

TANZANIA / JUDGMENT

george rugaimukamu kakoti vs joseph shumbusho others 2022 tzhc 9886 31 may 2022

COURT
TZHCDECIDED
31 May 2022

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA IN THE SUB- REGISTRY OF DAR ES SALAAM AT DAR ES SALAAM MISC. CIVIL APPLICATION NO. 576 OF 2020 IN THE MATTER OF ESTATE OF THE LATE SEBASTIAN RUGAIMUKAMU KAKOTI TIGWERA AND IN THE MATTER OF APPLICATION FOR REVOCATION OF GRANT OF THE LETTERS OF ADMINISTRATION TO JOSEPH SUMBUSHO BETWEEN GEORGE RUGAIMUKAMU KAKOTI..... APPLICANT AND JOSEPH SHUMBUSHO..... 1st RESPONDENT MARY TIGWERA..... 2nd RESPONDENT JAMES RUGAIMUKAMU..... 3rd RESPONDENT DAVID KAKOTI..... 4th RESPONDENT (Arising from Probate and Administration Cause No.11 of 2004)

RULING

29th April & 31st May, 2022 KISANYA, J.: This is a ruling on preliminary objections, filed by learned counsel for the 1st respondent, to the effect that the instant application is not maintainable in law due to the grounds that: -

1. This Court lacks jurisdiction to entertain the matter;
2. The Court has not been properly moved to entertain the application. 1
3. The affidavit in support of the application is incurably defective for containing verification clause, prayers, conclusions and extraneous matters;
4. That the affidavit in support of the application is incurably defective for containing a defective jurat of attestation (does not disclose place of attestation). The application which is subject to the preliminary objection has been preferred under the provisions of section 49 (1) (d) (e) and (2) of the Probate and Administration of Estates Act [Cap. 352, R.E. 2019 and Rule 29 (1) of the Probate Rules. The applicant, George Rugaimukamu Kakoti seeks revocation and nullification of the letters of administration of the late Sebastian Rugaimukamu Kakoti Tigwera (henceforth “the late Tigwera”) granted to the 1st respondent,

Joseph Shumbusho, on 29th April, 2019 vide Probate and Administration Cause No. 11 of 2004. The chamber summons is supported by an affidavit sworn by the applicant on 2nd November, 2020 which outlines the background of this matter and the reasons for revocation. When the matter came up for hearing on 22nd April, 2022, the applicant was represented by Ms. Queen Sambo, learned counsel, while Mr. Pascal Mshanga, learned counsel appeared for the 1st respondent. Other respondents were not in attendance. Upon the counsel for the applicant's prayer, it was agreed that the preliminary objection be heard by way of written submissions. 2 The applicant and 1st respondent filed their respective written submissions according to the schedule issued by the Court. Other respondents did not file submissions on the preliminary objection. Submitting in support of the first limb of objection, Mr. Mshanga contended that this Court has no jurisdiction to entertain this matter. His contention was based on the ground that the 1st respondent's appointment as administrator of estate of the late Tigwera was confirmed by the Court of Appeal in Civil Appeal No. 183 of 2016. In that regard, he was of the firm view that this Court cannot open and adjudicate matter which have been conclusively finalized by the Court of Appeal. On the second limb of objection, Mr. Mshanga submitted that this application is made under section 49(1)(d)(e) and (2) of the Probate and Administration of Estate Act Cap. 352, R.E. 2019 and rule 29(1) of the Probate Rules. He argued that the Probate and Administration of Estate Act was not revised in 2019. Citing the case of Nusrat Shaban Hanje and 6 Others vs R, Criminal Appeal No. 111 of 2020, the learned counsel submitted that the application is incompetent and liable to be struck out. As regards the third limb of objection, Mr. Mshanga contended that paragraphs 4,5,6,7 and 8 of the supporting affidavit contain argument, prayers, 3 conclusions and extraneous matters thereby contravening Order IX, Rule 3 of the Civil Procedure Code, Cap. 33, R.E. 2019 (the CPC) which bars affidavit to contain arguments and conclusion. Making reference to the case of Uganda vs Commissioner of Prisons Ex-parte Matovu [1996] E.A. 514, he argued that such affidavit is incurably defective. Submitting on the fourth limb of objection, Mr. Mshanga faulted the jurat of the supporting affidavit for failure to indicate the place where it was sworn. He argued that such anomaly violates section 8 of the Notary Public and Commissioner for Oaths Act, Cap. 12, R.E. 2019 (henceforth "Cap 12"). The learned counsel further argued that the said omission rendered the supporting affidavit incurably defective. He cemented his argument by referring me to the cases Simlius Felix Kijuu Issaka vs The National Bank of Commerce Ltd, Civil Appeal No. 24 of 2003 (unreported). In the light of the foregoing submission, the learned counsel for the 1st respondent prayed that the application be dismissed with costs. In her rebuttal submission, Ms. Sambo contended that all points of objection are not meritorious. With regard to the first limb of objection, the learned counsel argued that the applicant was not a party to Civil Appeal No. 2016 relied upon by the 1st respondent's counsel. However, she went on to 4 submit that the said decision did not suggest that the proceedings for revocation of the letters of administration cannot be commenced against the 1st respondent. As to the second limb of objection, Ms. Sambo argued that it is devoid of merit due the reasons that, the 1st applicant has not demonstrated how the anomaly prejudiced him; the court is presumed to know the law; and rule 29(1) of the Probate Rules cited in the chamber

