

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

CIVIL REVISION NO. 3 OF 2011

(CORAM: RUTAKANGWA, J.A., MJASIRI, J.A. And MANDIA J.A.)

1. MARK ALEXANDER GAETJE

2. WIEBKE GAETJE

3. HEDDA HEERDEGEN

..... **APPLICANTS**

VERSUS

BRIGITTE GAETJE DEFLOOR RESPONDENT

(Revision from Ruling of the High Court of Tanzania at Mwanza)

(Rwakibarila, J.)

**Dated the 26th day of May, 2011
in**

Misc. Civil Application No. 58 of 2010

.....

RULING OF THE COURT

7 and 23 September, 2011

MANDIA J.A:

KLAUS GAETJE made out his last will and testament on 11th November, 2002 at Mwanza. He died on 21st July, 2004 at the worksite of Kamanga Ferry in Port Bell, of Kampala, Uganda. After the death, the respondent BRIGITTE GAETJE DEFLOOR opened a Probate and Administration Cause No. 3 of 2005 in the High Court of Tanzania, Mwanza

Registry. The respondent petitioned for the grant of probate, and attached the last will and testament of the deceased to her petition. A citation was issued by the High Court and was published in the Government Gazette of 10th February, 2006 as Government Notice No. 72 of 2006. No caveat was filed against the petition, and on 15th June, 2006 the High Court of Tanzania issued the following order:-

"ORDER

Let letters of administration be issued to the applicant as prayed as there is no caveat filed.

Signed L. B. MCHOME

JUDGE

15/06/2006"

On 15th August, 2008, one of the applicants, MARK ALEXANDER GAETJE, who is a son of the deceased, applied for the revocation of the grant made on 15th June, 2006 but later changed his mind and withdrew the application on 10th October, 2008. Seven days later on 17th October, 2008, MARK ALEXANDER GAETJE filed Civil Case No. 14 of 2008 in which he prayed that the grant made to the respondent on 15th June, 2006 be

revoked. The civil suit proceeded to full hearing and was dismissed by the High Court. This made MARK ALEXANDER GAETJE file a notice of appeal against the High Court decision on 23rd February, 2009. Later he had a change of mind and on 1st July, 2009 filed a notice in which he withdrew the notice of appeal he had filed earlier on 23/2/2009.

After the withdrawal of the Notice of Appeal to the Court of Appeal of Tanzania, MARK ALEXANDER GAETJE went back to the High Court of Tanzania and filed, together with two others, another application for the grant made to the respondent on 15th June, 2006 to be revoked. Since by this time he was already out of time, he combined his application for revocation with that of seeking for extension of time. This application drew a preliminary objection on points of law which the respondent filed. After due hearing, the High Court sustained the preliminary objection on two grounds. The first ground is that the application for revocation is *res judicata* because a similar application had been finally determined on 10.10.2008, and the second ground is that the application was *sub-judice* in that it was made while an appeal to the Court of Appeal on the same issue was still pending.

After the ruling which upheld the preliminary objection was delivered, the applicants preferred an appeal to the Court of Appeal of Tanzania in Civil Appeal No. 15 of 2010. The Court of Appeal found that the High Court erred in entertaining proceedings while there was a notice of Appeal pending determination in the Court of Appeal. It declared all proceedings following the lodging of Notice of Appeal null and void and struck out the same. The matter went back to the High Court for determination of the application for extension of time and revocation. After due hearing, the High Court rendered a ruling on 26/5/2011 in which it rightly pointed out the difference between probate and letters of Administration but then made the following remark:-

"An order by Hon. L. B. Mchome, J (rtd) in which he granted letters of administration instead of the probate is not fit for alteration, nullification or modification by this court because he was exercising jurisdiction at the similar hierarchy like this court. A proper interference to that order can legally be made by the superior court. So that at this juncture this matter is hereby referred to the

Court of Appeal for purposes of enabling that court to give necessary orders or instructions in order to facilitate hearing and determination on merit of Mwanza High Court zone Probate and Administration Cause No. 3 of 2005 in which respondent BRIGITTE GAETJE applied for grant of probate.”

Pursuant to the above-quoted order of the High Court the learned advocate representing the applicants wrote letter Ref. RUT/785/MG/11 dated 17th June, 2011 in which letter he raised issue with the order of the High Court referring the record to the Court of Appeal for directions. This led to the opening of these revisional proceedings *suo motu*.

