

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM**

CIVIL REVISION NO. 34 OF 2020

(Arising from District Court of Kinondoni in Civil Revision No. 27 of 2018, original Probate and Administration Cause No. 108 of 2017 in Manzese/Sinza Primary Court)

WAHEEDA YAKUB SELEMANI ----- APPLICANT

VERSUS

MARY ATUPELE MUNGAI & ANOTHER ----- RESPONDENTS

Date of Last Order: 09/10/2020

Date of Ruling: 16/10/2020

RULING

L. M. MLACHA, J.

This is a ruling in respect of a Revision which was opened suo mottu by the court following some complaints lodged by Waheeda Yakub Selemani (herein referred to as the applicant or simply Waheeda Yakub Suleiman) who alleged to be one of the wives of the late Joseph James Mungai who died in instate in Dar es Salaam on the 08/11/2016. It is against

Mary Atupele Mungai and James Joseph Mungai (hereinafter referred to as first and second respondents or simply by their names). It is a fight for the control and possession of assets of the late Joseph James Mungai. As we shall see later, this is one of the critical situations of failure to observe the procedures of Probate and Administration in the primary courts and failure of the district court to make the necessary orders. It is a situation of mechanical justice or “*voda faster*” as is sometimes referred to, leading to a failure of justice, with far reaching consequences to third parties.

The record shows that there are several cases related to the estate of the late Mungai, some finished while others are still pending namely; High Court Matrimonial Cause No. 2/2013, Probate and Administration Cause No. 431 of 2016 of the Primary Court of Kinondoni at Kinondoni, Probate and Administration Cause No. 108 of 2017 of the Primary Court of Kinondoni at Manzese/Sinza, Kinondoni District Court Revision No. 13 of 2017, Kinondoni District Court, Revision No. 27 of 2018, High Court Probate and Administration Cause No. 32 of 2018, and High Court Misc. Civil Case No. 55 of 2020. This

revision is in respect of Revision No. 27 of 2018 and Probate and Administration Cause No. 108 of 2017.

The record shows that, the late Joseph James Mungai was a party (first respondent) in Matrimonial Cause No. 2 of 2013. Mary Atupele Mungai was the petitioner. Waheeda Yakub Selemani was the second respondent. Mary claimed to be the legal wife of Mr. Mungai and sought orders declaring her to be the owner of some landed properties which the first respondent had alienated to the second respondent whom it is alleged was a second wife of Mr. Mungai. While the case was so pending, Mr. Mungai passed away.

The record shows that soon after the death of Mr. Mungai, Probate and Administration Cause No. 431 of 2016 was opened. Mary Atupele Mungai and two of her children, William Joseph Mungai and Kitova James Mungai were appointed Administrators of the estate. This appointment was not without complaint from Waheeda who filed Revision No. 13 of 2017. The district court vacated the decision on 08/01/2018. But while the appointment was still pending, James Joseph Mungai moved to the next primary court and

was appointed an administrator of the estate in Probate and Administration Cause No. 108 of 2017 with limited powers of dealing with the estate of the deceased as reflected in the matrimonial cause. Revision No. 27 of 2018 was opened by Waheeda to challenge the appointment without success.

Using the appointment, Mr. James Joseph Mungai entered in the matrimonial proceedings, acting in the place of the husband, the late Mungai and caused the court to make some orders. Waheed who was a co-respondent in the case was dropped. James entered in a settlement with the petitioner (who is also his mother) giving his mother what she needed. The landed assets were shifted to Mary through the settlement order. Some execution orders were issued which affected Waheeda prompting her to complain to higher levels of the judiciary. It is through this background that, the court opened the Revision to examine the legality of proceedings of Revision No. 27 of 2018 and Probate and Administration Cause No. 108 of 2017.

Mr. Jeremiah Mtobesya appeared for the applicant while the respondents were represented by Mrs. Rwechungura and Mr. Jamhuri Johnson. Counsel were invited to address the

court on the matter. They addressed the court with some emotions. The parties were also high. The court had to make some interruptions to control the proceedings.

