

TANZANIA / JUDGMENT

revenanth eliawory meena vs albert eliaworry meena another 2017 tzca 135 22 may 2017

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22 May 2017

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IN THE COURT OF APPEAL OF TANZANIA AT ARUSHA (CORAM: 3UMA, Aa. C.J. MUGASHA. 3.A. And MWANGESI. J.A.) CIVIL REVISION NO. 1 OF 2017 REVENANTH ELIAWORY M E E N A APPLICANT VERSUS ALBERT ELIAWORY M E E N A 1st RESPONDENT ANNETH ELIAWORY M E E N A 2nd RESPONDENT (Application for Revision from the Proceedings and Ruling of the High Court of Tanzania at Moshi District Registry.) (Fikirini, J.) dated the 14th day of September, 2016 in Probate and Administration Cause No. 3 of 2015 and Miscellaneous Civil Application No. 25 of 2016 RULING OF THE COURT 15th & 22nd May 2017 MWANGESI. J.A. This application was opened suo motu in terms of the provision of section 4 (3) of the Appellate Jurisdiction Act, Cap 141 RE 2002, pursuant to the directive of the Honorable Chief Justice dated 17th November 2016. It was subject to an undated complaint letter with no reference No., which was written to him by the applicant complaining about the proceedings in Probate and Administration Cause No. 3 of 2015 at the High Court of i Tanzania, Moshi District Registry. It was alleged in the complaint letter that, the said proceedings, which were in relation to the administration of the estate of the late Dr. Eliawory Kristosia Meena, pending before the Court, and Miscellaneous Civil Application No. 25 of 2016 in respect of the same matter, which had been concluded, were conducted in blatant disregard of the Probate and Administration of Estates Act, Cap 352 RE 2002, and the Probate Rules. The brief complaints of the applicant as contained in a summary that was made by the Honorable Registrar of the Court of Appeal and presented to the Honorable Chief Justice reads as hereunder:-

- (a) The petitioner in Probate and Administration Cause No. 3 of 2015 before the High court of Tanzania at Moshi Registry is petitioning for letters of administration of the deceased's estate instead of petitioning for grant of letters of probate or petitioning for letters of administration with a Will annexed. The reason for not annexing the Will is that they contest it.
- (b) The court is proceeding as if the deceased died intestate as provided by section 55 of the Probate and Administration of Estates Act, Cap 352 RE 2002. 2

- (c) The petitioner filed the petition without annexing the consent of the heirs as provided for by rules 38, 71 and 72.
- (d) Failure to observe the requirement of the provisions of section 59 (2) of Cap 352. After a caveat was lodged, the petitioner was bound to apply for issuance of a citation to the caveator.
- (e) The trial court deemed the caveat withdrawn for non appearance of the caveator, who was not served with a citation as provided for by section 59 (2) of Cap 352. From the directive of the Honorable Chief Justice, the records of the two matters that is, Probate and Administration Cause No. 3 of 2015 and Miscellaneous Civil Application No. 25 of 2016 were called from the Registry of the High Court of Moshi, for examination by the Court and if need be, invoke its powers under the provisions of section 4 (2) of the Appellate Jurisdiction Act, which bears the following wording: "(2) For all purposes of and incidental to the hearing and determination of any appeal in the exercise of the jurisdiction conferred upon it by this Act, the Court of Appeal shall in addition to any other power, authority and jurisdiction conferred by this Act, have the power of revision and the power, authority and jurisdiction vested in the Court from which the appeal is brought" 3 What could be discerned from the records in Probate and Administration Cause No. 3 of 2015 is that, Albert Eliawory Meena (the first respondent) did petition for grant of letters of administration in respect of the estate of his late father one Eliawory Kristosia Meena, who died at Arusha Lutheran Medical Centre on the 9th day of October 2014. The petition was lodged in court on the 5th June 2015. Even though the record is silent about general citation of the petition being made, it was exhibited from the bar by the learned counsel for the respondent that, general citation of the petition was made through Mwananchi tabloid of 30th July 2015. We took that to have been the position and that is why, the applicant was able to learn the existence of the proceedings in court and take the necessary steps that did follow thereafter. On the 12th November 2015, Revenanth Eliawory Meena (the applicant), who happened to be the widow of the late Eliawory Kristosia Meena, did enter a caveat in respect of the petition for letters of administration that had been filed by Albert Eliawory Meena (first respondent). This was done pursuant to the provision of section 58 (1) of the Probate and Administration of Estates Act, Cap 352 RE 2002, and rule 4 82 (1) of the Probate Rules. The applicant did as well lodge a notice of preliminary objections contending that: 1. The Probate and Administration Cause No. 3 of 2015 is misconceived bad and incompetent in law for:
 - (a) The Probate and Administration Cause was opened in the court which was not within the jurisdiction of the deceased place of domicile as mandatory required by section 56 (2) of the Probate and Administration of Estates Act Cap 352 RE 2002.
 - (b) Does not state the family or relatives of the deceased, and their respective residences mandatory required by section 56 (1) of the Probate and Administration of Estates Act Cap 352 RE 2002.

