

**IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM**

CIVIL REVISION NO 38 OF 2013

COSMAS THOMAS MAKWASINGA... APPLICANT

VERSUS

JACKLINE DEOKALYUS MAKWASINGA... RESPONDENT

Date of Hearing 26.9.2014
Date of Ruling 08.10.2014

RULING

Feleshi, J.

This is an application for revision arising from the decision of the Kinondoni District Court dated 30th April, 2013, in respect of a Probate Cause No.11 of 2013 concerning the administration of the estate of the late Deokalyus Mwakasinga who died on 3rd May, 2012.

The application is brought under section 44(1) (a) and (b) of the Magistrate Court Act, Cap.11 R.E.2002. It is challenging the correctness, legality and propriety of the decision and an order of the lower court granting letters of administration of the estate of the late Deokalyus Thomas Mwakasinga to Jackline Deokalyus Mwakasinga, the Respondent. The record of the Kinondoni District Court does not present any difficulty to follow. The proceedings were initiated by the Respondent's petition

which was also cited in the Mwananchi Newspaper dated 14th March, 2013. At the hearing, the respondent testified that she was married to the deceased who had paid the requisite bride price for her. They lived together from 2007 to 4th May, 2012 when the deceased died. Apart from Frank, their lone child, the deceased had two other children namely, Julius and Thomas. During their marriage life they bought a plot at Kimara Kilungule and built a house and shifted therein in 2009.

The properties left behind by the deceased according to her, were two plots, two vehicles with registration No. T.649 BAH make Mazda and No. T. 519 BTZ make Isuzu Bighon, and a CRDB Bank account. In her evidence, which was subsequently supported by Jamanest Petropa Mboya, the family did not amicably agree on how to administer the estate of the late Deokalyus Thomas Mwakasinga. It was agreed that the matter be resolved in court. The Kinondoni District Court dealt with the matter and finally ruled in favour of the Respondent holding, I quote:

Court:

Having no objection or caveat file to object the application this court finds just to grant the application as prayed.

The deceased properties be administered as per the laws of the country.

The administrator to file inventories after 60 days as prosecution by law.

It is so ordered.

**Sgd by: Kihawa-RM
30/4/2013"**

During the hearing of this application, Messrs. Mwambene and Kessy, learned advocates represented the Applicant and Respondent respectively. Both counsels generally adopted the contents of the affidavit, counter affidavit and rejoinder to counter affidavit and made further submissions. I am very grateful to their submissions.

Paragraphs 4, 5, 6, 7, 9 and 14 of the Applicant's affidavit substantially form the backbone of the Applicant's complaint. They are thus reproduced as hereunder:

4. THAT prior to his death, the late Deokalyus Thomas Makwasinga (deceased) left a will duly signed by the deceased dated 11th January, 2012, which was made known to all the relatives immediately after the burial services of the deceased. A copy of the said WILL is herewith annexed and marked as B' for which leave is hereby craved to refer to it as part of this affidavit.

5. THAT through his WILL the late Deokalyus Thomas Makwasinga (deceased) had appointed one JULIUS DEOKALYUS MAKWASINGA who is the elder son of the deceased as the administrator of the estate of the late deceased. However, due to his age at the family clan meeting decided that the APPLICANT herein who is the elder brother of the deceased be proposed administrator of the said estate. Copies of the minutes of the family clan meetings dated 23rd June 2012 and that of 26th May 2012 are herewith collectively annexed and marked as C' for which leave is hereby craved to refer to it as part of this affidavit.

6. THAT having been proposed by the clan meeting to be the administrator of the estate of the late Deokalyus Thomas Makwasinga, on the 19th October 2012, the applicant

herein initiated probate proceedings in the PRIMARY COURT AT KIMARA which was assigned PROBATE No. 174 of 2012, followed by its citation in the MWANANCHI NEWS PAPER OF Saturday of November 10, 2012 ISSUE NO. 0856-7573 NO. 04521. Copies of the Receipt for the filing the Probate case at Kimara Primary Court and the Citation in Mwananchi Publication are herewith collectively annexed and marked as D' for which leave is hereby craved to refer to it as part of this affidavit.

7. THAT to the surprise and in amazement of the APPLICANT and the entire family of the late Deokalyus Thomas Makwasinga (deceased) the Respondent herein who is neither the widow of the deceased she was never married to the deceased, nor an appointee of both the WILL of the deceased or of the clan meetings held after the death of the late Deokalyus Thomas Makwasinga, she caused the PROBATE FILED AT Kimara PRIMARY COURT by APPLICANT to be transferred to the DISTRICT COURT OF KINDONDONI, where new proceedings were instituted as Probate Cause No. 11 of 2012. A copy of the letter in response to the Respondent initiative to transfer the Probate cause is herewith annexed and marked as G' for which leave is hereby craved to refer to it as part of this affidavit.

