

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 409 OF 2020

In the Matter of the Estate of the Late

AHMAD OMAR RWABIBI/OR AHMAD OMAR KATUNZI

and

In the Matter of Application for Directions of this Court on the Application of the Probate

and Administration of Estates Act, Cap. 352 R.E 2002 and the Probate Rules

by

FILZA GEORGE MBATI

Date of Last Order: 02/11/2020

Date of Ruling: 03/12/2020

RULING

L. M. Mlacha, J.

This application was filed under sections 92 (1) (b), 92 (2) and 93 of the Probate and Administration of Estates Act, Cap. 352 R.E 2002 (now R.E 2019) and Rule 14 of Probate Rules. It was heard exparte as provided under rule 14 of Probate rules. It seeks for the following orders: -

- (a) This Honourable Court be pleased to direct THAT THE PROBATE AND ADMINISTRATION OF ESTATES ACT, CAP. 352 R.E 2002, and

PROBATE RULES, be applied in the administration of the ESTATE OF THE LATE AHMAD OMAR KATUNZI @ AHMAD OMAR RWABIBI, who demised on 14th day of December, 2018 at Kigamboni District herein Dar es Salaam Region and this court be pleased to exercise its original jurisdiction in respect of the ESTATE OF THE LATE AHMAD OMARI KATUNZI @ AHMAD OMAR RWABIBI.

- (b) Costs of the application be provided for.
- (c) Further directions or orders as this court may deem just and necessary for the protection of the rights of the Lawful Heirs, Beneficiaries and Creditors of the deceased's Estate.

It was made by Mrs. Filza George Mbatl (herein after referred as the applicant) through the services of Mr. Kasimu Nyangarika, Advocate (retired Judge). Mrs Filza George Mbatl has a sworn affidavit taken in support of the application stating the grounds upon which the application is made. Mr. Nyangarika who later told me that he was just offering legal aid, made a detailed submission to substantiate the facts stated in affidavit. I will try to show albeit briefly, what he told the court.

It was the submission of the counsel that there are compelling grounds calling for an order that The Probate and Administration Act should apply in

to the estate of the late AHMAD OMARI KATUNZI @ AHMAD OMARI RWABIBI and calling for the exercise of original jurisdiction of the court in respect of a probate matter filed in the Primary Court of Kinondoni, Mirathi No. 26/2019. He said that, the case was filed without notice to the applicant, who is the legal wife of the deceased. It is also being conducted contrary to the interests of beneficiaries of the estate including the applicant. Further, counsel submitted, the deceased died in Kigamboni which is in Kigamboni District but the case was filed in Kinondoni Primary Court which is in Kinondoni District contrary to the Law. It was filed in a court which does not have jurisdiction to hear it, he said.

Counsel proceeded to say that the proceedings of the primary court does not show that there was any notice to the applicant who is the wife of the deceased. He went ahead and said that, the assets left by the deceased exceed Tsh. 100,000,000/= . It is therefore not a small estate, he said. He argued that if the court will agree that there are grounds calling for the application of the Act, it should proceed to direct that whoever will file the case should file it in the High Court because the estate involved is far beyond the jurisdiction of the district court which is limited to small estates. Referring to the record of Mirathi No. 26/2019, he said that the court made

the list of 4 heirs who included the applicant but she was not in court. He argued that if she was present the magistrate must have invited her to give evidence. That was not the case. Further, none of the heirs stood to give evidence. The evidence of the applicant did not have any corroboration from any of the family members, he said. He proceeded to say that the magistrate heard him alone and gave his ruling on the same day. The speed involved was just too big. He argued the court to grant the application.

I had time to examine the proceedings of the lower court. They are short.

They read thus: -

MWENENDO

23/10/2019

Mbele ya: *M. Mushi – Hakim*

Washauri: 1. Itowela
2. Husnah } *Wapo*

Muombaji: *Yupo*

Warithi: *Hawapo*

Amri: *Shauri kusikilizwa tarehe 15/2/2019 saa 2:30 Asububi.*

Tangazo litolewe na warithi wajulishwe.

S.N. Mkussu – Hakim

23/01/2020

15/02/2019

Mbele ya: M. Mushi – Hakimu

Washauri: 1. Itowela
2. Husnah } Wapo

Muombaji: Yupo

Warithi: Wapo

SHAURI UPANDE WA MUOMBAJI LINAANZA:

SM1:

Raya Ahmed Katunzi, 30 yrs, Mhaya, Kijitonyama, Muslim. Amethibitisha anasema, marehemu ni baba yangu mzazi alifariki tarehe 14/2/2018 katika hospitali ya Muhimbili. Baada ya mazishi kikao cha familia kiliketi na ndipo nilipendekezwa mimi kuwa msimamizi wa mirathi.

