

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

AT DAR ES SALAAM

CIVIL APPEAL NO: 223 OF 2018

(Arising from the decision of Kinondoni District Court in Misc. Civil Application No. 52 of 2018, Original Probate Cause No. 180/2014 at Sinza/Manzese Primary Court)

JAMES PETER MIDELO.....APPELLANT

VERSUS

ASIA MZEE NGOTO.....1ST RESPONDENT

MARTHA MACHEMBA.....2ND RESPONDENT

JUDGEMENT

MASABO J.L:-

James Peter Midelo, the appellant herein is unhappy with the ruling and order of Kinondoni District Court in Misc. Civil Application No. 52 of 2018 before Hon. A. A Mwingira RM. He is praying that the ruling and order be quashed and set aside. His grounds of appeal are that:

1. The District Magistrate erred in law and facts by holding that the appointment of Clement Joseph Mayunga as Administrator of the

Estate of the deceased Bertha Joseph Mayunga was valid in that it had followed all procedures.

2. The District Magistrate erred in law and in fact by ignoring the unchallenged evidence of forgery and fraud underlining the appointment of Clement Joseph Mayunga.
3. The District Magistrate erred in law and facts in quashing the order of the learned Primary Court Resident Magistrate who revoked the letters of administration granted to Clement Joseph Mayunga for being vitiated by fraud and forgery and substituting therein James Peter Midello as a lawful Administrator.
4. The District magistrate erred in law and facts for ignoring the documentary evidence filed in court antecedent to the appointment of Clement Joseph Mayunga as Administrator of the estate of the deceased Bertha Joseph Mayunga.

For a better appreciation of the issues, the facts antecedent to this appeal as could be deciphered from the record are that, one Bertha Joseph Mayunga demised interstate on 16th July 2013. She was neither survived by children nor a spouse. Her only surviving heir were her biological siblings one Clement Joseph Mayunga and Magdalene Joseph Mayunga. Upon her demise, her brother Clement Joseph Mayunga (now deceased) filed Probate Cause No 180 of 2014 at Manzese/Sinza Primary Court applying for letters of administration of estates which constituted among others a house situated at Plot No. MZN/UZR/Manzese Uzuri area, [then] Kinondoni Municipality in Dar es Salaam. The same was granted on the 15th September, 2014. Having

obtained the letters, he hurriedly sold the above premise to one Asia Mzee Ngoto the 1st respondent herein on 8th October 2014.

Meanwhile, the Appellant herein instituted another probate cause No. 5 of 2015 where he was appointed as administrator of the estate. On learning that there was a new administrator of the estate which could have jeopardized her interest in the house, the 1st Respondent sought intervention of the court. She filed a revision cause (Revision No. 21 of 2015 in the district court for Kinondoni whereupon the appointment of the Appellant was revoked on reasons of double appointment. This disgruntled him. He filed a revision application in this court (Civil Revision No. 19 of 2016 before Ndyasobera J) which was struck out for incompetence on 5th December 2016. Still desirous of pursuing the cause further, on 11th April 2017 the Appellant went back to Manzese/Sinza Primary Court where he sought revocation of the letters granted to the said Clement Joseph Mayunga on ground that the same was fraudulently obtained as the application for appointment was accompanied by a forged certificate of death and forged minutes of clan meeting. This time, his effort was not in vain. He successfully convinced the court which to enter a decision on his favour. The appointment Clement Joseph Mayunga was revoked and he was subsequently appointed in replacement.

This prompted the 1st Respondent to once again file an application for revision at Kinondoni in Misc. Civil Application No. 52 of 2018 (Mwingira RM). On 3rd October 2018, the court overturned the decision of Manzese/Sinza primary court. His appointment was nullified wing to his failure to demonstrate his interest in the estate and also owing to the fact that the

allegations for fraud upon which the revocation of the appointment of Clement Joseph Mayunga was predicated fall under the realm of criminal law hence they had to be addressed in a criminal forum. It is this decision which is now being appealed against.

The appeal was heard in writing. Mr. Coloniels Kariwa, learned counsel appeared for the Appellant. The 1st Respondent was represented by Mr. Augustino Kusarika whereas the 2nd Respondent and 3rd Respondent appeared in person.