- (c) Not being accompanied by affidavit as to the deceased's domicile as mandatory required by rule 31
- (1) of the Probate Rules.
- (d) Does not accompany by a copy of written will left by the deceased which the Petitioner is contested as mandatory required by section 78 (2) of Probate Rules.
- (e) The advertisement was not published in a GN as mandatory required by rule 12 of the Probate Rules. What transpired in court in the subsequent proceedings, I will leave the record of the court to take the floor:- 5 Date: 13/11/2015 Coram: Hon. B.A. Mpepo DR Petitioner: For Petitioner: Mrs. Minde Caveat: Revenanth Eliawory Meena For caveat: C/C: Rehema Order: Let the file be placed before the trial Judge for necessary orders. Signed DR. Date: 1/2/2016 Coram: Hon. P. S. Fikirini - Judge Petitioner: absent For Caveat: Mr. Priscus Massawe for C/C Rehema Court: Let the other party be served with a notice of preliminary objection raised as well as caveat intended. Order: Hearing 16/2/2016 Notice to parties. Signed Judge. Date: 16/2/2016 Coram: Hon. P. S. Fikirini - Judge 6 Petitioner: For Petitioner: Mrs. Minde - for Caveat: For caveat: Mr. Priscus Massawe for C/C; Rehema Ms Minde: This matter was marked for hearing by mistake. A caveat was filed and when the matter came up for mention on the 17th October 2015, the court ordered that the record be placed before Madam Judge, so as to order for citation. We request the honorable court, if citation has already been issued and whether there is an affidavit which has been filed in reply to this petition, we pray to be served. Mr. Massawe: We pray for leave to file the required counter affidavit and comply with other procedures required. Order: Mention 22/3/2016 The respondent/caveator to file all the necessary documents including a fresh caveat in case the one filed its time has elapsed. Signed Judge. Date: 22/3/2016 Coram: Hon. P. S. Fikirini - Judge Applicant: For Applicant: Ms E. Minde - for Caveat: i For Caveat: J absent C/C: Glory Ms Minde: This case came on the 16th February
2016. The Objector was present in person and their counsel one Priscus Massawe was present. We wish to draw the attention of the court that, on the 12th November 2015, the Objector filed a caveat. After filing the caveat, the record was placed before the Deputy Registrar who ordered the same be placed before the Judge. As noted up to the 16th of February, up to today no appearance was made in terms of section 58 of the Probate and Administration Act, they have not made formal appearance. I had expected based on the order made on the 16th February 2016, today there would be a formal appearance but they have not. The reasonable presumption is that, they have lost interest. By virtue of section 58 (5) of the Probate and Administration Act, Cap 352 RE 2002, and section 59 (A) of the Act, I am urging this court to fix a date of hearing this petition. By examining the petitioner and if that is deemed not necessary, we pray deemed on the information availed 8 to this court, the petitioner be appointed the administrator of the deceased's estate. Court: Pursuant to section 59 (4) the caveat placed has not been followed up as required under the law. The same is thus considered withdrawn after failure to fulfill the requirement prescribed by the law. The court, therefore, hereby proceed to fix a date of hearing of the petition before it.

Signed Judge. Order: Hearing on 10/8/2016 Signed Judge Following the withdrawal of the caveat by the court in the absence of the applicant and her learned counsel as reflected herein above, and fixing a date for hearing of the petition, the applicant did lodge Miscellaneous Civil Application No. 25 of 2016 under the provision of Order IX Rule 7 and section 95 of the Civil Procedure Act, Cap 33 RE 2002, seeking for the honorable court to depart from the scheduling order dated 22nd March

2016. This application was struck out by the court for want of competency in a ruling that was delivered on the 14th September 2016. Upon finding herself under such situation, the applicant did resolve to write the complaint letter to the Honorable Chief Justice, which prompted these suo 9 motu revisionary proceedings. Both parties were summoned to appear and address the Court in respect of the application. When the matter was called on for hearing, Mr. Shilinde Ngalula learned counsel did appear for the applicant, whereas, the respondents had the services of Ms Elizabeth Minde learned counsel. In his oral submission, learned counsel Mr. Shilinde Ngalula, urged the Court to revise the proceedings of the trial court by quashing them because they were tainted with several procedural irregularities. He did give a long list of such irregularities both in the petition and in Miscellaneous Civil Application of which, we feel there is no need to reproduce all of them. For the purpose of determining this application, we shall limit ourselves to the irregularities in respect of the caveat to the petition that was entered by the applicant. On the other hand, Ms Elizabeth Minde on behalf of the respondents, was of the firm view that, the complaints that were lodged by the applicant are misconceived, in that, the applicant is endeavoring to pre-empt the petition for Probate and Administration Cause, which is legally in progress at the High Court of Tanzania at Moshi Registry. She did condemn the attitude of the applicant, of not adhering to the requirement of the law and instead thereof, filing a number of applications and thereby occasioning 10 duplicity of proceedings in Court for no any founded bases. She did name such applications to include, Miscellaneous Civil Application No. 26 of 2016, which was dismissed for want of merit, Miscellaneous Civil Application No. 14 of 2017 which is still pending in court and others. Going by what took place in the process of filing of Probate and Administration Cause No. 3 of 2015 at the Registry of High court of Tanzania at Moshi, it has been the view of the learned counsel for the respondents that, all the requisite procedures as stipulated under the Probate and Administration of Estates Act, were complied with. And, it was her firm belief that, had the High court of Moshi been left to proceed with the proceedings, some of the irregularities which have been complained of by the applicant would have been resolved. With regard to the caveat that was entered by the applicant in respect of the petition filed by the first respondent for letters of administration, in the view of Ms Elizabeth Minde, learned counsel for the respondents, the same was correctly marked withdrawn by the court due to negligence on the part of the applicant whereby, she failed to make a proper follow up of the same as stipulated under the law. Regard being to the fact that, this is a probate matter she has averred that, the applicant li still has an avenue through which, she can take to ensure that her rights in the estates of the deceased are

