

TANZANIA / JUDGMENT

20100712 TZHC Dar es Salaam

COURT
TZHCDECIDED
12 July 2010

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I IN THE HIGH COURT OF TANZANIA AT DAR ES SALAAM PROBATE AND ADMINISTRATION
CAUSE NO 28 OF 2008 IN THE MATTER OF THE ESTATE OF THE LATE OMARY MOHAMED
BAHDELLA AND 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 : 6/7/2010 Date of Ruling 12/7/2010

RULING

Shangwa, J. On, 9TH May, 2008, the Petitioner Mahmoud Mohamed Hassan Bahdella filed a petition for letters of 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 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:-

1. That the Petitioner I Applicant lacks locus standi to bring this Petition I Application.
2. That the Petition I Application before the court is incompetent and incurably defective. On 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 Petition/ 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 Petitioner 5 / 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 Omar 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 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 If - / 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:- 9 " 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 .. Omar 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 no where is it 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 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

- io 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. 0 .. C 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 cave a tors 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 .i. ' 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. 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 . . . 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. A. Shangwa JUDGE 12/7/2010

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