

TANZANIA / JUDGMENT

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IN THE HIGH COURT OF TANZANIA AT DODOMA PROBATE AND ADMINISTRATION CAUSE NO. 1 OF 2012 IN THE MATTER OF THE ESTATE OF THE LATE JEREMIAH NDUDUMIZI MPANDA AND . ~ IN= THE-MATTE~OF-AN APPLICATION FOR LETTERS OJ AD~INIS~RATl<;)N · --- BY OMARY NbUDlJMIZI

RULING

7/12/2017& 20/02/20_1[3 A. MOHAMED, J. This marathon petition seeking for letters of administration -;:-: :...:-.,commetJceo: ,i,n<:tZ0):2~nct i\gs,; ·b_f\$~n l>g\$ \$l J5~ four :.~0:ns~cutive; caveats and the one in hand is the fifth. The petitioner, Omary ~Ndodumizi, ·has riow raised the followihg preliminary objection on points of law against the current caveator, one Majimbi .Jeremia Ndudumizi;

1. That the caveator' s appearance is accompanied by a defective affidavit. 1
2. That the aileged caveator' s appearance is bad for contravening the law
3. That the attached will to the affidavit is fatally defective Parties agreed to dispose of the matter by way of written submissions. When the petitioner filed his written submission, he abandoned his 3rd ground of the objection. In amplifying the first ground of the objection, Mr. Machibya for · ~- .--rr-T,-r-r-t~e~petitioner~ubmitt~ea~the affidavit accomp(?nying the caveatqr's dppearance filed on ·27 /11 /2017 has two defects. First he alleged the caveator's 9 th, 10th and 11 th paragraphs contain matters of law but she has fail~d to disclose her source of the information. The c:ounsel said, in h.?r verification clause, the caveator has alleged the information in the said paragraphs was true according to her own knowledge. However, the counsel submitted, the caveator verified the information contained in paragraph 9 was both from her own ~ .. __, ·. · kn6wledge· and:from ihforr'natioh supplied by her advocdte whom 0 she failed to mention. It was his view, this contravened Order XIX Rule 3 (r) of the Civil Procedure Code (Cap 33 RE 2002}. In support thereof she referred this court to the case of Augustine Lyatonga Mrema & others V. Attorney General & others (1996) TLR 273 where this court held the above provision requires an affidavit to be confined to facts which the deponent has personal knowledge and failure to disclose the source of information renders an affidavit to be 2 defective. Mr. Machibya concluded on this ground by urging this court to find the caveator's appearance was improper in law as the affidavit accompanying the

appearance was incompetent for contravening Rule 82 (4) of the Probate Rules, GN No. 10 of 1963. Secondly, Mr. Machibya assailed the 12th and 13 paragraphs of the caveat or's affidavit by arguing they contain extraneous matters and prayers thus contravening the provisions of Rule 3 (1) of Order XIX of the Civil Procedure Code. He referred this court to the principle in *Mukisa Biscuit Manufacturing Co. LTD V. West End Distributors Limited* (1969) E.A 696 stating that an affidavit should not contain extraneous matter or prayers. It was Mr. Machibya's other argument in this ground the caveat's Verification clause is undtd in contravention of rule 15 of Order VI of the Civil Procedure Code requiring a verification clause to be signed by the person making it and should state the date and place it was made. In concluding, the counsel submitted;

"that, under rule 15 of the Probate Rules (supra) of the Probate Act (Cap 352 RE 2002) where a caveator fails to enter appearance, the caveat is deemed withdrawn. He urged the objection be upheld with costs. In resisting the 1st ground of the objection, Mr. Wasonga for the caveator argued that she complied with rule 3 (1) of order XIX of the Civil Procedure Code as the deponent is the person who states which statement is true and what information was supplied to her. It was the counsel's argument the question whether it was the caveator who had made the statements as alleged by the petitioner require proof which is a point of fact and not of law as was held in Mukisa's case. In the course of his argument, Mr. Wasonga was of the view circumstances obtaining in *Augustina Lyatonga Mrema's* case differ from those in the instant case since that was an election petition unlike the present probate matter. It was Mr. Wasonga's further argument the caveat's affidavit met all requirements governing probate matters. In addition, he submitted, if there is any error in the records, the remedy is not to strike out but amend or substitute the same. He referred this court to rule 116 of the Probate Rules (supra) that reads: "Non compliance with any of these rules, or any rules amending or replacing the same, shall not render any proceedings void unless the court shall so direct, but such