Submitting in support of the appeal Mr. Kariwa narrated the story above and proceeded to submit that, the District Magistrate erred in law and facts by holding that the appointment of Clement Joseph Mayunga as Administrator of the Estate of the deceased Bertha Joseph Mayunga was valid because at page 9 of its ruling the District court ignored the proof that the clan members and relatives of the deceased Bertha Mayunga had not appointed Joseph Mayunga as administrator of the deceased estate. Also, it ignored the fact that Clement Joseph Mayunga submitted before the Primary Court a forged death certificate and forged clan meeting minutes to procure letters of administration.

In regard to the second ground of appeal Mr. Kariwa pointed out that the district court erred in refraining to address the issue of fraud and for proceeding to rule out that the procedure for grant of letters of administration were followed whereas it is on record that the appellant submitted before the District Court two certificates one with serial No C 1000005995 and another one with serial No. 100026127 all purporting to

have been issued by the Office of the Registrar , and an official report from the General Registrar of Births and Deaths proving that the Certificate Entry No 1003 779651C Serial No; 1000005995 which was relied upon by the court was forged, and therefore, the letters were fraudulently obtained.

Regarding the third ground of Appeal Mr. Kariwa submitted that the District Court erred in vacating the decision of the Primary Court without assigning plausible reasons. He reasoned that it was an error on the law and fact to quash the findings of the primary court in light of the established and uncontradicted fraud and forgery on the part of Clement Joseph Mayunga. Mr. Kariwa further submitted that had the District Court not ignored the pleaded fraud on the excuse that she was not presiding over a criminal Court, she would have arrived at a different and a balanced decision as there were concrete evidence to the effect that the certificate of death which was used to procure the letters of administration was forged. Mr. Kariwa cited the case of **Tanzania Harbors Authority V African Liner Agencies Co. Ltd** [2004] T.L.R 127 and argued that the under the provisions of Section 44(1) (a) of the Magistrates Courts Act 1984, Cap 11 RE 2018, the High Court is clothed with powers to make intervention and give directions as necessary in the interests of justice hence it is within the power of this court to investigate the illegality in the impugned decision.

Lastly, Mr. Kariwa argued that the proceedings before District court in respect to this appeal is misconceived and contrary to Section 22 (4) of the Magistrate Courts Act , Cap 11 RE 2019 Act which bars from the district court from revising proceedings of primary court after the expiry of 12 months from the termination of such proceedings in the primary court. He also added

that, this section bars the district court from exercising its revisional powers on a matter that had previously been the subject of a revisional order. He lamented that this objection was raised at the District Court but unfortunately it was suppressed. Based on the above submission he implored this court to vacate the decision of the District Court and restore the finding and order of the Primary court dated 23rd August, 2017.

Mr. Kusalika vehemently resisted the grounds of appeal submitting that late Clement Joseph Mayunga is not a party to this appeal hence there is no point to reply the averments against him. He argued submitted that, following the death of Clement Joseph Mayunga, the proper cause was to have him substituted by a personal representative and not to have his name dropped as it was done in the instant case. Regarding the 1st and 2nd ground of appeal, he submitted that the appellant is a remote relative of the deceased who is calling her aunt and his allegation for fraud were unfounded as this was not a criminal court. In sum, his major contention was that since the appellant is challenging the acts of the late Clement Joseph Mayunga who is not a party to this ammended appeal and since there is no replacement of administrator ship, the appeal at hand is devoid of merit and should be dismissed with costs.

In rejoinder Mr. Kariwa argued that the proximity of the relationship between the Appellant and the late Betha Joseph Mayunga is not at issue. What is at issue is the fraudulent obtainment of the letters of administration by the said Clement Joseph Mayunga. Besides, he argued that, pursuant to section 49(1)(b) of the Probate and Administration of Estate Act (Cap 352) letter of administration can be revoked if it is established that they were fraudulently

obtained. Hence, the trial it was error for the district court to avoid this issue while it as vested with mandate to address the issue of fraud.

I have painstakingly read the records of this appeal and have considered the submissions made by both parties. Before I proceed to determine the appeal, let me comment albeit briefly on Mr. Kusarika's argument regarding the fact that the appeal is not maintainable as it is addressing the appointment of Clement Joseph Mayunga who is now deceased. This matter cannot be addressed by this court owing to the fact that it had previously decided on it hence it is now *functus officio*. Records will reveal that, on 22nd July 2019 Mr. Ogunde who was representing Mr. Kusarika, did not object the prayer by Mr. Kariwa to have the name of the said Clement Joseph Mayunga struck out from record and having considered the prayer this court granted the prayer, hence legally it became *functus officio*.

