

TANZANIA / JUDGMENT

mohamed said hersy vs ally hersy jama 2024 tzhc 674 8 march 2024

COURT
TZHCDECIDED
8 March 2024

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IN THE HIGH COURT OF TANZANIA MUSOMA SUB - REGISTRY AT MUSOMA PC CIVIL APPEAL
NO. 47 OF 2023 (Arising from Probate Appeal No. 2 of 2023 at Musoma District Court, Originating
from Probate Cause No. 23 of 2023 at Musoma Urban Primary Court) MOHAMED SAID
HERSY..... APPELLANT VERSUS ALLY HERSY
JAMA..... RESPONDENT

JUDGMENT

19th February & 08th March, 2024 M, L, KOMBA. J; This is the second appeal by the appellant herein. Previous, the appellant herein was aggrieved by the decision of the District Court of Musoma at Musoma (the first appellate court) in Probate Appeal No. 02 of 2023 where it uphold the decision of trial tribunal in Probate Cause No. 23 of 2023 at Musoma Urban Primary Court (the trial court) that the Probate Cause No. 23 of 2023 is res judicata. Appellant via Probate Cause No. 23 of 2023 applied for a letter of administration of the late SAID HERSY JAMA who died on 25/07/2002. Appellant's major claims was decision over his application for letter of administration which was said to be res judicata. Page 1 of 14 In summary, this appeal traces its roots after the death of SAID HERSY JAMA who left behind survivors including the appellant. The deceased also left behind estates which included landed property and piece of land located in Musoma Municipality. During trial, respondent objected the appointment of the appellant as administrator contending that probate of the late SAID HERSY JAMA was already administered in the probate cause No. 33 of 2003 before the trial court and respondent was appointed to administer the estate of the deceased and the Probate Cause No. 33 of 2003 was closed. What encouraged the appellant to apply for the letter was his finding that there is still estate of deceased which was left without administered. The trial court Was impressed with argument by respondent that the matter is res judicata and dismissed it. As hinted the appellant appeal to the first appellate court via Probate Appeal No. 02 of 2023 armed with seven (7) grounds of appeal. His appeal was also dismissed hence this appeal equipped with five grounds (5);

1. That the first appellate court apparently errored both in law and fact to uphold decision of the trial court that probate cause No. 23/2023 Is a matter res Judicata against the probate cause No. 33/2003 which previous probate No. 33/2003 never survived to finality, but prematurely revoked for want of inventory and account Page 2 of 14
2. That the first appellate court errored both in law and fact to hold the view that respondent herein had already administered and dosed Probate cause No. 33/2003; contrary to conclusive order and decree of the same which withdrew the said probate under section 9(1) (d) of the Primary Court (Administration of Estates) Rules GN. 49 of 1971, seconded by revoking the respondent from administration of the same.
3. That the first appellate court errored both In law and fact by failure to objectively analyze and evaluate evidence on trial records, where respondent categorically stated that deceased had left no estate hence prompted the court to withdraw the Probate Cause No. 33/2003 and revoked the grant, yet subsequently on appeal No. 02/2023, the same respondent employ or impute objection on res Judicata of estate he had already denounced for being inexistence.
4. That the first appellate court errored both in law and fact for his failure not to appreciate that the trial court was biased to technically disposed of the appellant's probate No. 23/2023 on a preliminary objection contrary to law and practice, but proceeded to uphold Irregular and preemptive decision of the trial court on a misconstrued PO.
5. That the first appellate court errored both in law and fact by its failure to appreciate that the appellant's probate No. 23/2023 was summarily preempted on PO and the appellant was never afforded fair hearing on substance as regard to PO raised. Page 3 of 14 At the hearing of the appeal, appellant stand solo, without any representation while Mr. Daudi Mahemba, learned advocate, appeared for respondent. It was the submission of the appellant in the 1st ground that the 1st appellate court errored by deciding that Probate Cause No.23 of 2003 is res judicata against Probate Cause No. 33 of 2003 while the Probate Cause No. 33 of 2003 was not finalized but it was removed for lack of form No. V and VI which are inventory and account. It was his submission that where there is revocation the principle of res judicata is inapplicable on probate or application of probate as on 24/2/2023 the administration was revoked because the administration was seen to have no continuity. The revoked administration was filed on 21/03/2003 and registered as Probate Cause No.
 - ' 4 33 of 2003 which was open for twenty years while administrator was doing nothing. It was his submission that the record of trial Court show there was no form no. V and VI and there was no order to close Probate Cause No. 33 of 2003 but there was a revocation order by the trial court dated 24/02/2023 which was done after failure to file inventory. It was appellant submission that probate is closed upon filling form No. V and VI and not otherwise. He Page 4 of 14 insisted that if administrator ignore to file relevant forms the remedy is revocation of appointment as per Regulation 9 of Primary Courts (Administration of Estates) Rules (the rules) and the appointment of new administrator follows. Arguing for the 2nd ground appellant submitted that the probate was not closed but the administration of the estate was

