

TANZANIA / JUDGMENT

eva ndimangwa mrutu vs mkunde peter kitunga 2020 tzhc 4345 31 march 2020

COURT
TZHCDECIDED
31 March 2020

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IN THE HIGH COURT OF TANZANIA (DAR ES SALAAM DISTRICT REGISTRY) AT DAR ES SALAAM
CIVIL CASE NO. 68 OF 2017 EVA NDIMANGWA MRUTU..... PLAINTIFF
VERSUS MKUNDE PETER KITUNGA..... DEFENDANT

RULING

When the matter was called for hearing I asked Ms Maria Mushi the learned Counsel for the defendant (petitioner at the subordinate court) to address me the tenability of this matter, in particular compliance with section 59(2) of the Probate and Administration of Estates Act, Cap 352 R.E. 2002 read together with rule 82(2); including sub rules (3), (4) and

- (5) of rule 82 of the Probate Rules, Cap 352 R.E. 2002. The learned Counsel for the defendant readily conceded that the procedure for citation and appearance of the plaintiff (caveator at the subordinate court) was not followed. However she asked to file document for citation before this Court for the matter to proceed. i According to a memo (office minute sheet) dated 21.3.2017 which initiated these proceedings, reveal that it was filed by fiat of Honorable Judge incharge under rule 83 (presumably of the Probate Rules, Cap 352 supra). This was done after the subordinate court had referred it to this Court under section 5(3) of the Probate and Administration of Estates Act, Cap 352. For easy of reference I reproduce the proviso to Rule 83 of Cap 352,1 quote, "Where an application for grant of probate or letters of administration has been made to a District Delegate in respect of an estate the gross value of which exceeds fifteen thousand shillings and a person who has filed a caveat against such application has entered an appearance, the District Delegate shall upon receipt of the appearance and the affidavit in support thereof forward the record of the proceedings to the Registrar who shall proceed as required by paragraph (6) of rule 82" bold added 2 The learned resident magistrate had forwarded this matter to this Court after sustaining a preliminary objection raised by the caveator that the subordinate court had no jurisdiction to entertain this contentious probate which exceed its pecuniary jurisdiction, citing section 5 of Cap 352 (supra). The ruling of the subordinate court was delivered on 12.6.2016. This ruling was delivered after the caveator had raised an objection for a second time (on similar ground) to the amended petition filed on 4.3.2015 following the order of the subordinate court made in the first ruling delivered on 12.2.2015. Initially the caveator had entered a

caveat simultaneously with an affidavit and a notice of preliminary objection. The trio documents were filed on 27.3.2014. This created a confusion to the probate, to the extent that the learned resident magistrate rushed to dispose the preliminary objection prior the petitioner had made an application for issue of citation under section 59(2) Cap 352 (supra) read together with rule 82(2) Probate Rules, calling the caveator to state whether she support the grant of probate to the petitioner or if she does not, requiring her to enter appearance in terms of rule 82(4), after issuance of citation 3 by the subordinate court under rule 82(3). Ideally appearance in probate matter is technical, in a sense that appearance by the caveator ought to be made in the form prescribed in Form No. 65 of the First Schedule, Probate Rules Cap 352 (supra) accompanied by an affidavit stating the right and interest of the caveator and the grounds of objection to the petitioner's application for grant. See rule 82(4) and section 59(2). It is to be noted that the cited provisions above are all coached on mandatory terms, meaning that non compliance it render the subsequent proceedings a nullity. In *Revenanth Eliawory Meena vs Albert Eliawory Meena and another*, Civil Revision No. 1 of 2017, Court of Appeal of Tanzania at Arusha (unreported), at page 18, the apex Court had this to say, I quote, "It is worthy pointing out that, the stages as set out by the law in rule 82 of the Probate Rules were made with a purpose and as such, compliance is mandatory and not optional as can be inferred from the word "shall" which was used" 4 Now as the above provision were blatantly flawed, this matter cannot stand. In other words, this matter was referred and taken to this Court prematurely. The resultant is to abrogate the whole proceedings conducted after the first ruling. The matter is remitted back to the subordinate court to comply with the above provision. For avoidance of doubt, the subordinate court should pick from 12.2.2015 when a ruling was delivered which ordered a fresh petition to be filed, indeed was filed on 4.3.2015 in compliance with the court order. Thereafter the petitioner should make an application for citation, the court should issue citation and the caveator should enter appearance formally as depicted above. The caveator should also take note that the life span of a caveat is four months, in terms of section 58(5) Cap 352 (supra), which provide, I quote, "A caveat shall remain in force for four months after the date upon which it was lodged (unless sooner withdrawn) but subject to the provisions of section 59, may be renewed" Therefore the caveator is advised to validate her caveat by seeking renewal before the subordinate court. 5 The matter is struck out. Tl^s being a probate, each party should shoulderJts costs. ER l/UA/nnrin u % 'f ; i jKdge 30.2020 6 31.3.2020 Coram: E.B. Luvanda, J For the Plaintiff: Absent For the Defendant: Maria Mushi Advocate B/C: Zawadi 7

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