- "O.V. - 0, proceedings may be set aside either wholly or in part, as irregular or amended or otherwise dealt with in such manner and upon such terms as the court may think fit" Finally, Mr. Wasonga urged the objection be dismissed with costs. 4 After reviewing the parties' submissions and upon examination of the caveat's appearance form with its accompanying affidavit, I will now consider the parties' contentions. I will commence by restating established principles guiding preliminary objections with a quote from the celebrated case of *Mukisa Biscuit Manufacturing Company Ltd. v. West End Distributors Ltd.* (1969) EA 696, where Sir Charles Newbold P. said at page 701 :- "A preliminary objection is in the nature of a point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or what is the exercise of judicial discretion." At page 700 of the same case, Law JA stated thus:- "So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of the pleadings, and which, if argued as a preliminary objection, may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of

(time) limitation, or a submission that the parties are bound by the 5 contract giving to the suit to refer the dispute to arbitration". In view of the above statements, I will first consider the parties' contentions by examining the 9th, 10th and 11th paragraphs of the caveator's affidavit together with the verification clause. They read as follows:

9. That (sic) Caveator through services of National Attorneys made (sic) follow up by making (sic) Court Perusal only to
 - ... find that; the Petition Itself which was filed in Court is incompetent. "Copy of the Court perusal attached herein marked "NA3" leave is craved to refer the same as part of this Affidavit".
10. That the Caveator objects (sic) an appointment of Omary Ndudumizi on the following grounds;
 - (a) That the Law, Rules Regulations and Practice require that when (sic) deceased leaves a will behind, the court will always be reluctant to grant letter (sic) of Administration.
 - (b) That, the law provides clear (sic) to the effect that procedure to grant letter of Administration is only where there is no will left by the deceased. 6
 - (c) That, (sic) Application for letters of Administration and petition for probate where the (sic) will is Jeff are two different procedure provided under the Jaw.
 - (d) That, the Caveafor will pray for dismissal of the petition since if is not proper in the Court.
11. That the Petition filed in the Court is marred by procedural irregularities which clearly make this Petition nugatory. The ground (sic) of irregularities are as follows; '=-~,= 0 , -:- =~-:~-- ~-< -:-~:-== ,--_ ~='(aJ ~ "rhat; paragraph 5 of the Peti~ion :stfpulafes the search has been made but no will has been found. The facts are false as the petitioner was :aware of the existence bf fhe will~
 - (b) That, rules provides clearly that certificates of death shall be accompanied but has not been aftac~e.d to9et1?er with the Pe,tition.
 - (d) That, Certflicaies as to the financial position of the sureties (sic) not accompanied.
 - (e) That, the consent of heirs is not proper before the Court due to the fact Omary Ndudumizi c;;annot give consent to himself and also very few members gave their consent.
 - (f) That, no Affidavit as regard to sole Administrator has been filed in Court. 7 VERIFICATION I, MAJIMBI JEREMIA NDUDUMIZI, do hereby verify that all I have stated in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 9, 10, 11, 12 and 13 hereinabove are true to the best of my knowledge and save for paragraph 9 the information which has been supplied to me by my advocate which we believe to be true. Verified at Dodoma this 27th day of November 2017." Below the verification clause is the right thumb print of the caveator; one, Majirn!;;i Jeremia NdUdurnizi acknowledging sigriihg thereon. As correctly submitted by Mr. Machibya, I am of the view the 10th, and 11st paragraphs of the applicant's affidavit contain legal argu,,rnents anc;f thus cqp_trove.n~ RLJle (~), (ll 9f Order XIX o.f the Civil Procedure Code

pertaining to affidavits. The provision reads as follows: "Affidavits shall be confined to such facts as the deponent is able to prove except on interlocutory applications, on which statements of his belief may be admitted" Applying the rule in the above provision to the facts in the instant matter, I am satisfied the contents in these two paragraphs do not refer to facts that the deponent is able to prove. In addition, I am content the caveator is an unlettered person who proved so by putting her right thumb print instead of a proper signature on the verification clause. I am thus in agreement with Mr. Machibya's assertion that they indeed contain legal arguments and prayers. In line with the Court of Appeal's decision in *Abdi Ali Mumin v. M.S GS motors LTD and another*, Civil Case No. 82 of 1997 HC at Dar es Salaam, (unreported), I hereby expunge these two offending paragraphs from the affidavit. I -noy' - turp Jo the 9 th . paragraph.. If is evident the cavedtor verified she had personal knowledge of the contents in that paragraph as well as had received the same information from her