Turning to the merit of the application, having gone through submissions of both parties, I find that this court is to determine the following issues; whether the District Court had jurisdiction to entertain the application for revision; whether the letters of administration in probate cause No: 180 of 2014 were fraudulently obtained and whether or not the District court of Kinondoni properly quashed the decision of the Primary court.

Regarding the 1st issues, as rightly submitted by Mr. Kariwa, section 22(4) of the Law of Marriage Act, Cap 11 RE 2018 bars district courts from entertaining a matter after the expiry of 12 months following the termination of the proceedings in the primary court. It also bars the court from revising a matter which has previously been a subject of a revisional order.

"No proceedings shall be revised under this section after the expiration of twelve months from the termination of such proceedings in the primary court and no proceedings shall be further revised under this section in respect of any matter arising thereon which has previously been the subject of a revisional order under this section.

Indeed, the submission by Mr. Kariwa is correct as far as the position of law is concerned. However, as the background narrated above would reveal, the application for revision emanated from the decision of Hon. Futuruni dated 23/8/2017 which revoked the appointment of Clement James Mayunga and replaced him with the Appellant. According to the records, the application for revision was filed on 26th February 2018 which was well before the expiry of twelve months. It is equally true that, the matter for which the revision was sought although emanated from the same probate matter, was not subject to the review conducted by Hon. Moshi SRM. The issue for determination in the previous review was double appointment of administrators which led to nullification of proceedings leading to the appointment of the Appellant. As narrated above, after this decision, the Appellant herein sought revision in this Court and after his attempt turned futile he went back to the primary court and successfully moved it to revoke the appointment of Clement James Mayunga on ground that it was fraudulently obtained and this culminated into Misc. Civil Application No. 52 of 2018 whose decision is now being challenged. On this ground, I find no reason to fault the district court as the complaint that it acted without jurisdiction is with no merit.

Having resolved that, let me move to the third issue. As submitted by Mr. Kariwa, section 49 (1) (b) of the Estate and Administration of Estate Act (Cap 352) RE 2002, lists fraud as one of the factors upon which the letters of administration can be revoked. For easy of reference, I will reproduce the provision below:

91(1) The grant of probate and letters of administration may be revoked or annulled for any of the following reasons—

(a) that the proceedings to obtain the grant were defective in substance

(b) that the grant was obtained fraudulently by making a false suggestion, or by concealing from the court something material to the case;

The provision above is concise and, in my view, not supportive of the inference made by Mr. Kusarika. With respect, his argument that in determining an application for revocation of the letters of administration the district court cannot inquire on the fraud allegedly made by the petitioner as doing so will amount to usurping criminal jurisdiction in a probate matter is seriously misguided. I will revert to this point later having determined whether or not the allegation of fraud was founded.

It is a settled law that for the petition for letters of administration of Estates to be granted there must be proof of death, evidenced by a death certificate or affidavit of a relative or a person who attended the burial of the deceased. Thus, the application for letters of administration must be accompanied by

the death certificate of the deceased (see **Rule 39 of the Probate Rules G.N NO: 10 OF 1963**) or where for any reason beyond the control of the petitioner a death certificate is unavailable, an affidavit of a person who saw the remains of the deceased being interred or cremated; or an affidavit from a medical practitioner who pronounced the death of the deceased, filed in lieu thereto. This is a mandatory requirement of the law and failure to follow it vitiates the proceedings (see **Rashidi Hassani V Mrisho Juma** [1988] TLR 134).

In the instant case the records from primary court reveals that Clement Joseph Mayunga was appointed on the 15th September, 2014. Two documents supported his application for appointment, that is, a certificate certifying the death of the said Bertha Joseph Mayunga and minutes of a family meeting dated 16/7/2013. A further scrutiny of the certificate reveals that it has a certificate No; 1000005995 and was registered on the 17th November, two months after the grant of the letters of administration. Literary, this suggests the appointment of Clement Joseph Mayunga in Mirathi No: 180 of 2014 came prior the registration of the death of Bertha Joseph Mayunga/prior to issuance of the certificate certifying her death. In my painstaking perusal of the records I did not come across any affidavit filed in lieu thereto which would suggest that the petition was granted without there being a proof that the said Bertha Joseph Mayunga was indeed dead. However, and as correctly held by the honorable magistrate this was subject to proof.

