

**IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA**

**IN THE DISTRICT REGISTRY OF SONGEA**

**AT SONGEA**

**DC. CIVIL APPEAL NO. 07 OF 2021**

**(Originated from Probate and Administration Cause No. 02 of 2020 in the  
District Court of Mbinga at Mbinga)**

**LEOCADIA SIXMUND MBELE..... APPELLANT**

**Versus**

**JUDITH SIXMUND MBELE..... RESPONDENT**

**JUDGMENT**

**Date of Last Order: 23/09/2021.**

**Date of Judgment: 19/10/2021.**

**BEFORE: S.C. MOSHI, J:**

Before the District court of Mbinga, the respondent petitioned for letters of administration of the estate of the late Sixmund Thomas Mbele. The appellant raised a caveat based on two grounds. Firstly, that she was not involved in the family meeting which proposed the respondent to petition for letters of administration. Secondly, that she has interest in land on Plot number 15 Block "C" at Mbinga Urban area since the said house was included in the properties listed for administration.

The caveat was overruled, and the petition was allowed. The respondent was appointed as the administrator of estate of the late

Sixmund Thomas Mbele. Aggrieved, the appellant has appealed to this court on the following grounds: -

- (i) That the Honourable trial court grossly erred in law and fact in entertaining and deciding on the matter relating to the ownership of the disputed house on Plot No. 15 Block "C" Mbinga Urban Area, within Mbinga district while it had no any jurisdiction to adjudicate on land matters as its power over the matter before it was only rest on appointment administrator of the deceased as required by the law governing probate matters.*
- (ii) That, the Honorable trial court grossly erred in law and fact for failure to hold that availing to the circumstances of the case the respondent is time barred to claim over the appellant suit house located on Plot No. 15 Block "C" Mbinga Urban Area, within Mbinga district since the appellant had been in occupation of the suit land since 2001 i.e*

*almost for 19 years now lapsed without any interruption from the respondent.*

- (iii) That, the Honourable trial court grossly erred in law and fact for failure to properly evaluate the evidence adduced by appellant who established conclusively that the disputed house on Plot No. 15 Block "C" Mbinga Urban Area, within Mbinga district belongs to the appellant.*
- (iv) That, the Honourable trial Court grossly erred in law and fact when it refused to admit the Exhibits/ documentary evidence tendered by the appellant through the land officer without any legal justification.*
- (v) That, the Honourable trial court grossly erred in law and fact in relying on unfounded and contradictory evidence of the respondent's side.*
- (vi) That the Honorable trial court grossly erred in law and fact for failure to take into accounts*



*the weight of evidence adduced by  
appellant's side.*

The appeal was disposed of by way of written submission. The appellant was represented by Mr. Gaudence Ndomba, advocate whereas the respondent enjoyed the services of Mr. Zuberi Maulid, advocate.

On the first ground Mr. Ndomba submitted among other things that, the trial court erred in law and fact in entertaining and deciding the matter relating to ownership of disputed house on Plot No. 15 Block C, Mbinga Urban area while it had no jurisdiction to adjudicate on land matters as its power over the matter before it was on appointment of administrator of the deceased estate as required by the law governing probate matters. He said that, what the trial court did was contrary to section 167(1) of the Land Act, Cap.113 R.E 2019 which vests jurisdiction in land matters including issues of ownership to the Court of Appeal, the High court, the District Land and Housing Tribunal, Ward Tribunal and Village Land Councils. He submitted further that, District Court has no jurisdiction to determine ownership of land, he cited section 4(1) of the Land Disputes Courts Act, Cap. 216 R.E 2019.

He argued that the trial court was of the opinion that the petitioner qualified for appointment as provided under section 100 of the probate

and Administration of Estates Act, Cap. 352 R.E. 2019. It was supposed to proceed with the appointment of an administrator of the estate. On the issue of ownership of disputed house, he said that, the trial court was supposed to advise parties to take the matter to a forum which has jurisdiction to determine it.

