

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO.328 OF 2015

*(Arising from Probate and Administration of Estates Cause No. 23 of
2000 by Hon. Judge Thema)*

NDELE FRANCIS MLOZI.....APPLICANT

VERSUS

MRS CAROLINE FRANCIS MLOZI.....RESPONDENT

R U L I N G

13 & 16 July, 2018

DYANSOBERA, J.:

By an application in the form of a chamber summons made under sections 68 (e) and 95 of the Civil Procedure Code [Cap. 33 R.E.2002] filed in court on 5th June, 2015, the applicant is seeking both *ex parte* and *inter partes* orders. In the application for *inter partes* order, the applicant is asking the Honourable court to decree the respondent to provide full accommodation, food and clothing to the applicant pending the hearing of the application inter parties.

In the application for *inter partes*, the applicant is seeking for the following orders:

- a) That this Honourable court may be pleased to decree the respondent to provide full accommodation, food and clothing to the applicant pending the determination of (b) and (c) below.
- b) That this Honourable court may be pleased to decree the respondent to submit in court full list of all properties left by the deceased and furnish to this court the manner she distributed the same to the beneficiaries for assessment of its fairness.
- c) That upon assessment of the fairness in (a) above, this Honourable court may be pleased to order a fair redistribution of the deceased's estate to the beneficiaries including the applicant, so that each of them run his/her own life independent from the respondent.

In the alternative:

- d) This Honourable court may be pleased to revoke the grant of letters of administration to the respondent and thereafter appoint another person to administer the deceased's estate

- e) Costs of this application be borne by the respondent
- f) Any other relief which this Honourable court may deem fit and just to grant in the circumstances of this case.

The application which has been taken at the instance of Karua and Co. Advocates is, according to the chamber summons drawn and filed by Karua and Co. Advocates, supported by the affidavit duly sworn by MS. AIKA FLORA NGIDO for the applicant.

The respondent has resisted the application by filing a counter affidavit.

The following are brief facts leading to this application. Following the death of the late Dr. Francis Mwanangwa Mlozi, Mrs Caroline Francis Mlozi, the present respondent who is the widow of the deceased was appointed administrator of the estate of the deceased vide Probate and Matrimonial Cause No.23 of 2000. Having been appointed, the respondent assumed all legal responsibilities of the deceased including taking care of the issues of the deceased such as paying school fees, medical fees and other essential necessities. In complying with Section 103 of the Probate and Administration of the Estates Act and rule 106 of the Probate Rules, she embarked on the duties of administering the respondent embarked on the

administration duties and made distribution of the estate to the heirs.

An inventory was made to that effect and presented to court on 28th March, 2002.

The applicant who is the deceased's child born out of wedlock, was not satisfied with the distribution and thought the distribution was unfairly and unequally made. He decided to take a legal cause by filing this application.

The application was partly heard by my sister Lady Justice Korosso, J. who was then transferred to the Division of the High Court after which I took over on 10th April, 2018.

At the hearing of the application, the applicant was represented by Messrs. Cuthbert Carlos and Fikiri Liganga, learned advocates while for the respondent, Mr. Ngatunga, learned counsel stood.

Mr. Fikiri Liganga argued in support of the application.

On prayer (a) to the Chamber summons, counsel for the applicant told the court that the respondent has, since December, 2014 neglected to provide anything to the applicant, has never paid for school fees for this academic year, has refused to provide accommodation to the applicant and has refused to provide or pay for medical expenses when the applicant was required to have a minor nose surgery. He pointed out that the respondent's argument under

paragraph 6 of the counter affidavit that the applicant was born out of wedlock and therefore not entitled to all those rights unless done out of good will has no merit as it ought to have been raised at the time the respondent was petitioning for the grant of letters of administration and that the respondent has been living with the applicant from the time the appellant was five years old. Further that the argument that the applicant was born out of wedlock is a non-starter and should not be taken into consideration as the respondent gave some of the properties to him.

As regards prayer 2 of the Chamber Summons in respect of prayer (b) and (c), counsel for the applicant decided to abandon them as there is already a list by way of inventory the respondent has submitted to court. He, however, prayed to submit the document to support his application. On prayer (c), counsel for the applicant first prayed the court to assess on the fairness of the distribution of the deceased's estate on the grounds that the plot to be given to the applicant was not actually given to him because there is no any document which shows that he was given such a plot. That the properties given to the respondent's children were uneven as the children were given two plots while the applicant got only one and that the properties given to the applicant and the respondent's

children were, in terms of locality, of different value. He prayed the court to order re-distribution. Second, counsel told the court that there was misappropriation of the deceased's estate in that some of the deceased's properties are not found in the list (inventory). Then there was a prayer by counsel for the applicant to file an additional affidavit pegging it on paragraph (d) which was objected to on the ground that the move was unprocedural. The court upheld the objection holding that it was not appropriate for the applicant to file a supplementary affidavit where the hearing had started, moreover, that it is with leave of the court and subject to the consent of the parties.

In concluding his submission, Mr. Cuthbert abandoned the prayers made in the alternative save prayers (e) and (f).

Mr. Ngatunga, in response, told this court that the cited provisions, that is sections 68 (e) and 95 of the Civil Procedure Code are not applicable to this matter and cannot assist the applicant to move the court to grant the prayers sought. He pointed out that the proper provisions would have been those under the Probate and Administration of Estates Act and Probate Rules.

Counsel for the respondent contended that no sufficient grounds have been advanced to support the application. He reasoned

that the applicant is a child born out of wedlock and that at that time the applicant was not entitled to inherit. Reliance was put on the decision in the case of **Vaileth Ishengoma Kahambwa v. Administrator General and Another** [1990] TLR 72.