9. THAT furthermore on the foregoing, the PROBATE cause instituted at the KIONONDONI DISTRICT COURT by the Respondent was conclusively determined and letters of administration granted to the respondent without and citation issued to it, and without any proof of relationship between the Respondent and the late Deokalyus Thomas Makwasinga (deceased) and also in total disregard of the wishes of the deceased as expressed in his last WILL. Copy of the letters of administration granted to the respondent is herewith annexed and marked as H' for which leave is hereby craved to refer to it as part of this affidavit.

14. THAT for the interest of justice it is just and fair to grant this application to which the contrary the lawful heirs and beneficiaries of the late Deokalyus Thomas Makwasinga stands to suffer irreparable loss.

In support of the application, Mr. Mwambene further submitted that, the deceased died testate and his will disclosed his estate, heirs and appointed Julius Thomas Makwasinga, his senior son, to be the executor of his will. However, the family meeting held on 26th May, 2012 appointed and sanctioned the Applicant to petition for probate proceedings because the appointed executor was still below 18 years. The Applicant thus filed Probate No. 174 of 2012 in Kimara Primary Court which was also cited in the Mwananchi Newspaper dated 18th November, 2012. He also maintained that the deceased never got married.

Mr. Mwambene argued that the proceedings in the Kinondoni District Court defeated the purpose contained in its letter dated 5th November, 2012 which gave directions intended to maintain the status quo of the Applicant in the probate proceedings. It indicated that the Respondent and her advocate sought an opportunity to challenge the Applicant's petition in the district court. He argued that, allowing the Respondent to petition for letters of administration of the estate of the deceased Deokalyus Thomas Makwasinga through Probate Cause No.11 of 2013 without the sanction of the executor and clan meeting was an irregularity on the proceedings and was contrary to the mandatory requirements of Section 56(1) (a)-(f) of the Probate and Administration of Estate Act, Cap.352 R.E.2002 and Probate Rules 89, 90 and 91 of the Probate Rules,

G.N. 10, 107 and 369 of 1963. He submitted that, the failure by the court to ensure compliance of the mandatory requirements tainted the proceedings of the District Court.

Mr. Mwambene cited the decisions of this Court by Mruke, J. in **Tatu Hamza Vs Hamidu Hamza Said, in Civil Revision No.53 of 2008** (Dar es Salaam Registry-Unreported) and Bramble, J. in **Hassan Msange Sarota Vs Rep. (1969) HCD No.34** where it was held that an appellate court may revise an order or decision only if the order or decision of the proceedings are irregular. He thus invited this court to revise the proceedings of Probate Cause No.11. of 2013 and order that the initiated proceedings in the Primary Court be completed.

In response to Mr. Mwambene's submission, Mr. Kessy, the learned Advocate for the Respondents strongly challenged the validity of the deceased's will. He argued, it was not properly attested. He cited the decision of this Court by Mwaikasu, J., in **George A. Mmari and Anand A. Mmari Vs Afra Fuime [1995] TLR 146** where it was held that valid will must be attested besides wife or wives by at least two persons of whom one must be a relative of the deceased.

Mr. Kessy also submitted that the Respondent was a wife of the deceased with whom they lived together under one roof for eight years and were blessed with one child. That fact was well known by members of the deceased's family. He challenged the appointment of the Applicant by the

clan meeting which she said was biased and intended to defeat her right to administer the estate of her husband. After all, Mr. Kessy stressed, the Respondent had conducive environment to administer the estate proceeds than the Applicant who lives in Mahenge District in Morogoro Region because the estate proceeds are in Dar es Salaam.

He further argued that, the transfer of the probate proceedings from Kimara Primary Court to Kinondoni District Court was in compliance with the court order and it did not prejudice the Applicant who was well informed of those processes through the probate proceedings at Kimara Primary Court and the citation made in the Mwananchi Newspaper on 14th March, 2013. Mr. Kessy further argued that, as long as the deceased had survived with a wife and three children, his brothers and sisters therefore, should not be allowed to interfere with the administration of his estate. However, the Respondent acknowledged to have had attended the family meeting on 23rd June, 2012 and initiated her signature on page numbers 1 and 2 of the minutes. Mr. Kessy finally urged this court to dismiss the application.

From the foregoing submissions, I will start by briefly addressing the issue of the **deceased's will**. I found it as an undisputed fact that the deceased died and left Julius Thomas Mwakasinga still a minor. Section 23 of the Probate and Administration of Estate Act (supra) prohibiting courts to grant probate or letters of administration of estate to any person who is a minor or of unsound mind. For that reason, Julius Thomas Mwakasinga

was legally incompetent to petition for probate or letters of administration proceedings. It is very unfortunate that the learned advocates unnecessarily spent much time to submit on this aspect. In any case, it is a settled position of law that the procedure applied to deal with a will whose validity is questionable is that provided under Rule 90 of the Probate Rules -G.N Nos 10, 107 and 369 of 1963. Such undertaking happens in the course of hearing except where the will is first subjected to fraud inquiry.