On the second ground of appeal, he argued that, the appellant had been in actual possession of the disputed house and has been using it openly and peacefully since 2001 when the deceased was still alive, the deceased passed away in 2004, thus he owns the land for 19 years. Neither the deceased nor the respondent or anybody else did question or claim for anything against appellant over the disputed house. In support of his argument he cited rule 22 of the schedule of the law of limitation Act, Cap. 189 R.E 2019.

Ground three and six were argued together, he argued that, the appellant testified and proved that she has been occupying the disputed house for more than 19 years from 2001 to 2020 when the respondent listed it as part of the estate of the deceased. The land officer of Mbinga District testified that he personally knew the deceased, the deceased went to his office in 2001 with the appellant who is his daughter and two elders namely mzee Sitin and Abesh, and asked Land officer to



effect transfer of the house to the appellant. The deceased did handover the house to the appellant in writing.

In respect of ground four, it was his submission that the trial court erred in refusing to admit handing over letter tendered by PW1 (land officer) without any legal justification. He said that, the said document was tendered by the addressee himself who received it in 2001 in his office. The trial court was supposed to accept and admit it as exhibit so that it could give an opportunity to the opposite party to examine and cross examine over it and finally the trial court could have given its judgment. He said that by refusing to admit it, such act denied an opportunity not only to the trial court but also to the appellate court to go through it and decide over it.

On fifth ground, he argued that the defence witnesses' evidence relating to the location of the disputed house varies. DW1, the appellant said that it is located at Luhuwiko which is a ward in Mbinga Town Council while DW2 stated that the house is located at Msikitini area within Mbinga B ward. He said this difference entails that possibly the two witnesses were talking about two different houses. He stated further that respondent stated that after the death of her mother in 2011, the disputed house was handed to the appellant whereas DW2

said that the house was placed under him until when the appellant demanded it. He also said that, the trial court admitted Exhibit D1, rent assessment form issued by Land office Mbinga while the same shows plot No. 5 Block C Ruhuwiko in Mbinga while disputed house is located on plot. Number 15 Block C, Mbinga Urban. Again, he said that in exhibit D1 the owner of the house is Sixmund Thomas while the owner before the transfer was Sixmund Thomas Mbele, he said that, these are two different people.

In reply the respondent's counsel firstly stated that being the officer of the court having all duty to the court, he discovered the anomaly in proceedings of the trial court in respect of reception of the evidence of advocate as a witness. He said that it has been the cherished procedure of this court and under section 52(2) of the Probate and Administration of Estate Act, Cap. 352 R.E 2019 which provides that once a caveat is entered, the proceedings shall take as nearly as may be in form of a suit in which the petitioner of the grant shall be the plaintiff and any person who appears to oppose the proceedings shall be the respondent. He said in that regard procedure of hearing governing civil suit will equally apply.

He argued that, looking at the trial court proceedings Mr. G. Ndomba (advocate) is the one who was identified as a caveator, during hearing of the caveat, he submitted in support of the same testifying as a plaintiff and he went further to tender documentary evidence which is purely a role of witness and not an advocate as he did. He said that, nowhere in records of the trial court the said purported objector appeared to have testified anything before the court of law. He contended that, that is why even after closure of evidence of caveator side the respondent was not given an opportunity to cross examine the evidence of purported objector or even of the said advocate. He contended that, this error need intervention of this court.

In respect of the grounds of appeal, he started with the first ground of appeal, he replied that section 58(1) of the Probate and Administration Act (supra) entitles a party who alleges to have an interest in the estate of the deceased and wishes to assert her interests to enter a caveat against the grant of the probate or letters of administration as the appellant did by complaining about inclusion of house on plot No. 15 Block C Mbinga Urban area as among the deceased's estate.



He said that, he is aware of the position of the law as cited by counsel for the appellant, that the jurisdiction in land matters including issues of ownership only rests on land courts established in accordance with section 167(1) of the Land Act. He submitted that, however the record does not show that the trial court determined a land matter but the issues before the trial court was whether a house on Plot No. 15 Block C Mbinga Urban Area form part of deceased's estate? The issue which was within the jurisdiction of the trial court.

