IN THE HIGH COURT OF TANZANIA
AT DAR ES SALAAM

CIVIL APPEAL NO. 61 OF 1994

(Original Probate Cause No. 31 of 1992 at the Resident Magistrate Court Kisutu)

SWALEH BWANDAU ..... APPELLANT

VERSUS

MOHAMED ..... RESPONDENT

JUDGEMENT

LUANDA, PRM, (EXT. J.):

In the District Court of Ilala at Kivukoni one SWALEHE BWANDAU (hereinafter referred to as the Appellant) applied for letters of administration so that he be appointed administrator of deceased estate of the late MWANTENDE FUNDI who died interstate. As usual citation was issued and published in the local news paper of Uhuru dated 5/6/1992.

It would appear MOHAMED HAMISI SWALEHE (hereinafter referred to as the Respondent) happened to come across to this citation. He filed a caveat. The trial Court fixed a date a date of hearing of the caveat.

On four occassions the Respondent didnot appear. The trial Court, in absence of the caveator, granted letters of administration to the appellant.

Sometime, after the granting of the letters of administration, the Respondent through his advocate one Miss Sheikh emerged and asked the Court to set aside the order of granting letters of administration on the ground that he was not given an opportunity of being heard. Mr. Maftah who advocated for the Appellant objected to the setting aside the order saying the Respondent had to show he was not aware of the date of hearing. He went on to say that even the basis upon which the application is based, that is, the caveat, neither was in force nor renewed as provided under S. 58(5) of the Probate and Administration Ordinance Cap. 445. In short he submitted that there was no valid legal caveat before the trial Court to look into it.

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At the end of the day, however, the trial Court set aside the Orders and went further in granting leave to the Respondent so that he renew his caveat. It is not stated under which section of the Probate and Administration Ordinance, Cap. 445 was the Order made. Be that as it may, the Respondent was then heard plus his witnesses. The Appellant was also heard plus his witness. Finally judgment was written and delivered which ordered fresh application be lodged in Court so that all interested parties, to use the word of the Court should apply so that they be considered as administrator of the deceased estates. Soon after that judgment the Respondent applied to be appointed as administrator of the deceased estates, hence the issuance of citation and publication in Mzalendo News Paper of 21/8/94. Thus the appearance of the name of the Respondent on the folder.

In this appeal Mr. Maftah advocated for the Appellant whereas the Respondent was represented by Mr. Mlanzi Learned Counsel.

Mr. Maftah raised three grounds of appeal in his memo of appeal; namely:-

1. The Learned Magistrate erred in law in ordering that fresh application be lodged in Court for the appointment of the administrator.

2. The Learned Magistrate erred in law and fact in failing to address his mind to the evidence available in record.

3. The Learned Magistrate has erred in law and fact in failing to appoint the applicant as administrator.

As regards to the first ground. Mr. Maftah in his written submission, argued that by Ordering a fresh application be lodged in Court, the Learned Magistrate was exercising powers of Appellate Court which he had none. This was not proper. He submitted. Coming to the second ground of appeal Mr. Maftah submitted that the issue for determination is appointment of administrator of the deceased estates and not inheritance. He went on to argue that the appellant was looking after the deceased houses while the deceased was still alive by collecting rent, effect minor repairs and make necessary maintanance. This place him in a good position vis-a-vis the others.

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Lastly Mr. Maftah submitted like in the second ground the appellant was a fit person to be appointed as administrator of the deceased estate.

Mr. Mlanzi on the otherhand supported the finding of the trial Court. He submitted that the Court was right in ordering a fresh application as the Court is entitled to revoke the grant when the proceedings leading to grant the letters of administration were defective in substance as provided under section 49 of the Probate and Administration Ordinance, Cap. 445. He went further to submit that the Court was right in ordering a fresh application be made because section 71(1) of the Probate and Administration Ordinance Cap 445 was not complied with. The section states that all people who are interested are required to give their written consent to the would be administrator. However, this point was not canvassed at the trial. Be that as it may, in the alternative Mr. Mlanzi submitted that in the event the lelter "Exhibit D3" is declared to be a will then the same is a nullity as it contravenes with some requirements of a valid will under Islamic law and traditions.

