

IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

PC CIVIL APPEAL No 35 of 2010

MZEE ALLY MDOKA.....APPELLANT

VS.

KIJAKAZI MZEE.....RESPONDENT

JUDGMENT

Date of last Order: 24-09-2010

Date of Judgment: 29-10-2010

JUMA, J.,

Appellant Mzee Ally Mdoka appeals against the judgment and decree of the District Court of Temeke (Civil Appeal No. 36 of 2009- Nzowa-RM) dated 25 February 2010 which had dismissed his appeal for lack of merits. In this appeal which he filed on 25 March 2010, appellant has preferred three grounds to manifest his grievance with the decisions of the trial court and the District Court. Appellant now contends that the District Court erred-

- 1) by invalidating the appointment of the petitioner/appellant as the administrator of the estate of deceased despite the trial court being *functus officio*;
- 2) in appointing a foreigner to administer the deceased estate instead of the wife and children of the deceased;

- 3) to entertain and enter judgment on a matter which had been decided by the same court, without any formal application or complaint.

The background to this appeal traces back to Probate Cause number 21 of 2009 initiated at Mbagala Primary Court by the appellant praying to be allowed to administer the estate of the late Ally Mzee Mdoka. Appellant informed the primary court that the deceased Ally Mzee Mdoka left behind a bank account number 048201033773, three houses at Tandale, at Mbagala kwa Makuka and at Mbagala Zakhim. Mayasa Pembe who was the widow of the late Ally Mzee Mdoka supported this appellant's application for probate. On 28th January 2009 the primary court (Nangwalanya-PCM) duly appointed the appellant to administer the estate of the deceased.

This appellant's appointment as an administrator of the deceased estate lasted for less than six months because later on 3rd June 2009 an objection against his appointment was filed at the same Primary Court Mbagala which had earlier appointed him. Following this objection, the primary court (Nangwalanya-PCM) suspended the appointment of this appellant till further orders of the primary court. At the hearing of the objection on 1st July 2009, the objector Kijakazi Ally identified herself to be the daughter of the deceased. In place of the appellant, Kijakazi Ally wanted her aunt to be appointed the administrator of the estate of her late father. The primary court magistrate (Nangwalanya-PCM) found

that the appellant had lied and forged documents he used in support of his application for appointment. As a result the trial court appointed Kijakazi Mzee to take over from the appellant the administration of the estate of the late Ally Mzee Mdoka. In addition the Primary Court directed the new administrator to collect all the property of the deceased and to distribute the property to heirs of deceased i.e. Kijakazi Ally (a child of the deceased); Mzee Ally (a child of the deceased); and a third of the estate to the widow (Mayasa Pembe).

Aggrieved by the decision of the primary court; appellant lodged an appeal to the District Court Temeke (Civil Appeal Number 36 of 2009), to contend that the trial primary court was *res judicata* when it revoked his earlier appointment as an administrator of the estate. The District Court Magistrate (Nzowa-RM) dismissed the appeal for want of merit. In the dismissal of the appeal before District Court the learned Resident Magistrate relied on Rule 2 of the Fifth Schedule to the Magistrates Courts Act which makes provision for revocation of appointment of an administrator. According to the District Court, the primary court properly revoked the appointment of the appellant under Rule 2 (b) and (c) of the Fifth Schedule to the Magistrates Courts Act. The learned Resident Magistrate saw no element of *res judicata* since the same primary court which appoints an administrator is also vested with powers to invalidate any appointment of administrator of the estate.

Hearing of this appeal was by way of written submissions. Mr. Luguru the learned Advocate duly filed written submissions on

behalf of the appellant. Mr. Stevens Kosi Madulu prepared and filed respondent's written submissions.

In his first ground of appeal to this court, appellant has contended that the Mbagala Primary Court in Probate Cause number 21 of 2009 was *functus officio* when it invalidated his appointment as an administrator of the estate of Ally Mzee Mdoka. Mr. Luguru, for the appellant submitted that the records of the trial court do not show when and how the primary court was moved into revoking the appointment of the appellant as an administrator of the estate of Ally Mzee Mdoka. The learned Advocate submitted further that it was improper for the same Primary Court Magistrate who had on earlier occasion appointed the appellant to reverse his own decision to revoke the appointment.

