

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

AT TABORA

MISCELLANEOUS CIVIL APPLICATION NO. 26 OF 2020

*(Originating from High Court Tabora Probate and Administration Cause
No. 2 of 2019)*

ALFRED MESHACK NSUHUZWA & 7 OTHERS..... APPLICANTS

VERSUS

ABIA MESHACK NSUHUZWA & ANOTHERRESPONDENTS

RULING

Date 16/02/2022 & 25/03/2022

BAHATI SALEMA, J.:

This application was filed by Alfred Meshack Nsuhuzwa and seven others under section 49(1)(b) of the Probate and Administration of Estate Act, Cap.352 [R.E. 2019] seeking for annulment and/or revocation of the letters of administration granted by this Court to the respondents in Probate and Administration Cause No. 2/2019.

The application was supported by a sworn affidavit of Mr. Musa Kassim, learned counsel who represented the applicants. In the affidavit, Mr. Mussa listed two grounds for annulling and revoking the appointment of the respondents as follows that;

- i. *The respondents fraudulently wrote a last will which could not be made by the late Meshack Nsuhuzwa Ngwanka as he could not make a last will which included the house in Tabora at Mwanza or Migazi Street and Milling Machine, which were already matrimonial properties and were awarded to Sarah Tumvile in Matrimonial Civil Appeal No. 2/1997 by the High Court at Tabora in the division of matrimonial properties when the court granted a divorce of their marriage.*
- ii. *That, the late Meshack Nsuhuzwa Gwanka could not make a last will to Respondents which included the respondent's mother and recognizing her as his wife, while he divorced her way back in 1969.*

Further, the applicants prayed for costs of this application and any other relief that the court may be pleased to grant.

When the matter came for hearing Mr. Mussa Kassim represented the applicants while Mr. Frank Kavishe for the respondents. With the

leave of this court, the application was argued by way of written submissions.

In the submission in chief filed by Mr. Kassim, counsel stated that the appointment of respondents by this court to administer the estate of the late Meshack Nsuhuzwa Gwanka based on the last will alleged to have been written by the deceased was a fraud committed by respondents by making false suggestions and concealing something material to the case.

Mr. Kassim stated that, as it can be discerned from the purported last will, the properties allegedly listed therein included the properties which were involved in matrimonial Civil Appeal No. 2/1997, High Court at Tabora, the properties which no longer belonged to the late Meshack Nsuhuzwa Gwanka. Furthermore, the respondents made a false suggestion in the said will by stating that Hellena Meshack Nsuhuzwa was the wife of the deceased, while she was divorced way back in 1969.

He submitted further that, as per court order in Matrimonial Civil Appeal No. 2/1997, the house that was awarded to Sarah Tumvile did not form part of the deceased's estate and thus could not be bequeathed anyhow by the deceased.

Responding, the respondents jointly submitted that the applicants are misleading this court by making an application against a non-existing order of the court. He explained further that this court pronounced in Probate and Administration Cause No. 2 of 2019 that they quoted the order of this as it reads in the cited case: -

"Since no objection has been raised to this petition of probate, I hereby granted (sic) probate of the will of the deceased as prayed by the petitioners..."

It is their submission that, this court granted probate, not letters of administration as submitted by the applicants. Therefore, the applicants are seeking to annul or revoke an order that has never been granted by this court. The respondents further submitted that the error cannot be cured under the overriding objective principle because it delays justice.

As to allegations of fraud and the inclusion of a house located at Mwanza road, it is the respondent's submission that the applicants have failed to consider the real life of the late Meshack Nsuhuzwa Gwanka and his ex-wife Sarah Tumvile to prove the allegation. Further that, they failed to prove the ownership of the alleged house since it is the duty of the one who alleges to prove (See *Kwiga Masa vs. Samwel Mtubatwa* [1998] TLR 103).

They submitted further that the inclusion of property of another person in the last will does not automatically amount to fraud or making a false suggestion during grant of probate while making reference to the fact that the will was proved to be written by the deceased and there was no allegation whatsoever that the will was forged. He added that, as per Section 49(1) (b) of the Probate and Administration of Estates Act and Rule 29 (1) of the Probate Rules 1963, the act of fraud stated in the laws is in respect of administrators, not the testator, so nothing in the will can be termed as fraud.