protected. To that end, she has argued that, there is nothing that calls for revision of the proceedings that are going on at the High Court at Moshi. She has thus implored this court to let the High Court of Tanzania at Moshi Registry conclude the probate proceedings which are pending before it and this application for revision be dismissed. What stands for our deliberation in the light of what has been submitted by both counsel above, is whether there were any serious procedural irregularities which were occasioned in the conduct of Probate and Administration Cause No. 3 of 2015, which is still pending at Moshi High Court Registry. Upon going through the proceedings of the trial court as well as hearing the submissions from both learned counsel, we are convinced that, there were indeed occasioned some irregularities as submitted by the learned counsel for the applicant. Nonetheless, we think the need does not arise to go through all the irregularities that have been named by the applicant. We shall therefore, restrict ourselves to just few which we believe, will conclude the matter before us. 12 Our observation of the proceedings has convinced us that, from the filing stage of the petition to the general citation, basically there was compliance with the procedural requirements. Our take off therefore, will be from when the applicant entered her caveat. We note that, the procedure for dealing with probate and administration causes in a situation where a caveat has been entered, are governed by the provisions of section 58 and 59 of the Probate and Administration of Estates Act, Cap 352 RE 2002 and Rule 82 of the Probate Rules. A person with an interest in the estates of a deceased in which, a petition for grant of probate or letters of administration has been lodged, is required to enter a caveat in terms of section 58 (1) of the Probate and Administration of Estates Act, Cap 352 RE 2002, which reads: "(1) Any person having or asserting an interest in the estate of the deceased may enter a caveat against the probate grant or letters of administration." We would wish to emphasize here that, the caveat to be entered in court, has to conform to the format set out in Form 62 appearing in the First Schedule to the Probate Rules. Thereafter, the whole procedure as articulately stipulated under rule 82 of the Probate Rules has to be followed. To appreciate the stages in which the whole process has to be 13 channeled through before a petition with a caveat comes to be termed contentious proceeding and therefore ripe for hearing under normal procedure in terms of the provision of section 52 (b) of the Probate and Administration of Estates Act, we hereby reproduce the provision of rule 82 in extenso. "82 (1) A caveat shall be in the form prescribed in Form 62 set out in the First Schedule and shall be attested by a person before whom an affidavit may be sworn.

- (2) An application under section 59(2) of the Act for a citation to a caveator shall be in writing in the form prescribed in Form 63 set out in the First Schedule. (2A) Where a petitioner fails to make an application under section 59(2) of the Act within thirty days after the petition or the caveat has been lodged, whatever is the later, the Registrar shall cause a notice in the form prescribed in Form 63A set out in the First Schedule to be served upon the petitioner requiring him to lodge such application within a further period of twenty-one days from the date of the service of the notice. (2B) Where a notice under paragraph (2A) of this rule has been served upon a petitioner and he fails to lodge an application under section 59(2) of the

A ct within 14 twenty-one days from the date o f the service thereof, his petition sh all be deemed to have been withdrawn. (2C) Service o f a notice under paragraph (2A) o f this rule sh all be by personal service either on the petitioner or his advocate through whom the petition was lodged or by registered p ost (2D) Where a petition is deemed to have been withdrawn under the provisions o f paragraph (2B) o f this rule it sh all be open to the petitioner to apply to the court for the restoration o f the petition and where it appears to the court that it is ju st and equitable to restore the petition it sh all make an order restoring the petition upon such term s as to costs or otherwise as it deems fit: Provided that no petition sh all be restored under this paragraph so long as any grant by any court in Tanzania o f probate or letters o f adm inistration o f the estate concerned in favour o f any other person is subsisting. (2E) An application for the restoration o f a petition sh all be by cham ber summons supported by an affidavit giving reasons why the order applied for should be made and sh all be accom panied by an application under section 59(2) o f the Act. 15 (2F) A copy o f an application fo r the restoration o f a petition and a copy o f the affidavit lodged in support thereof sh all be served upon the caveator.

- (3) Upon receipt o f an application under paragraph (2) the Registrar sh all issue a citation in the form prescribed in Form 64 set out in the First Schedule to the caveator calling upon him to state, within a period o f thirty days from the date o f the service o f the citation upon him, whether he supports the grant o f probate or letters o f adm inistration to the petitioner, and, if he does not, requiring him to enter an appearance.
- (4) Appearance by a caveator sh all be in the form prescribed in Form 65 set out in the First Schedule and sh all be accom panied by an affidavit stating the right and interest o f the caveator and the grounds o f the objection to the petitioner's application fo r grant
- (5) A copy o f the appearance and the affidavit filed under the preceding rule sh all be served upon the petitioner.
- (6) Where a caveator enters an appearance the proceedings sh all be numbered as a su it and the Registrar sh all appoint a date upon which the su it shall be listed before a Judge in Court for such orders as to pleadings and date o f the hearing as the Judge may m ake." 16 We have reproduced the whole part of rule 82 of the Probate Rules for purposes of showing that, a number of stages are involved whenever a caveat has been entered in a petition for letters of administration. As it will be noted, some of these stages may necessarily not be covered in some petitions, depending on the circumstances of each particular petition. What is pertinent however, is the fact that, where a certain stage has to be passed through in a petition, it has to be strictly be complied with. Much as the records in Probate and Administration Cause No. 3 of 2015 disclose, after the caveat had been entered by the applicant on the 12th November 2015, the subsequent stages as elucidated under rule 82 above were never followed. Ordinarily, the next stage after the entering of the caveat, ought to have been an application being made by the petitioner to the Deputy Registrar by filling Form 63, so that he could issue citation of the caveat through Form 64 in terms of rule 82 (3), which in turn, would have moved the applicant caveator to enter appearance in terms of