Let me start with the alternative argument raised by Mr. Mlanzi. There is nothing on record to suggest that Exhibit D3 was declared by the trial Court to be a will. Mr. Maftah neither did he raise it nor did he ask the Court that his client be a sole inheritor of the deceased estates. So it is not an issue before the trial Court. Having said so let me proceed with the merits of the appeal.

It is not in dispute that the Appellant applied to be appointed as administrator of deceased estate. It is further not in dispute that the respondent filed a caveat with a view, it would appear to preventing the appellant from being appointed. It is also not disputed that the Respondent didnot appear when the matter was fixed for hearing. Thus the appellant was appointdd. It is further not in dispute that after the appointment the Respondent ask the Court to set it aside so he be allowed to explain why he filed the caveat. The order was set aside and hence the ordering of fresh application. The question for determination and decision is whether that was proper. This inturn bring me to the issue of what is a caveat and what purpose does it serves.

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And that alone will dispose off this appeal.

According to BLACK'S LAW DICTIONARY SIXTH EDITION the word caveat has been legally defined and it also states what purpose it serves. It says:-

> Let him beware. Warning to one to be careful. A formal notice or warning given or warning given by a party interested to a Court, judge or ministerial Officer against the perfomance of certain acts within his powers and jurisdiction. This process may be used in the proper Courts to prevent (temporary or provisionally) the proving of a will or the grant of administration etc.

By lodging a caveat the Respondent wanted to prevent temporarily the issuance of letters of administration for reasons he would adduce or withdraw it in case he find it he has no objection or consent to the appointment. But it should be borne in mind that a caveat has a life span of four months. This is provided under section 58(5) of the Probate and Administration Ordinance, Cap, 445. It provides:

> (5) A Caveat shall remain in force for four months after the date upon which it was lodged (Unless sooner withdrawn) but, subject to the provisions of section 59, may be renewed.

The Learned trial Resident Magistrate was very much aware of it. But he went ahead in setting aside the order of granting letters of administration for reasons he has stated therein without stating the enabling provision to do so. This is not proper. In any case after the expiry of four months the caveat so lodged is deemed to have been withdrawn and that no further caveat may be entered. This is provided under subsection 4 of section 59 which reads:-

> (4) Where a Caveator gives notice that he supports the petition, or where he fails to give notice to that effect and fails to enter an appearance to the petition within the time limited therefor, the caveat shall be deemed to have been withdrawn and no further caveat may be entered by or on behalf of the caveator.

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In the instant case, at the time of hearing the Caveat, the same was marking its 20th month of its non existence. And that it was not renewed. In terms of the quoted section, the caveat was deemed to have been withdrawn after the expiry of four months i.e. on 6/11/92. To put it differently at the time of hearing the caveat i.e. on 28/3/1994 there was no enforceable caveat existed. So the Learned trial Resident Magistrate abdjucated on a non existent matter.

Mr. Mlanzi submitted that the trial Court revoked the order of granting the letters of administration. With due respect to Mr. Mlanzi his assertion is not borne out by the record. The record clearly stated that it set aside the order.

As that is the crux of the appeal, and for reasons adduced, I allow the appeal in that I set aside the order of the trial Court in ordering fresh application be made. Instead I restore the decision of the same Court dated 24/6/93 which appoints the appellant administrator of the deceased estate. The appeal is allowed with costs.

Order accordingly.

(B. M. LUANDA)
PRM. EXT. JURISDICTION
6/1/97

Judgment delivered in the presence of Mr. Mlanzi, Advocate for the Respondent and the Respondent present in person.

Mr. Maftah, advocate-absent duly served.

(B. M. LUANDA)
PRM. EXT. JURISDICTION
6/1/97

Mr. Mlanzi: We pray for leave to appeal to the Court of Appeal of Tanzania.

Court: Under what Rule of the Court of Appeal?

Mr. Mlanzi: I pray for leave for half an hour to check.

Court: Granted

Court: Mr. Mlanzi indicated the Rule in writting.

Order: Upon reading Rule 43(a) of the Court of Appeal Rules, 1997

leave to appeal to the Court of Appeal is hereby granted. Court

of Appeal is hereby granted.

(B. M. LUANDA)
PRM. EXT. JURISDICTION
6/1/97