As to the divorce of Sarah Tumvile, they submitted that, after divorcing each other, they proceeded to live harmoniously in that circumstance. The property so claimed must be proved as to whether it was still the property of the deceased or had at any time changed hands. They added that, it is a long established principle that if a person has an interest in a property so wrongly included in a will, the proper procedure is to file an objection for the same to be removed from the deceased's estate.

Finally, the respondent stated that, this court should not be moved so easily without any proof of the alleged fraud and that if the said fraud really existed, the applicants would have used a criminal court for the alleged fraud if at all they had evidence to prove it.

In a short rejoinder, Mr. Kassim admitted that the court granted probate of a will to the respondents and that is what he is challenging as the same was obtained fraudulently by the respondents.

As to the issue of proof of allegations of fraud, Mr. Kassim submitted that the same was proved as the decision and proceedings of this court showed the properties listed in the alleged will were the subject of a matrimonial case and that the said property no longer belonged to the testator.

Having carefully considered the record, the arguments by the parties, and the law. The issue is whether the application is meritorious.

Both parties have agreed that the respondents were granted probate of a will in Probate and Administration Cause No. 02/2019, not letters of administration as the applicants' submitted in-chief. To clear the error, Mr. Kassim suggested that since section 49(1) of the Probate and Administration of Estate Act provides for revocation of grant and removal of executors, his application should stand regardless of the errors.

Upon perusing the chamber summons that was filed with this court, it seems that the learned counsel was not sure of the prayer that was granted to the respondents in Probate and Administration Cause

No. 02/2019. That is why he prayed to revoke letters of administration instead of probate. This court is guided by procedures of law which must be followed before granting any prayer to a party. Some errors, if committed, are curable under the overriding objective principle, but others, like this one, are not. In ***SGS Societe Generale de Surveillance SA and another v. VIP Engineering & Marketing Ltd and another*** (Civil Appeal No. 124 of 2017) CAT at Dar es Salaam, the Court of Appeal stated that,

"The amendment by Act No. 8 of 2018 was "not meant to enable parties to circumvent the mandatory rules of the Court or to turn blind to the mandatory provisions of the procedural law which go to the foundation of the case."

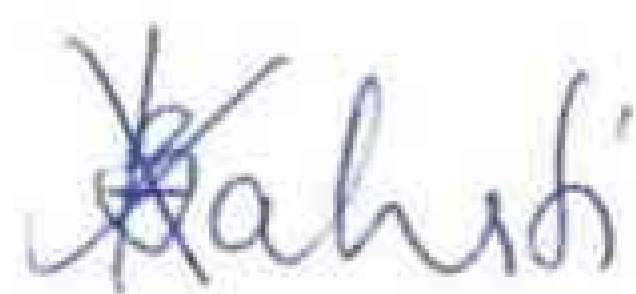
Based on the decision of the apex court quoted above, the applicants ought to be specific in their prayer founded under section 49(1) of the Probate and Administration of Estate Act since the provision of law provides for both the removal of executors and the revocation of letters of administration. Praying for the court to annul or revoke letters of administration in a case where it has granted probate is untenable.

As already found in the first prayer, the second issue is none other than adjudging that the inclusion of a house at Mwanza Road in a deceased's

will cannot be termed as fraud by the executor and he cannot be blamed for such. The proper action the applicants could take was to challenge the will and if found defective, the executor would automatically be removed. That being the case, the court finds that the applicants have failed to prove the alleged fraud. Therefore, the only relief deserving the applicants is to dismiss the application, which order I hereby issue.

The application is dismissed in its entirety with no costs.

Order accordingly.



A. BAHATI SALEMA

JUDGE

25/03/2022

Ruling delivered under my hand and Seal of the court in Chamber this 25th day March, 2022 in the presence of both parties.



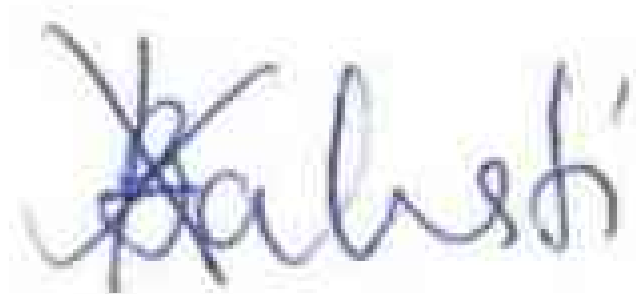
A. BAHATI SALEMA

JUDGE

25/03/2022



Right to appeal is fully explained.



A. BAHATI SALEMA

JUDGE

25/03/2022

