

TANZANIA / JUDGMENT

in the matter of the estate of the late mwanaarafa abdallah vs in the matter of an application for letters of administration by abdul mohamed 2012 tzhccomd 17 19 octob

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TZHCCOMDDECIDED
1 January 2012

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IN THE HIGH COURT OF TANZANIA DAR ES SALAAM DISTRICT REGISTRY AT DAR ES SALAAM PROBATE AND ADMINISTRATION CAUSE NO.18 OF 2008 In the matter of the estate of the late MWANAARAFA ABDALLAH And In the matter of an application for letters of administration by ABDUL MOHAMED Date of Last Order: 27/03/2012 Date of final submissions: 27/07/2012 Date of Judgment: 19/10/2012 RULING ON PETITION MAKARAMBA, J.: On the 10th day of March 2008, ABDUL MOHAMED, a resident of Magomeni, Somanga Street in the City of Dar es Salaam, applied in this Court for a grant of Letters of Administration of the estate of the late MWANAARAFA ABDALLAH. On the 1st day of July 2008, Mr. MMANGA ALLY ABDALLAH lodged a caveat in this Court against the petition, to the effect that "let nothing be done in the matter of estate of MWANAARAFA ABDALLAH without notice." On the 28th July, 2008, this Court scheduled the matter for hearing of the caveat and the petition. As per the Certificate of Death, No.00224505 dated 8th day of June 2007 attached to the petition, the late MWANAARAFA ABDALLAH died at Dar es Salaam on the 10th of April, 2007 aged 82 years. She is survived Page 1 of 13 by three relatives, namely, MOHAMED JAMAL, ADBUL MOHAMED, the petitioner, who as per the information on the Certificate of Death, he is the "deceased's grandson", and LAISA MOHAMED. The deceased was of Tanzanian origin and a professed Muslim. At the time of her death, the deceased lived in House No. 60 Block J Somanga Street Magomeni Ward, Dar es Salaam. She died intestate and according to the Petitioner due diligent search could not reveal the existence of a WILL. The subject matter of the application for grant of letters of administration is House No.22 on Plot No.60 Block, J located at Somanga Street, Magomeni Ward, Dar es Salaam, which the Petitioner claims that that it is only know property in the estate of the deceased. The Petitioner asserts further that there had been no previous proceedings for grant of probate or administration in respect of the deceased's estate. In determining the matter, the Caveator brought four witnesses, Mr. MMANGA ALLY ABDALLAH (the Caveator), PW1, M/s ZAWIYA ABDULKHERI MFAUME, PW2, Mr. NGOI ATHMANI, PW3 and Mr. SAID KINANDA, PW4. The Petitioner on his part also brought four witnesses, Mr. MSESE ELIAS MLWANDE, an Officer of the National Housing Corporation, as DW1, M/s HAMISA SALUM as DW2, Mr. HAMIS KULATA as

DW3, and Mr. ABDUL MOHAMED JAMAL, the Petitioner herein as DW4. The Caveator was represented by Mr. NASSORO, learned Counsel, and the Petitioner by Mr. NGUDUNGI, learned Counsel. At the close of the hearing, the learned Counsel for the parties requested this Court to allow them to make written closing submissions, Page 2 of 13 which prayer this Court duly granted by its order of 27/03/2012. However, as it turned out due to delays in typing the proceedings, copies could not be availed to the learned Counsel on 25/05/2012, which could not happen until 09/07/2012. This delayed the filing of closing submissions by learned Counsel but finally Mr. Nassoro filed his written closing submissions on 16/07/2012 and Mr. Ngudungi on 27/07/2012. As Mr. Ngudungi rightly stated in his closing submissions, no issues were framed and recorded by this Court for the determination of the matter. In the course of making his closing submissions, Mr. Ngudungi, learned Counsel for the Petitioner attempted to "assist" this Court by proposing some issues. Much as I commend Mr. Ngudungi for this effort, with due respect, I wish to draw his attention to the case of DEBENDRA PRASAD SUKUL V. SURENDRA PRASAD SUKUL AND ORS (1) (1920), A.I.R P at p. 343 as cited in the decision in the case of MAAMUN BIN RASHID SALIM EL-RUMHY VERSUS HAIDER MOHAMED BIN RASHID EL-BASAMY (1963) 1 E.A. 438 (SCK) at page 441 that: "...the only issue before the court in a cause brought as a result of caveat being entered is whether or not the person who has applied for the grant is entitled to it and there is no issue as to whether he or not the person has a better right to the grant." (the emphasis is of this Court). Page 3 of 13 Emanating from the above persuasive authority, there is only one issue in proceedings in a cause brought as a result of caveat entered such as the present one, namely whether or not the petitioner is entitled to a grant of letters of administration of the estate of the late Mwanaarafa Abdallah and there is no issue as to whether he or not the person has a better right to the grant. Before I delve into determining the only issue in these proceedings, I find it pertinent to determine some preliminary matters particularly those touching on the jurisdiction of this Court. Both Counsel for the parties in the course of making their closing submissions have raised some points of preliminary objection. Mr. Ngudungi has raised a preliminary objection that the Caveator's claim is time barred. Mr. Nassoro has also submitted that the Petitioner is not a faithful person on the following reasons:

