

TANZANIA / JUDGMENT

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- 1 F, IN THE HIGH COURT OF TANZANIA AT DAR ES SALAAM / PROBATE AND ADMINISTRATION CAUSENO 28 OF 2008 IN THE MATTER OF THE ESTATE OF THE LATE OMARY MOHAMED BAHDELLA W% I IN THE MATTER OF A PETITION FOR LETTERS OF ADMINISTRATION OF THE ESTATE OF THE LATE OMARY MOHAMED BAHDELLA BY MAHMOUD MOHAMED BAHDELLA Date of last Order. 61712010 Date of Ruling 121712010

RULING

Shangwa, J. Q 9TH May, 2008, the Petitioner Mahmoud Mohamed Hassan Bahdella filed a petition for letters of r7 " 2 Administration of the estate of the late Omary Mohamed Bahdella who died intestate on 31/4/1997. The deceased was survived by two sons and three daughters whose respective names are Omar Mohamed Bahdella, Ally Omar Mohamed Bahdella, Mariam Omar Mohamed Bahdella, Zena Omar Mohamed Bahdella and Rigeeye Omar Mohamed Bahdella. The Petitioner is uncle of the deceased. It is alleged that the deceased left properties estimated at a grand total value of Tshs. 100,000,000,000/=.. The Petitioner issued a citation in the Majira News Paper dated 19/6/2008. On 20th March, 2009, Mohamed Omar Mohamed Bahdella and Ally Omar Mohamed Bahdella who are the sons of the deceased filed a caveat objecting to the Petition / Application by Mahmoud Mohamed Hassan Bahdella to be appointed as Administrator of their father's estate. The 3 Petitioner in this matter is represented by Mr. Malamsha, Advocate and the caveators are represented by Mr. Swai, Advocate. On 23rd September, 2009, learned counsel for the caveators filed a Notice of Preliminary Objection based on two grounds which are as follows:- That the Petitioner / Applicant lacks locus standi to bring this Petition / Application. That the Petition / Application before the court is incompetent and incurably defective. Q 9th February, 2010, I ordered that the Preliminary Objection filed by the caveator should be argued by way of 4 written submissions and it was so done. Counsel for the caveators contended on the first ground of preliminary = objection that the petitioner has no locus standi to apply for Letters of Administration of the estate of the Late Omary Mohamed Bahdella who died intestate. He said that whereas the Petitioner brought the Petition / Application acting under power of Attorney of Zena Omary Mohamed Bahdella who is living in Saudi Arabia; the provision of law under which the Yetition / Application was brought is S. 56 of the Probate and Administration of Estates Act, Cap. 352 R.E. 2002 and r. 39 of the Probate Rules which is not applicable where the Applicant is acting under Power of Attorney. He submitted that the Provision of Law which is applicable for someone who is acting under Power of Attorney is S. 34 of the Probate and Administration of

