

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
AT TABORA

MISC. CIVIL APPLICATION NO. 41 OF 2019

*(Originating from Probate Case No. 2 of 2019 at the High Court of
Tanzania at Tabora)*

SARAH TUMVILE KAPONOLA ----- APPLICANT

VERSUS

ABIA MESHACK NSUHUZWA ----- 1ST RESPONDENT

ADELA MESHACK NSUHUZWA ----- 2ND RESPONDENT

RULING

Date 05 .08 2021& 03 .09 2021

BAHATI, J.:

The applicant herein named **Sarah Tumvile Kaponola** has moved this Court under section 49 of the Probate and Administration of Estate Act, Rule 14 and 29 of the Probate rules, and section 95 of the Civil Procedure Code Cap. 33 [R.E 2019] in a quest for an order of this Court to revoke or annul the letters of administration granted in the estate of the late Meshack Nsuhuzwa Gwanka in Probate and administration cause No. 2 of 2019 at High Court of Tanzania, Tabora Registry.

The application was supported by an affidavit sworn by the applicant. With the permission of this Court, both parties agreed to dispose of the application by way of written submission.

Submitting in support of the application, the applicant stated that, she is an ex-wife to the deceased Meshack Nsuhuzwa, they lived together as husband and wife until when they divorced and distributed their matrimonial assets vide Matrimonial Cause No. 1 of 1996 and Matrimonial Civil Appeal No. 2 of 1997 and among other things, she was awarded a House situated at Plot No. 117 Block "E" Migazi Street in Tabora and Milling Machine.

The applicant claims that as per the order of this court in Matrimonial Civil Appeal No. 2 of 1997 she was awarded the above-mentioned assets by Mchome J but now the respondent has wrongly placed the same in the Estate of the late Meshack Nsuhuzwa. She claims further that, Justice Rumanyika had already given an order on the same matter through Miscellaneous Civil Application No. 04 of 2017 so the respondent's act amounts to abuse of court process and in fact contempt of court.

Finally, the applicant prayed this court to revoke or annul the letters of administration issued in the estate of the late Meshack Nsuhuzwa Gwanka.

The respondents through their advocate Mr. Frank Severin Kavishe before giving in to the substantive arguments raised by the applicant started by submitting that; Probate and Administration Cause No. 2 of 2019 was for petition of probate and the same was granted not letters of administration as submitted by the applicant. Further that, Misc. Civil application No. 41 of 2019 and Misc. Civil

Application No. 26 of 2020 are two faces of the same coin which were brought to this court to delay justice.

On the substance of the application, the learned counsel submitted that Justice Rumanyika in Misc. Civil Application No. 04 of 2017 called for any interested party to object to the application for the grant and when Probate and Administration Cause No. 2 of 2019 was filed in this Court while staying for almost six months for its final determination the applicant opted not to take any action.

Mr. Kavishe added that it is the applicant who caused wastage of time by disregarding procedures established in Tanzania to deal with probate-related cases and her intention has always been to delay and defeat the right of heirs of the will of the late Meshack Nsuhuzwa Gwanka.

Having gone through the applicant's application, submissions made by both parties, and the records of this case, there is no doubt that the appellant Sarah Tumvile Kaponola was once the wife of the deceased Meshack Nsuhuzwa Gwanka. The records state further that the couple divorced and distributed to each other their matrimonial assets, which is evidenced by the judgment of this court in Matrimonial Civil Appeal No. 2 of 1997 delivered by Mchome, J.

It is on record that, the applicant (who was the respondent in the appeal) was awarded the following, I quote: -

"The respondent is awarded the house in Tabora at Mwanza or Migazi Street, milling Machine, one weighing scale, one radio, and one cart"

From the record, it seems that since the order of the court was pronounced the applicant never executed the decree because no record reveals any move to execute the decree until the demise of Meshack Nsuhuzwa Gwanka.

The applicant is now praying this court to revoke or annul the letters of administration issued in the estate of the late Meshack Nsuhuzwa Gwanka in Probate and Administration Cause No. 2 of 2019 for the reason that the executor included the applicant's personal properties to the estate of the deceased while knowing that the same is not the properties of the deceased.

In this application, the respondent has corrected the applicant to the effect that what was granted by this court in Probate and Administration Cause No. 2 of 2019 was Probate, not letters of administration as the appellant claimed. This is a minor error, it should be overlooked. There is no dispute that he was appointed executors of the estate of the late Meshack Nsuhuzwa.

Section 49 (1) (b) of the Probate and Administration of Estates Act, Cap 352 [R.E 2019] which deals with grants and removal of executors states that: -

(1)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;

Guided by that principle, the court has noted that in all of his submissions, the respondents have not contested the decision of this Court in Matrimonial Civil Appeal No. 2 of 1997 that granted the applicant a house at Migazi Street (which is now the subject of contention). It is my view that prior to filing the application for grant of probate to this court the respondents were aware of the division of matrimonial assets between the deceased and his ex-wife Sara Tumvile Kaponola. It is my considered observation that the respondents concealed from the court the existence of the Matrimonial Civil Appeal No. 2 of 1997 which declared the applicant the owner of a house at Migazi Street.

Further, the court has noted that before the respondents could be appointed as executors, Rumanyika, J in Misc. Civil Application No. 04 of 2017 observed the same and he ordered that: -

"Unless there was any other decision of a competent Court to the reverse, the four properly (sic) (subject of the Caveat) were w.e.f 7/8/2019 no longer and should not be counted as part of the deceased's estate any further. It is in fact so ordered."(Sic)

Despite the order of the Court that was delivered before the appointment of the respondents as executors, they never informed the court that one of the properties listed does not form part of the deceased's estate as the Court had ruled earlier.

The application that led to the grant of executorship to the respondents was supported by a will of the deceased, the question that comes to my mind is whether the Will stands to be valid if one of the properties bequeathed is not the property of the testator (see *Benson Benjamin Mengi & 3 Others vs Abdiel Reginald Mengi & Another Probate & Administration Cause no. 39 of 2019*). Since the last will of the deceased is not attached in this application, my view is on assumption that, it is the respondents who included the applicant's property into deceased's estate but if it is the deceased himself who bequeathed another persons' property through his last will, I would say that the respondents were appointed executors based on void will.

In the upshot, the application is granted, the respondent's grant of probate is hereby revoked. In the event, if any interested party desires may freshly apply for the appointment of a new administrator of the estate and that should be done in accordance with the law. The respondents should forthwith deliver to the court all necessary documents witnessing the grant.

Order accordingly.

A.A. Bahati

A.A. BAHATI,

JUDGE

03/09/2021

Ruling delivered under my hand and seal of the court in Chamber, this 3rd day September, 2021 in the presence of the Applicant.

A.A. Bahati

A. A. BAHATI

JUDGE

03/09/2021

Right of appeal fully explained.

A.A. Bahati

A. A. BAHATI

JUDGE

03/09/2021

