IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: KAIJAGE, J.A., MMILLA, J. A. And MZIRAY, J.A.)

CIVIL APPEAL NO. 85 OF 2014

FATIMA FATEHALI NAZARALI JINAH..... APPELLANT

VERSUS

MOHAMED ALIBHAI KASSAM ..... RESPONDENT

(Appeal against the judgment of the High Court of Tanzania Dar es Salaam Registry)

(Aboud. J.)

dated the 13th day of April, 2012

in

Probate and Administration Cause No. 63 of 2008

JUDGMENT OF THE COURT

2nd & 20th June, 2016

MMILLA, J.A.:

In this appeal, Fatima Fataeli Nazarali Jinah **(the appellant)** is contesting the ruling and order of the High Court of Tanzania at Dar es Salaam in Probate and Administration Cause No. 56 of 1997. In that application, the appellant had requested the High Court to annul the grant which was made in favour of the respondent, Mohamed Alibhai Kassam on 20.5.1998 whereby he was appointed as the administrator of the estate of

the late Kulsum Velji @ Kulsum Kachra (**the deceased**). The latter died intestate in Dar es Salaam on 13.2.1974. In dismissing the application, the High Court held that the appellant had no interest in the deceased's estate so as to qualify to enter caveat in that regard under section 58 (1) of the Probate and Administration of Estates Act Cap. 352 of the Revised Edition, 2002 **(the Probate Act)**; so also to apply for revocation of the grant made to the respondent. It is on that basis that the appellant preferred the present appeal to the Court.

Prior to instituting the said application on 28.6.1999, the appellant had filed two caveats under section 58 (1) of the Probate Act and Rule 82 of the Rules thereof which concerned Probate and Administration Cause No. 56 of 1997. While the first caveat was filed on 15.2.199, the second one was filed on 29.3.1999. In June, 1999, she filed a Chamber Application seeking the High Court's indulgence to annul the grant of letters of administration to the respondent. Among others reasons, the appellant's prayer for annulment was that the respondent secured the letters of administration in Probate and Administration Cause No. 56 of 1997 by deceit on account that he was aware that one Firozali Rawji Kachra successfully petitioned for grant of letters of administration in 1974 in respect of the estate of the deceased in Probate and Administration Cause

No. 57 of 1974. The appellant disclosed in her affidavit in support of that Chamber Application that she had an interest in the property situated on Plot No. 1522 Block 158, Nkrumah Road, which title was derived from a deed of sale dated 19.6.1974 in a transaction between her and Firozali Rawji Kachra. She attached in her application the letters of administration dated 10.10.1974 grated to Firozali Rawji Kachra as afore stated, and the Sale Agreement dated 19.6.1974.

On the other hand, the respondent's counter affidavit in that court constituted denials of the existence of Probate and Administration Cause No. 57 of 1974, and that the appellant had no interest whatsoever, in the property situated on Plot No. 1522 Block 158, Nkrumah Road as was claimed. It was contended that if letters of administration in respect of Probate and Administration Cause No. 57 of 1974, whose existence he denied, were granted on 10.10. 1974, it could not be possible for the said Firozali Rawji Kachra to pass good title to the appellant on 19.6.1974.

In this Court, the appellant was represented by Mr. Joseph Rutabingwa, learned Advocate. He filed a four point memorandum of appeal as follows:-

1. *That the learned Judge erred in law and on fact by confirming the status of the respondent as administrator merely because he has attached the original death certificate whereas that death certificate was obtained on 10th May 1996 and the objector was not bound to produce a death certificate following the existence of an earlier filed and concluded Probate and Administration Cause No. 57 of 1974 as confirmed by letters of grants.*
2. *That the learned Judge erred in law and on fact by not taking judicial notice on the original Probate and Administration Cause No. 57 of 1974 which has not been nullified or set aside so that the proper cause open to the respondent would have been to challenge that original Probate and Administration Cause instead of filing a fresh Probate and Administration Cause on the same estate of the deceased Kulsum Velji alias Kulsum Kachra.*
3. *That the learned Judge erred in law and on fact by holding that the appellant, then the objector has no interest to apply for the revocation whereas she had been in continuous occupation of the disputed house since 1974 uninterrupted and her interest would have been justified in separate proceedings as to the ownership*

and whereas the issue of locus had been previously raised and withdrawn by the petitioner.

