

IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM

MISCELLANEOUS CIVIL CAUSE NO.5 OF 1995

FAUSTIN FELIX ISAYA APPLICANT

VERSUS

JOVITA KATUNZI RESPONDENT

R U L I N G

The applicant FAUSTIN FELIX ISAYA has, through his counsel Mr. Ukwonga, filed this application under sub section 79 (1) and 95 of the C.P.C. 1996 and section 44 (1)(b) of the M.C.A. 1984, seeking for this court to exercise its revisional powers in Kisutu RMC Probate cause No.19 of 1994 and quash the Ruling made on 29/3/95 whereby the application to have the *exparte* hearing set aside was refused. The applicant is also asking this court to revise the *exparte* proceedings from 22/2/95 up to 29/3/95 for being a nullity.

The history behind this application, as it was revealed after going through the records as follows.

One JOVITA KATUNZI, the son of the deceased Secunda Nkuba, applied on 14/5/93 to be granted letters of administration for the estate of his deceased mother who died in Dar es Salaam on 6/6/90. That was Probate Cause No.35 of 1993.

As the hearing was in progress the trial magistrate was directed by his senior to transfer the file to the District Court. This transfer was a result of the application by Mr. Ukwonga acting on behalf of one Faustin Felix Issaya the husband of the deceased. It was not transferred on the *instante* of the applicant as was recorded by the trial Magistrate, Probate Cause No.19 of 1994 was therefore opened at the RM Court Kisutu, and Faustin Felix Issay applied for letters of administration in regard to the estate of the late Secunda Nkuba. I must remark that this is where matters started going off course. The applicant Faustin Felix ought to have filed a caveat in Probate Cause No.19 of 1994.

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Instead it is the original applicant Jovita who having opened another file at RM Kisumu - Probate cause No.24 of 1994 - now became the caveator, after being advised to do so by the RM incharge. I note in record that there is a piece of paper inscribed by the PRM on 25/4/94 to that effect. Be it as it may, Jovita Katunzi continued to press with the matter. He filed a chamber application to challenge the application by Faustin Felix Issaya. The hearing took off with the usual mentions and adjournments until on 22/2/95 when the PRM ruled that the hearing of the application proceed exparte as the applicant Faustin had refused to obey court summons. On 15/3/95 the applicant then respondent filed another chamber summons under O 9 Rule 13 asking the court to set aside the exparte order and hearing to proceed interpartes. An affidavit was filed by Faustin in support of the application, while Jovita the caveator countered the affidavit. The trial magistrate was not impressed. He was of the firm view that as Faustin had refused to be served, the court was right to proceed exparte. Faustin felt aggrieved hence this application for review before this court.

The issue before me is whether the trial magistrate was justified in ordering on 22/2/95 to proceed exparte. In otherwords, whether the court could proceed exparte in such probate proceedings.

That there are several persons interested to administer the estate of the late Secunda Nkuba is not disputed. There is Jovita Katunzi the son, Faustin Felix Issaya the husband and of course the brothers of the deceased. It is therefore a contentious matter and from the record it is clear that none of the parties is willing to give up the claim without a fight.

The applicant filed an affidavit on 15/3/95 in support of his chamber application to have the exparte order set aside. Whereas the trial magistrate had based his decision on the fact that the applicant refused to be served, the applicant himself says nothing on the matter. Rather he says he was misinformed on the dates by a court clerk by the name of

The said Mtui has not been asked to deny or confirm applicant's story.

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I view of the evidence on record that the applicant had refused to be served, I think the trial magistrate acted properly in the circumstances to proceed to hear the objector alone. I am not satisfied that the applicant has shown sufficient cause to make me depart from the path taken by the trial magistrate. The applicant has, in my view conveniently avoided to say anything on the summons - why? It is not for this court to fill up the gap. In the event, I cannot fault the decision by the trial magistrate to proceed exparte. Application dismissed with costs.

A. G. Bubeshi
A. G. BUBESHI
JUDGE

10/5/96

Delivered before

Mr. Ndanzi for Respondent

Applicants being absent though served.