

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

AT DAR ES SALAAM.

CIVIL APPEAL No. 174 OF 2019

(An Appeal arising from the decision of Temeke District Court, Application
No. 90 of 2018 which originated from Probate and Administration of Estate
Cause No. 28/2012)

BILLIONAIRE JOHN MKEU.....APPELLANT

Versus

MOZA GILBERT MUSHI & ANOTHER.....RESPONDENT

JUDGEMENT

24th July 2020 – 3rd September, 14th September, 29th October, 2020

J. A. DE-MELLO, J;

Before the **Temeke District Court**, in Civil Application No. 90 of 2018, the Respondents their prayers for Revocation of the Appellant as the Administrator of the Estate of the late **Esther John Mkeu**, them being the legal heirs of their deceased mother was granted. It is apparent from record that, the application before the **District Court of Temeke** was entertained Ex Parte for non filing by the Appellant of a Counter Affidavit. Two contentious issues were vivid here, first, that of, non filing of inventory contrary to **section 107 (1) of Probate and, Administration of Estate Act Cap. 352 R.E 2002**. Second, was that of converting the estate of the late Esther, for his own benefit. Having heard the submissions from the Applicants Advocates, **Koin** and, **Godfrey**, the Trial Magistrate was satisfied that, the Appellant failed to discharge his duty, as he allowed the Application,

appointing the Applicants the Respondents here as the joint administrators of the estate of **Esther John Mkeu**.

Being aggrieved, the Appellant filed in this Court by way of Appeal, the following grounds;

- 1. That, the Trial Magistrate grossly erred both law and facts in revoking the Letters of administration of the Appellant and appointing the Respondents without assigning good cause, consequently, the Ruling and Order was a nullity.**
- 2. That, the Trial Honorable Magistrate grossly erred in both law and facts in finding that, the Appellant failure to file an inventory disqualified the Appellant from being an administrator of the estate without having regards to the assigned reasons for the non-filing of the inventory and the trial magistrate refused to extend time which was not even the subject matter of the application and the trial magistrate ought to have condemned the appellant to pay fine or imprisonment if found guilty of non-filing within the prescribed 6 months from the date of appointment.**
- 3. The Trial Magistrate erred in both law and facts in making the holding that the Appellant has a bad tendency of misapplying and misappropriating the proceeds of the land properties located on plots No. 339.E and 384/191 A located at Mbutu area within Kigamboni Municipality in Dar es Salaam while there had been no any proceeds of the said estate properties.**

- 4. That, the Trial Magistrate grossly was quite wrong as was swayed away by irrelevant evidence placed by the Respondents in alleged application by the Appellant for ownership of estate landed properties while there was no cogent evidence to prove the authenticity of the relied on letter with reference No. TMC/LD/MBT.A/25495/14/RM which was wrongly admitted in the absence of the handwriting expert and the copy of the same letter was not at any stage examined with the original letter which is under the custody of the addressee the Kigamboni municipality.**
- 5. That, the honorable Trial Magistrate court grossly erred in law and facts in finding that the Appellant fraudulently conducted a survey of the estate shamba measuring 40 acres located at Mbutu area in Kigamboni, Dar es Salaam and therefore, the Appellant, wrongly condemned to have acted dishonestly and fraudulently in disregard of expected probate and administration conduct which findings were not supported with any concrete evidence on record.**
- 6. That, the honorable Magistrate erred in law and facts in failing to apply the probate and Administration laws and attach due weights on evidence by the Appellant as related to mental disorders of the Respondent finally appointed as co administrator. Therefore, the Ruling and Order were generally contrary to law, weight of evidence, probabilities of the Application and that, the Trial Magistrate was biased and**

made conclusions against the weight of evidence and Reply Submissions by the Respondent.

