

TANZANIA / JUDGMENT

secilius kutisa fussi vs dorah kawawa fussi 2011 tzhc 2071 13 september 2011

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TZHCDECIDED
13 September 2011

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IN THE HIGH COURT OF TANZANIA (At Dar es Salaam) Probate and Administration Cause No. 57 of 2010 IN THE MATTER OF THE ESTATE OF THE LATE COL. SECILIUS KUTISA FUSSI [DECEASED] AND IN THE MATTER OF APPLICATION FOR GRANT OF LETTERS OF ADMINISTRATION BY DORAH KAWAWA FUSSI

RULING

Date of last Order: 15-08-2011 Date of Ruling: 13-09-2011 JUMA, J: This is a Ruling on a Notice of Preliminary Objection on the point of law which was raised by Armando Swenya, learned Advocate on behalf of the Caveator (EVANS FUSSI). The Caveator is objecting that an application for grant of letters of administration which Mrs Dorah Kawawa Fussi made on 23rd September, 2010, was filed in this Court without complying with: (i) Rule 39 (d), (e), (f) and (g) of the Probate Rules, and (ii) section 22 of the Probate and Administration of Estates Act, Cap. 352. The background to this Ruling traces back to the Petition by DORAH KAWAWA FUSSI for grant of letters of administration of the estate of the late Colonel Secilius Kutisa Fussi in her capacity as wife of the deceased. Apart from herself, the Petitioner in her application identified the following twelve (12) other beneficiaries to the estate:

- i) Evans Fussi (child); ii) Happiness Fussi (child); iii) Jones Fussi (child); iv) E/gift Fussi (child);
- v) Jacqueline Fussi (child); vi) Edward (child); vii) Beatrice Fussi (child); viii) David Fussi (child); ix) David Fussi (child);
- x) Junior Fussi (child); xi) Edward Fussi (child); and xii) Apolonia Gausi Fussi (child). The Petitioner did not include any document to confirm that the afore-mentioned twelve beneficiaries gave their prior consent allowing the Petitioner to apply for the Letters of Administration of the estate of the deceased. The Petitioner attached to her application
- (i) an Affidavit in support of her petition as a sole administrator (Form No. 17); (ii) an Affidavit to confirm her domicile (Form No. 45); and (iii) her oath to faithfully administer the estate of the deceased (Form No. 46). On 30 September 2010 this Court directed the Petitioner to place an advertisement in the Official Gazette to notify the public of her application for grant of letters of administration and also invite any person objecting to the application of the

letters, to come forward with appropriate objection. The advertisement was duly placed on 15th October 2010. It was on 6th June 2011 when Evans Fussi issued a legal notice by filing an application under section 59 of the Probate and Administration of Estates Act, Cap. 352 and Rules 82 (4) of the Probate Rules. Mr. Fussi sought to appear as a Caveator. In his supporting affidavit which gives the facts and circumstances why an appearance is sought, the Caveator complained that the Petitioner had instituted her application for the grant of letters of administration without prior consent and wishes of the other twelve beneficiaries of the estate. tVi At the hearing before me on 15 August 2011, the Petitioner was represented by the learned Ms C. B. Rwechungura. The learned Mr. Armando Swenya of the Lugaila & Associated Advocates represented the Caveator Evans Fussi. The two learned Counsel agreed that two issues should guide the hearing of the Preliminary Points of Objection. The two issues are, first- whether the petition for grant of letters of administration has met the requirements of the law. Secondly; whether, the Petitioner is eligible to petition for the grant of letters of administration of the estate of the deceased. Mr. Swenya for the Caveator submitted that the petition for grant of letters of administration is incompetent because it has not complied with mandatory Rule 39 (d), (e), (f) and (g) of the Probate Rules. Referring to Rule 39, the learned Counsel pointed out that the Petitioner has not included administration bond as required by paragraph (d) and has also not included in her application any certificate as to the financial position of the sureties as required by paragraph (e). Mr. Swenya cemented his argument by referring to Rule 69 of the Probate Rules which when read together with Rule 39 (e), regards a certificate on a surety's financial position to be a mandatory requirement for applicants who are not a corporation. Mr. Swenya submitted that the Petitioner has not complied with the mandatory requirement of Consent; and urged this court to find that where the estate subject of an application for grant of letters is intestate, an applicant seeking the grant of letters of administration must lodge his application together with document evidencing Consent of beneficiaries to the estate of the deceased. In her reply, Ms Rwechungura for the Petitioner submitted that theoretically an administration bond under Rule 39 (d) of the Probate Rules becomes mandatory after an Administrator of the Estate of the Deceased is appointed by the Court and it is not a mandatory requirement of the law before the formal appointment of the administrator. The learned Counsel similarly submitted that a certificate as to the financial position of the sureties is not a mandatory requirement at the stage where the Petitioner files her application but only becomes mandatory after the letters of administration of the estate of the deceased has been finally granted by the court. 4 With regard to Consents of beneficiaries mentioned under Rule 39 (f) of the Probate Rules, the Ms Rwechungura submitted that applications for grant of letters of administration by sole administrators do not need the accompaniment of Consent of heirs. In so far as the learned Counsel is concerned, the Petitioner complied with the law when she elected not to include the Consent of the beneficiaries because it is not every application for grant of letters which requires consent of heirs. From the two sets of oral submissions, one main issue calls for my determination. This issue is whether when filing an application for grant of letters of administration of the estate a deceased the person who died intestate, that application must