- advocate who is : (Jnnomed. This statement is misleading and in addition, the deponent has failed to mention the advocate's name that allegedly availed her of the information. The question on unnamed sources of information in an affidavit was canvassed by --: .t! :i.e~courtofApP-eal-in Solima Vuoi Foun v Registrar of Cooperative Societies.and 3 others (1995) TLR 75 where it observed: "Where an affidavit is made on information, it should not be acted upon by any court unless the sources of information are specified " In view of the above statement, I expunge the 9 th paragraph from the caveator's affidavit. 9 " Next, for consideration is the allegation that the caveator's 12th and 13th paragraphs contain extraneous matters and prayers contravening Rule 3 (1) of Order XIX of the Civil Procedure Code which was allegation strongly resisted by Mr . Wasonga. They relevant paragraphs read: " 12. That for the foregoing right interest and grounds of the objection, the Caveator prays for (sic) dismissal order of the ,~s,~ (>efiffcin Y{ifh'Costi
- 13. That the Application also moves this Court to give order (sic) of proper Administration of the estate of the deceased as per his will" After consideration, I am in agreement with Mr. Machibya's argument that the above two paragraphs in de d . contain prayers which ought not to be in an affidavit as per Rule 3 (1) of Order XIX of the Civil Procedure Code. In *Uganda versus Commissioner of Prisons, Ex parte Matovu* (1966) EA .520, the court held that: " It is clearly bad in law again as a general rule of practice and procedure, an affidavit for use in court being a substitute for oral evidence, should only contain statements of facts and circumstances to which the witness deposes either of his own personal knowledge or from information which he believes to be true. Such an affidavit must not contain an extraneous matter by way of objection or prayer or legal argument or conclusion." I wholly subscribe to the above statement. I therefore expunge the above mentioned paragraphs from the affidavit. Before parting with the matter, I wish to consider Mr. Wasonga's argument that in this case: this court find any matter or document defective, then provisions of Rule 116 of the Probate Rules GN. No 10 of 1963 should apply that provide such proceedings cannot be rendered. It "Was his View; the Rule stipulates a remedy by way of amendment or substitution. With respect I disagree. I think the import of the Rule is

that non compliance with the Rules will not render any proceeding null and

- yqiq LJ,nJ~ss the-s::;ourt st;lgll so .di.re~t. It is_ cleqr Jti~ v;von:::lin~ js co~ched in discretionary terms. And in the present case, I think they cannot be interpreted to allow non compliance with mandatory provisions of the Civil Procedure Code pertaining to affidavits as observed by the Court of Appeal in the above referred cases. In the final, I expunge paragraphs 9, 10, 11, 12, and 13 from the caveator's affidavit. I am satisfied, after their removal; the remaining ones cannot support the caveator's appearance which is rendered incompetent and she has thus failed to comply with Rule 82 (4) of 11 the Probate Rules (supra). Section 59 (4) of the Probate and Administration Act (supra) stipulates that: "Where a caveator gives notice that he supports the petition, or where he fails to give notice to that effect and fails to enter an appearance to the petition within the time limited therefore, the caveat shall be deemed to have been withdrawn and no further caveat shall be entered by or on behalf of the caveator." In view of the above provision, I find and hold the caveator is deemed to have withdrawn her caveat for failing to enter a proper appearance in law.
- . · {dcccording·ly :sus:fdin the preliminary objection with costs. Since there is no pending caveat before this court, I hereby grant the letters of Administration of the estate of Jeremiah Ndudumizi lv\pqn9a to the Petitioner. It is so ordered. A. MOHAMED JUDGE
20/02/20 12

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