

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DAR ES SALAAM SUB-REGISTRY)
AT DAR ES SALAAM**

MISC. CIVIL APPLICATION NO. 03 OF 2022

Ref no 20230216000480181

(Originating from the High Court of Tanzania Dar es Salaam District Registry at Dar es Salaam Probate Cause No. 7 of 2016).

THEOFRIDA MHAGAMA.....APPLICANT

VERSUS

REUBEN JACKSON MWAIKINDA..... 1ST RESPONDENT

LYNETE GWANTWA MWAIKINDA..... 2ND RESPONDENT

SEKELA RITA MWAIKINDA 3RD RESPONDENT

RULING

29th April & 16th May, 2024.

KIREKIANO, J.:

According to the amended chamber summons, the applicant, under section 14 (1) of the Law Limitation Act, prays for the following orders:

- 1. That the Court may be pleased to grant the applicant an extension of time to file a caveat out of the period required by law to challenge the validity of the will of the late Jackson Reuben Mwaikinda dated 1/8/2008 because the will of the deceased is invalid and cannot be acted upon by the Court*

to appoint the executor appointed by the deceased in the will.

2. The Court may be pleased to order the status quo to be maintained in respect of the house on plot no. 625 Block L Mbezi Beach Dar es salaam till further orders of the Court.

3. Costs.

4. Any other reliefs deemed fit by the Honourable Court.

This is a ruling on the preliminary objection posed by the respondent. The details will appear shortly, but at this stage, for good reasons and coherence purposes, I prefer to give a brief background of this application. This legal encounter between the parties arises from the probate and administration cause no. 07/2016. The same involved the estate of the late Jackson Reuben Mwaikinda. The applicant is the widow of the deceased, who died on 9th February 2015. The couple were not blessed with children together, but the deceased had three children of his own, namely, Reuben Jackson Mwaikinda, Lynette Gwantwa Mwaikinda and Sekela Rita Mwaikinda, the respondents in this application.

It is noted from the record of the said probate that Njengafilimbi Mponjoli Mwaikagule was appointed as the executor of the estate, following the deceased will.

In the said will, the deceased had bequeathed several properties, but significantly, the property mentioned in the second applicant's prayer, which is a house at Plots No. 625 and 626 Block 'L' Mbezi Beach Area in Dar es Salaam to Reuben, and the appellant was to be a caretaker of the deceased's properties within two years.

The applicant went into a legal encounter with the executor Njengafibili Mponjoli Mwaikugile as the legal representative of Jackson Reuben Mwaikinda challenging the interpretation of contents of the Will, she lost the battle both in miscellaneous Civil Application No. 638 of 2018 in this court and in appeal before the court of appeal that is Civil Appeal No. 160 of 2020. In its decision, the Court of Appeal adjudged thus;

Now, since the appellant failed to challenge the Will in accordance with the law when she had the opportunity to do so, she cannot be heard to complain now because neither the trial court nor this Court is the rightful forum to raise that issue.

The court went on to decide;

We are in agreement with Mr. Bwana. This is because, according to paragraph 3 of the Will, the disputed house was bequeathed to the deceased's son Reuben. Further, under paragraph 9 of the Will, the appellant was only permitted to control the disputed house and the one at Ada

Estate for two years after the burial of the deceased after which the authority over them would cease and automatically vest in the rightful heirs namely, Reuben Jackson Mwaikinda and his two sisters, respectively.

*Since the appellant forced to remain in the suit premises after the expiry of two years, the trial court did not err when it referred to her as a tenant at 18 will, since as earlier stated, she is not one of the heirs permitted to reside in the disputed house (see **Theofrida Mhagama vs Njengafibili Mpojoli Mwaikugile (Civil Appeal 160 of 2020) [2021] TZCA 660 (5 November 2021) Tanzania**)*

As days passed, the record reveals that the life of the executor of the will and legal representative of the said Ruben ended on 20/11/2021 and was laid to rest. Undaunted, the applicant has resurrected the battle with the respondents herein. She thus seeks leave to file a caveat out of time and an order to maintain the status quo in the disputed property as indicated above. This ruling responds to the objection posed against the application on three points thus;

- 1. The application at hand is untenable for want of the executor of the will or Administrator of the estate of the late Jackson Reuben Mwaikinda.*

2. The Application at hand is incompetent for impleading persons not parties to the application

3. That the application is an abuse of court process.

The objection was heard orally. The applicant had the services of Miss Rwechungura and Mr Jamhuri Johnson, learned advocates, while Miss Nsangizyo Zilahulula represented the first Respondent. The second and third respondents defaulted appearance despite efforts to serve them by publication.

In support of the first point of objection, Miss Zilahulula submitted that this application is untenable because it seeks to challenge the execution of the will of the late Jackson Reuben, Mwaikinda's estate, at the same time, the executor, Njengafilimbi Mwaikagule, passed away on 20/11/2021, a fact that the applicant admits. Regarding the second point of preliminary objection, Miss Zilahulula submitted that the application is incompetent for impleading persons not parties to the application.

