

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

AT DAR ES SALAAM.

CIVIL APPEAL NO. 61 of 2020

HERIETH PETER SHEMWETA.....APPELLANT

Versus

BEATRICE JOEL MKUMBWA.....RESPONDENT

(From the decision of District Court of Kinondoni at Kinondoni)

(Kiliwa- Esq, RM.)

Dated 19th February, 2020

in

Mis. Civil Application No. 42 of 2019

JUDGEMENT

22nd June & 5th July 2021

Rwizile, J

This is the first appeal. The appellant who is a widow of the late Joel S. Mkumbwa appeals against the decision of the District Court of Kinondoni. By its history, this appeal traces its origins in Probate and Administration Cause No. 36 of 2013.

According to the judgement in the record, following the demise of her newly married husband, on 12th December 2009, the appellant petitioned the court for probate and letters of administration. The district court, however having discovered that the deceased left a Will, the respondent, as the caveator in the same cause, was appointed an administratrix of the deceased estate. The appointment was done on 8th April 2016. The appellant as it seemed, did not sit on her grievances occasioned by the decision. Having discovered she was late to appeal against that decision, she applied before this court for extension of time. This attempt was through Misc. Civil Cause No. 756 of 2016. It is unfortunate, that the same was dismissed on 26th September 2017 because the same was abandoned by her.

When this attempt failed, some two years later. She filed Misc. Civil Application 42 of 2019, applying for revocation of the probate issued to the respondent some years back. Before the same court and same Magistrate, her application was dismissed for want of merit. This was on 19th February 2020. She then filed this appeal advancing two grounds of appeal, which were argued together.

She was represented by Mr. Sanga, who faulted the trial magistrate for failure to consider time taken for the respondent to administer the estate. In his view since the respondent has been misappropriating the estate of the deceased and is not in good terms with appellant, her appointment should be revoked as this court did in the, In the Matter of application for letters of administration of the late **Donati Mwasi Kezirahabi vs Benedict Museso Kezirahabi**, Probate and Administration Cause No. 4 of 2010 at page 8.

According to him, the reasons for revocation are apparent as in section 49(1)(e) and (2) of the Probate and Administration of the Estate Act.

He also asked this court to be fortified by the decisions of this court in the cases of **Safiel Cleopa vs J Kadege** [1984] TLR 200 and **Judith Patrick Kyamba vs Tunsume Mwimbe and 3 Others**, Probate Cause No. 50 of 2016.

On his party, the respondent who was represented by Mr. Tairo was of the submission that there is no reason that may warrant revocation of the respondent as stated under section 49 of the Act. Mr. Tairo was of the view that the delay to complete the administration process was due to the appellant's cases filed in court. They have been according to him, the source of delay. The learned advocate went on saying, the respondent could not mismanage the property because she does not live there. He went on submitting that, the house, the only property subjected of administration, was the only source of income of the deceased and, that it was built by the respondent's mother way back in 1992 before the appellant was married by her father. He asked this court to dismiss the appeal for lack of merit.

By way of rejoinder, it was submitted for appellant that revocation in this case is inevitable since section 49(2)(e) of the Act dictates so. He lastly referred to the case of **Mercedes Mathias Masawe vs Sophia Mbaga**, PC Civil Appeal No. 06 of 2019 and he asked the revocation be done and at least a neutral person should be appointed.

In the premises, it is apparent that the respondent was appointed an administratrix in 2016. It is five years since her appointment. This however has been the cause of this case.

When dismissing the impugned application, the trial court was of the considered opinion that section 49 (1) (a) to (e) of the Act, could not suit the circumstances of the case warranting revocation. She did so upon discussing the import of the same section.

I have perused the same, it is crystal clear that the law imposes conditions to the administratrix to file the inventory and exhibit the statement of the account in 6 months or for the time not exceeding one year or as the court may from time to time determine upon application by the party. This applies to the dictates of section 107 of the Act. In the instant matter, it is indeed true that the respondent has not exhibited any inventory since her appointment. This conflicts the law and the remedy is as per section 49 of the Act, where the appeal is pegged. To be more precise, the section provides as follows.

49. (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;

(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant, though such allegation was made in ignorance or inadvertently;

(d) that the grant has become useless and inoperative;

(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 provisions of Part XI or has exhibited under that Part an inventory or account which is untrue in a material respect.

(2) Where it is satisfied that the due and proper administration of the estate and the interests of the persons beneficially entitled thereto so require, the High Court may suspend or remove an executor or administrator (other than the Administrator-General or the Public Trustee) and provide for the succession of another person to the office of such executor or administrator who may cease to hold office, and for the vesting in such person of any property belonging to the estate.

It follows from the above that, revocation is the remedy when the court is satisfied that any of the conditions set under the provisions has not been complied with. For revocation to be granted there must be evidence that probate was obtained by means of fraud or that the grant was obtained through untrue information. It has also to be proved that, the same is useless or inoperative, but above all, failure to exhibit an inventory willfully and without reasonable cause.

In the case of **Joseph Mniko and Others vs Daudi Mahende Kichonge**, Probate and Administration Cause No. 48 of 1996. This court Shangwa J (as he then was), revoked the grant for failure to file the inventory. In that case, an inventory was not filed 9 years following the appointment and for the bad tendency of misappropriating the estate of the deceased. The appellant has cited the cases of **Judith Kyamba** and **Benedicto Museso**(supra) which in my view are distinguishable. In the latter, for instance, revocation was due to jurisdictional issues among others.

It has been submitted by the appellant, which I agree that failure to exhibit an inventory may lead to revocation. The point to determine, is whether there is evidence that the administratrix willfully neglected to file the same. I have perused the record with healthy eyes. According to the submissions of the appellant there is such negligence. But in the eyes of the respondent, it was submitted, it was due to the cases, filed by the appellant. Two incidences were cited as shown before. There is also no evidence that the respondent has wasted the estate.

I have no doubt that basing on the evidence procured before the trial court. The respondent did not willfully and without reasonable cause fail to have the requirements of the law followed. In the case of **Mercedes** (supra), the court dismissed the appeal. It was on the grounds that part of the estate was administered already. I think, revocation of letters of administration becomes the propose cause of action to take, if there is evidence that the administrator and, in this case, the administratrix has sat on the estate for too long without reasonable grounds, or that she is misappropriating the estate.

In as much as I agree that the cited section should be followed as suggested by the appellant. Still, each case must be judged according to its merit. In the matter at hand, it could not be at the best interest of the estate to make any revocation, because to do so will directly affect the estate. Given its nature and history of how the respondent in actual fact acquired it and has been maintaining it. Like the court below, I find no reason to make revocation as asked. I dismiss the appeal with no order as to costs.

I make an order that the respondent is given 6 months from the date of this judgement to complete the task and file the inventory and exhibit the accounts before the trial court. In case, the order is not followed to the letter, the respondent should be properly dealt with as per section 107 (3) of the Act.

ACK. Rwizile
Judge
05.07.2021



Recoverable Signature

X

A handwritten signature in blue ink, appearing to be 'A.K. RWIZILE', written over a horizontal line.

Signed by: A.K.RWIZILE