The gist of the parties' submissions can be put thus; Mr. Mtobesya had the view that, Probate and Administration Cause No. 108/2017 was opened while there was another appointment in respect of the estate made in Probate and Administration Cause No. 431 of 2016 and therefore illegal.

Counsel submitted that, if the purpose was to act in the matrimonial cause, the three administrators namely; Mary Atupile Mungai, William J. Mungai and Kitova J. Mungai who were already in place could do so. He has the view that Probate and Administration Cause No. 108/2017 was opened erroneous. In the same reasoning, the court erred in appointing James Joseph Mungai, he said.

Both Mrs. Rwechungura and Mr. Jamhuri had the view that the court does not have jurisdiction to revise the proceedings of the primary court, which if anything, could be questioned and revised by the district, not this court. Further, there are pending matrimonial proceedings making these proceedings irregular and contrary to the Law, they argued.

Mrs. Rwechungura attacked Waheeda (causing her to cry) saying that she is trying to buy the sympathy of the court to get what she does not deserve. She admits that Waheeda was a mistress of the deceased whom they had 2 kids Jacob and Sandra but does not see her as having a right in the assets of the deceased. She said that Waheeda has never been the second wife of the deceased. She does not see problems with the revision proceedings and the decision of the district court or those of the primary court. The Law was followed and observed, she said.

Mr. Mtobesya made a rejoinder submission and joined issues with counsel for the respondents.

I have examined the record of Probate and Administration Cause No. 108 of 2017 which was the basis of Revision No. 27 of 2018. I had the advantage of readings the decisions of the cited cases which were attached in the complaint letter. I could also put an eye to High Court Probate and Administration Cause No. 32 of 2018 which is pending before Kulita, J involving the same parties. As remarked right from the beginning, I am not happy with what was done by the primary court. Equally, I am not happy with the decision of

the district court in what appears as a burial of justice. I will try to show albeit briefly.

I will start with the question of jurisdiction. Section 44(1) of the Magistrates Courts Act reads in part as under: -

“44(1) In addition to any other powers in that behalf conferred upon the High Court –

- (a) Shall exercise all **general powers of supervision of all district courts and courts of a resident magistrate** and may, at any time, **call and inspect or direct the inspection of the records of such court and give such directions as it considers may be necessary in the interests of justice**, and all such courts shall comply with such directions without undue delay.*
- (b) May in any proceedings of a civil nature**on application being made in that behalf by any party or of its own motion, if it appears that there has been an error material to the merits of the case involving injustice**, revise the*

proceedings and make such decision or order therein as it sees fit....." (Emphasis added).

With respect to the learned counsel, I think that the court has power to question the proceedings and decision of the primary court under section 44(1) of the Act, so long as the same has been tested before the district court. Things could be different if there had been no decision of the district court in respect of the proceedings and decision in which case the power of the court could be limited to directing the district court to take the necessary action to rectify the error or omission. My hands are not tied. I have power to inspect and revise proceedings of the two courts so long as there is a complaint and legal base for doing so. In this case as we shall see later, there are errors material to the merits of the case involving injustice. They call for intervention of the court by revision. That said, with respect again, the question of jurisdiction is found to have no merits and rejected.

My perusal of Probate and Administration Cause No. 108 of 2017 shows that what was done by the magistrate (S. N. Mkussu) was unlawful and funny. The records will speak for themselves. They are reproduced in full as under: -

"12/06/2017

Mbele ya: S. N. Mkussu, Hakimu

Washauri : Husna

Mwadawa

S. Itowela

Mwombaji: Yupo

Warithi: Hawapo

Amri: Shauri hadi tarehe 13/06/2017 saa 2:30
asubuhi.

