Laws of Wills, Rule 1.

⁷⁰*Ex Parte Boedel Steenkamp 1962 (3) SA 954 (O)*

⁷¹Shannon V, Circumstances in which an unborn child can inherit from a Deceased Estate, accessed from <https://www.schoemanlaw.co.za/circumstances-in-which-an-unborn-child-can-inherit-from-a-deceased-estate>

Johannes is entitled to share in the estate of the testator in equal amounts to his mother, brother and sister.⁷²

The same position had been emphasised in the case of *Sopher v. Administrator-General of Bengal*⁷³ a grandfather made the bequest to his grandson who was yet to be born, by creating a prior interest in his son and daughter in law. The Court upheld the transfer to an unborn child since the vested interest was transferred when grandsons were born and only enjoyment of possession was postponed till they achieved the age of majority was held to be valid.⁷⁴

Despite the fact that foreign decisions are mere persuasive in Tanzania as local courts are not bound to follow the decision of the foreign court, they are very useful and therefore can be adopted to fill the lacuna under the proviso of section 2 of the Judicature and Application of Law Act,⁷⁵ that provides for the application of the common law in Tanzania. It provides: “the common law shall be in force in Tanzania only so far as the circumstances of Tanzania and its inhabitants permit and subject to such qualifications as local circumstances may render necessary.” Interestingly, there is nothing in the Customary Law Declaration Order that prohibits a testator to include a foetus in will, provided that the foetus was conceived before the death of the testator and the child born alive. In fact, a testator is free to dispose his estate by will regardless of intestate rules as provided in the Local Customary Law Declaration Order.⁷⁶

Succession Rights of Unborn Child under Customary rules of intestacy

The term intestate succession refers to the devolution of estate upon death of a person, which occurs when a person dies without leaving a will or dying with a will, which is invalid in the eyes of the law.⁷⁷ A man is considered to die intestate in respect of all property of which he has not made a testamentary disposition which is capable of taking effect. This happens where a person dies without leaving a will. It is regarded as intestate. If one left a will which for some reasons it cannot take effect it will still be intestate.⁷⁸

Rules of intestacy refer to rules which concern the grounds under which an individual may be entitled in the estate of the deceased. The rules which regulate the distribution of estates depends on whether the deceased died without a will (Intestate) or otherwise.⁷⁹ This study is premised on that assumption that there is inadequate legal protection of succession right of unborn child under customary law in Tanzania.

⁷²*Ibid.*

⁷³AIR 1944 PC 67

⁷⁴*Ibid.*

⁷⁵ Cap 358 [R.E 2002]

⁷⁶No 4 of 1963

⁷⁷Kitime E, above at note 27, p. 4

⁷⁸Kitime, E, above at note 27, p. 92

⁷⁹Kitime E, above note 27, p. 92

Therefore, analysis is placed on this assumption to establish whether customary rules of intestacy provide recognize and provide protection to succession rights of the unborn child in Tanzania. In fact, there is no express provision under the Local Customary Declaration Order that either permits or bars unborn child from intestate succession. Thus, unborn child can be entitled to succession right under customary rules of intestacy though practically can be very difficult to implement such rights. This is due to the fact that customary rules of intestacy are primarily based on gender and age.⁸⁰The rules provide the main heir has a bigger share than any of the others. Heirs in the 2nd degree get a bigger share than those in the 3rd degree. The sons get more than daughters. As per rule 30, within the 2nd and 3rd degrees, individual heirs will get more in accordance with age. It is very difficult to identify the sex of the unborn child without undue delay and costs. Consequently, the administrator is likely to face challenges on distributing the estate to the so called unborn child without known the sex of the child.

Nonetheless, the administrator is not be bound by these discriminatory rules based on age and gender as it has been persistently declared to be unconstitutional. As it was stated in the case of *Bernado Ephraim v Holaria Pastory*⁸¹ that:

*“Rule 20 of the Rules of Inheritance of the Declaration of Customary Law, 1963, is discriminatory of females in that, unlike their male counterparts, they are barred from selling clan land. That is inconsistent with article 13 (4) of the Bill of Rights of our Constitution which bars discrimination on account of sex. Therefore under section 5(1) of Act 16 of 1984 I take section 20 of the Rules of Inheritance to be now modified and qualified such that males and females now have equal rights to inherit and sell clan land.”*⁸²

It was further stated that from now on, females all over Tanzania can at least hold their heads high and claim to be equal to men as far as inheritances of clan land and self-acquired land of their fathers is concerned. He further emphasized that Females just like males can now and onwards inherit clan land or self-acquired land of their fathers and dispose of the same when and as they like.⁸³The age of discrimination based on sex is long gone and the world is now in the stage of full equality of all human beings irrespective of their sex, creed, race or colour.⁸⁴

Despite the fact that customary law of this country have been declared to 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 and it should not be repugnant to natural justice or morality.⁸⁵ Since rule 20 of the Rules of Inheritance of the Declaration of Customary Law, 1963, is discriminatory of females in that, and has been

⁸⁰ Rule 25 and 30 of the Local Customary Law Declaration Order, No 4 of 1963

⁸¹(2001) AHRLR 236 (TzHC 1990),

⁸²Ephraim v Pastory (2001) AHRLR 236 (TzHC 1990), para 42

⁸³*Ibid*, para 44

⁸⁴*Ibid*, para 43

⁸⁵*Maagwi Kimito V Gibeno Werema* [1985] TZCA 1, [1985] TLR 132 (TZCA)

declared to be unconstitutional for being inconsistent with article 13 (4) of the Bill of Rights of our Constitution which bars discrimination on account of sex;⁸⁶the administrator is thus not bound by these rules. The administrator can distribute the estate of the deceased father to the unborn child regardless to the rule of customary rules of succession as articulated under rule 20. This is justified by the statement of the court in the case of *Ephraim v. Holaria Pastory* that emphasized that section 20 of the Rules of Inheritance to be now modified and qualified such that males and females now have equal rights to inherit and sell clan land.