- 7. That, the honorable Trial Magistrate erred in both law and facts as there was no compliance with the prescribed requirement format under the Probate and Administration rules.**
- 8. That, the Trial Magistrate grossly erred both in law and facts in dismissing the significant raised preliminary objections to the Application.**
- 9. That, the Ruling and Order were made on the 9 day of August 2019. The Copies of the Ruling and Order were supplied on 14 day of August 2019 respectively well within the prescribed time. The Appeal is, therefore, in time.**

Oral submissions was preferred and, which the Court duly granted as Counsels were duly heard. Same Counsels **Leslie Saliyana Koini** together with **Godfrey Francis** represented the Respondents, whereas; the Appellant enjoyed the legal services of **Counsel Alex Mashamba Balomi**. Commencing his submissions, **Counsel Alex Mashamba Balomi** consolidated grounds number one, two, three, four and, five, submitting that, the Trial Court was wrongly moved by **section 49 (1) (d) (e) and, 49 (1) (d) (2) of Probate and Administration of Estate Act Cap. 352 R.E 2002**, holding that and as seen in pages 10 and, 11 of the Ruling that, failure to file inventory, disqualified the Appellant to even justify extension to do so. Further that, the Appellant had a tendency of misappropriating the properties on **Plot No. 3391/E and 384/191 A** located at **Mbulu** Area

Amani Kigamboni, again contrary to duties bestowed upon him as the Administrator. However and, if this was not enough, the Court went on to appoint the Respondents as joint Administrators. Strangely, the Court disregarded the fact that, **section 107 (4)** of the **Probate and Administration of Estate Act Cap. 352 R.E 2002** which creates an offence to the Administrator, in the event to imprisonment as opposed to revocation, if proved, criminally imputed for fraud, in essence of the doctrine of presumption of innocent. If at all, **section 110** and, **111** of **Probate and Administration of Estate Act Cap. 352 R.E 2002** for, '**one who alleges must prove**'. Furthermore, that, it all involves a **fourty (40) acres** un-surveyed land which the Appellant on his own and, expenses took measures to survey the land, leading to **seventeen (17) titles** readily available for distribution to heirs. Notwithstanding all this, the Respondents maliciously and, with bad faith, filed this Application for **Revocation. Counsel Balomi** is of a firm position that, failure to file inventory was a result of multiplicity of cases filed by the Respondents namely; **Land Application No. 209 of 2017, Misc. Application No. 90 of 2018, Commercial case No. 33 of 2012**, notwithstanding interventions from the Regional Commissioner's office and, the Police, preventing the Appellant to discharge his duties to administer including identifying, collecting, distributing as well as settling debts. With regard to ground number six, **Counsel Balomi** found it illegal to appoint the second Respondent, whose state of mind is doubtful and, hence in contravention to **section 23** of **Probate Act (supra). Rule 45** of the same Act too, owing to mentally ill health of the party, neither is a minor of unsound mind, qualifies to administer. The Court he suggests, disregarded

this situation but worse even is that which **section 138 and, 139** of the **Probate Act** (supra) for not instituting a criminal case if proved against the Appellant. With regard to ground seven, the format adopted was improperly made not indorsed by the legal representative of the deceased. On ground number eight, the Court dismissed the four objections raised by the Appellant hence resulting in entertaining a defective matter and revoking the Administrator, which if entertained would have disposed the Application instead of acting on amended Chamber Summons bearing a defective Affidavit in the Jurat, thus offending **section 10** of **Oath and Statutory Declaration Act Cap. 3**. The case of **Ahmed Mohamed vs. Fatuma Bakari Civil Application No. 71 of 2012** was cited for this contention. Counsel safely prayed for the Appeal be allowed.

Counsel Leslie for the **Respondent** argued that, the Revocation was properly invoked for the two reasons that, of failure to file inventory for five years from the date of grant but, sadly misappropriation and, abuse of the deceased's estate. The Appellant's allegations that, he had surveyed the **fourty (40) acres** land which brought **17 Title Deed**, is doubtful as all bore his personal names, introducing himself before the **Director of Kigamboni and Temeke**, as the sole owner. Citing **section 59 (1) (e)** of the **Probate and Estate Act Cap. 352**, Counsel reiterated the effect of not filing the inventory and, its consequences. He challenged the proposal that, **section 107 (4)** of the **Probate Act (supra)**, rendering the conversion as fraud and, which attracted a criminal offence as opposed to Revocation. This is wrong, considering no inventory has been lodged to support or oppose the allegations, but instead and, in fact the Appellant

converted the estate of the deceased to his own personal ownership against his duty to administer only. All this, he did claiming ownership under customary rites knowing it to be untrue. A list of authorities have contended on the duties and, obligation of Administrator when it comes to estate of the deceased. In the case of **Sekunda Mbwambo vs. Rose Ramadhani [2004] TLR pg 9**, it was pointed out;

“...not to collect and monopolize the deceased properties....distribute as he wishes...”