summons is sufficient to move the Court. She bolstered her arguments by citing the cases of Francis Kashabi Masanja and 4 Others vs R, Criminal Appeal No. 21 of 2021, HCT at Shinyanga, R vs Halfan Bwire Hassan and 3 Others, Economic Case No. 16 of 2021, HCT, Corruption and Economic Division at DSM (unreported), Dangote Cement Ltd vs Nsk Oil and Gas Ltd, Misc. Commercial Application No. 8 of 2020 and Idd Uddi Miiruko vs Simon N. Sokolo, Misc Land Application No. 188 of 2020, HCT, Land Division at DSM (all unreported). In response to the third limb of objection, Ms. Sambo contended that the paragraphs of the supporting affidavit which are subject to this objection contain statements of facts and circumstances to which the applicant deposed of his own knowledge and belief. The learned counsel further submitted that even if the said paragraphs are found to be defective, the remaining parts of 5 the affidavit support the chamber summons. She supported her argument by citing the case of the Principal Secretary, Ministry of Defence and National Service [1992] TLR 387. Lastly on the fourth limb of objection, the learned counsel submitted that the omission to indicate where the oath was taken is a minor and slight defect and that this Court has mandate to cure the same. She referred me to the case of Sanyou Service Station Ltd vs BP Tanzania Ltd (now PUMA Energy (T) Ltd, Civil Application No. 185/17 of 2018 where it was held, among others, that rules of procedure should be followed, with some sense of reasoning and justice. She went on to submit that the court has discretion to allow the deponent to amend the affidavit instead of dismissing the application. That said, the learned counsel for the appellant urged me to dismiss all points of objection with costs. Having carefully gone through the learned counsel's contending submissions, the ball is now on the Court to determine whether the preliminary objections are meritorious. The first limb of objection poses the issue whether this Court has jurisdiction to entertain the matter. It is trite law that jurisdiction is created by 6 statute and not otherwise. This position was also stated in the case of Sospeter Kahindi vs Mbeshi Mashini, Civil Appeal No. 56 of 2017 (unreported) in which the Court of Appeal cited with approval the case of Shyam Thanki and Others v. New Palace Hotel [1971] 1 EA 199, where it was underlined that:- "All the courts in Tanzania are created by statute and their jurisdiction is purely statutory. It is an elementary principle of law that parties cannot by consent give a court jurisdiction which it does not possess. " As alluded earlier, the applicant is seeking revocation of the 1st respondent as administrator of the estate the late Tigwera. Pursuant to section 49(2) of Cap. 352 R.E. 2022, the High Court is enjoined to suspend or remove an administrator of estate of the deceased upon being satisfied that the due and proper administration of the estate and the interests of the persons beneficially entitled thereto so require. The objection that this Court lacks jurisdiction is not based on the provision of any law. It is premised on the undisputed fact that the Court of Appeal had, in its decision in Civil Appeal No. 183 of 2016, declared or confirmed, the 1st respondent as an administrator of estate of the deceased. However, as rightly submitted by Ms. Sambo, the Court of Appeal did not decide that the 1st respondent's appointment cannot be challenged or revoked. In fact, 7 the Court of Appeal made it clear, that the 1st respondent's appointment as administrator of estates may be challenged in accordance with the law when it held that:- "We are compelled to set aside the appointment of the respondents as joint administrator and restore the appellant to his office as legally

appointed administrator of the estates of the late Sebastian Rugaimukamu Kakoti Tigwera unless otherwise he is challenged and removed by the due process of law.” (Emphasis mine) Flowing from the above bolded excerpt, it is clear that the appointment of the 1st respondent as the administrator of the estate of the late Tigwera can be challenged after complying with the law. Considering that it is this Court which appointed the 1st respondent to administer the estates of the late Tigwera, I am of the view that, it has mandate to entertain an application seeking to revoke or remove him from the office as the appointed administrator. That being the position, the first limb of objection is devoid of merits and thus, dismissed. I prefer to discuss the third limb of objection before reverting to the second limb of objection. In their respective contending submission, the learned counsel are at one that, an affidavit shall not contain arguments, prayers, 8 conclusion and extraneous matters. This requirement is provided for under rule 3 of Order XIX of the CPC which provides:- “3.- (1) Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications on which statements of his belief may be admitted: Provided that, the grounds thereof are stated.