He said that it is ridiculous to condemn the trial court to address the issue regarding the house as it did taking into account that it is the appellant herein who entered the caveat and in support thereof he made a submission based on that ground. He said that, the said house be regarded as part of deceased's estate but this time he submitted that the trial court was supposed not to say anything about the said house rather was required to advice parties to file the matter before the proper forum. He argued that, this is abuse of court process taking into account that the appellant before the trial court was represented by the same advocate.

He said that, the issue of the house was discussed by the trial court in due course of determining the caveat lodged before it and what

determines jurisdiction of the court is the subject matter in dispute. He said that, in the case at hand, the subject matter was not a house on Plot No. 15 Block C, but it was an application for petition of letters of administration of deceased's estate of which the said house appeared to be one among the deceased's estate.

He added that if the appellant thinks that the said house does not form part of the deceased's estate, still she has a legal remedy, she can initiate a litigation before a proper forum that is in the land courts to establish that she is the owner of the land by suing the respondent as administratrix of deceased's estates.

For the second ground, he replied that the trial court correctly decided the matter before it and the same was legally right for not considering the issue of acquisition of land by way of adverse possession on the ground that she had been using it for more than twelve years because by doing so would have failed to determine the matter brought before it. He said that rule 22 of the schedule of the law of limitation is irrelevant to the matter at hand as the said provision regulates time limit to claim interest on land matter which was not the issue before the trial court; hence he argued the same to be disregarded.



He argued the third and sixth grounds of appeal together; he said that the trial court correctly decided the matter by dismissing the caveat as the decision was based on evidence adduced before it. The appellant contended to have acquired the house in dispute from her father as a gift during his life time but the records show that the appellant changed the ownership of the said house while acting in her capacity of administratrix of the deceased's estates, the legality of the transaction is questionable. He said that, the trial court was correct to proceed with the appointment of the respondent as administratrix of deceased estates because even the appellant himself failed to advance any sufficient reason to justify objection of appointment of the respondent.

On the fourth ground of appeal, he submitted that, the trial court was correct to refuse to admit the said document which purportedly was a handing over letter because the same was tendered contrary to the law and it failed to meet legal conditions for it to be admitted as documentary evidence to prove the fact.

As to the fifth ground of appeal he argued that, the trial court was correct to decide the matter taking into consideration the weight of evidence of the respondent which was water tight than that of the appellant. He also said that, the disputed property was properly



identified by the witnesses and if the respondent committed minor contradictions in identifying the said property in question the same does not change the truth that it is the same property which is subject of this dispute. Lastly, he submitted that the appeal has no merits, he prayed the same to be dismissed.

After considering the submission filed by the parties, grounds of appeal and records of trial court, I will not deal with the grounds of appeal following the irregularities which were pointed out by the respondent's advocate, that the trial court's proceeding relate to procedures pertaining to the legal requirement following a caveat which was entered by the appellant.

The procedures for dealing with probate and administration causes in a situation where a caveat has been entered are governed by the provisions of section 58 and 59 of the Probate and Administration of Estates Act, Cap. 352 R.E 2019 and Rule 82 of the Probate Rules.

Basically, a party who alleges to have an interest in the estate of the deceased and wishes to assert her interests has a right to enter a caveat against the grant of the probate or letters of administration. In relation to this, see section 58(1) of the Probate and Administration Act. Cap. 352 R.E 2019, which reads thus: -

*"Any person having or asserting an interest in the estates of the deceased may enter a caveat against the probate grant or letters of administration."*

The caveat to be entered in court has to conform to the format set out in form 62 appearing in the first schedule to the Probate Rules. After a caveat has been filed the procedures enumerated under Rule 82 of the Probate Rules has to be followed including the filing of an application for issuance of the citation to the caveator or calling upon him to state his stance as to whether he/she supports the grant of probate or letters of administration or not. See section 59(2) of the Probate and Administration of Estates Act, Cap. 352 R.E 2019.