The prerequisite of the validity of any will made by **literate** and **illiterate** testators are clearly stated in the case of **George A. Mmari and Anand A. Mmari Vs Afra Fuime (supra)**, cited by Mr. Kessy- for the will made by a literate testator, and the case of **Ferdinand Lumboyo Vs Ngeiyamu Kajuna [1982] TLR 142-** for the will made by an illiterate testator. Since the question of validity of will was not made part to the Probate Cause No. 11 of 2013, it is my view that the issue ought not to have attracted such extensive discussions.

The next issue I wish to address is that of the challenged marital relationship between the Respondent and the late Deokalyus Thomas Mwakasinga. Incidentally, both parties acknowledged to have participated in the clan meetings including that held on 23rd June, 2012. In that meeting, members present unanimously agreed to recognize the Respondent as the wife of the deceased. I think it should be noted here, that the Applicant and the Respondent together with Jamanest Petropa

Mboya, who issued consent to the Respondent to file her petition on 7th March, 2013, were among the thirty two members who were in attendance. The Respondent acknowledged to have initiated her signature on some pages of the minutes of that meeting. If that is what happened, how can we disprove that position. Therefore, disowning the Respondent's marriage with the deceased at this stage is an afterthought and is unacceptable.

Furthermore, in the absence of cogent evidence to disprove the period of eight years the spouse had lived as husband and wife or that their marriage was rebutted in accordance with section 160(2) of the Law of Marriage Act, Cap.29 R.E. 2002 this court has no legal basis upon which it can entertain the Applicant's allegations. Nevertheless, the issue of Respondent's marital relationship with the deceased is not part of the challenged probate proceedings.

In addressing the issue complained of irregularities on the Probate Cause No. 11 of 2013 proceedings, I closely examined the integrity of petition for letters of administration that was concluded in favour of the Respondent. As discussed earlier on, the issue of who was to administer the estate of the late Deokalyus Thomas Mwakasinga was made by the Mwakasinga family in a meeting that also involved the Respondent. Under the guidance of section 33 of Probate Administration of Estate Act (Supra) **any person**, of course, other than Julius Thomas Mwakasinga who was

found to be a minor, could be appointed to petition for probate or letters of administration of estate proceedings.

For reasons advanced in the affidavit and Mr. Mwambene's submission, the Applicant was appointed and sanctioned to file probate proceedings. Therefore, he filed Probate No. 174 of 2012 in Kimara Primary Court and cited it in the Mwananchi Newspaper dated 18th November, 2012.

Three months later, i.e. on 7th February, 2013 the Resident Magistrate In-Charge of the Kinondoni District Court through a letter with Ref. No.DM/KM.PR/COR/8 directed the Primary Court Magistrate In-Charge of Kimara Primary Court to close the Probate No. 174 of 2012 and direct the parties to refer their petition to the Kivukoni Resident Magistrate's Court. That letter is part of the Respondent's counter affidavit and was numerously referred to at the hearing. For the interest of justice, I find it apt to quote part of it as hereunder:

"...nimepata barua toka kwa Wakili DECORUM ATTORNEYS akiomba kuhamishwa shauri hili kutoka katika Mahakama yako kuja katika Mahakama hii ya Wilaya ili aweze kumtetea mteja wake ambapo mawakili hawaruhusiwi kusimamaia wateja wao katika Mahakama ya MWANZO.

Kwa vile jalada hili linasemekana lilishaletwa huku na linaangaliwa halionekani, naelekeleza kwamba fungua jalada mbadala na kufanya taratibu za kulifunga na kuwaelekeza wahusika kupeleka maombi yao Mahakama ya Hakimu Mkazi Kivukoni Kinondoni.

Sgd

**HAKIMU MKAZI MFAWIDHI
MAHAKAMA YA WILAYA KINONDONI
DAR ES SALAAM**

**Nalala:
Wakili,
Decorum Attorney-kwa taarifa
S.L.P.21487,
DAR ES SALAAM"**

On the strength of the directives issued in the referred letter, which was not copied to the Applicant, the Applicant's petition at Kawe Primary Court was discontinued. Shortly, a Probate Cause No. 11 of 2013 was instituted at Kinondoni District Court. A failure by the Resident Magistrate In-Charge of the Kinondoni District Court to copy his letter to the Applicant, in same way he did to the Respondent's Advocate and a subsequent institution of Probate Cause No. 11 of 2013 by the Respondent unreservedly fortifies Mr. Mwambene's complaint, that the integrity of the judicial process in which the deceased estates were been dealt with, was compromised. For same reasoning, the complaint gains my support.

The record also depicts further that, whereas the court processed a citation inviting objections against Probate Cause No. 11 of 2013, if any, to be given on or before 3rd April, 2013 as per Rule 75 and Form 58 of the Probate Rules (Supra), the requisite Form was signed by the Kinondoni District Magistrate In-Charge on 11th March, 2013 and published in the Mwananchi Newspaper on 14th March, 2014. Mr. Kessy vehemently maintained that the processes did not prejudice the Applicant because the processes were made known to him. However, Mr. Kessy's contention was not acceded to by Mr. Mwambene and lacked further proof to support the citation made in the newspaper.