- (2) The costs of every affidavit which unnecessarily set forth matters of hearsay or argumentative matter or copies of or extracts from documents shall (unless the court otherwise directs) be paid by the party filing the same. As rightly argued by Ms. Sambo that, if the court is satisfied that the affidavit contains argument, prayers, conclusion or extraneous matters, the proper recourse is to expunge the respective paragraph(s) of the affidavit which contravenes the law and leave other parts of the affidavit unaffected. In this case, it is Mr. Mshanga’s argument that paragraphs 4,5,6,7 and 8 of the supporting affidavit contravenes the law. Therefore, I find it appropriate to reproduce the complained paragraphs as hereunder: “4. That, since his appointment as an administrator the 1st Respondent omitted to exhibit an inventory of the estate of the late Sebastian Rugaimukamu Kakoti Tigwera. 9
5. That the 1st respondent filed a false accounting of the use of proceeds from the state, in particular the monies collected as rent from leasing the house at Plot No. 1048 Msasani Peninsula.
6. That the 1st Respondent has neglected to release funds for the necessary maintenance and repair of the said property on Plot 1048 Msasani Peninsula, Dar es Salaam leading the depreciative costs, a loss in value and rendering it non tenantable.
7. That, the 1st Respondent has derived his own benefit by selling or giving away part of property held jointly and commonly by all the beneficiaries in Tabata Segerea, Dar es Salaam, namely land which a small two-room building which was developed by the Applicant, to a stranger, identified as HOKA ABDALLAH resulting in constant conflict, among beneficiaries.

8. That sequel to paragraphs 4, 5, 6 and 7 of the letter of administration to the 1st Respondent has been in operative. And if the Orders sought in the chamber summons are not granted the estate of the late Sebastian Rugaimukamu Kakoti Tigwera will continue to be at risk and I stand to lose my entitlement in inheritance.” Reading from the above paragraphs, I find no argument, conclusions or prayers. Pursuant to section 49(1)(d) and (c) of Cap. 352, the letters of administration granted to the 1st respondent may be revoked for the reasons 10 that the grant has become useless and inoperative or where the person to whom the grant was made has willfully and without reasonable cause omitted to exhibit an inventory or account in accordance with the law. It follows, therefore, that the facts deposed above intended to show the reasons for revocation of the letters of administration of the late Tigwera which were granted in favour of the 1st respondent. Indeed, if the said facts are duly proved, the Court may revoke appointment of the 1st respondent as administrator of the estate of late Tigwera. Thus, the third ground lacks merits as well. Returning to the second limb of objection that the Court has not been properly moved to entertain the matter, the time bound principle is to the effect that, non-citation or wrong citation of provisions of law renders the application incompetent. See for instance the cases of Bahadir Sharif Rashid and 2 Others v. Mansour Sharif Rashid and another, Civil Application No. 127 of 2006, CAT at Dar es Salaam (Unreported) and Chama cha Walimu Tanzania vs. Attorney General, Civil Application No. 151 of 2008, CAT at Dar es Salaam (unreported) and Hussein Mgonja vs The Trustees Tanzania Episcopal Conference, Civil Revision No. 2 of 2002, CAT at Arusha, (unreported) to mention but a few. In the latter case of Hussein Mgonja (supra), it was held that: 11 “If a party cites the wrong provisions of the law the matter becomes incompetent as the Court will not have been properly moved.” However, after introduction of the principle of overriding objective, the issue whether non-citation or wrong citation of the law renders the application incompetent depends on the circumstances of each case. It is my considered view that, the application cannot be declared incompetent if the court has mandate to determine the matter. See also the case of Maranatha Engineering and Trading Co. LTD vs. TPB (Mbeya Branch), Misc. Land Application No. 39 of 2020, HCT at Mbeya (unreported) in which this Court (Utamwa, J) held as follows: - “As to the second limb of the PO, I agree with the learned counsel for the applicant that, the contemporary law is to the effect that, wrong or non-citation of the enabling provisions does not necessarily render the application incompetent if the court has the requisite jurisdiction to entertain the application before it.” Therefore, upon being satisfied that the Court has jurisdiction to entertain the matter, the court may cause the amendment of the chamber summons for purposes of inserting the proper provision of law. 12 In our case, it is common ground that the Probate and Administration of Estate Act was not revised in 2019. Therefore, it is clear that the Probate and Administration Act was not properly cited in the chamber summons. However, the said defect does not render the present application incompetent because, this Court has jurisdiction to determine the matter under section 49(2) of Cap. 352, R.E. 2002. Further to this, the applicant cited rule 29(1) of the Probate Rules which also empowers this Court to determine the application at hand. From the foregoing, I find the preliminary objection lacks merit. The said defect can be cured by making an order of amending the chamber