Mr. Stevens Kosi Madulu supports both the decisions of the primary, and district courts to revoke the appointment of the appellant to administer the estate of the deceased Ally Mzee Mdoka because appellant had cheated his way into his appointment as an administration of the estate. According to Mr. Madulu, the primary court properly applied paragraph 2 [b] and [c] of the Fifth Schedule to the Magistrates Courts Act empowering the courts to revoke appointment of administrators of estates.

The main question for my determination of this ground of appeal is whether the Mbagala Primary Court had the power to revoke the appointment of the original administrator and to appoint another person. My perusal of the records of the proceedings at the

primary court indicates that appellant was appointed an administrator of the estate on 28 January 2009 but six months later on 3 June 2009, other family members had gone to the same primary court to object to the earlier appointment of the appellant.

After hearing of objection, appellant's appointment as an administrator of the estate was finally revoked on 1 July 2009. The main ground behind the objection and subsequent revocation of the appointment was to the effect that the appellant had lied about family meeting having been convened to propose his name to apply for the administration of the estate. The primary court and the Temeke District Court on appeal both agreed that the document purporting to show a family meeting on 25 November 2008 [at House No. 582 Block G Mbagala kwa Makuka] was a forgery. The two courts below concluded that as a result of forged document the legal beneficiaries to the estate of the deceased were not involved in the nomination of the appellant to be an administrator of the estate.

The Fifth Schedule to the Magistrates Courts Act provides for the powers of primary courts in administration cases. The District Court has correctly restated the law that the same primary court which appoints an administrator is also vested with powers to invalidate any appointment of administrator of the estate. The learned district magistrate [Nzowa-RM] has in my opinion correctly stated that paragraph 2 [b] of the Fifth Schedule to the Magistrates

Courts Act gives primary courts very wide latitude in not only in appointments of administrators of estates but also ordering the revocations of those appointments whenever the need arises. The relevant paragraph 2 [b] of the Fifth Schedule provides,

A primary court upon which jurisdiction in the administration of deceased's' estates has been conferred may–

[a] either of its own motion or on an application by any person interested in the administration of the estate appoint one or more persons interested in the estate of the deceased to be the administrator or administrators thereof, and, in selecting any such administrator, shall, unless for any reason it considers inexpedient so to do, have regard to any wishes which may have been expressed by the deceased;

[b] either of its own motion or an application by any person interested in the administration of the estate, where it considers that it is desirable to do for the protection of the estate and the proper administration thereof, appoint an officer of the court or some reputable and impartial person able and willing to administer the estate to be administrator either together with or in lieu of an administrator appointed under subparagraph (a);

[c] revoke any appointment of an administrator for good and sufficient cause and require the surrender of any document evidencing his appointment;

Records of the trial primary court show that on 3 June 2009; appellant was present when the trial magistrate, announced that other members of the family of the late Ally Mzee Mdoka had filed an objection against the appointment of the appellant to administer the estate of the deceased. Appellant made no attempt to dispute the allegation that the document he used to support his application to be allowed to administer the estate which purported to show a family meeting on 25 November 2008 [at House No. 582 Block G Mbagala kwa Makuka] was a forgery.

Appellant's reliance of this suspicious document to support his earlier application to be appointed an administrator was sufficient and good reason for the revocation of his appointment within paragraph 2 [c] of the Fifth Schedule to the Magistrates Courts Act. I am satisfied that the primary court had the power in terms of paragraph 2 of the Fifth Schedule, to revoke the appointment of the appellant.

Again, I do not with respect agree with the suggestion that it was improper for the same primary court magistrate who had appointed the appellant to also revoke the appointment of the appellant. Administration of deceased's estates is a long process which is not restricted to the appointment of administrators. Primary Courts under the Fifth Schedule to the Magistrates Courts Act are vested with wide powers and these primary courts become *functus officio* only where an administrator has made full account to the primary court for his administration and probate is closed at the primary court. As long as the Probate Cause No 21 of 2009 is still pending at the Mbagala Primary Court till when the administrator has made full account in terms of Paragraph 11 of the Fifth Schedule to the Magistrates Courts Act, the same primary court who is presiding a pending administration of estate has all the legal powers to intervene and revoke an appointment of the administrator.