This is even vivid glaring, from the Affidavit deponed by the Appellant himself as seen on **page 8**. The law is clear of the distinction between legal Administrator and, someone else. **Counsel Godfrey Francis** is of the view that it is not true that, second Respondent was and is mentally ill, unless medically proved hence rendering the allegations mere speculation and highly fabricative. **Section 110 (i) (iii)** ought to prevail for the one alleging to prove. **Rule 116** of the **Probate Act** reads so as well. Similarly, is the Constitution which reminds us of the duty to avoid technicalities in as far as **Article 107A** stipulates as was observed in the case of **May Mgaya vs. Salimu & Salehe Said Civil Application No. 264 of 2017** which dismissed the **P.O** raised for failure to capture the Tittle of a Probate matter, originating from an interlocutory order which was appealable unless it has an effect of determining the case to finality. **Section 74 (2) of Cap. 33** is clear, whereby several cases have held this position but namely here is this one of **MD Souza Motors ltd vs. Rujaz Gulamali & Another TLR [2001]**

"...decision or order interlocutory in nature is not appealable".

Counsel concluded by observing the allegations of multiple cases by the Respondents but with no relevance here, rendering the Appeal with no merits and, justifies a dismissal with costs.

Rejoining, Counsel for the Appellant submit that, if not for him, the un-surveyed land would have not secured and with Titles him being an Administrator, they ought to read his name for a future transfer during distribution exercise. With regard to mental illness of the second respondent, it is his own revelation as depicted from the Counter Affidavit of the Appellant, and, same one who carried the duty to arrange and ensure treatment in Tanga. **Section 23** of the **Probate and Administration of the Estate Act Cap. 352**. It is even clear that, minors and, persons of unsound mind, if so, then the Court would have gone further. The revocation passed by the Trial Court was irregularly determined, hence tainting the Court. He reiterated his stance for allowing appeal. **Section 49 (1) to (e)** of the **Act** stipulate as follows;

"That the person to whom the grant was made has willfully and without reasonable cause omitted to exhibit and inventory or account in accordance with the provision of Part XI or has exhibited an inventory or account which is untrue in material respect".

In the case of **Safiniel Cleopa vs. John Kadaghe [1984] TLR 198**, held; **Section 49 (1) (b) (c)** and, **(e)** of the **Act** (supra) also reads;.

"The grant of probate and letters of administration may be revoked or annulled for any of the following reasons-

(a) N/A (b) that the grant was obtained fraudulently by making a false suggestion, or by concealing from the court something material to the case; (c) that the grant was obtained by means of untrue allegations of a fact essential in point of law to justify the grant though such allegation was made in ignorance or inadvertently;

(d) N/A (e) that the person to whom the grant was made has willfully and without reasonable cause omitted to exhibit an inventory or account in accordance with the provision of Part XI or has exhibited under that Part an inventory or account which is untrue in a material respect”.

Further, the High Court has powers in terms of **section 49 (2)** of the Act to suspend or remove an executor or administrator for the due and, proper administration of the estate and the interest of the beneficiaries. For academic purposes Revocation is the withdrawal of what was granted by Court, which in my sincere view has to go through a thorough scrutiny of evidenced and, facts. In my sincere view and, considering absence of inventory, the allegations whatsoever by the Appellant, and, which require evidence for proof, is horribly premature. In view of the foregoing, and in the interest of justice and, cognizant this being a Probate matter, filing of inventory is mandatory as required by law under **section 107 (1) of Probate Act** (supra) following accomplishment by the Administrator in collecting, administering, distribution and, disposal if any of the Estate of the deceased on behalf of and, for the benefit of the heirs, whose time span is that of **six months (6)**. Since **10th July, 2014** on **Probate and**

Administration cause number 28 of 2013, no inventory has been filed. The claim brought forward that, of multiplicity of suits notwithstanding and lame. **Five years (5)** in absence of any, survey of land if at all, and allegations of the unsound mind of the second Respondent without proof, are baseless. The registering of Titles in the Appellant's own name, raises eyebrows adding salt to the wounds of the beneficiaries, for this Court to entertain.

The Appeal is with no merits, and, is hereby dismissed without no costs, it being a Probate matter. The Trial Court findings prevails.

It is so ordered.



J. A. DE-MELLO

JUDGE

29th October, 2020.