- a) The Petitioner Tied in his petition that there were no prior proceedings for grant of letters of administration of the deceased's estate.
- b) The Petitioner failed to abide with the order of the District Court in Civil Appeal No. 56 of 2007 which ordered inter alia, before proceeds with probate matter there must be a family meeting involving the Caveator to deliberate the appointment of a person to be administrator of the estate. Page 4 of 13
- c) The Petitioner's petition is not accompanied by a valid consent contrary to mandatory requirement of the probate rules as we have explained above.
- d) The Petitioner's Petition proceeded in total misted of the Court:-

- i. No citation was issued to the Caveator as mandatoriiy required. ii. The Petition proceeded while the Caveator stood as the Plaintiff and Petitioner the Defendant contrary to mandatory law.
- e) Neither the Petitioner during trial did not pray to be appointed or granted Letters of Administration.
- f) The Petitioner by not recognizing the Caveator, PW2 and PW3 who are dose and remained relatives of the deceased he as such is unfaithful person. He will not do justice to all legal heirs of the deceased. I shall however, address myself to the preliminary matters concerning the jurisdiction of this Court in the present proceedings. Mr. Nassoro submitted that the Petitioner lied in his petition that there were no any other prior proceedings for probate or grant of letters of administration in respect of estate of the late Mwanaarafa Abdallah. Mr. Nassoro pointed out that the statement of the Petitioner in paragraph 8 of his Petition is not correct, and has been made to mislead this Court because there was/is MIRATHI Na.202 of 2007 (Probate and Administration Cause No.202/2007) at the Page 5 of 13 Magomeni Primary Court where the Petitioner was granted letters of administration of the estate of Mwanaarafa Abdallah. The decision of the Magomeni Primary Court was challenged by Mr. Mmanga Ally, the Caveator herein, in the Kinondoni District Court by way of appeal in Civil Appeal No. 56/2007. The Kinondoni District Court quashed and set aside the decision of the Magomeni Primary Court, and revoked the letters of administration that had been granted to the Petitioner herein, and ordered that the matter be heard afresh (de novo) by the Court of the first instance, the Magomeni Primary Court. Mr. Nassoro has attached a copy of the decision of the Kinondoni District Court to his submissions for easy of reference. Unfortunately, Mr. Nassoro further submitted, the Petitioner unilaterally has decided to come to this Honourable Court to institute these proceedings afresh. The decision of the Kinondoni District Court was not challenged, Mr. Nassoro further argued, and therefore it is still valid and binding on the parties. As the order of the Kinondoni District Court on appeal was for a fresh trial by the Magomeni Primary Court, the probate proceedings before this Court are therefore subjudice, Mr. Nassoro surmised. I have gone through the testimonies of PW1, PW4, DW2 and DW4 at the hearing of the caveat and petition. They show very clearly that indeed there were proceedings for grant of letters of administration relating to the estate of Mwanaarafa Abdallah involving the same parties, the Petitioner and the Caveator, which had been commenced at the Magomeni Primary Court as Probate No. 202 of 2007 between Abdul Ally Jama! and Mmanga Ally Abdallah. Furthermore, the witness Page 6 of 13 testimonies also show that the matter indeed went on appeal to the Kinondoni District Court as Civil Appeal No.56 of 2007 between Mmanga Ally Abdallah and Abdul A. Jamal. In the judgment in Civil Appeal No.56 of 2007, Hon. Wambura, the Principal District Magistrate of the Kinondoni District Court dated 25th January 2008 ordered the matter to be heard afresh (denovd) by the Primary Court where it had originated. However, instead of abiding with that order the Petitioner elected to assume the risk of forum shopping and come to this Court and file the petition the subject of the present caveat. Whether there were indeed any other proceedings for a grant of probate or letters of administration involving the same