4. *That the learned Judge erred in law and on fact by not revoking the grant to the respondent under the Probate and Administration Cause No. 56 of 1997 filed almost 23 years from the date of the deceased Kulsum Velji alias Kulsum Kachra and after the death of the original appointed Firozali Rawji Kachra under Probate and Administration Cause No. 57 1974 who would have rightly objected to the latter proceedings the subject of the appeal based on the same estate.*

Before he proceeded to make submissions in support of these grounds, Mr. Rutabingwa prayed the Court to adopt the written submission he had filed. Also, he discussed these grounds generally and was very brief.

His beginning point was the question of conclusiveness of letters of administration. He submitted that the High Court ought not to have blessed the co-existence of the two letters of administration in respect of the estate of deceased; that of 1974 which is being relied upon by the appellant and the other one issued in 1998 which is being relied upon by the respondent.

He contended that the High Court ought to have annulled the subsequent grant of 1998.

On the question of locus, Mr. Rutabingwa submitted that the trial judge erred in holding that the appellant had no ***locus standi*** in the case because that aspect was not conversed in that court. He illustrated that though the respondent had on 15.11.2001 filed a notice of preliminary objection that the objector/appellant had no ***locus standi***, on 31.12.2002 he filed a notice of withdrawal of the said preliminary objection, meaning that the question of ***locus standi*** was no longer a subject of contention. At any rate, Mr. Rutabingwa submitted, the judge wrongly found that the appellant had no ***locus standi*** because she purchased the house in respect of the estate of the deceased from Firozali Rawji Kachra (the previous administrator) and has been in occupation of the said premises to date. In the circumstances, contended Mr. Rutabingwa, it was wrong for the High Court to have found that the appellant had no ***locus standi***. He urged the Court to allow the appeal with costs.

The respondent was represented by Mr. Gabriel Simon Mnyele, learned advocate. He submitted that the validity or otherwise of the two letters of administration is secondary; to him the crucial issue in the case is

whether the appellant has any interest in the estate of deceased who was the owner of the subject house. He contended that the appellant was not appointed as administrator of the estate of the deceased, but that she comes into the picture by virtue of the purported sale allegedly effected on 19.6,1974. He added that because the previous grant was allegedly signed on 10.10.1974, and since there is no indication when the grant was made, it is obvious that as at 19.6.1974 Firozali Rawji Kachra had no power to pass titled in respect of the deceased's property to the appellant. He contended further that looking at the sale document on page 28 of the court record, Firozali Rawji Kachra purported to sell that property as his own property and not in his capacity as an administrator of the deceased's estate. As such, he submitted, the appellant has no interest in that estate.

On another point, Mr. Mnyele submitted that under normal circumstances, transfer of the deceased's estate is governed by the provisions of section 67 of the Land Registration Act Cap. 334 of the Revised Edition, 2002, but that this procedure too was not followed.

On another point, Mr. Mnyele submitted that the appellant had no ***locus standi*** to contest the existence of two grants in respect of the estate of the deceased. He insisted that it was argued and the High Court

made a finding on the point. While admitting that the two grants cannot co-exist, Mr. Mnyele contended that the appellant was not the proper person to challenge the said co-existing grants because she had no interest, and is a stranger to that estate.

Last but not least was Mnyele's submission on the aspects of the two caveats. He contended that those caveats were misconceived because they were filed after the grant in Probate and Administration Cause No. 56 of 1997 had already been made. Even, he added, the appellant had not filed any affidavit(s) to pave way for the matter to become a suit. He pressed the Court to dismiss the appeal.

In a brief rejoinder, Mr. Rutabingwa submitted that non-compliance or otherwise with section 67 of the Land Registration Act was not fatal. He referred the Court to the case of **Malmo Montagekonsult AB Tanzania Branch v. Margaret Gama**, Civil Appeal No. 86 of 2001, CAT (unreported) in which the Court held that such registration could be done at a later stage. He reiterated his prayer for the Court to allow the appeal with costs.