rule 82

- (4) of the Rules, by filling Form 65. It is at such stage, when the matter would have been termed contentious and therefore, bringing into play the provision of section 52 (b) of the Probate and Administration of Estates Act, which bears the following wording: "(b) In any case in which there is contention ; the proceedings sh all take, as nearly as may be the form o f 17 a su it in which the petitioner for the grant sh all be p la in tiff and any person who appears to oppose the proceedings sh all be defendant" As there was no citation that was issued by the Deputy Registrar to the caveat that was entered by the applicant in the proceedings of the petition at hand under the prescribed procedure, as readily conceded by the learned counsel for the respondent, who told the Court from the bar that, the application for citation of the caveat by the petitioner was done orally the omission was a fatal irregularity. Besides the fact that, there was no proof to the contention by the learned counsel for the respondent for oral citation, even if it were to be established so, still it remained to be legally improper. It is worthy pointing out that, the stages as set out by the law in rule 82 of the Probate Rules were made with a purpose and as such, compliance is mandatory and not optional as can be inferred from the word "shall", which has been used. The holding of this Court in the case of Professor (Mrs^ Peter Mwaikambo Vs Davis Mwaikambo and Others, Civil Appeal No. 52 of 1997 (unreported), emphasizes the necessity to compliance with the stipulation of the law when it stated that: "The om ission by the Registrar to issue citation to the respondents caveators, made them to fa il to enter an 18 appearance, which would have rendered the m atter contentious and hence bring it within the am bit o f section 59 (3) o f the Probate and Adm inistration Ordinance (by then)" And the fact that the proceedings in the above cited case had proceeded without citation of the caveat, it was held that, the subsequent proceedings were nullity. In that regard therefore, the ruling of the trial court in the instant petition that was given on the 22nd day of March 2016 to the effect that, the caveat that had been entered by the applicant was considered to have been withdrawn because the applicant had failed to fulfill the legal requirement prescribed by the law and thereby, invoking the provision of section 59 (4) of the Probate and Administration of Estates Act, was a misconception. As it can be noted from the sequence of the stages that have been listed under rule 82, the applicant could enter appearance by filling Form 65, only after the petitioner had applied to the court for citation of the caveat by filling Form 63 and thereafter, the Deputy Registrar had served the applicant (caveator) with Form 64. Consequently, there is no gainsaying in holding that, all proceedings in respect of Probate and Administration Cause No. 3 of 2015 after the entering of caveat by the applicant on the 11th November 2015, as well as 19 all the proceeding involving Miscellaneous Civil Application No. 26 of 2016 were nullity and cannot be left to stand. In terms of the provision of section 4 (3) of the Appellate Jurisdiction Act, Cap 141, we do hereby quash them and set aside. In lieu thereof, we order that, Probate and Administration Cause No. 3 of 2015 be remitted back to the trial court for continuation from when the caveat got entered by the applicant before another Honorable Judge in strict compliance with the laws governing the administration of estates proceedings. We make no order as to costs. Order accordingly. DATED at ARUSHA this 18th

day of May, 2017. I. H. JUMA Aq. CHIEF JUSTICE S. E. MUGASHA JUSTICE OF APPEAL S. MWANGESI \ JUSTICE OF APPEAL O f: O ' ^ \ i J I certify that this is\ a true copy of the Original.

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Prepared on 13 October 2026 · Esheria