Therefore, unborn child can be entitled to succession under the customary rules of intestate in the case where there is no last Will, provided that he or she is born alive and would have come into consideration by the testator as an heir or even to suspend the distribution of estate pending glance period where the person dies while his wife is pregnant. In this effect, the distribution of may be postponed upon application by either interested party or administrator till childbirth. Alternative, a process of withholding a share of unborn child would be applied where distribution of estate is done before a child birth.

Succession Right of Unborn Child under Common Law

There is a well-established exception to the common law rule that the unborn has no legal personality and no legal rights. It is referred to as the *nasciturus* exception. This is a Latin version of the rule refer to “a child about to be born”.⁸⁷This exception exists as part of the law of succession, a branch of Property Law. The *nasciturus* exception accepts that a gift to a class of children living at a particular date is held to benefit a child *en ventre sa mere* which literally means a fetus in utero and the unborn child may even be a party to an action.⁸⁸ Thus, it would seem an unborn child shall be deemed to be born whenever its inheritance rights or interests as a financial dependant require it. This legal exception is a legal fiction. Lord Justice Fletcher Moulton in *Schofield v Orrell Colliery Co Ltd*⁸⁹ identified the approach as a peculiar fiction of law by which a non-existing person is taken to be existing person.⁹⁰Therefore, a foetus in the mother’s womb is entitled to inherit his father’s estate provided was conceived before the death of his father and was subsequently born alive. Realistically, and for all intents and purposes, whether or not the *nasciturus* enjoys legal subjectivity prior to its birth is irrelevant because until the nasciturus is in fact born alive, it is not physically or legally capable of enjoying any benefits, rights, entitlements or interests

⁸⁶*Ibid.*

⁸⁷Whitfield A, (1993), Common Law Duties to Unborn Children, *Med Law Review*. p. 28

⁸⁸Alison Burton, Women, the Unborn, the Common Law and the *State Southern Cross University Law Review*, Volume 5 – October 2001, p. 173

⁸⁹[1909] 1 KB 178

⁹⁰Alison Burton, above at note 44

in a corporeal sense.⁹¹ Although the *nasciturus* is theoretically capable of enjoying incorporeal benefits in a non-legal sense while *in utero*, the operation of the *nasciturus* doctrine remains subject to live birth.⁹² The *nasciturus* doctrine in whatever form one chooses to interpret it, serves as a practical legal mechanism to protect potential *nascitural* benefits before birth by securing them for the *nasciturus* until such time as it is born alive and acquires bona fide legal subjectivity which enables it to take legal ownership in a sense of such benefits.⁹³

Interim Protection under Procedural Laws

This section analyses the procedural law relating to probate and administration of estate in Tanzania. The issue is aimed at analyzing whether the procedural law accord some legal protection of the succession right of unborn child by setting a specific glance period before distribution of estate particularly where the deceased has left a widow. The issue of entitlement may come into sharp focus if there is litigation about the inheritance whilst the child is in the womb of the mother or if another party proposes to act to the child's prejudice. In either case the legal system is supposed to provide an interim protection to the interest of the child, possibly including the appointment of appropriate representative or postponement of the distribution of estate or otherwise withholding the share of the unborn child.⁹⁴ If a person dies while his wife is pregnant, the distribution is supposed to be postponed, if possible, till childbirth; otherwise, a share will be withheld for the child.

Unfortunately, the existing procedural law regulating probate and administration of estate in Tanzania which is the Probate and Administration of Estate Act⁹⁵ does not provide for an option to postpone the distribution of estate pending a glance period for a pregnancy mother to deliver her baby child or to withhold the share of unborn child. The rules should clearly stipulate the minimum period of time of which an administrator or executor is allowed to distribute estate to the heirs. In consideration to succession rights of the unborn child, the rule ought to stipulate the glance period after which administrator or executor is allowed to proceed with distribution of estate. Essentially this would be after expiration of nine months from the death date of testator or the person whose properties are subject to succession. In absence of a clear rule defining a glance period, there is a possibility of distributing estate in less than nine months in detrimental to succession rights of foetus in the mother's womb. Even if it can be distributed before the stated period, an exception should be provided where the deceased left a widow.

⁹¹Marc S, (2014), *The Nasciturus Non-Fiction; the Libby Gonen Story Contemporary Reflections on the Status of Nascitural Personhood in South African Law*, LLM Dissertation, The University of the Witwatersrand, p. 40

⁹²*Ibid.*

⁹³Marc S, above at note 51, p. 41

⁹⁴Paisley R. M, (2006), *Succession Right of the Unborn Child*; *Edinburgh Law Review*, Vol. 10, p. 50

⁹⁵Cap 352 [R.E 2002]

Conclusion

Therefore, the existing succession regime in Tanzania offers a little protection of the succession rights of unborn child who is conceived before the death of the father but born after the death of the said father. In absence of clear and express provision providing for that effect would prejudice unborn child from their succession rights. To deny the foetus, which the law presumes the man (deceased) would include as one of his children, the right to inherit simply because of the fact that it was not born at the time of death is seen to be unfair. Therefore, a common law exception to the general rule of legal personality should be adopted and applied to a child conceived before and born after the testator's death with the aim of protecting their succession rights. In particular, all of the revealed legal gaps seem to speak forcibly enough for the need to introduce a general provision in Tanzanian law providing protection of *nasciturus*'s rights and interests. The issue of the legal status of a conceived child carries several legal problems apart from succession that are difficult to resolve without clear provision of the law.