parties and concerning the same subject matter and issues were instituted in other courts is without dispute. As rightly Mr. Nassoro rightly submitted, the statement in paragraph 8 of the Petition that "no proceedings (other than those specified below) for the grant of probate of letters of administration of the estate of the said deceased have been commenced before any Court or authority, whether inside Tanganyika or outside Tanganyika is incorrect. By this statement the Petitioner intentionally concealed the truth about the existence of any other proceedings for probate or grant of letters of administration relating to the deceased's estate and involving the same parties. I am alive to the consequences of a Petitioner who blatantly lie about the existence of other proceedings for grant of probate or letters of administration which were stated by the Court of Appeal of Tanzania in MWANAHAWA MUYA VERSUS MWANAIDI MARO [1992] T.L.R. 78 Page 7 of 13 (CA). In that case, the Court of Appeal (Mzavas, Omar and Ramadhani, J J. A) as they then were held as follows:

- (i) Respondent's blatant lies that there had not been previous proceedings regarding grant of probate or letters of administration while she was in fact the objector in the R.M. 's court when letters of administration were granted to the appellant, amply demonstrated that she was bent to defraud other interested parties in the estate. Had the High Court (Nchaila, J.) dealt with this issue he would no doubt have found that this was a good reason to annul the grant of letters of administration to the respondent by the High Court (Chua, J.). The case of Mwanahawa Muya vs. Mwanaidi Maro (above) started in the Primary Court. It was later transferred to the District Court, the Arusha District Court, which granted letters of administration to Mwanahawa Muya. Despite this grant, Mwanaidi Muro filed a petition for letters of administration in the High Court in respect of the same estate. The High Court (Chua, J.) granted letters of administration to Mwanaidi Muro. Dissatisfied, Mwanaidi Muya filed an application to the High Court to challenge the grant of letters of administration to Mwanaidi Muro, and prayed for its revocation. Nchalla, J. of the High Court exercising the revisional powers of the Court quashed the whole proceedings and set aside the order of the Arusha District Court granting letters of administration to Mwanahawa Muya, and ordered that Mwanaidi Muro was to remain the administrator of the deceased's property as appointed by the High Court (Chua, J.). Dissatisfied with this decision, Mwanahawa Muya appealed to the Court of Appeal of Tanzania. Among the issues before the Court of Appeal was whether or not the grant by the High Court (Chua, J.) was invalid by reason of being obtained fraudulently by the respondent who was allegedly to have made false suggestion and/or concealing from the court something material to the case. In the petition before the High Court (Chua J.), Mwanaidi Maro had made a statement in paragraph 7 of the petition, which is similar to the statement in paragraph 8 in the present petition, denying the existence of any proceedings for probate or grant of letters of administration regarding the deceased's estate in any other court of competent authority. The Court of Appeal allowed the appeal having determined that the grant by the High Court (Chua, J.) was invalid by reason of having been obtained fraudulently by the respondent who was allegedly to have made false suggestion and/or concealing from the court something material to the case. Apart from allowing the appeal, the Court determined that the decision does not bar

