

IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CIVIL APPLICATION NO 124 OF 2010

MAHMOUD GULAM RENDY.....1ST APPLICANT

FADHIL GULAM RENDY.....2ND APPLICANT

VERSUS

HAMZA BATENGAS.....RESPONDENT

RULING

Bongole,J

The Applicants namely Mahmoud Gulam Rendy and Fadhil Gulam Rendy herein after called the 1st and 2nd Applicant respectfully filed application No 124/2010 before this court against the respondent one HAMZA BATENGAS. Their application is made under the Fifth Schedule Part 1, item 3 and 4 of the Magistrate's Court Act Cap. 11 R.E 2002.

The reliefs sought in the application are:-

1. This honourable court be pleased to call for the records of Kinondoni Primary Court in Probate and Administration Cause No 157 of 2005 and issue notice directing that the Probate and Administration of Estates Act applies to the estate in issue, order revocation of the appointment of the respondent herein as administrator of the estate of the late SAPHAA FADHIL BATENGA'S and direct the administration be placed in the hands of the applicants.
2. This court be pleased to direct the Primary Court of Kinondoni upon removal of the respondent as the legal administrator of the estate of the late Saphaa Fadhili Batenga's to produce proper accounts of the estate since he took administration to date.

3. The cost of this application be met by the respondent.
4. Any other and further relief the court deem fit may be ordered.

The respondent filed a Counter Affidavit along with a notice of Preliminary Objection on points of law to wit:-

1. That this honourable court is improperly moved and has no jurisdiction to grant the reliefs prayed for in the chamber summons.
2. The application is overtaken by event as the applicant has finished administration process and there is nothing to administer any more.

Before this court, the applicants have the legal services of G.S UKWONG'A ADVOCATE and where as the respondent enjoyed the legal services of MDAMU and ASSOCIATES Advocates.

With the permission of the court, the learned Advocates filed written submissions in disposing the Preliminary Objections.

Having passed through the submission it is outright that the second Preliminary Objection (Supra) do not qualify to be termed as a preliminary point of law.

The issues on whether the matter has been overtaken by event is an issue of evidence which requires facts to substantiate it. In here, I invite the holding of **New bold P.** in the case of Mukisa Biscuit Manufacturing Company Limited Vs. West End Distributors Limited (1969) E.A where he said "*A preliminary objection is in the nature of what used to be demure. It raises a pure point of law which if argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or what is sought is the exercise of judicial discretion*"

Having found the 2nd ground of Preliminary point inconsistent to what should be a point of law, it is hereby overruled.

Arguing the 1st ground the respondent's Advocate submitted that the law relied on the application that is to say, The fifth schedule, part 1, Items 3 and 4 provides for the powers given to Primary Courts in Administration cases and not powers of the High Court in such cases. That there is no any ambiguity in the law with regard to jurisdiction, as under part 1 of the said fifth schedule of [Cap. 11 R.E 2002] it reads:-

"POWERS OF PRIMARY COURTS IN ADMINISTRATION CASES"

That in Item '3' and '4' of part 1, of Cap. 11 it reads.

Item 3:- *"Where the High Court has directed that the Probate and Administration Ordinance shall apply to an estate of which an administration has been, appointed by a Primary Court, the Primary Court shall, up on receiving notice to that effect from the High Court – revoke the appointment of such administration and require the surrender of any document evidencing his appointment"*

He submit therefore that nothing in the above law confers jurisdiction to the "High Court" to entertain the application at hand but only the Primary Court where the High Court has directed and given notice as to such effects as the law status. That as right now there is no direction or notice which has been issued by the High Court to the Primary Court or any person whomsoever as regards to the probate cause at hand. They further submit that the use of the law under which the application relies on, is misconception of the law in which case the court is improperly moved and so they pray the application be struck out with costs.

In response, the applicant's Advocate submitted that the estate involved is a large estate that was not supposed to be filed in the Primary Court as the respondent did. That been a large estate, the High Court has power to declare the probate and Administration of Estate Act Cap. 352 R.E 2002 applies to the estate of the late Saphaa Batengas. They said there is conflict of laws. That it was the Primary Court that granted letters of

Administration that had no power to entertain the application for the administration of the estate in issue.

Further more that this court has power under S.95 of the Civil Procedure Code Act Cap. 33 R.E 2002 as it has inherent powers to entertain this application.

A fact that the applicant are saying the issue revolving in this application lies on a large Estate as opposed to small estates and a fact that letters of Administration with regard to the estate was issued by the Primary Court, I find nothing to detain me in saying that this court has powers to entertain this application in ascertaining on whether the Primary Court which determined the matter earlier had such powers of issuing letters of Administration to the respondent or not. Regard should be on whether the estate is a large estate or not.

In view of the aforesaid, I am of settled mind that this court is properly moved and has powers to entertain the application.

In the upshot, the 1st Preliminary Objection is equally overruled for want of merit.

S.B. Bongole

JUDGE

19/09/2014

19/09/2014

Coram: S.B. Bongole,J

For the 1st Applicant

For the 2nd Applicant

For the Respondent

All Absent

C.C. Emma

Court: Ruling delivered in the absence of the parties this 19/9/2014.

S.B. Bongole

JUDGE

19/09/2014