Marehemu ameacha warithi wanne (4)

1. *Raya Ahmed Omari*
2. *Ashrat Ahmed Omari*
3. *Abdallah Ahmed Omari*
4. *Filzer George Mmbari*

Marehemu pia ameacha mali zifuatazo:

1. *Kiwanja Kisarawe.*
2. *Kiwanja Kigamboni*
3. *Kiwanja chenye nyumba ndogo Mjimwema Kigamboni.*
4. *Akaunti CRDB*

Hivyo ninaomba mahakama initeue kusimamia mirathi hii.

Raya Ahmed Katunzi amesaini

S.N. Mkussu – Hakim

15/02/2019

Hoja za wanafamilia:

1. Deizy Hugy (mama mzazi):

Sina swali

Deizy Hugy amesaini

Hoja za Mahakama:

1. Itowela: *Hajaacha wosia wowote.*

Husna:

Hakuna mali zingine zalidid nitasimamia kwa uaminiifu.

Hakimu:

Wote wanataarifa.

S.N. Mkussu – Hakim

15/02/2019

Amri: *Uamuzi leo tarehe 15/2/2019 saa 7:00 mchana.*

S.N. Mkussu – Hakim

15/02/2019

The primary court applies Customary and Islamic Law in probate matters as per the 5th Schedule to the Magistrates Courts Act. This court has concurrent

jurisdiction with the primary court in matters of Customary and Islamic Law save that jurisdiction of this court does not come from the 5th Schedule to the Magistrates Courts Act. It comes from the Probate and Administration of Estates Acts. Section 92(1) of the Act provides for a scenario where a matter which is already in the primary court in its exercise of jurisdiction in Customary or Islamic Law can be terminated and shifted to the district court or High Court. This is done through an order which will have the effect of terminating the proceedings in the primary court and starting fresh proceedings in respect of the matter in the district court or the High Court.

Counsel has referred the court to section 92(1)(b) which provides that, the court may direct the provisions of the Act to apply in a particular case on its own motion or upon an application by a district court or any interested party. And where it so directs, the provisions of the Act will apply in the proceedings in the manner as provided under part IX of the Act. Subsection (2) provides that where the High Court so directs, it may itself exercise original jurisdiction in respect of the estate or order that jurisdiction shall be exercised by the district court (where the estate is a small estate).

Section 93 (1) gives further direction. It provides that where an order for the administration of an estate has been made by or proceedings in respect

of inheritance have been commenced in a primary court, the High Court shall not give any directions unless it considers that it is necessary in the interest of justice or for the protection of a beneficiaries or creditor that the estate shall be administered under the Act.

Section 93(2) says that where the High Court gives any directions it shall forthwith communicate them to the primary court by which the order for administration was made or in which the proceedings have been commenced and the primary court **shall revoke** the order for admission or **stay the proceedings** until the grant of probate or Letters of Administration has been made or an administrator has been appointed.

The issue now is whether there are circumstances compelling this court to issue an order that the Probate and Administration Act should apply in respect of the proceedings now pending at Kinondoni Primary Court and whether this court can exercise its original jurisdiction. Mr. Nyangarika has made a list of grievances as pointed out above and he thinks that the interests of justice can best be met if the order is made. I agree with him. The records show that Mirathi No. 26/2019 was placed before the magistrate and heard quickly. There was no citation of publication. It was heard and granted on the same day. Raya was the only witness. None of the family

members came to support her. The wife of the deceased was left aside for unknown reasons. I think what is happening at the primary court is a failure of justice.

There is an option to appeal against the decision of the primary court to the district court and the option to call for the application of the Probate and Administration of Estates Act. Both are available to the applicant. She has opted to call for the application of the Act. I see nothing wrong with that. Bringing the application of the Probate and Administration of Estates Act to the matter will operate in the best interest of heirs and beneficiaries (including the applicant) for two main reasons; one, to get a chance to start the matter afresh and two, to get the right to be represented by an advocate. I think that Mr. Nyangarika has a point, well presented and worthy the attention of the court.

That said, I order the following: -

1. That, the Probate and Administration of Estates Act, Cap. 352 R.E 2019 shall apply in respect of proceedings pending at Kinondoni Primary Court, Mirathi Na. 26/2019.
2. The primary court magistrate is directed to revoke the appointment of RAYA AHMED KATUNZI who was appointed on

15/2/2019 to administer the estate of the late AHD MAD OMARI KATUNZI in view of the application of the Act in the matter.

3. The applicant or any interested party is allowed to file the case in this court.

I order so.



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

L. M. MLACHA

JUDGE

03/12/2020

Court: Ruling delivered in the presence of Ida Rugakingira, Advocate for Applicant and in absence of Respondent.



A handwritten signature in blue ink, identical to the one above, consisting of a stylized 'L' and 'M' followed by a horizontal line.

L. M. MLACHA

JUDGE

03/12/2020