Where a caveator appears and opposes the petition for probate or letters of administration then sub section 3 of section 59 of the Probate and Administration Act comes into play, it requires the court to proceed with the petition in accordance with paragraph (b) of section 52 of the Probate and Administration which provides: -

*"In any case in which there is contention, the proceedings shall take, as nearly as may be the form of a suit in which the petitioner for the grant shall be plaintiff and any person who appears to oppose the proceedings shall be defendant".*

Therefore, where a petition has been opposed, the probate or administration proceedings change, they are conducted as nearly as can be into an ordinary civil suit, where the petitioner becomes the plaintiff and the caveator becomes the defendant and parties are required to file special pleadings. See the cases of **Nuru Hussein vs. Abdul Ghani Ismail Hussein** [2000] TLR 217 and the case of **Monica Nyamakare Jigamba vs. Mugeta Bwire Bhakome as administrator of the Estate of Musiba Reni Jigabha and Hawa Salum Mengele**, Civil Application No. 199/01 of 2019, Court of Appeal sitting at Dar es salaam (Unreported).

The trial court proceedings, after the caveat had been entered by the appellant on 18<sup>th</sup> February 2020 are quoted hereunder: -

*20/02/2020*

*CORAM -G.E KIMARO, RM*

*APPLICANT: Present*

*C/C A. Kapungu*

*CAVIETOR: MR.G.NDOMBA (Adv)*

*MR. G.NDOMBA.*

*There is a caviet(sic) towards the petitioner's application, she is objecting the grant of probate to*



*the applicant, the appearance is already made, as per Rule 82(6) of the probate Rules, which requires this court to mark the suit as contentious suit. And we pray for the hearing date of this caveat.*

*ORDER: 05/03/2020 Hg of the caveat parties to appear*

*Signed*

*20/02/2020*

*5/03/2020*

*CORAM-G.E. KIMARO, RM*

*APPLICANT: Present*

*CAVEATOR: Jovin Komba (Adv) hold brief for Ndomba*

*C/C A.Kapungu*

*MR. J. KOMBA*

*I am hold (sic) the brief of the learned Counsel Mr. Ndomba who is sick, we pray for another date.*

*ORDER: 10th March 2020 for hearing of caveat(sic)*

*Parties to appear.*

*Signed*

*05/03/2021*

Thereafter hearing of the caveat started on 10/03/2020. From the above extract the subsequent stages as elucidated under rule 82 of the Probate Rules were not followed, on 20/2/2020 the appellant's advocate informed the trial court that appearance was entered requiring the court to mark the suit contentious but the record is silent as to what transpired after the caveat was filed in court. The next stage after entering of the caveat, ought to have been an application made by the respondent who was the petitioner to the trial court by filling form number 63, so that it could issue citation of the caveator through form 64 in terms of rule 82(3) which in turn would have moved the appellant to enter appearance in terms of rule 82(4) of the Rules, by filing form 65. It is at such stage when the matter would have been termed contentious and therefore, bringing into play the provision of section 52(b) of the Probate and Administration of Estates Act. Since the procedure were not followed and taking into account that the stages as set out by the law in rule 82 of the Probate Rules were made with a purpose and as such compliance is mandatory and not optional as can be inferred from the word "shall" which has been used, non compliance

renders the proceedings a nullity. See the case of **Revenanth Eliawory Meena vs. Albert Eliawory Meena and Anneth Eliawory Meena**, Civil Revision No. 1 of 2017, Court of Appeal sitting at Arusha, (Unreported).

Consequently, there is no gainsaying in holding that, all proceedings in respect of Probate and Administration Cause No. 2 of 2020 were a nullity from the date the caveat was raised. I do here quash them and set aside. I order that Probate and Administration Cause No. 2 of 2020 be remitted back to the trial court for continuation from where the caveat got entered by the applicant before another Magistrate with competent jurisdiction in compliance with the laws governing the administration of estates proceedings. I make no orders as to costs since the parties are siblings.

It is so ordered.

Right of Appeal Explained.



**S.C. MOSHI**

**JUDGE**

**19/10/2021**