For the foregoing reasons, the first ground of appeal is without merit and is dismissed.

In his second ground, appellant contended that the primary court erred in the appointment of the respondent [deceased's sister] instead of appointing the widow and children of the deceased to administer the estate. Mr. Luguru, the learned Advocate for the appellant submitted that it was improper for the primary court to revoke the appointment of the appellant and to appoint the respondent who is a stranger to the estate of the deceased. In other words, appellant is contending that the widow and the children of the deceased should have been considered for appointment instead of the respondent. Further, Mr. Luguru submitted that the appointment of the respondent raises the likelihood of mismanagement of the estate to the disadvantage of the beneficiaries of that estate.

Responding to the appellant's submissions on the second ground of appeal, Mr. Stevens Kosi Madulu the learned Advocate submitted that the appellant merely alleged that the respondent is a foreigner without proving the allegation and showing how this affected respondent's ability to administer the estate of the deceased. On the appellant's submission that the beneficiaries of the estate should have been appointed, the learned Advocate noted that the wife and children of the deceased are already well taken care of in the administration of the estate. Mr. Madulu drew the attention of this court to the legal duty which administrators of estate owe to the beneficiaries of the estate.

Perhaps I should point out that although in his second ground of appeal appellant objects the appointment of a "foreigner" to administer the estate, the appellant did not appear to have meant that the respondent Kijakazi Mzee is not a citizen of Tanzania. Mr. Luguru's submission described the appointment of the respondent as appointment of a "stranger to the estate." In my opinion the second ground of appeal refers to a stranger to the estate but not to the respondent being a non-citizen.

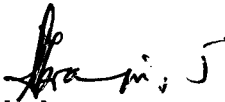
Having reviewed the opposing submissions of the two learned counsel on the second ground of appeal i.e. whether the widow and children of the deceased should have been appointed to administer the estate instead of respondent, I think the issue for my determination here is whether the appointment of the respondent was in accord with the applicable provisions of the law.

Paragraph 2-[a] and [b] of the Fifth Schedule to the Magistrates Courts Act make provisions on qualities which courts look at when making appointment of administrators of estates of deceased. Primary court making an appointment of an administrator of estate is required to appoint persons who have interest in the estate of the deceased. The court also considers any wishes which may have been expressed by the deceased. In addition, primary court may appoint any other reputable and impartial person able and willing to administer the estate to be administrator, where the court considers that it is desirable to protect the estate and ensure the proper administration of the estate.

From the foregoing parameters for the appointment of administrators of deceased estate by primary courts, it is clear that the appointment of administrators is not restricted only to the widow or the children of the deceased. In my opinion, there is no reason to question the trial magistrate conclusion that the respondent [deceased's sister] has an interest to ensure that the administration of the estate of her late brother is conducted in accordance with the law. And after revocation of appellant's appointment following allegation of forgery of minutes of family meeting, there is nothing on record to make me fault the conclusion that the respondent is best placed to protect the estate and ensure the proper administration of the estate.

The contention by the appellant that the respondent, if allowed to administer the deceased estate, she is bound to mismanage the estate need not be our concern in this appeal. The Mbagala Primary Court is still vested with power under the Fifth Schedule to the Magistrates Courts Act to protect the integrity of the whole process of administration of the deceased's estate from such mismanagement. Like any other administrator of the deceased's estate the respondent can be tasked under paragraph 11 of the Fifth Schedule to the MCA to make full account to the primary court on how the respondent administers the estate of Ally Mzee Mdoka.

All said; there is no legal barrier preventing the Respondent from administering the estate of Ally Mzee Mdoka. This appeal is dismissed in its entirety with costs.


I.H. Juma
JUDGE
29-10-2010

Delivered in presence of:

Mr. Luguru (Advocate) (For Appellant) and
Ms Kijakazi Mzee (Respondent).




I.H. Juma
JUDGE
29-10-2010