After carefully going through the court record and the submissions of the learned counsel for the parties, we think that for reasons we intend to

assign in the course, the third ground of appeal is sufficient to dispose of this appeal. That ground touches on the issue whether or not the appellant had any interest in the estate of the deceased to entitle her to apply for the revocation of the subsequent grant thereof.

Before we may proceed to discuss that issue however, we wish to make one observation on who may file a caveat and at what stage.

In terms of section 58 (1) of the Probate Act, a caveat may be filed by any person having or asserting an interest in the estate of the deceased, and it must be made before a grant has been made. That section provides that:-

> *"S. 58 (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.***" [Emphasis is added].

As already pointed out, the appellant in our present case filed two caveats; the first one on 15.2.1999 and the second on 29.3.1999 both of which concerned Probate and Administration Cause No. 56 of 1997. However, both caveats were filed long after the High Court had granted the letters of administration to the respondent on 20.5.1998. The learned

counsel for the parties had taken note of this point. They in common informed the judge of the High Court that the said caveats were therefore misconceived and of no consequence. However, the judge did not make a specific finding on the point.

We are entirely in agreement with the submissions of the counsel for the parties on the point. We need to stress here that because a caveat is relevant before the grant, and since the caveats in the circumstances of the present case were filed after a grant was made, the High Court ought to have made a specific finding, as we accordingly do, that they were inoperative.

We now come to address the third ground. As already pointed out, the basic issue in that regard is whether the appellant had any interest to entitle him to apply for revocation of the subsequent grant in respect of the estate of the deceased. We will begin with section 49 (1) of the Probate Act which provides for circumstances under which a person may file for revocation of grants and removal of executors. That section states that:-

> *(1) The grant of probate and letters of administration may be revoked or annulled for any of the following reasons–*

(a) that the proceedings to obtain the grant were defective in substance;

(b) that the grant was obtained fraudulently by making a false suggestion, or by concealing from the court something material to the case;

(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant, though such allegation was made in ignorance or inadvertently;

(d) that the grant has become useless and inoperative;

(e) that the person to whom the grant was made has wilfully and without reasonable cause omitted to exhibit an inventory or account in accordance with the provisions of Part XI or has exhibited under that Part an inventory or account which is untrue in a material respect."

The court's power to revoke any grant on the grounds listed above is enacted under sub section (2) of that section. In our opinion, that is suggestive that an application to that effect may be made by a person with interest, and must be beneficiary entitled to the estate of the deceased.

Since the appellant in the present case was neither a beneficiary nor a person entitled to the estate of the deceased, we hold firm that she could not have appropriately filed an application for revocation of that grant.

We are aware of the appellant's strong point that she bought the house which forms part of the estate of the late Kulsum Velji or Kulsum Kachra from the previous administrator of that Estate, one Firozali Rawji Kachra, and that she has been in occupation of that house for not less than 22 years. In our view however, much as the point appears attractive, the remedy to her claim may be realized in a separate suit, and not in an application for annulment of the grant.

Before we may come to the conclusion however, we desire to address one important legal point which was raised and discussed by both counsel for the parties. That point is none other than the question of co-existence of two grants in respect of the estate of the deceased. Both counsel for the parties are at one that the two grants cannot co–exist. With great respect, we agree with them.

As correctly submitted by both counsel for the parties, the point under consideration is covered under section 70 (1) (b) of the Probate Act which talks about conclusiveness of the grant. That means the first grant

dating back to 1974 was conclusive. Since it was not annulled, we invoke the powers we have under section 4 (2) of the Appellate Jurisdiction Act Cap. 141 of the Revised Edition, 2002 on the basis of which we revoke the order granting Mohamed Alibhai Kassam the letters of administration signed by the Registrar on 20.5.1998, and also annul the subject letters of administration.

In the final analysis, the appeal is partly allowed to the extent indicated above. Each party to bear own costs.

DATED at DAR ES SALAAM this 14th day of June, 2016.

S.S. KAIJAGE
JUSTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL

R.E.S. MZIRAY
JUSTICE OF APPEAL

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

E.F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL