IN THE COURT OF APPEAL OF TANZANIA

AT TANGA

(CORAM: RUTAKANGWA, J.A., KIMARO,J.A., And MANDIA, J.A.)

CIVIL APPEAL NO. 71 OF 2012

AHMED MOHAMED AL LAAMAR ..... APPELLANT

VERSUS

FATUMA BAKARI .....1ST RESPONDENT

ASHA BAKARI .....2ND RESPONDENT

(Appeal from the Ruling of the High Court of Tanzania at Tanga)

(Teemba, J.)

dated 28th August, 2009

in

Misc. Civil Application No. 40 of 2007

.....

JUDGMENT OF THE COURT

29th June, & 6th July, 2012

RUTAKANGWA, J.A.:

We have found it apposite to preface this judgment with this illuminating quotation from the judgment of this Court in the case of **Hadija Masudi as the Legal Representative of the late Halima Masudi v. Rashid Makusudi,** Civil Appeal No. 26 of 1992 (unreported). In that appeal the parties, as is the case in this appeal, were embroiled in a bitter dispute over the administration of the estate of one Salima Makusudi who had died intestate in the late 1960s. This Court had lucidly observed thus:-

> *"We have found it necessary to give a chronological background to this case since the outcome of the appeal is to say the least,* ***a startling demonstration of the truth that this Court like all courts can do justice only in accordance with the law and not otherwise..."*** *(Emphasis is ours).*

The conventional wisdom inherent in this 1993 observation, was in 2000, given constitutional recognition in Article 107B of our 1977 Constitution. We shall, therefore, endeavour to render the justice the parties herein are seeking, "in accordance with the law of the land and not otherwise."

The respondents herein are siblings. They are the daughters of the late Abubakar Bin Hassan (the deceased) who died on 10th November, 1969, although the parties both in this Court and the High Court had said it was on 15/11/1972. The deceased had left behind his "last will and testament" (the will) dated 28th July, 1966. In the will, the deceased had appointed one Ahmed Mohamed Al-Laamar (the appellant) as the executor of the "will and Trustee" of his "minor children FATUMA BINTI BAKARI aged 12 years and ASHA BINTI BAKARI aged 6 years."

In the will, the deceased, among other things, directed the appellant to pay out first all his funeral and testamentary and legal expenses for the grant of probate. He had also bequethed to the two respondents, his two

coconut plantations situate at Mavia in Pangani district. These were plot No. 159 K.B.2 and Plot No. 169 K.B.2.

In paragraph 5 of the will, the deceased unequivocally directed the appellant that:-

> *"...my estate and assets all and singular, real and personal should not be distributed to my aforesaid two heirs until my daughter* ***ASHA BINTI BAKARI*** *attains the age of 25 years and in the event of* ***ASHA BAKARI*** *predeceased* ***FATUMA BINTI BAKARI*** *before she* ***(ASHA BINTI BAKARI)*** *attains the age of 25 years, then until* ***FATUMA BINTI BAKARI*** *attains the age of 25 years."*

Fortunately, both daughters are still alive. Simple arithmetic leads to the conclusion that since in 1966 ASHA was six years old, she attained 25 years of age in 1985. So, by the strict terms of the will, the deceased having died in 1968, his estate was not to be distributed as spelt out in the will, **earlier than 1985.**

Following the death of the deceased, the appellant petitioned for the grant of probate in the High Court of Tanzania, at Tanga. This was in Probate and Administration Cause No. 10 of 1968. There is no dispute on the fact that he was, on 11th November,1972, granted the probate sought in accordance with the provisions of the Probate and Administration

of Estates Act, Cap 352 R.E. 2002 (the Act) and the Rules made thereunder(the Rules).

In November 2007, the respondents moved the High Court at Tanga for the revocation of the appellant's grant of the probate and to provide for their own succession to the office as joint administrators of the deceased estate. The High Court was moved by chamber summons under sections 29, 49 (1) and (2) and 107 of the Act. The respondents cited in their joint affidavit, the following reasons which prompted them to seek the two orders:

(a) The appellant was irregularly granted the probate;
(b) The appellant had failed to file any inventory in the appointing High Court as required by the law, and
(c) The appellant, instead of distributing the estate to the mentioned beneficiaries in the manner stipulated in the will, sold the properties forming part of the estate even before Asha reached 25 years of age.

In his counter affidavit, the appellant vehemently resisted the application. His main basis was that the application was totally misconceived in law as he had duly completed the administration as directed in the will, 21 years earlier. He categorically denied distributing the estate before Asha attained the age of 25 years. He, significantly, attached as annexture A1 to the counter affidavit, the inventory containing

a full and true estimate and the account of the estate, which he allegedly exhibited in the High Court on 25th February, 1987.

The respondents disputed the genuiness of the said inventory and account, denying to have acquired any property from the estate of their late father. They claimed that the annextures to the counter affidavit showing them to have received their due shares in the estate, carried their forged signatures.

Having studied the affidavits in support and opposition of the application and the parties' written submissions, the learned High Court judge who heard the matter found herself having to decide this one crucial issue: Whether or not "there was anything left to be executed according to the deceased's will".

In her judicial approach in search of a conclusive solution to the above issue, the learned judge was minded to peruse the original High Court record containing the petition for the grant of probate. Her good intentions were frustrated. She was led to believe that that record could not be traced anywhere. She took that to be the case given the fact that it was a 1968 case. But this was not a fatal handicap to her.

Appearing to accept the appellant's claim that he had already discharged his duties as executor of the deceased will, the learned judge, and here we shall take the liberty of quoting her **in extenso,** held:-

"Once the execution process is completed the best alternative, in case of future complaints, one would suggest that the applicants be advised to institute an action against the respondent. *This was an argument by Mr. Akaro, learned counsel for the respondent. Mr. Akaro was of the view that, since the distribution was effected in 1986 when the applicants were over 25 years, it does not make sense for them to file this application well over 20 years later. I take note of this argument but on the other side of the coin,* ***there are allegations of non – disclosure of other deceased properties. In the event that the allegations are proved to be true, it will be unfair for the applicants who have raised it several times.*** *In addition, where it is proved that the property exists, it will also be difficult to recover it if another administrator is not appointed. For the interest of justice, I am of strong views that if the application is granted, the applicants will legally be able to pursue their rights in two ways. One, by recovering the deceased's estate* ***if anything was left out by the respondent in his capacity as an administrator/Executor****. If not appointed as*

administrators, it may become difficult for them to do so. Two, the applicants, in their capacity as heiresses, may sue the respondent for recovery of any property misappropriated.

In the upshot and for the reasons given above I grant the prayers as presented in this application. No order for costs." (Emphasis is ours).

We are compelled to point out here that we found it important to provide the emphasis in the above extract, in order to demonstrate two decisive facts. One, it is evident that the learned judge harboured no illusions on the fact that the appellant had, by that time, already discharged his duties as executor of the will. That is why he was not ordered to deliver forthwith the granted probate under section 51 (1) of the Act. Two, the claims of non disclosure, waste or dissipations and existence of other properties forming part of the deceased estate remained mere allegations needing to be specifically and formally proved by the respondents.

The appellant was aggrieved by the ruling and orders of the High Court. After obtaining the requisite leave to appeal, he lodged this appeal through Mr. Alfred Akaro, learned advocate. Mr. Akaro has preferred these two grounds of appeal:-

"(1) That learned High Court Judge erred in law and fact by granting the prayer for revocation/ annulment of the Appellant's probate whereas the Appellant had already wound up his duties and functions as executor about 23 years past.

(2) The learned High Court Judge erred in law and fact by appointing the Respondents as administrators of the estate of the late ABUBAKARI BIN HASSAN deceased whereas the administration of the estate of the said deceased had already been wound up by the Appellant about 23 years past."

On 22nd June, 2012, before the appeal came up for hearing before us, the respondents lodged a notice of preliminary objection. It had the following points:-

"(1) That the appellant had not fulfilled all the directives laid down in the last will and testament dated 28th July 1966 and the probate No. 10 of 1968 was not Executed legally as directed in the will by the late Abubakari Bin Hassan. The appellant did not distribute the two farms No. 159 and No. 169

to the Respondents in 1985 when Asha had attained the age of 25 years.

(1966 Asha was 6 years old) .:1966 + 25 = 1991 – 6 = 1985).

The appellant did not exhibit an inventory and accounts within 6 months from the grant of the probate and he did not wind up the administration duties in 1985 as prescribed by section 24 of and section 107 for the Probate and Administration of Estate Act, (CAP 352 R.E. 2002).

(2) That the Probate No. 10 of 1968 granted to the appellant was of a limited purpose it expired by Effluxion of time and it become useless and inoperative since 1985. The Ruling of the Civil Application No. 40 of 2007 granted the joint letter of administration to the Respondents on 12th September 2011 to Administer the Unadministered properties which were misapplied by the appellant whereof he derived benefit from the office (Administrator) by retaining the title of the farm No. 159, he sold 12 houses and transferred 5 farms Nos. 151, 152, 153, 154 and 155 to himself as prescribed by

section 47, 49 (1) (d) and (2) section 103 and section 138 of the Probate and Administration of Estate Act (CAP 352 R.E. 2002).

(3) *That the appellant's learned Advocate has wrongly moved the High Court with the revoked Rules of the Court of Appeal Rules, 1979, the notice of appeal was made under Rule 76 and Rule 43 (a) leave to appeal, he did not seek leave of the court to amend the Notice of appeal. He did not comply with transitional provisions as prescribed by Rule 130 of the Court of Appeal Rules 2009."*

We should hasten to point out here that if we have chosen to quote in full the contents of the three points the subject of the notice of preliminary objection, it was not on account of their pedagogical value. We only wanted to demonstrate that they are unintelligible as they are totally misconceived. This was a result, as we learnt during the course of the hearing of the appeal, of the respondents placing much faith in the advice and directions of legally untrained minds in the pursuit of their rights, be they real or imagined. Furthermore, we wanted to show the futility of these objections, unabatedly raised by many litigants these days, sometimes out of sheer ignorance but in most cases deliberately to derail court proceedings.

When the appeal was called on for hearing the two respondents appeared before us in person, fending for themselves. The appellant was represented by Mr. Akaro.

As is always the case, we had to deal first with the raised preliminary objections before dealing with the appeal itself. Being lay persons, the respondents had, understandably, nothing useful to tell us to substantiate their points of objection. The Court had to make it clear to them that the first two points cannot in law, by any stretch of imagination, form a basis of a point of preliminary of objection as elucidated in the case of **Mukisa Biscuit Manufacturing Co. Ltd. v West End Distributors Ltd** (1969) E.A. 696 at page 700. See also, **Karata Ernest and Others v. The Attorney General**, Civil Revision No. 10 of 2010 (unreported). They appreciated the Court's efforts and guidance and accordingly abandoned them.

On the third point of preliminary objection, it was their contention that the High Court was wrongly moved to grant the leave to appeal. To them the notice of appeal had to be issued under the Tanzania Court of Appeal Rules, 2009 (the Court Rules) and not the 1979 Court Rules. They equally argued that the application for leave to appeal ought to have been made under the Court Rules and not the 1979 Court Rules.

In his short response, Mr. Akaro urged us to dismiss the preliminary objection as it was legally misconceived. It was his contention that the ruling of the High Court was delivered on 28th August 2009. He went on to argue and the respondents agreed with him, that the notice of appeal was lodged on 10th September, 2009, the same day he lodged the application for leave to appeal. As the Court Rules became operative on 1st February, 2010, he could not be faulted for relying on the 1979 Court Rules. We then reserved our ruling in order to save the Court's and parties' time and money. It was to be incorporated in the Court's final judgment in the appeal, which we hereby do.

Having considered the parties' submissions on the issue, we are constrained to agree with Mr. Akaro that this point of objection is totally misconceived in law. As the Court Rules came into operation on 1st February, 2010, the notice of appeal was correctly lodged under Rule 76 of the 1979 Court Rules. We also hold without any demur that the application for leave to appeal was correctly based on section 5 (1) (c) of the Appellate Jurisdiction Act, Cap. 141 and Rule 43(a) of the 1979 Court Rules. We accordingly dismiss the preliminary objection.

Submitting in support of the two grounds of appeal, Mr. Akaro contended that since the appellant had discharged his duties as executor in February, 1987, a fact accepted by the learned High Court judge, both the revocation and succession to the office of the executor was superfluous.

He further argued that if there was any part of the deceased estate which was wasted, damaged, etc, or left undistributed, the respondents were free to sue the appellant for damages and/or for their recovery from him or any other person in possession of the same. He accordingly prayed the Court to hold that the revocation and/or annulment of the probate granted to the appellant and the appointment of the respondents as administrators of the deceased estate was superfluous and wrong in law.

On their part, the two respondents resisted the appeal and pressed for its dismissal. It was Fatuma's contention that she was not aware of the properties which the appellant distributed which were the subject of the inventory he exhibited in the High Court. She further claimed that they were "appointed to administer those properties which were not mentioned in the will". Both in their joint affidavits and in her submission before us, she did not specifically state those properties plus their value which were left undistributed, which they were appointed to administer. All they alleged in the affidavits, was that the appellant had fraudulently sold either to himself or other people some houses and shambas belonging to the deceased and had filed false information in the inventory.

Asha told us that the appellant had not distributed anything to them, at all.

In response, Mr. Akaro asserted that all the properties mentioned in the will were distributed to the respondents.

As we have already shown in this judgment, the application before the High Court was based on sections 29, 49(1) and (2) and 107 of the Act. Section 49 deals with the revocation of grants of probate and letters of administration and removal of executors. Section 107 deals with the time frame for exhibiting the inventory and accounts in the High Court. It is categorically provided in Section 107 (4) that if an executor or administrator exhibits intentionally a false inventory or account he/she commits an offence and on conviction is liable to imprisonment for a term not exceeding seven years. It goes without saying, therefore, that the exhibiting of a false inventory or account being a criminal act, needs proof beyond reasonable doubt in a criminal prosecution and not otherwise.

On the other hand, section 29 partly reads thus:-

"29. Where –

(a) no executor is appointed by will, or

(b) the executor or ail the executors appointed by a will have renounced or are persons to whom probate may not be granted; or

(c) no executor survives the testator; or

(d) all the executors die before obtaining probate or before having administered all the estate of the deceased; or

(e) the executors appointed by any will do not appear and take out probate, letters of administration with the will may be granted of the whole estate or so much thereof as may be unadministered to such person or persons as the court deems the fittest to administer the estate;

...."

In this particular case it is crystal clear that none of these enumerated conditions apply to the execution of the will of the deceased. This is simply because, the appointed executor, the appellant, petitioned for the grant of the probate and was, admittedly, granted the probate sought which he never renounced. It is our respectful finding, therefore, that section 29 of the Act was wrongly invoked by the respondents and could not be relied on by the learned High Court judge in granting their prayers.

Indeed the High Court is vested with powers to revoke or annul the grant of probate and/or letters of administration for reasons stated in section 49(1) (a) to (e) of the Act. The word *'revoke'* has its origin in a Latin word "*revocare,*" which meant "to call again or back". In both legal

and ordinary English language, this word means to cancel, withdraw, reverse, repeal, vacate, put to an end, etc. In our respectful opinion, both common sense and logic dictate that one can only annul, repeal, vacate, put to an end, etc, what was previously granted or passed and is still operative or existing. Nothing which has already come to an end can be put to an end or vacated, etc. That's why, for instance, no stay order can be passed to stay execution of a decree which has already been executed. The pertinent question which we have to answer now, is whether in view of this clear meaning, the probate granted to the appellant in 1972 was capable of being revoked or annulled in Misc. Civil Application No. 40 of 2007.

The firm basis for the answer to the above posed question can only be obtained from one unimpeachable source, which was not readily available to the learned judge. As already shown in this judgment, while deciding the application before her, the learned judge did not have the original record in Probate and Administration Cause No. 10 of 1968 at her disposal. We were luckier. Our own efforts not only led to the recovery of the said court record, but also that of the Tanga High Court Probate and Administration Causes register wherein the filing of the said petition was entered.

It is evident from both the register and the court record, that Probate and Administration Cause No. 10 of 1968 was instituted on **19th**

December, 1968. More significantly, contrary to the repeated assertions in the High Court to the effect that the deceased died in November, 1972, the truth, as gathered from the death certificate, is that he died on **10th November, 1968.** Since the petition for probate was lodged on 19th December, 1968 and the probate granted on **11th November, 1972,** the provisions of section 62 of the Act were not flouted at all as the Respondents have persistently claimed all along. Furthermore, we have discovered from the High Court record, that as consistently claimed by the appellant, he did exhibit the requisite inventory and account in the High Court on 25th February, 1987. This fact is proved beyond any reasonable doubt by Exchequer Receipts Nos. 643059 and 643058 respectively both dated 26th February 1987. In law the probate proceedings were effectively closed from that day.

Given the fact that the appellant had already discharged his duties of executing the will, whether honestly or otherwise, and had already exhibited the inventory and accounts in the High Court, there was no granted probate which could have been revoked or annulled in terms of section 49(1) of the Act. As the appellant was already **functus officio,** as correctly argued by Mr. Akaro, the revocation or annulment order, in our respectful opinion, was superfluous. It had no purpose to serve [see **HADIJA MASUDI v. RASHID MAKUSUDI** (supra)]. It is no wonder, as already alluded to earlier on in this judgment, that the High Court did not order the appellant to surrender the granted probate to it in terms of

section 51 (1) of the Act. We are, therefore, constrained to allow the first ground of appeal.

We understand that under section 49 (2) of the Act, the High Court has jurisdiction to *"suspend and remove an executor or administrator ... and provide for the succession of another person to the office of such executor or administrator who may cease to hold office..."* This is what appears to have been done by the High Court in the impugned ruling and order. To us, this order seems to be problematic in law for two reasons.

Firstly, the law clearly empowers the High Court to suspend or remove an executor or an administrator and appoint a successor to that office. The appellant, as already amply demonstrated, was granted probate and on the material available, he had completed his obligations under the will. This was on 26th February, 1987. There was, therefore, no office of executor to which the respondents could have succeeded to under section 49(2).

Secondly, the appellant was the executor of the will. Assuming without deciding here that the execution of the deceased will was yet to be completed, if the respondents had made out a good case, the High Court would validly have removed the appellant as the executor and validly provided for the succession to his office, of ***executor,*** by the respondents. But that was not the case here. The learned judge appointed them as administrators to administer the alleged unadministered part of the estate

not covered in the will. It is our respectful holding that that jurisdiction could not have been derived from section 49 (2) of the Act, for the appellant was not appointed as the administrator of the deceased estate. The respondents could only succeed the appellant only as executors of the will and not otherwise. Their appointment as joint administrator was, therefore, bad in law.

For these two reasons, we allow also the second ground of appeal. In fine, we allow the appeal in its entirety.

Finally, although we have no legal obligation to do so, we wish to make these brief observations. **One,** if the respondents genuinely believe that the appellant acted in excess of his mandate or wasted the estate and/or subjected it to damage or occasioned any loss to it through negligence, they are free to sue him. Sections 138 and 139 are relevant. **Two,** if they are also convinced that he either fraudulently converted some properties forming part of the estate, and/or that he deliberately exhibited a false inventory or account, they are equally free to institute criminal proceedings against him in accordance with the provisions of the governing laws. Indeed, we are really left wondering as to why the respondents have been unwilling to pursue these courses of action, which were clearly pointed out to them in the letter of the District Registrar, High Court Tanga, Ref. No. HC/Civ. I/Vol.III/011 dated 15th March, 1993 which is annexture F.5 to their Reply to the counter affidavit in the High Court. We

hope they are alive to the principle of equity that *"Delay defeats the Equities."*

All said and done, we allow this appeal in its entirety. We quash and set aside the ruling and order of the High Court dated 28th August, 2009. We make no order for costs.

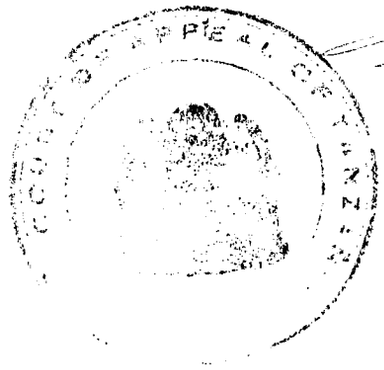
DATED at **TANGA** this 4th day of July, 2012

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

N.P. KIMARO
JUSTICE OF APPEAL

W.S. MANDIA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.



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