S.N. MKUSSU – HAKIMU

12/06/2017

13/06/2017

Mbele ya: S. N. Mkussu, Hakimu

Washauri: Husna

Mwadawa

S. Itowela

Mwombaji: Yupo

Warithi: Hawapo

SHAURI UPANDE WA MWOMBAJI LINAANZA

Jina: James Joseph Mungai

Miaka 48

Mhehe

Program Director

Mbweni

Kristo

Amethibitisha anasema, mimi ni mtoto wa marehemu Joseph James Mungai ninaomba usimamizi wa mirathi ili niweze kumuwakilisha marehemu katika kesi ya Ndoa Na. 2013 iliyopo Mmahakama Kuu (T) Dar es Salaam. Nitashukuru iwapo Mahakama itazingatia obi langu.

James Joseph Mungai: Amesaini

S.N. MKUSSU – HAKIMU

13/06/2017

Hoja za wanafamilia:

Kitova Mungai: Sina hoja

Mtoto wa marehemu: Amesaini

Hoja za Mahakama:

1. **Mwadawa:** Sina hoja
2. **Husna:** Sina hoja
3. **S. Itowela:** Sina hoja
4. **Hakimu:** Hakuna hoja

S.N. MKUSSU – HAKIMU

13/06/2017

UAMUZI

Hili ni Shauri la Mirathi Na. 107/2017. Mwombaji usimamizi JAMES JOSEPH MUNGAI marehemu Joseph James Mungai.

Mwombaji katika shauri hili amesema kwamba, marehemu ni baba yake mzazi na kwamba marehemu alifariki na kuacha kesi ya ndoa Mahakama Kuu (T), kesi ambayo pia inahusisha mali za marehemu. Hivyo yeye kama mtoto wa marehemu na kwa idhini ya familia anaomba, Mahakama imteue ili aweze kuwa muwakilishi katika kesi hiyo (Matrimonial Cause No. 2/2013), iliyopo Mahakama Kuu (T).

Mahakama hii baada ya kumsikiliza mwombaji haikuwa na pingamizi lolote juu ya ombi lake hivyo, Mahakama inatamka kwamba Ndg. JAMES JOSEPH MUNGA ameteuliwa kuwa mwakilishi wa marehemu katika shauri hilo lililopo Mahakama Kuu (T), chini ya Kifungu Namba 2(q) cha Sheria za Mahakimu Sura 11/2002 R.E, Jedwali la V.

Hivyo aandikiwe hati ya usimamizi pamoja na barua husika ili aweze kutambulika kama ndie mwakilishi mteule katika shauri hilo.

S.N. MKUSSU – HAKIMU

13/06/2017

Uamuzi huu umetolewa leo tarehe 13/6/2017 hapa Mahakama ya Mwanzo Sinza.

S.N. MKUSSU – HAKIMU

13/06/2017

Rufaa: Haki ya rufaa imeelezwa wazi ndani ya siku 30 kuanzia leo.

S.N. MKUSSU – HAKIMU

13/06/2017

Washauri:

1. Husna
2. Mwadawa
3. Said Itowela

Nathibitisha kwamba hii ni nakala halisi ya uamuzi."

No citation was issued. No publication was done. The case was received on day one and set for hearing on the next day, 13/06/2017. He was heard on this date. The petition was heard and granted on the same day. No caveat was lodged to oppose the appointment for obvious reasons, lack of publication. Nobody came to support his appointment. The minutes show that the wider family (clan) did not sit. The meeting had 4 people only. There was his mother, himself and his two brothers (William and Kitova). William was the chairman. Kitova acted as the secretary. He was proposed to be the administrator for the sole purpose of handling the matrimonial cause which involved his mother (Mary), his

father Mr. Joseph Mungai and Waheeda. No mention was done in respect of the earlier Probate and Administration Cause No. 431 of 2016.

Waheeda was not aware of Probate and Administration Cause No. 108 of 2017. Upon being informed, she filed Revision No. 27 of 2018 through her daughter Faraja Joseph Mungai. She requested the district court to make the following among other orders.