be filed together with documents mentioned under Rule 39 of the Probate Rules. It is not in dispute that Rule 39 is couched in mandatory terms, requiring a number of documents to accompany a petition for letters of administration. The Rule reads: R. 39. A petition for letters of administration shall be in the form prescribed in Forms 26 or 27 set out in the First Schedule, whichever is appropriate, and shall be accompanied by the following documents—

- (a) subject to the provisions of rule 63 a certificate of death of the deceased signed by a competent authority;
- (b) an affidavit as to the deceased's domicile;
- (c) an administrator's oath;
- (d) subject to the provisions of rule 66, an administration bond;
- (e) a certificate as to the financial position of the sureties;
- (f) subject to the provisions of rules 71 and 72, consent of the heirs; and
- (g) in the case of an application for a grant to a sole administrator, an affidavit as required by rule 32. Ms Rwechungura is of the view that applications under Rule 39 (f) for grant of letters of administration by sole administrators do not need the accompaniment of Consent of heirs. Rule 39 (f) governing consent is expounded by Rules 71 and 72 of the Probate Rules which state: Rule 71:
 - (1) Where an application for the grant of letters of administration is made on an intestacy the petition shall, except where the court otherwise orders, be supported by written consent of all those persons who, according to the rules for the distribution of the estate of an intestate applicable in the case of the deceased, would be entitled to the whole or part of his estate. (2) ...
 - (3) Where a person whose consent is required is an infant or a person of unsound mind consent may be given on his behalf by his guardian.
 - (4) Consent shall be in the form prescribed in Form 56 set out in the First Schedule and shall be signed by the person or persons giving the same and attested by any person before whom an affidavit may be sworn. 6 Rule 72:
 - (1) Where a person whose consent is required under these Rules refuses to give such consent, or if such consent cannot be obtained without undue delay or expense, the petitioner shall, together with his petition for grant, file an affidavit giving the full name and address of the person whose consent is not available (where such name and address are known) and giving the reasons why such consent has not been produced.