open for 20 years that mean administrator was not performing that's why the grant was revoked under S. 9 (1) (d) of the rules. About the evidence adduced during trial as the 3rd ground, appellant submitted bitterly that the 1st appellate court failed to read the Primary Court record appropriately as when the administrator said there is no properties left by the deceased there follows revocation of appointment. He was complaining of the evaluation of record by the 1st appellate court because it I upholds the trial court decision that Probate cause No. 23 of 2023 is res judicata while it was a new probate cause. He insisted it was a new probate because while administering the estate in Probate Cause No. 33 of 2003 respondent insisted that the deceased left no properties while holding administration for twenty years (20) without performing his duty. In 1st appeal which is Probate Appeal No. 02 of 2023 the respondent informed the Page 5 of 14 court he has collected and distributed all assets and filed form no. V and VI but during trial on the date of revocation the same respondent said they had a clan meeting and found deceased left no property. He then requested this court to adopt 4th and 5th ground as they read in the petition of appeal and prayed this court to grant what appellant prayed in his petition with costs and addition that he should be appointed as administrator of the estate of the late SAID HERSY JAMA.' In reply Mr. Mahemba who gallantly opposed the appeal, was fairly brief and contended that Probate Cause No. 23 of 2003 was res judicata on the reasons that record of the trial Court in Probate Cause No. 33 of 2003 and order made on 24/02/2023 shows the administrator informed the trial court that there is no property left by the deceased and prayed to close probate. On that day he prayed this court to note that appellant was in count and he did not object the prayer by the respondent herein. Following that prayer, Mr. Mahemba submitted that the matter was removed under rule 9 (1) (d) of the Rules and that was the proper record as deceased disposed his properties prior to his death so there was no property which was left undistributed. He confirmed the probate was closed on 24/02/2023. Page 6 of 14 It was Mr. Mahemba's further submission that so far as the probate was closed it was not proper for the appellant to file Probate Cause No. 23 of 2023 as it was res judicata as forms no. V and VI was filed on 27/08/2020 and on 24/02/2023 the matter was not revoked. He prayed this court to find the appeal has no merit and prayed it be dismissed with costs. In relation to prayer for appellant appointment, the counsel averred that the appellant cannot be appointed as administrator as his application was rejected by Primary Court as res judicata. During rejoinder the appellant said in trial court record there is application for revocation of respondent and the trial Court ruled that Form No. V and VI were not in file as per judgment issued on December, 2022. Appellant insisted that under the Rules after filling of Form No. V and VI the probate is usually closed and not revoked. Elaborating what was distributed, the appellant said on 27/08/2020 the proceedings show respondent distributed house located in plot 260 Musoma Municipality, he said that was not the property of the deceased since 1994 and it was not supposed to be listed as property of the deceased as belong to somebody else prior to the death of the deceased. He prayed his appeal to be allowed. Page 7 of 14 With the above exposition of the nature of the appeal, it is appropriate now to direct my mind on the merit or otherwise of the appeal while noting that this is the second appeal and the practice is that, the second appellate court should very sparingly depart from concurrent findings of

fact by the trial and first appellate court. Only in exceptional circumstances, that any interference may be warranted and it is when it is clearly shown that there was misapprehension of the evidence, miscarriage of justice or violation of some principles of law or procedure by the courts below. See Joseph Safari Massay vs Republic, Criminal Appeal No. 125 of 2012, and Felix s/o Kichele & Another vs Republic, Criminal Appeal No 159 of 2005 and Abdallah Mussa Mollel ©Banjoo vs DPP - Criminal Appeal No. 31 of 2008 (all unreported). I find the 1st, 2nd and the 3rd ground of appeal herein may be joined and determined on whether Probate cause No. 33 was closed. In other words, whether the matter was res Judicata. It was the appellant submission that on 24/02/2023 the administrator ship of the respondent was revoked due to failure of the latter to perform his duties. To the contrary, Mr. Mahemba submitted that on 24/02/2023 the Page 8 of 14 probate was closed. This assertion made me to read the record of probate Cause No 33 of 2003 and finds the following. MASIMAMIZI: Tumekaa kikao cha ukoo na tumebaini kuwa hakuna mall yoyote marehemu aiiacha hivyo naomba kufunga shauri hili ieo. Sahihi: S.g.d MOHAMED SAIDY HERSY: Sina pingamizi na hilo afunge tu hiyo mirathi. Sahihi: S.d.g Mahakama: Ombi iimekubaiwa hivyo kwakuwa hakuna maii yoyote shauri hili iinaondoiewa chini ya Kifungu 9 (1) (d) The Primary Courts (Administration of the Estates) Rules GN No. 49 of 1971 kwa kuwa usimamizi umeonekana hauna muendeiezo. I.K.S G.M Ngojo- HAKIMU MKAZI 24/02/2023 Amri: 1. Shauri iimeondoiewa chini ya K. 9 (1) (d) The Primary Courts (Administration of the Estates) Rules GN No. 49 of 1971.