summons. On the fourth limb of objection, my starting point is that, a jurat is one of the ingredients of any valid affidavit. It tells where, when and before whom the affidavit was made. This requirement is provided for under section 8 of Cap. 12 which stipulates: “Every notary public and commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall insert his name and state truly in the jurat of attestation at what place and on what date the oath or affidavit is taken or made.” The above cited provisions are coached in mandatory terms. This implies that the requirement stated therein must be complied with. It is also settled law that omission to show the place where the oath or affidavit was taken renders the affidavit incurably defective. This position has been stated in a number of authorities, including the case of *Director of Public Prosecutions vs Dodoli Kapufi and Another*, Criminal Application No. 11 of 2008 in which the Court of Appeal observed that: “Total absence of jurat, or omission to show the date and place where the oath was administered or the affirmation taken or the same of the authority and/or the signature against the jurat, renders the affidavit incurably defective. There are a plethora of authorities to bear us out on this assertion. To mention but a few, see:-

- (i) *WANANCHI MARINE PRODUCTS LTD Vs OWNERS MOTORS VESSELS*, Civil Case No. 123 of 1996, High Court Dar es Salaam (unreported); (ii) *AZIZ BASHIR Vs MS JULIANA JOHN RASTA & TWO OTHERS*, Misc. Civil Application No. 23 of 2003, High Court Arusha, (unreported);... (iii) *D.P. SHAPRYA & CO LTD VS BISH INTERNATIONAL B.V* [2002] E.A. 47, and (iv) *ZUBERI MUSA V SHINYANGA TOWN COUNCIL*, (CAT) CIVIL APPLICATION NO 100 OF 2004 (unreported)” 14 As rightly pointed out by Mr. Mshanga, the affidavit in support of the application does not indicate the place where the oath was taken. Considering that the applicant introduced himself as a resident of City of Spring Hill, Williamson, in the State of Tennessee, United States of America, there was a need of indicating, in the supporting affidavit, the place where the oath was taken. Ms. Sambo contended that the omission is a minor and slight defect. Her argument was also based on the principle of overriding objective which requires this Court to uphold substantive justice. In view of the stated position of law stated herein, I respectfully disagree with Ms. Sambo. Since the law is settled that the omission renders the affidavit incurably defective, the chamber summons is left with no supporting affidavit. Also the need to comply with the mandatory requirement of the law cannot be cured by the principle of overriding objective. This stance was also taken in the case of *Dodoli Kapufi* (supra), when the Court of Appeal held that: - In the *SHAPRYA* case (supra), this Court categorically rules that the requirement to strictly comply with section 8 of Cap 12 is mandatory and not a sheer technicality and that regularities in the form of a jurat cannot be waived by the parties. See also the case of *Mondorosi Village Council and 2 others vs Tanzania Breweries Limited and 4 others*, Civil Appeal No. 66 15 of 2017, CAT at Arusha (unreported) in which the Court of Appeal declined to consider the principle of overriding objective on a breach of an important rule of procedure. The case of *Sanyou Service Station Ltd* (supra) cited by Ms. Sambo dealt with wrong numbering of affidavit thereby affecting the verification. Nothing was stated about the jurat of attestation in terms of section 8 of Cap. 12. Thus, the said case is distinguishable from the circumstances

of this case. For the reasons I have endeavored to state, I find merit in the fourth limb of objection and sustain the same. This renders the application incompetent before the Court. Ultimately, the application is hereby struck out for being incompetent. The applicant is at liberty to refile a competent matter. This being a probate matter, I make no order as to costs. DATED at DAR ES SALAAM this 31st day of May, 2022. S.E. Kisanya JUDGE 16 Court: Ruling delivered this 31st day of May, 2022 in the presence of Ms. Queen Sambo, learned advocate for the applicant, Mr. Paschal Mshanga, learned advocate for the respondent and in the absence of the 2nd, 3rd and 4th respondents. B/C Zawadi present. Right of appeal explained. S.E. Kisanya JUDGE 31/05/2022 17

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