Counsel for the respondent further stated that the respondent is a widow and she and other children born in wedlock have an interest in the estate but that notwithstanding, she included the applicant, a child born out of wedlock as one of the heirs. Counsel contended that the respondent distributed the estate of the deceased as evidenced by Ann.A-1 to the affidavit in support of the application which is a final account of the deceased's properties. It was further contended on part of the respondent that the applicant was given a piece of land but his biological mother refused to take it. Mr. Ngatunga was of the view that the distribution was fair and took into account all the heirs including the applicant and there is nothing to falter the distribution.

On the allegations that the respondent has refused to live with the applicant, counsel for the respondent told this court that the allegations are unfounded because the respondent who is not the applicant's biological mother has been staying with the applicant from the time he was a minor and throughout the schooling and has

been providing school fees and undertaking his upkeep only that it is after the applicant attained adulthood that he started making demands of not only his share but a large share and has been disrespectful to the respondent in such a way that the respondent thinks the better way, in the circumstances, is the applicant to go to her biological mother who is alive.

Mr. Fikiri Liganga rejoined. On the question that the court has not been moved by proper provisions of law, he pointed out that the only prayer exclusively covered by the Probate and Administration of the Estates Act and its Rules is prayer (d) which has been abandoned. He argued that since the respondent included the applicant as one of the heirs, she was duty bound to distribute the estate fairly and equally to all the beneficiaries. He further argued that the plot give to the applicant is still in the respondent's name as evidenced by Ann. B to the respondent's counter affidavit. Counsel for the applicant denied the applicant to have been given the plot but then refused. According to him, payment of school fees did not exclude a fair and equal distribution of the estate and the fact that the applicant was born out of wedlock could not be a defence to a unfair distribution. On the application of the case of Responding to the case of **Vaileth Ishengoma Kahambwa** (supra), counsel for the applicant told this

court that the same is distinguishable in that it is not clear if the circumstances obtaining at the time that case was decided have changed.

I have considered the application and the submissions in support of and against it. The crucial issue for determination is whether this court has been properly moved to grant the prayers the applicant is seeking.

Counsel for the respondent is of the view that it has not. Advocates for the applicants suggest that the court has been properly moved.

I think, counsel for the respondent is right. This application has been filed under the provisions of 68 (e) and 95 of the Civil Procedure Code [Cap. 33 R.E.2002].

Section 68 (e) of the Civil Procedure Code which is on supplemental proceedings provides:

“68. In order to prevent the ends of justice from being defeated the court may, subject to any rules in that behalf-

(a) (.....not relevant);

(b) (.....not relevant);

(c) (.....not relevant);

(d) (.....not relevant) or

(e) make such other interlocutory orders as may appear to the court to be just and convenient.”

It is clear that the section is only supplemental and cannot, alone, support any application. The Court of Appeal of Tanzania in the case of **Sea Saigon Shipping Limited v. Mohamed Enterprises (T) Limited**, Civil Appeal No. 37 of 2005 had this to say:

“It is to be observed that Section 68 is supplemental proceeding. It summarizes the general powers of the court in regard to nterlocutory proceedings. This section is similar to Section 94 of the Indian Code of Civil Procedure where it is also specified as a supplemental proceeding. Commenting on this provision of law (section 94), Mulla on the Code of Civil Procedure, Volume 1, Fifteenth Edition, at page 666 had this to say:

This section summaries the general powers of the court in regard to interlocutory proceedings. The details of procedure have been relegated to schedule 1.

Since Section 68 merely summaries the general powers of the court in regard to interlocutory proceedings, whoever applies

for a specific order must cite the order under which he is applying for. For example, if he is applying for attachment before judgment he must cite Order XXXVI and the appropriate rule. If he is applying for an injunction order or for any such other interlocutory orders, he must cite the order applicable to injunction or other interlocutory orders, that is, Order XXXVII, and the appropriate rule.

In the case on hand, the applicant has sought to move this court under section 68 (e). There is no substantive section or the applicable order cited. On the above authority, section 68 (e) of the Code is inapplicable.

There is also cited section 95 of the Code. This section means what it says, that is preserving the inherent powers of the court to make such orders as may be necessary for the ends of justice and to prevent abuse of the process of the court. The section cannot be used to sustain an application for the orders the applicant is seeking because, as correctly pointed out by counsel for the respondent, there are clear provisions under the framework of the Probate and Administration Act and the Probate Rules. For instance, actions against executors or administrators are stipulated under sections

138 and 139 of the Probate and Administration of Estates Act [Cap.352 R.E.2002].

It is my finding that sections 68 (e) and 95 of the Civil Procedure Code are not enabling provisions capable of moving this court grant the prayers sought. The law is settled that it is the citation of the relevant law which gives the court jurisdiction to grant relief or order sought. Non-citation, wrong citation of the law, section, subsections and /or paragraphs of the law will not move the court to do what is asked and renders the application incompetent. A case in point is **Citibank Tanzania Limited v. Tanzania Telecommunications Co. Ltd and 4 others**: Civil Application No. 64 of 2003 (unreported).

As cited provisions of law were not the enabling provisions hence the court was not properly moved, the application is, therefore, incompetent.

The application is struck out with no order as to costs.

Order accordingly.



W.P. Dyansobera

JUDGE

16.7.2018

Delivered this 16th day of July, 2018 in the presence of the applicant
in person but in the absence of the respondent.



W.P. Dyansobera

JUDGE