

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

AT DAR ES SALAAM

MISCELLANEOUS CIVIL APPLICATION NO.611 of 2020

EILEEN MFINANGA..... APPLICANT

VERSUS

PETER ALPHONCE MLAY.....RESPONDENT

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

(Mwakalinga, Esq- SRM)

Dated 9th November 2020

in

Probate and Administration Cause No.48 of 2020

RULING

6th June & 12th August 2021

Rwizile, J.

This application is for revision. It is preferred under section 79 of the Civil Procedure Code. Apparently, it arises from the Probate cause commenced at the District Court of Kinondoni. The respondent petitioned for letters of administration with a Will of the estate of the late Onesfor Aloyce Mlay who died testate. Upon citation, the applicant filed a caveat.

Days passed by without prosecuting it. The trial court was of the firm decision and dismissed the same for failure to have it prosecuted. He proceeded to hear and ultimately granted the petition in favour of the respondent after due examination of his worthiness to stand as an executor.

The applicant therefore was not amused by the act. She has appeared before this court applying for revision of the same in the following terms;

- (a) The Hon. Magistrate erred in law and in fact by granting letters of administration without affording the applicant the right to be heard, which denial amounted to breach of principles of natural justice.
- (b) That the Hon. Magistrate erred in law and fact by granting the respondent's application without issuing citation to the applicant and or summons to appear and defend her caveat which failure occasioned injustice on part of the applicant;
- (c) That the Hon. Magistrate erred in law and fact by granting the respondent's application without there being a notice and or gazetting the application as required by the law;
- (d) That the Hon. Court erred in law and fact by withdrawing the applicant's caveat before expiration of the statutory period 60 days;
- (e) That the Hon. Magistrate erred in law and fact by dismissing the applicant's caveat on the ground that the applicant abandoned her caveat after being served with the citation while there is no proof of service to that effect; and

- (f) That the Hon. Magistrate erred in law and fact by determining the application without first referring the matter to the High Court after the applicant's caveat to have been lodged which failure amounts to irregularity hence incorrect decision against the applicant.

Before this court, the applicant was represented by Mr. Elly Musyangi learned advocate while the respondent was represented by Mr. Fulgence learned advocate. The application was argued orally as follows;

According to Mr. Musyangi, the order has to be revised because the court did not issue citations when the caveat was filed, which is contrary to section 59(2) of The Probate and Administration of Estates Act. The law according to him, should be read together with Rule 9 and 13 of the Probate and Administration Rules. According to Mr. Musyangi, the court dismissed the caveat before an elapse of 4 months contrary to section 58(5) of the Act. It was his argument further that in terms of section 58(3) and (4) of the Act, upon filing a caveat, the petition became contentious and ought to have been referred to the High Court. He asked this court to take reference in the case of **Revenath Eliawory Meena vs Albert Eliawory Meena and Another**, Civil Revision No. 1 of 2017, CA Unreported.

On his party, Mr. Fulgence was of the view that since service was done but the applicant could not appear the court was justified to dismiss the caveat. He was of the view that section 58(5) deals with treatment of the caveat and the court did not see it fit to apply the same. He asked this court to dismiss the application.

When rejoining, Mr. Musyangi was of the same view as in his submission in chief that the application has merit. It should be granted.

The application is filed under section 79 of the CPC, which provides for three conditions for any revision to stand, **one**, where the subordinate court has exercised jurisdiction not vested in it by law, **two**, or where it appears to have failed to exercise jurisdiction so vested, and **three**, or where it has acted in the exercise of its jurisdiction illegally or with material irregularity.

It appears to me, that the applicant has filed a litany of grounds for which this application should lie, which appear to be coached in the form of a memorandum of appeal.

Going by the application itself, this court is asked to revise the court ruling and an order dated 2nd November 2020, by the trial Magistrate. Having been so asked, I had to revisit the record. What transpired on that day, the case was heard by examining 4 witnesses and a judgement reserved to 9th November 2020 (see page 10 of the typed proceeding). The record is therefore clear, there was no ruling made on that day and the only order was just for hearing and for fixing the day for the judgement. In that premise I do not see if that is what should be revised.

From the submission, the applicant's advocate has attacked the trial court for its failure to issue citation when the caveat was entered. According to him, this was a glaring non-compliance of the law. I was asked therefore to grant the application. In my view, granting this application means nullifying the proceedings of the trial court conducted on 2nd November 2020. I wonder, if such order can be made at this stage.

The record shows, the respondent was appointed an administrator of the estate of the deceased Onesfor Aloyce Mlay on 9th November 2020. The applicant is challenging an interlocutory order made days before the grant.

In my view, the applicant did not address any of the three principles enunciated by the law as I have shown before for this revision to stand. But still under section 79(2) of the CPC, this court is not enjoined to revise an interlocutory order that did not mean to finally determine the matter. The law states as hereunder;

Notwithstanding the provisions of subsection (1), no application for revision shall lie or be made in respect of any preliminary or interlocutory decision or order of the Court unless such decision or order has the effect of finally determining the suit.

The applicant therefore has, if he intended this court to deal with what is not consistent with the law in the decision, I mean the whole decision, which is not the case here, he ought to have filed an appeal to challenge it. For the foregoing reasons, I hold that this application has no merit. It is dismissed with costs.

AK. Rwizile
Judge
12.08. 2021



Recoverable Signature

X

Signed by: A.K.RWIZILE