At the hearing of the revision appearances by the parties was the same as in the High Court. Mr. Rutabingwa, learned advocate representing the applicants in the High Court argued that the grant of letters of Administration instead of probate by the High Court was a clerical error which was curable under Section 96 of the Civil Procedure Code, a line of

reasoning which was agreed upon by Mr. Senen Mponda, learned advocate representing the respondent.

Both parties to the petition as presented in the High Court agreed that the respondent petitioned for the grant of probate and had attached the will of the deceased in her petition. Both parties are also in agreement that the High Court granted the application "as prayed for" but granted Letters of Administration instead of probate. The advocates for both sides jointly moved this court to hold that the difference between the petition which was filed in court and the prayer granted was a slip of the pen which is correctable under Section 96 of the Civil Procedure Code as a clerical or arithmetical error.

We will endeavour to put the matter in proper perspective by defining what **probate** is. According to **Blacks Law Dictionary**, ninth edition, **probate** is defined thus:-

"probate 1. The judicial procedure by which a testamentary document is established to be a valid will, the proving of a will to the satisfaction of the court.

Unless set aside, the probate of a will is conclusive upon the parties to the proceedings (and others who had notice of them) on all questions of testamentary capacity, the absence of fraud or undue influence, and due execution of the will. But probate does not preclude inquiry into the validity of the will's provisions or their proper construction or legal effect. Also termed *proof of will*."

In a petition for probate, the court is concerned with the **validity** of the will as annexed to the petition. The questions which will come up are whether or not the will has been properly executed; whether or not the testator had the capacity to make the will; in the case where the testator has disabilities like blindness, deafness or illiteracy, whether or not the contents of the will were made knowledgeable to him by reading over, etc and he had granted his approval; whether there was undue influence or not; whether there was forgery and fraud or not; and whether the will has been revoked or not. If the will passes all the tests enumerated above it is taken to be proved, and the court grants the executor the power to administer the will. These requirements of the law are reflected in Sections

24 to 28 of the Probate and Administration of Estates Act, chapter 352 R.E. 2002 of the Laws, and also in the definition of "probate" in Cap 352 which goes thus:-

"probate" means the copy of a will, or, in the case of an oral will, a statement of the contents thereof, certified under the seal of the court with a grant of administration of the estate of the testator;"

In probate, therefore, it is the wish of the deceased testator that is given effect as shown in the will. In the case of administration of estates, on the other hand, the outstanding difference with probate is that the deceased dies without leaving a will and a third party applies to the court to administer the estate of the deceased. The probate and Administration of Estates Act details the procedure for applying for Letters of Administration in intestate succession in Sections 33 to 34 of the Act. There may occur, circumstances where Letters of Administration may be granted with will annexed as provided in Section 29 to 32 of the Act. This can only happen where the deceased dies leaving a valid will but there is no executor to

execute the will because either the executor has died before the testator, or the executor has renounced the probate.

Section 28 of the Act shows the effect of the grant of probate in that it establishes the will and grants title to the executor to execute the will. On the other hand the effect of a grant of Letters of Administration as shown under Section 44 of the Act is to grant all the rights of the deceased to the administrator from the moment of the death of the deceased. This means the rights of an executor are derived from the will, and the rights of an administrator are derived from the grant made by the court. Viewed in this way the procedures, powers and effects of the executorship and administration of estate are different. To confuse the two procedures cannot be called a slip of the pen or a clerical error but is a fundamental error which cannot be cured by Section 96 of the Civil Procedure Act. We therefore invoke our revisional jurisdiction under Section 4 (3) of the Appellate Jurisdiction Act, Chapter 141 R.E. 2002 of the laws, and quash the order of the High Court dated 15th June, 2006.

We find that the purported reference of the High Court to this Court for directions is a side issue which we will not comment upon at this point.

the court to process Probate and Administration Cause No. 3 of 2005 in accordance with Part VII of the Probate and Administration of Estates Act, Chapter 352 R.E. 2002 of the laws.

DATED at DAR ES SALAAM this 15th day of September, 2011

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

W. S. MANDIA
JUSTICE OF APPEAL



I certify that this is a true copy of the original.


J.S. MGETTA
DEPUTY REGISTRAR
COURT OF APPEAL