- (2) Where an affidavit under paragraph (1) is filed, the court may make an order either dispensing with such consent or requiring a citation in the form prescribed in Form 57 set out in the First Schedule to be served upon the person whose consent is not available.
- (3) Where the court makes an order under paragraph (2) of this rule requiring service of a citation the Registrar shall call upon the petitioner to pay the prescribed fees for such citation and service and upon receipt of such fees shall cause the citation to be served.
- (4) The Court may at any time and for sufficient reason shown vary, alter or rescind any order made under this rule or make such order in lieu of an order requiring personal service of a citation as it may deem fit. In my Ruling, I consider the question of an informed consent of the beneficiaries of an estate of the deceased who died intestate to be of paramount importance. Since the beneficiaries of the estate have a stake in the estate and are likely to be affected by any decision of the administrator, they have a right to give or withhold their consent to any person applying for letters of administration. The law in Tanzania thankfully recognizes this right of beneficiaries. The law as manifested under Rules 39 and 71 of the Probate Rules is couched in mandatory terms. I do not agree with the suggestion by Ms Rwechungura that requirement to include the Consent of heirs or beneficiaries to the estate of the deceased does not extend to those applying for letters of administration as sole administrators. My reading of Rules 39 (f), 71 and 72 of the Probate Rules leaves me in no doubt that Consent document is a mandatory requirement for all applications for grant of letters of administration where the deceased died intestate. The language couched in Rule 71 of the Probate Rules is to the effect that where an application for the grant of letters of administration is made on an intestacy, that application must be supported by written consent of all those persons who, according to the rules for the distribution of the estate of an intestate applicable in the case of the deceased, would be entitled to the whole or part of his estate. The format of the Consent envisaged under Rule 71 shall be as prescribed in Form 56 of the First Schedule and shall indicate the relation with the deceased and the person giving the consent. Rule 72 of the Probate Rules prescribes for situations where the Consent of the beneficiaries of the estate of the deceased cannot be obtained. The consent may not be available either because the person whose consent is required refuses to give such consent, or if such consent cannot be obtained without undue delay or expense. Here the Petitioner shall, together with his petition for grant, file an affidavit giving the full name and address of the person whose consent is not available (where such name and address are known) and giving the reasons why such consent has not been produced. From the totality of Rules 71 and 72 of the Probate Rules, it is my finding that the Petitioner has not complied with the mandatory requirement to include the documents evidencing either the consent of heirs or an affidavit explaining why she did not enclose the consents of twelve (12) beneficiaries she identified in her Petition. The next question for my determination is what shall visit the failure to comply with mandatory requirements to file the Petition together with the Consent documents of twelve (12) beneficiaries of the estate the Late Col. Secilius Kutisa Fussi. With 12 beneficiaries having a claim from the estate of the deceased, the rationale to obtain their prior written consents before applying for letters of administration

makes a lot of sense. I believe that the legislature in Rules 39 (f) and 71 of the Probate Rules intended that Consent documents shall be filed together with an application for grant of letters to ensure that beneficiaries consult and agree to allow one of their own to apply for letters of administration. Failure by the Petitioner to file these documents renders her Petition for grant incompetent before this Court. The law is now settled in Tanzania that according to section 53

- (2) of the Interpretation of Laws Act (Cap 1 R.E. 2002) where in a written law the word “shall” is used in conferring a function, that word shall be interpreted to mean that the function so conferred must be performed:- -ABASI SALIM KICHENJE Vs 1. SHEHE 9 MOHAMED ZAYUMBA, 2. ABDI SALIM KICHENJE -CIVIL APPEAL NO. 49 OF 2005. Upon my foregoing finding that the Petitioner failed to comply with the mandatory requirement to file her application for the administration of the estate of the deceased accompanied with the documents evidencing the Consent of twelve (12) beneficiaries of the estate, the first point of objection regarding Consent of heirs is hereby sustained and I see no utility of addressing myself on the remaining points of objection which the Caveator raised. I shall exercise my discretion under section 64 of the Probate and Administration of Estates Act, Cap. 352 on the recorded reason that the Petitioner DORAH KAWAWA FUSSI failed to obtain mandatory consents of the twelve beneficiaries when she applied for the grant of letters of administration. The interest of justice to the petitioner and the twelve beneficiaries would best be served by my making an order refusing to grant the Petitioner’s application for letters of administration. I hereby make an order refusing to grant the Petitioner’s application for letters of administration of the estate of the late Colonel Secilius Kutisa ^ ;i. Caveator is awarded the costs. I.H. Juma JUDGE 13-09-2011 10 Delivered in Court Chambers in the presence of Ms Rwechungura, Advocate (for the Applicant) and Mr. Evans Fussi (Caveator) in person. I.H. Juma JUDGE 13-09-2011 11

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