She argued that the proper person to be sued or brought to court in this application is the executor, who is now dead; thus, the administrator could be sued, if any. Therefore, filing this application against the beneficiary

intending to challenge the will's validity is improper in law and against the procedure.

In her reply, Mrs Rwechungura responded that this Court ordered the first respondent, Mwaikagule, to be removed. No point of law is indicated suggesting what in law has been infringed; she argued that the point raised should have cited the explicit provision of law infringed. She noted the case of **Mukisa Biscuit** to the effect that failing to raise the point of law means that the same ought to be dismissed.

She argued that this objection is misconceived, referring to Order XXII Rule 2 of the Civil Procedure Code, which states that a suit may proceed in the event of the death of a part. She submitted that removing the executor by death means the remaining heirs are interested in this application. On the other hand, she argued that the point that the application impleaded persons not parties to the application lacks merit.

In a short rejoinder, Miss Zilahulula insisted that the application was incompetent because the applicant and respondents are beneficiaries of the deceased estate; they can not sue each other. As such, Order XXII Rule II of the CPC is applicable in ordinary cases, and thus, the application is incompetent.

I am alive to the principle stated in the cited case of **Mukisa Biscuit Manufacturing Co. Ltd Vs Westy End Distributors Ltd [1969] EA 696.**

The spirit in that decision is that objections should be raised on a pure point of law, and cannot be raised if any fact has to be ascertained. Further, a preliminary objection is argued on the assumption that all the facts pleaded by the other side are correct and which, if claimed as a preliminary point, may dispose of the suit.

On my part, I wish to start with question posed by Miss Rwechungura whether there is objection in the first place. On the first point the counsel for the respondent's point is lucid, stating that there is no executor or administrator. Admittedly, when posing this objection, the respondent did not cite the section of the law. I consider this not fatal, taking the progressive view that, when the point of law is raised, the court should consider if it possesses a pure point of law or otherwise.

My approach is also based on the development made that in applications where there is a non-citation or wrong citation, the court will consider if it has the requisite jurisdiction to entertain the application and ignore the error in citation of the section. See **Bin Kuleb Transport Company Limited vs. Registrar of Titles & Others (Civil Application**

522 of 2020) [2022] TZCA 259 (9 May 2022) Equally so, when an objection is raised with wrong or non-citation of the law, the same should not justify the court in ignoring the court's consideration on the point. For the sake of argument, what was expounded in Mukisa Biscuit's case was the content of the objection rather than the form in posing the same.

On the first point, I have considered the applicant's prayers and the party's submission on the tenability of this application. Admittedly, under section 58 of the Act, any person having or asserting an interest in the deceased's estate may enter a caveat against the probate grant. There is no dispute that the property mentioned in the second prayer was the estate's property. The problem with this application is that there is no executor nor administrator of the estate in the office.

Assuming the properties were not entirely administered as the applicant suggests, then if there was any issue, the procedure in the event of the death of the executor is as provided under section 46 of the PAEA thus;

*On the death of a sole or sole surviving executor who has proved the will or of a sole or sole surviving administrator, **letters of administration may be granted in respect of that part of the estate not entirely administered**, and in granting such letters*

of administration, the court shall apply the same provisions as apply to original grants.

I have also considered the submission by Miss Rwechungura on the application of order XXII Rule 2 of The **Civil Procedure Code Cap 33** [RE 2022 that is where there are more plaintiffs or defendants than one, and in the event of death of any of them then the remaining person may proceed, with respect I disagree with this submission because there're is specific law on the specific matter that is the probate law on probate issue on what happens upon the death of the executor.

It is not in dispute that the executor of the estate and the legal representative of the Late Jackson Reuben Mwaikinda is dead and that no administrator was appointed for the purpose of the unadministered estate, if any. As such given what transpired in ***Theofrida Mhagama vs Njengafibili Mpojoli Mwaikugile (Civil Appeal 160 of 2020) [2021] TZCA 660 (5 November 2021) Tanzania***, The applicant can not sue or go into a legal battle against the 1st respondent's legal representative in the first place and, again, against him personally. I thus find merit in the first point of objection.

I have noted that the respondent addressed the third point inadvertently, referring to the chamber summons, which had the name of the deceased executor. Considering the same was amended, I shall not deliberate on the third point.

For the reason stated, the objection on the first point is sustained.

In passing, as can be gathered from the Court of Appeal's decision on the will and property at issue, the issue of the validity of the will and status of the said house was deliberated by the Court of Appeal. Given this, the parties need to inform themselves on the principle of finality in litigation. The same is founded on the public interest policy that requires litigation to end regardless of the parties' views of the decision handed down.

I shall pose here and refrain from protracting the argument any further. All said this application is incompetent, and it is struck out. Considering this is a probate matter, I shall make no order regarding costs.



A. J. KIREKIANO

JUDGE

16.05.2024

COURT:

The ruling was delivered in the chamber in the presence of Miss Chrisensia Rwechungura, learned counsel for the applicant, who also held a brief of Miss Nsangizyo Zilahulula, counsel for the respondent.



A.J. KIREKIANO

JUDGE

16/05/2024