*“(i) That this honourable court be pleased to **quash and set aside the Manzese/sinza Primary Court decision in Probate Cause No. 108 of 2017.....***

*(iii) That this honourable court be pleased to **revoke and nullify the respondent’s appointment in Probate Cause No. 108 of 2017 for being tainted with illegality and irregularities.***

(Emphasis added)

The grounds upon which the application was made are contained in pars 7 and 8 of the affidavit which reads: -

“7. That at no point did the beneficiaries of the estate of the late Joseph James Mungai

appoint or nominate the respondent to seek for letters of Administration for the purposes of conducting pending Matrimonial Proceeding at the High Court of Tanzania.

8. *That, as one of the heirs to the estate of the late Joseph James Mungai I am aggrieved by the decision of the Sinza Primary Court Probate Cause No. 108/2017 appointing the respondent as Administrator of the estate of the late Joseph James Mungai for a purpose of conducting pending Matrimonial Proceedings No. 3/2013 between the deceased and Mary Atupele Mungai."*

The revision met an objection and it was dismissed for being overtaken by events. Further that, it was misconceived. The issue now is whether the proceedings and decisions of the primary court and district court were proper in Law.

I have considered the grounds upon which the revision was dismissed closely. As hinted above, it was dismissed on the grounds of being overtaken by events and misconceived. With respect, I think that the magistrate run to those concepts

without examining the pleadings closely. The grounds for the Revision as reflected in para 7 and 8 of the affidavit supporting the application was that, there has been no meeting of beneficiaries of the estate to propose Mr. James to act as an administrator of the estate. Further that, she was not happy the appointment aimed at interfering with the pending matrimonial proceedings and therefore illegal. These points were never addressed in the ruling of the district court. Neither can they be said to be overtaken by events or misconceived. They were strong points which in my view, if examined closely, could have the effect of nullifying the proceedings and decisions of the primary court. A further look of the record could find more serious issues as under.

The record in Probate and Administration Cause No. 108 of 2017 was loud that Mr. James Joseph Mungai was appointed contrary to the Law and procedure. He was appointed in a probate cause without any citation. He was appointed in a span of 2 days contrary to the usual practice and the Law which require citation and publication for a period of 90 days or else as was said in the case of **Hadija Said Matika v. Awesa Said Matika, PC Civil Appeal No. 2 of 2016, (HC Mtwara)**, at

least 4 weeks. He was appointed quickly showing that there was an ill motive in the matter. He was also appointed on top of another appointment which was also known to him. He is also aware of Probate and Administration Cause No. 32 of 2018 pending in this court. All these, if they had been checked by the district court, could not leave the decision of the primary court intact. They were good grounds for revision.

With these short observations, I find the proceedings and decisions of the primary court in Probate and Administration Cause No. 108 of 2017 and Revision No. 27/2018 illegal, null and void. I vacate and set them aside. I declare the appointment of James Joseph Mungai done in Probate and Administration Cause No. 108 of 2017 and all what was done by him illegal, null and void.

As there is already in place proceedings which are pending in this court involving the parties, in respect of the estate of the deceased, High Court Probate and Administration Cause No. 32 of 2018, the parties are directed to forward their grievances in respect of the estate of the late James Joseph Mungai to that case.

It is order so. No order as to costs.

A handwritten signature in black ink, consisting of a stylized 'L' and 'M' followed by a horizontal stroke.

L. M. Mlacha

JUDGE

16/10/2020

Court: Ruling delivered in the presence of the applicant and absence of the respondent. Right of appeal explained.

A handwritten signature in black ink, consisting of a stylized 'L' and 'M' followed by a horizontal stroke.

L. M. Mlacha

JUDGE

16/10/2020

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SHAURI UPANDE WA MWOMBAJI LINAANZA

Jina: James Joseph Mungai

Miaka 48

Mhehe

Program Director

Mbweni

Kristo