Mwanaidi Maro, the respondent, from challenging the grant of letters of administration to Mwanahawa Muya, the appellant, by the Resident Magistrate Court, if she was so minded. The principle established by the Court of Appeal of Tanzania in *Mwanahawa Muya vs. Mwanaidi Maro* (above) is that where a petitioner makes false suggestion and/or conceals from the court something material to the case and obtains a grant of probate or letters of administration, it amounts to obtaining the grant fraudulently and hence a good reason for annulling it. In the present proceedings the situation is Page 9 of 13 however slightly different. It does not concern any annulment of a grant of probate or letters of administration. The principle of *Mwanahawa Muya vs. Mwanaidi Maro* (above) is applicable to the present proceedings in so far as the fact that there is a statement made by the petitioner and which is calculated to mislead the court. The Petitioner is well aware and actually participated in the other proceedings for grant of probate or letters of administration regarding the deceased's estate. The Petitioner however, deliberately elected to conceal this fact to the court when filing his petition. As the record shows, there is a binding court order of the Kinondoni District Court in Civil Appeal No.56/2007. This was an appeal from the Magomeni Primary Court in Probate No.202/2007, where the Petitioner had been granted letters of administration. The Kinondoni District Court revoked the grant of letters of administration to the Petitioner. In its decision dated 25/01/2008, the Kinondoni District Court made the following

orders:

- i) The matter to be heard de novo by the Court of first instance by a competent magistrate having jurisdiction to entertain the same. H) Hi) Relatives of the late Mwanaarafa have to sit together in the family meeting so as to consent the Appellant or any other person who wishes to apply for appointment." Page 10 of 13 In my considered opinion, where a court on appeal make an order for a matter to be heard afresh by the court from where the appeal originated, the court of instance is technically still seized of the matter. The order of the Kinondoni District Court did not require the parties to institute fresh proceedings but ordered the matter be heard afresh before the same court of first instance by a magistrate with competent authority. That being the case therefore the Magomeni Primary Court is still seized with jurisdiction in the matter. A party cannot therefore circumvent that valid court order by going to another court and institutes fresh proceedings concerning the same subject matter, issues and parties. I wish also to point out here that according to the Fifth Schedule to the Magistrates' Courts Act, Cap. 11 R.E. 2002, a Primary Court not only is a competent court but has exclusive original jurisdiction in administration of estate of a deceased person where the law applicable is either customary law or Islamic law, unless the High Court has ordered that the provisions of the Probate and Administration of Estates Act is applicable. The High Court to my knowledge has not made such order in respect of the proceedings at the Magomeni Primary Court. The decision of the Kinondoni District Court has not been appealed. Its order that the matter be heard afresh (denovo) by the Magomeni Primary Court, a court of first instance by a competent magistrate, is still valid and binding

on the parties. The Petitioner has made false suggestion and/or concealed from this Court something material to the case. This is an attempt to defraud the other interested parties in the deceased's estate. In doing so, the Petitioner has assumed a risk the consequences of which he must also be Page 11 of 13 preapred to shoulder. The statement by the Petitioner that there had not been any proceedings for grant of probate or letters of administration while he in fact was the grantee of the letters of letters of administration by the Magomeni Primary Court, which the Kinondoni District Court revoked, is a blatant lie and it amply demonstrates that the Petitioner was bent to defraud the other interested parties in the estate. The Petitioner by making false suggestion and/or concealing from this Court the fact of any other proceedings for grant of probate and letters of administration in other competent courts was something material to the proceedings, which is a good reason for dismissing the entire petition. The petition stands dismissed on grounds of the matter being subjudice, and on ground of the Petitioner making false suggestion and/or concealing from the court something material to the case. I find no good reason that will be served by this Court dwelling with the other issues in the petition and the caveat. The Caveator shall have his taxed costs. Order accordingly. R.V. MAKARA MBA JUDGE 19/10/2012 Word count: 2966 Page 12 of 13 Ruling delivered this 19th day of October, 2012 in the presence of Mr. Matunda, Advocate for Mr. Ngudungi, Counsel for the Petitioner and in the presence of Mr. Matunda Advocate for Mr. Nassoro Counsel for the Caveator. R.V. MAKARAMBA JUDGE 19/10/2012 Page 13 of 13

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