2. Ally Hersy amevuiwa kuwa msimamizi wa mirathi ya marehemu Said Hersy. I.K.S G.M Ngojo- HAKIMU MKAZI 24/02/2023 Page 9 of 14 Unofficial interpretation of the court order goes like this '1. The matter is dismissed under rule 9 (1) (d) The Primary Courts (Administration of the Estates) Rules GN No. 49 of 1971; 2. Ally Hersy ceases to be administrator of the estate of Said Hersy.' From the above excerpt, the Trial Magistrate used the word revoked as it appears in the rules. For easy of understanding I- shall quote the relevant rule as follows; Rule 9: Revocation or annulment of grant of administration
 - (1) Any creditor of the deceased person's estate or any heir or beneficiary thereof, may apply to court which granted the administration to revoke or annul the grant on any of the following grounds-
 - (a) that the administration had been obtained fraudulently;
 - (b) that the grant had been made in ignorance of facts the existence of which rendered the grant invalid in law;
 - (c) that the proceedings to obtain the grant were defective in substance so as to have influenced the decision of the court;
 - (d) that the grant has become useless or inoperative;
 - (e) that the administrator has been acting in contravention of the terms of the grant or willfully or negligently against the interests of creditors, herein or beneficiaries of the estate.

- (2) Where any grant of administration is revoked- Page 10 of 14
- (a) any payments already made bona fide to the administrator shall be a valid discharge to the person making the same;
 - (b) the person who has been acting as administrator shall forthwith surrender the document evidencing the grant and a full account of administration to the court;
 - (c) the court may order the person who has been acting as administrator to pay such compensation for the loss or damage caused to the estate or any interest therein by his willful acts or negligence as the court may determine;
 - (d) the person who has been acting as administrator shall be entitled to retain and reimburse himself out of the assets of the estate for any reasonable payments made by him bona fide in the course of the administration of the estate; or
 - (e) the court may appoint any other person from amongst the heirs, executors or beneficiaries of the estate to be the administrator of the estate. It is obvious that the word used by the trial Magistrate is revocation and not closed. That means the grant was revoked and administrator cease to administer the probate (Rule 9(2)(b). The probate is not closed as submitted Mr. Mahemba. From the quotation, the reason for revocation is the time spent by the administrator in administration of deceased estate from 2003 to 2023 and the administrator reported the deceased has no property. A reasonable person may ask what was he doing in all these years. It was said there is no lifetime administrator. See Beatrice Brighton Kamanga and Page 11 of 14 Amanda Brighton Kamanga vs Ziada William Kamanga, Civil Revision No. 13 of 2020. The action of the trial court to revoke the administration mean the probate is open and any person at any time may apply to be appointed as administrator upon proof of the existence of property or unadministered property. Read rule 9(2).(e) of the rules. If that is the case therefore, so far as the Probate Cause No. 33 of 2003 was not closed, it was right for the appellant to file Probate Cause No. 23 of 2023 as the former administrator did not perform his duties to finality. I shall not venture on forms as because the issue of revocation is enough to determine this appeal. It has to be known that there is no res judicate in probate cases because at any time any person may discover the estate of deceased which was not administered and the court shall grant a letter to any applicant to administer if there is no objection. In case the property intended to be administered was listed in the previous probate any interested party may file objection to inventory and register his claim. In the appeal at hand, so far as the letter of administration in probate cause no. 33 of 2003 was revoked, any person Page 12 of 14 was at liberty to apply to be appointed. The meaning of revocation has been provided in Ahmed Mohamed Al Laamar vs Fatuma Bakari and Asha Bakari, Civil Appeal No. 71 Of 2012 At Page 15 to mean; The word 'revoke' has its origin in a Latin word "revocare," which meant "to call again or back". In both legal and ordinary English language, this word means to cancel, withdraw, reverse, repeal, vacate, put to an end, etc. In our respectful opinion, both common sense and logic dictate that one can only annul, repeal, vacate, put to an end, etc, what was previously granted or

passed and is still operative or existing. Nothing which has already come to an end can be put to an end or vacated, etc. That's why, for instance, no stay order can be passed to stay execution of a decree which has already been executed. In the appeal at hand, during trial administrator said deceased left no property. That means he filed no inventory neither account. He performs no duty with regard to administration and therefore revocation was proper remedy. This court finds the Probate Cause No. 33 of 2003 was not closed due to non-performance and therefore there was no res judicata. From that finding, the appeal at hand has merit, application for grant of a letter of administration in Probate Cause No. 23 of 2023 should proceed from where Page 13 of 14 it was before the objection by the respondent. The matter to be assigned to different Magistrate for him/her to proceed. The combined grounds 1, 2 and 3 are enough to determine this appeal. From analysis the appeal is found with merit and therefore it is allowed. It is so ordered. DATED at TARIME this 08th day of March, 2024.
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