Upon further scrutiny of the records, I have noted that the record is silent on whether this allegations were subject to proof. There is no record that

upon the allegation been metered the said Clement Joseph Mayunga was summoned to refute the allegations fronted by the Appellant. All what is on record is that the Appellant herein logged a complaint against Probate Cause No. 180 of 2014 vide a letter dated 11th April, 2017 with Ref No: KAR/TANPC/ addressed to Primary Court of Manzese/Sinza alleging that Clement Joseph Mayunga obtained the letters fraudulent. The decision of Hon. Futuruni which I have keenly read is replete with assertions made by the Appellant herein with no reference whatsoever to the response if any of Clement Joseph Mayunga which signals that he was condemned unheard contrary to the principles of natural justice which dictate that a every party in a suit should be accorded a right to be heard. The failure to accord him the right to be heard vitiates the proceedings which culminated into the revocation of the letters and the subsequent appointment of the Appellant, and by necessary implication, the proceedings in Misc. Civil Application No. 52 of 2018.

Before I pen off on this point, let me remark that, I am fully aware of the obligation to summon the parties to address me on the above issue. However, this requirement was rendered impracticable owing to the fact that the said Clement Joseph Mayunga to whom the allegations of fraud were leveled has already expired hence it would have served any purpose other than affording the Appellant an avenue to nourish his allegations and in so doing I would have risked to potentially uphold the condemnation.

Regarding the allegations of fraud, In convincing this court to hold on the Appellant's favour, Mr. Kariwa referred this court to page 9 of the District Court's judgement whereby he has persuaded this court to hold that the

Hon. Magistrate erred in ignoring the proof brought by the appellant before the court on the forged death certificate. It is indeed on record that, in its ruling, the district court held that the issue of forgery was not within its mandate as it should have been dealt with in a criminal forum.

At this juncture, let me now revert to my first point regarding the grounds for revocation of letters for administration. Without having to repeat what I have stated above, I am of the settled view that this was a misdirection on the part of the magistrate because, as demonstrated above, fraud is one of the grounds for revocation of letters of administration. Therefore, forgery arising in a probate matter cannot be termed as a criminal matter per se. It has to be dealt with pursuant to section 49(1)(b) and determined accordingly. In my strong view, failure to determine this issue on pretext that it is a criminal matter and should be dealt upon in a criminal forum is tantamount to an abdication of the duty vested in court by section 49(1)(b).

As regards the submission on the forged minutes of the clan meeting, it will not waste my time because minutes of clan meeting are not a requirement of law. It is a settled law that powers to appoint an administrator of the deceased's Estate is vested into the court before which an application is lodged and not the clan meeting. This principle was amplified in the case of **Obeth Wange V Anyagenye Mwalubilo** DC Probate Appeal No: 1 of 2007 where Chocha J (as he then was) held that:

"A clan however powerful, cannot appoint an administrator. It merely nominates the candidate. Actually, the clan meeting aimed at nominating a suitable candidate for administration of the

deceased's estate is a matter of practice. The Clan is under no legal obligation to do so."

I entirely subscribe to this view.

Based on my finding regarding the appropriateness of the proceeding which culminated into the revocation of the appointment of Clement Joseph Mayunga and the subsequent appointment of the Appellant, I have found it just to invoke the revisional powers vested in this Court by the Section 44 (1) (a) of the Magistrate Court Act, Cap 11 RE 2019 to nullify the decision and proceedings of the district court for being predicated on nullity proceedings and decision of the primary court.

I, therefore, allow the appeal on reasons above stated. The proceedings of the District Court for Kinondoni in Misc. Civil Application No. 52 of 2018 is hereby quashed and set aside for being a nullity. Considering that order above has the effect of reinstating Clement Joseph Mayunda to his position as administrator and since the Said Mayunga has already expired, the Appellant and other beneficiaries of the estate are directed to take the necessary measures for appointment of an administrator in replacement.

This being a probate matter, I will make no orders as to costs.

DATED at DAR-ES SALAAM this 14th day of May 2020.



A handwritten signature in black ink, appearing to read "J.L. MASABO", is written over a circular stamp.

J.L. MASABO

JUDGE