

TANZANIA / JUDGMENT

elizabeth michael ringo vs alex reuben kimaro 2019 tzhc 242 16 december 2019

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TZHCDECIDED
16 December 2019

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IN THE HIGH COURT OF TANZANIA (DAR ES SALAAM DISTRICT REGISTRY) AT DAR ES SALAAM
CIVIL APPEAL NO: 161 OF 2018 (Arising from probate and Administration Cause No. 26 of 2017
Kinondoni District Court) ELIZABETH MICHAEL RINGO.....APPELLANT
VERSUS ALEX REUBEN KIMARO..... RESPONDENT

RULING

MASABO, J.:— The appellant, is challenging the decision of the district court of Kinondoni in probate Cause No. 26 of 2017 Kinondoni District Court) which appointed the Respondent as co-administrator of the estate of Fidelis Desaiya Kimaro to which she had petitioned to appointed as adminstrix; recognition by court three children born by the deceased out of extra marital affairs as rightful heirs of the deceased (Frank Fidelis Kimaro, Anold Fidelis Kimaro and Dorice Fidelis Kimaro) and the inclusion into the estate of the share of widow (50% share) in matrimonial assets jointly acquired by the deceased and the widow. The appeal was heard in writing to accommodate the appellant who is with no legal representation but depends on assistance in the form of preparation of pleadings/submissions by Women Legal Aid Clinic (WLAC). In the course of preparation of the judgment, I noticed that the appeal was lodged against a wrong party (a person who was not party to the probate cause) where upon I called upon the parties to address the court on this issue. For better appreciation of this anomaly, the brief background of the dispute is as follows: The appellant, Elizabeth Michael Ringo, is the sister to one Rose Michael Ringo a widow Fidelis Desaiya Kimaro who died interstate. With full endorsement of the widow, the said Rose Michael Ringo, and her two children the Appellant petitioned for appointment as an administrator of the estate of the said Fidelis Desaiya Kimaro (her brother in law). Two persons, namely Frank Fidelis Kimaro and Magreth Sylivery Henry entered caveats claiming an interest in the estate. Frank Fidelis Kimaro (1st Caveator) claimed that he was a son of the deceased (born out of wedlock) and the said Magreth Sylivery Henry (2nd Caveator) claimed that she had an extra marital relationship with the deceased and that they had two children. Upon trial the court held that the first caveator (Frank Fidelis Kimaro) and the other two children born out of the extra marital relationship between the deceased and 2nd caveator are rightful heirs Fidelis Desaiya Kimaro. It also subsequently appointed, Alex Reuben Kimaro, the respondent here who is a brother of the deceased as a core administrator. Dissatisfied, the appellant lodged

an appeal against Alex Reuben Kimaro who was appointed as the co administrator. In his address to the court, Mr. Mlembe Kaliro from WLAC submitted that indeed the appeal was filed against a wrong party in that that Alex Reuben Kimaro was not a party to the probate matter whose parties were Elizabeth Michael Ringio as petitioner and Frank Fidelis Kimaro and Magreth Sylivery Henry as 1st and 2nd caveator, respectively. Having conceded to the defect, he prayed for leave to amend to the memorandum of appeal to implead Frank Fidelis Kimaro and Magreth Sylivery as substitutes. On his part, Mr. Sist Bernard learned counsel for the Respondent submitted that section 63(3) of the probate and administration of Estates Act provides that when a caveat is entered in a probate cause and the caveator enters appearance, the proceedings of the matter shifts into ordinary proceedings of a civil suit where the petitioner becomes the plaintiff and the caveators becomes the Defendants. In support he cited the case of Nuru Hussein v Abdul [2000] TLR 27 and the case of Shabir Tayabali, civil Appeal No. 180 of 2017. Regarding the prayer to amend the memorandum of appeal, he submitted the same can not be sustained as the defect is fatal and the remedy is to have it struck out. He supported his submission with the decision of the court In Inter- Consult Lts v Mrs. Nora Kassanga & Another Civil Appeal No. 79 of 2015 Court of Appeal of Tanzania at Dar es Salaam, where the court held that substitution of names is fatal and renders the appeal incompetent. I have considered the submission of both parties. Considering that the parties are in agreement that the memorandum of appeal is defective for including a wrong party, I will refrain my self from making any determination on this point at it will be a wastage of precious efforts and time. I will only confine myself to appropriate action to remedy the defect. Having considered the submission by both parties, I am of the same view with Mr. Benard. The change of party in the instant matter is not technical especially considering that the defect has been noticed at the level of preparation of the judgment. Substituting the name of the Respondent in the fashion proposed by the Appellant's counsel will not by any standard serve the interest of justice. To the contrary, it will only serve to deprive Frank Fidelis Kimaro and Magreth Sylivery Henry of their right to be heard by dragging them to the appeal to which they were not parties. In my considered view, the circumstances of this matter dictate that it be struck out. The appellant with the assistance of her counsels may, if she is still interested, rectify the anomaly and reinstate the appeal upon obtaining an extension of time. DATED at DAR ES SALAAM this 16th day of December 2019. J.L. MASABO JUDGE 4

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