

**IN THE HIGH COURT OF TANZANIA
AT DAR ES SALAAM
CIV.APP.NO. 181 OF 2002**

ISMAIL MOHAMED.....APPELLANT

VERSUS

MWAHIJA GULAM MUHAMED.....RESPONDENT

Date of Last Order: 19/10/2006

Date of Judgment: 8/3/2007

JUDGMENT

Mlay,J

This is an appeal from the ruling of the Court of the Resident Magistrate of Dar es Salaam (Mirumbe SRM). in Probate and Administration Case.No. 120 of 2000, in which the Senior Resident Magistrate revoked the appointment of the appellant ISMAIL MOHAMED as the administrator of the estate of the Late GULAM MOHAMED, and appointed the respondent MWAHIJA GULAM to be the administrator. Originally, the appellants memorandum of appeal contained 5

grounds of appeal, but in the Amended Memorandum of Appeal filed on 7/4/2004, the grounds were reduced to 4 grounds as follows:-

- (i) That the Honourable Magistrate erred in law and fact by granting the powers of administration of the deceased's estate in absence of any application by the respondent to that effect.
- (ii) That the Honourable Magistrate erred in law and fact by taking note that the appellant has turned hostile to the deceased's children while infact the deceased had no any legitimate child.
- (iii) That the Honourable Magistrate erred in law by not directing himself to the

fact that the administration of the deceased's estate is governed by Islamic law on which the respondents are not recognized as heirs of the deceased's estate.

- (iv) That the Honourable Magistrate erred in fact by not taking note that the application lodged by the Respondent was time barred.

When the appeal came up on 10/2/2004 for the purpose of fixing the date of hearing, Mr. Mkali advocate appeared for the Appellant while Mr. Luanda advocate appeared for the respondent. Mr. Mkali proposed and Mr. Luanda agreed to have the appeal argued by way of written submissions. As the result, by consent of both counsels, the following schedule of filing written submission was ordered. The appellant was to file by 31/12/2004 as proposed by Mr. Mkali while the respondent was to file a reply by 21/1/2005

with any rejoinder being BT 28/1/2005. The record shows that only the appellants advocate filed written submission. It is no clear if the respondents counsel was served with the appellants written submissions but although the respondents advocate was aware of

matter of limitation is governed by the Law of Limitation Act, 1971 item 21 of the 1st Schedule, which provides that the limitation period is 60 days. He concluded that the application filed on 29/4/2002 was hopelessly out of time but the trial magistrate did not address this issue. He referred to section 3 of the said Act and submitted that such an application must be dismissed whether or not limitation has been set as a defence.

The appellant then went on to submit on the first ground of appeal in which he has contended that the trial magistrate granted the respondent letters of administration without there being an application to that effect. He contended that the application was for “(a) Revocation of letters of administration granted to the appellant” and or “(b) costs”. He therefore submitted that the trial court granted letters of Administration in respect of the Respondent the prayer of which was not made by the Respondent.

On the second ground of appeal, the appellant contended that the deceased had no legitimate

children and that all this children were born out of wedlock despite the fact that the deceased lived with their mother,. He submitted that the trial magistrate decided the matter basing on extraneous matters such as:-

- (i) *The appellant did not show any Islamic Law*
- (ii) *Islamic law recognizes polyganism*
- (iii) *The deceased lived with the Respondent's mother for more that 15 years and had three children with her.*
- (iv) *That the Appellant recognizes, the Respondent and other children*

The appellant submitted that on the appellant's uncontradicted evidence, the deceased had no legitimate children within Islamic law and therefore they are not recognized heirs of the estate of their late father.

Before considering the appeal on its merits, it appears from the record of the trial court that there is an issue of jurisdiction of that court in entertaining the Probate and Administration case and the application arising from it, which is the subject of this appeal.

The Appellant applied for letters of administration of the estate of the late GULAM MOHAMED in the Court of the Resident Magistrate of Dar es Salaam in probate and administration cause No. 120 of 2000. The gross estate of the deceased was estimated to be valued at T.shs. 1,000,000/= (One Million). It transpired that the estate was in fact worth more than Seven Million Shillings. The Resident Magistrate's court duly granted the application and the appellant was granted letters of administration on 10/4/2001. The present respondent then applied to the same court for the revocation of the grant of letters of administration to the appellant.

The application was made under section 49 and 82 of the Probate and Administration Ordinance. In

using the form specified in the Fourth Schedule to this Act, where the deceased died within the jurisdiction of the court.

(2)The Jurisdiction of district court shall be exercised in accordance with the provisions of part VIII and IX”

In terms of the provisions of section 3 and 6 of the Probate and Administration Act, Cap 352 R.E 2002, the court of the Resident Magistrate and a Resident Magistrate, do not have jurisdiction to entertain an application for letters of administration or for revoking them. A Resident Magistrate may only exercise jurisdiction if such resident magistrate has been appointed to be a District Delegate, pursuant to the powers conferred upon the Hon Chief Justice by Section 5 of Cap 352 R.E. 2002. He does not have jurisdiction by virtue of being a resident magistrate. There is no evidence that Hon G. Mirumbe Senior Resident Magistrate has been applied a District Delegate and if so, he has been appointed a District Delegate of the District in which the deceased died.

There is no record to show that any resident magistrate has ever been appointed a District Delegate for any district.

In the circumstances the proceedings in the court of the Resident Magistrate Probate and Administration Cause No. 120/2000 and in the Application for the Revocation of the letters of administration thereunder, are a nullity.

There is also another ground for faulting the proceedings on grounds of jurisdiction. The record shows that the deceased was a Moslem and the court sought advice from the Regional Office of Bakwata. The estate of the deceased was apparently, to be administered according to Islamic Law. PART IX of Cap. 353 provides for the administration of estates in accordance with Islamic Law. Section 92(1) clearly provides that:-

The provisions of this Act shall not apply to the administration of any estates for which a Primary Court has jurisdiction unless:-

- (a) *The Minister, by order published in the Gazette directs that they shall apply to any specific class of such estates in any particular area, or*
- (b) *The High court, either of its own motion, or upon the application of a district court, or where the estate is not a small estate, directs that they shall apply in any particular case, or*
- (c) *A district court presided over by a district magistrate of its own motion.*

There is no direction either from the Minister or from this court to apply the provisions of the Ordinance to the estate of the deceased or to the area in which the estate is situated.

Paragraph 1(1) of the FIFTH SCHEDULE to the Magistrate's Court Act Cap. 11 R.E. 2002 confers "*Jurisdiction of a Primary court in the administration of deceased's states where the law applicable to the administration or distribution or the succession to the estate is customary law or Islamic Law*".

By reason of section 92 of Cap 352 and the FIFTH SCHEDULE to Cap 11, R.E. 2002, the Court of the Resident Magistrate does not have jurisdiction to deal with the administration of the estate of the deceased GULAM MOHAMED, which is to be administered in accordance with Islamic Law.


For the two reasons given above, the proceedings are a nullity and they are set aside. It is directed that the proceedings be reinstated in the Primary Court which has jurisdiction and both the appellant and

respondent to be summoned by that court to account for the administration of the estate as administered by them during the period they were appointed administrators by the court of the Resident Magistrate.

I make no order as to costs.


J.I. Mlay
JUDGE

Delivered in the presence of the appellant and in the absence of the respondent this 8th day of March, 2007.


J.I. Mlay
JUDGE
8/3/2007