Estates Act, Cap. 352 R.E. 2002 and Rule 43 of the Probate Rules. He contended therefore that as the Petition /Application was brought under a Provision which is not applicable in the circumstances of this matter, the Petitioner has no locus standi. Furthermore, he submitted that under S. 33 of the Act, a person such as the Applicant who is not entitled to the whole or any part of the deceased's estate in cases where the deceased dies intestate cannot be granted the letters of administration to administer such deceased's estate. On the Second ground of Preliminary Objection, counsel for the caveators submitted that the Petition before the court is incompetent and incurably defective because the Petitioner / Applicant did not have a valid power of Attorney at the time of filing the Petition which was duly registered and that the Petition was filed under wrong provision of Law and by using improper documents. Counsel for the caveators contended that even if the Power of Attorney is valid, it does not give specific or general power to the Applicant to file the Application on behalf of the donee. Counsel for the caveators submitted that the Application is incurably defective because in filing it, the Applicant did not do so under specific or general provisions of the Probate and Administration of Estates Act, [Cap 352 R.E. 2002] and its Rules. He requested this court to strike out the Application on grounds of being incompetent and on grounds that this court has not properly been moved. In support of his request, he cited three authorities one of them is Civil Application No. 7 of 2002 Mossy Zakaria P. Co, Ltd V the Commissioner for Stamp Duty (unreported). 7 In reply, counsel for the Petitioner did not mince his words. He submitted that the Late Omary Mohamed Bahdella died in 1997 but that since then to the present date, his estate has not yet been distributed to his lawful heirs and that Zena Ornar Mohamed Bahdella who is living in SAUDI ARABIA gave Power of Attorney to the Petitioner to claim for her share in her father's estate. He said that the caveators are brothers of the same womb with Zena Omar Mohamed Bahdella. He further said that legal - technicalities should not be used to defeat rights of genuine heirs and that the caveators should not turn the law into a bush where they can hide and deny other heirs their right of inheritance in their father's estate. There are two issues in this matter which the court is called upon by the parties to determine. The first one is whether or not the Petitioner / Applicant lacks locus standi 8 to bring the Petition / Application for Letters of Administration of the estate in issue. The second one is whether or not the Petition / Application before the court is incompetent and incurably defective. On the first issue, I am of the view that the Petitioner /Applicant has the locus standi to bring the Petition / Application at hand. I say so because the Petitioner brought the Application at hand in his own name and not in the name of Zena Omar Mohamed Bahdella from whom he holds Power of Attorney. Looking at Paragraph 1 of the Petition for Letters of Administration of the deceased's estate which was filed by the Petitioner, it is quite plain that the Applicant brought the Petition in issue in his own capacity. This paragraph reads inter - alia as follows and I quote:- cc I, Mahmoud Mohamed Hassan Bahdella of P.O. Box. 25081 Dar es Salaam hereby apply to be Administrator of the estate of the late Omary Mohamed Bahdella." I think therefore that as the Petitioner brought the Petition in his own name and not in the name of Zena Ornar Mohamed Bahdella, S. 34 of the Probate and Administration of Estates Act [Cap 352 R.E. 2002] cited by counsel for the caveators is not applicable and the applicable provision of law is S. 56 of the Act and r. 39 of the Probate Rules under which the Application was brought. 10 Moreover, there is nowhere it is indicated in the Power of - Attorney given by Zena- Omar Mohamed Bahdella to Mahmoud Mohamed Hassan

Bahdella that he should petition for letters of administration of the estate of the late Omary Mohamed Bahdella on her behalf. This Power of Attorney only authorizes Mahamoud Mohamed Hassan Bahdella to act on her behalf in claiming for her share in her father's estate which is controlled by the caveators. It appears to me that S. 33 of the Probate and Administration of Estates Act [Cap 352 R.E. 2002] which was cited by counsel for the caveators to cement his argument that the Petitioner / Applicant has no locus standi to apply and be granted the Letters of Administration of the estate of the late Omary Mohamed Bahdella who died intestate is not restrictive as presented by counsel for the caveators. Had it been restrictive, it 11 would have expressly provided that where the deceased has died intestate, letters of Administration of his estate shall only be granted to any person who, according to the rules for the distribution of the estate of an intestate applicable in the case of such deceased, would be entitled to the whole or any part of such deceased's estate. Instead of expressly and strictly providing so, the section provides in unrestrictive way that where the deceased has died -Intestate, letters of Administration of his estate may be T granted to any person who ... would be entitled to the whole or any part of such deceased's estate. This means that where the deceased has died intestate letters of Administration of his estate can be granted to any other person who is not entitled or who would not be entitled to the whole or any part of such deceased's estate. Thus, I resolve the first issue in favour of the Petitioner by S - 12 repeating to say that he has a locus standi to petition for Letters of Administration of the deceased's estate. On the second issue, I am of the view that the petition before this court is not incompetent and is not incurably defective. First of all, the provision of law under which it was brought namely S. 56 of the Probate and Administration of Estates Act [Cap 352 R.E. 2002] and r. 39 of the Probate Rules are correct provisions under which the Petition for Letters of Administration of deceased's estate has to be brought. Therefore, Civil Application No. 7 of 2002 Mossy Zakaria & Co. Ltd V. Commissioner for Stamp Duty (unreported) cited by counsel for the caveators is irrelevant. 13 Secondly, the Petitioner filed the Petition for Letters of Administration of the estate in issue in his own capacity and not on behalf of Zena Omar Mohamed Bahdella acting under her Power of Attorney. Thirdly, the Power of Attorney which is said to be invalid by counsel for the caveators was not given to the Petitioner by Zena Omar Mohamed Bahdella for the purposes of filing the Petition in issue. As I have already mentioned, it was given to him for the purposes of claiming for her share in her father's estate Therefore, whether it was given to him before filing the Petition or after filing it, yet still the Petition would remain competent. In addition to that, as the Petitioner did not file the Petition acting under the Power of Attorney of Zena Omar S 14 Mohamed Bahdella, the argument by counsel for the caveators that the Petition is incompetent for not having been filed Under specific or general provisions of the Act and its Rules for a person who is petitioning for the Letters of Administration acting under Power of Attorney has no basis. Also, as the Petitioner did not file the Petition acting under the Power of Attorney of Zena Omar Mohamed Bahdella, the argument by counsel for the caveators that the application is incompetent because it was filed by using improper documents or forms provided by the Probate Rules which are used to petition by a person acting under the Power of Attorney has no basis. F 15 For these reasons, I hereby overrule both points of Preliminary Objection raised by counsel for the caveators against the Petition in issue. I do so with costs. A.Shangwa JUDGE 12/7/2010 Delivered in open court this 12th

day of July, 2010 in the presence of the petitioner and Mr. Tarimo for Mr. Swai for cay cP A. Shangwa JUDGE 12/7/2010 Mr. Tarimo for Mr. Swai for caveators. My Lord, in view of the Ruling of the court which has just been read, let the 16 matter be fixed for hearing on any date convenient to the court. ORDER: Hearing on 22/7/20 10 at 2.00 p. m. A. Shangwa I \ H JUDGE 12/7/2010

- L 1 IN THE HIGH COURT OF TAZANIA AT DAR ES SALAAM PROBATE AND ADMN.CAUSE NO. 28 OF 2008 THE CAVEATORS IN THE MATTER OF THE ESTATE OF THE LATE OMARY MOHAMED BAHDELLA AND IN THE MATTER OF THE PETITION. FOR LETTERS OF ADMINISTRATION OF THE ESTATE OF THE LATE OMARY MOHAMED BAHDELLA BY MAHMOUD MOHAMED HASSAN BAHDELLA

RULING

Shangwa, J. On 9th May, 2008, Máhrnoud MOhamed' H'assan Bahdelia filed a petition for letters of Administration of the 2 Estate of the late Omary Mohamed Bahdella who died intestate on 31st April, 1997 in House No. 22 at Kigoma Street, ilala District, Dar es Salaam Region. In his life time, the late Omary Mohamed Bahdella was blessed with two sons namely Mohamed Omary Mohamed Bahdella, Ally Omary Mohamed Bahdella and three daughter's namely Mariam Omary Mohamed Bahdella, Zena Omary Mohamed Bahdella and Rigey.e Omary Mohamed Bahdella. Mariam Omary Mohamed Bahdella is married to the petitioner. Zena Omary Mohamed Bahdella lives in Jeddah Saudi Arabia. Rigeye Omary Mohamed Bahdella is dead. She died before the death of her father the late Omary Mohamed Bahdella. The petitioner is a son in law of the late Omary Mohamed Bahdella and a brother in law of his two Sons. Before filing this petition, the petitioner was given a power 3 of Attorney by her sister in law Zena Omary Mohamed Bahdella and thereafter he engaged legal services of Mr. Malamsha, Advocate to represent him in this petition. On 25th June, 2008 and 30th June, 2008 respectively, the two sons of the late Omary Mohamed Bahdella through the legal services of Mr. Swai and Tarimo, Advocates filed caveats with affidavits. In their caveats, the said sons, strongly objected to the petition by their brother in law Mahmoud Mohamed Hassan Bahdella to be appointed as administrator of their father's estate. The grounds of objection to the petition are stated in their affidavits. I will mention herein below just a few of these grounds. First, that the petitioner was not given consent by all beneficiaries to their father's estate to petition for being appointed as administrator of their fathers estate. Second, that the petition is defective, incompetent and that it violates the law. Third, that the petitioner has no locus standi to petition for being appointed as administrator of their father's estate. The 2nd and 3rd grounds that I have mentioned above were overruled by this court in my ruling delivered on 12th July, 2010 following a Preliminary Objection which was raised by learned counsel for the caveators on 23rd September, 2009. In my ruling, I held that the petitioner has a locus standi to bring the petition and that his petition is neither defective nor incompetent. Hearing of the petition began on 22nd July, 2010. Two issues were agreed upon by counsel for the petitioner and appointed as administrator of their fathers estate. Second, that the petition is defective, incompetent and that it violates the law. Third, that the petitioner has no locus standi to petition for being appointed as administrator of their father's estate. The 2nd and 3rd grounds

that I have mentioned above were overruled by this court in my ruling delivered on 12th July, 2010 following a Preliminary Objection which was raised by learned counsel for the caveators on 23rd September, 2009. In my ruling, I held that the petitioner has a locus standi to bring the petition and that his petition is neither defective nor incompetent. Hearing of the petition began on 22nd July, 2010. Two issues were agreed upon by counsel for the petitioner and 5 counsel for the caveators. The first issue is whether the Applicant/Petitioner is legally qualified to administer the estate of the late Omary Mohamed Bahdella. The second one is what reliefs are the parties entitled to. In his testimony, the petitioner stated that in 1964, he got married to the daughter of the late Omary Mohamed Bahdella called Mariam and that the late Omary Mohamed Bahdella was a well to do long time businessman. That between 1960 and 1964, he used to assist him in selling his business items and that he stopped assisting him in doing so when he got married to his daughter Mariam. That he was agent of Tanzania Cigarette Company, Tanzania Tea Blenders and BP Shell. That in 1975, he sustained a motor cycle accident which incapacitated him and that later he became blind and lost memory which made him to retire from doing business. That in 1980 he was in bad health and that his health did not improve up to 1997 when he died. That when he retired from doing business, the caveators who are his sons took over. That at the time of his death, he had a Bank Account with NBC. That after his death, his house at Kigoma Street from which he was living with his family and doing business was demolished by the caveators who built a two storey house in its place. That from 1980 onwards, the caveators have been buying old houses in the city of Dar es Salaam and rehabilitating them. That Mohamed Omary Mohamed Bahdella bought a total of four old houses at Kigoma Street Ilala, Utete Street Ilala and Arusha Street Ilala. That Ally Omary Mohamed Bahdella bought a total of 13 old houses. Two houses at Nzasa Street, two houses at Bukoba Street, two houses at Tanga Street, one house at Mtwara Street, two houses at Kariakoo, two houses at Upanga one house at Moshi street and one house at Msasani. That he established a company known as Bahdella and company which is owned by him and his children at Kariakoo. That this company imports fuel and hardware material for sale. That he has ten tankers. That he has a big plot at Buguruni area on which he built three godowns. That both caveators bought seven motor vehicles and sold them. That at present, both of them own six motor vehicles which include pickups and saloon cars. The petitioner testified as P.W. 1. he called three witnesses on his side namely Abdul Karim Mohamed (P.W.2), Salehe Shomari Kongwa (P.W.3) and Afia Omar Salim (P.W.4). The caveators gave testimony on their behalf and called four witnesses on their side namely Maulidi 8 Rajabu (D.W. 1), Shabani Masenga (D.W. 2), Mwaila. Tajiri Joyo D.W.3 and D.W.5 Omar Mohamed. The following matters in this petition are not in dispute. First, that the late Omary Mohamed Bahdella died intestate on 31st April, 1997. Second, that he was survived by two Sons namely Mohamed Omary Mohamed Bahdella, Ally Omary Mohamed Bahdella and two daughters namely Mariam Omary Mohamed Bahdella who is married to the petitioner and Zena Omary Mohamed Bahdella who got married in Jeddah Saudi Arabia. Third, that he owned a shop at Kigoma Street House No. 22 Ilala from which he was selling food stuffs, tea, cigarettes, coconuts and paraffin for many years from 1960. up to 1975 when he sustained a motor cycle accident which made him unable to run his business. Fourth, that after sustaining the accident in 1975, his sons assisted him, in running his business up to 1997 when he died. Fifth, that before his death, he bequeathed his house at

Kigoma Street i.e, No. 22 Ilala, District to his grandson . Ornary Mohamed Bahdella. Sixth, . that the caveators did assist their son Omary Mohamed Bahdella by reconstructing his House No. 22 Ilala and turning it into a two storey house for his use. Seventh, that from the time of Omary Mohamed Bahdella's death in 1997 to the date of this ruling, no administrator or administratrix of his estate has ever been appointed. During their testimonies, the caveators told this cOurT that when their father died in 1997, he left no properties to be administered or distributed. As already mentioned, the petitioner contradicted them by saying that from 1980 onwards Ally Omary Mohamed Bahdella bought a total of 13 (thirteen) houses. Two houses at Nzasa Street, two houses at Bukoba Street, two houses at Tan.ga Street, two houses at. Kariakoo, two .houses at Upanga, one house at 10 Mtwara Street, one house at Moshi Street and one house at Msasani. Also, the petitioner said that during the same period, Mohamed Omary Mohamed Bahdella bought four old houses, two at Kigoma and Ilala Streets two at Utete and Arusha Streets in Ilala District. In addition to that, the petitioner said that both caveators own six motor vehicles which include pickups and saloon cars and that after the death of Omary Mohamed Bahdella, Ally Mohamed Bahdella opened a company. called Bahdella and Company which imports fuel and hardware materials at Kariakoo and that he has ten tankers and a big plot at Buguruni area where he built three godowns. Lastly, the petitioner said that at the time of his death Omary Mohamed Bahdella had a Bank Account at NBC but that he does not know how much money was on that account. It must be 'comprehended that the question to be determined in this matter is not whether or not the late 11 Omary Mohamed Bahdellä left any properties such as houses, motor vehicles, petrol stations or money, in. the Bank. The question to be considered is whether or not the petitioner is legally fit to be granted letters of administration of the estate of the late Omary Mohamed Bahdella as applied. As I shall soon show the petitioner's application has a lot of setbacks. First of all, although the petitioner is the brother in law of the caveators, he is not a family member of the late Omary Mohamed Bahdella. Secondly, although the petitioner was given power of attorney by one of the caveators' sister, he was not given written consent by the family members of the late Omary Mohamed Bahdella to apply for a grant of letters of administration of his estate. The family members of the late Omary Mohamed Bahdella who did not give him consent are the caveators themselves 12 and their sister Mariam Omary Mohamed Bahdella who is married to the petitioner. Thirdly, the petitioner merely alleges that the late Ornary Mohamed Bahdella left properties but he does not distinguish those properties from the properties which were acquired by his two sons (caveators) from 1975 when their father sustained a motor cycle accident to 1997 when he died and the properties which, were acquired by them from 1997 to 2013. He does not even .recognize the fact that House No. 22 at Kigoma Street was bequeathed to his grandson who is married to his daughter. Fourthly,. he is not in good terms with, the caveators who are his shemeji's (brothers in law). .Fifthly, the caveators who are the. great beneficiaries to the estate of the late Omary Mohamed Bahdella have, no faith and trust in him. Both of them called D.W2 Shahani Masenga and .D.W.3 Mwaila Tajiri Joyo who told this court that the petitioner is. not creditworthy. D.W. 2 said that in the 13 1970's he sold his house to the petitibner at Tshs. 10,000/= and that the petitioner paid him Tshs, 7,000/= only and that since them to the present date he has not paid him the balance. D.W. 3 said that the deceased gave the petitioner a shop at Iringa Street Ilala to manage it on his behalf but that he made it bankrupt. As it can be seen from above, the

petitioner is not in a favourable position to be appointed as Administrator of the estate of the late Omary Mohamed Bahdella. Thus, I dismiss his petition. However, I make no order as to costs which means that each party should bear its own costs. The family members of the late Omary Mohamed Bahdella can now convene including Zena Omary Mohamed Bahdella and give consent to one of them to I_ c' apply for being appointed as Administrator of the estate of the late Omary, Mohamed Bahdella in case it exists. Whether or not it exists, the family members are in a better position to know than anybody else including the petitioner himse 4'i. ' t A)shangwa JUDGE 29/1/2014 Delivered in open court this 29 1h day of January, 2014 in the presence of Mr. Malamsha for the petitioner and Miss Eilene for Mr. Tarimo for Mr. Swai for caveators. AShangWa JUDGE I ? 29/1/2014

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