

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

PROBATE AND ADMINISTRATION CAUSE NO. 12 OF 1999

DORIS ROSE MAKENE.....APPLICANT

VERSUS

JONIA KENGELI MAKENE.....RESPONDENT

RULING

SHANGWA, J:

On 20th August, 2004 Doris Rose Makene, one of the Daughters of the late professor William Josbert Makene who resides in North London in the United Kingdom, filed an application for revocation of the grant of letters of Administration to the respondent Jonia Kengeli Makene and her appointment as administratrix of the estate of the late professor William Josbert Makene.

Jonia Kengeli Makene was the Senior wife of the late professor William Josbert Makene. The record shows that she

was appointed by this court as administratrix of the said deceased's estate on 16.5.2002. She filed the inventory of the deceased's estate on 29.6.2004.

In her application, Doris Rose Makene is alleging that the inventory of the estate of the late Professor William Josbert Makene which was filed in court by the respondent Jonia Kengeli Makene is false.

On 15.12.2004, the said respondent presented a notice of preliminary objection in which two points of objection to the applicant's application are raised. First, that this court lacks jurisdiction to entertain this matter on the grounds that the matter is now before the Court of Appeal. Second, that the matters raised in paragraph 5 of the affidavit of the applicant are res-judicata having been raised and decided upon in the judgment of Madame Kimaro, J. and that such matters can only be argued on appeal.

On 21.12.2004, the court ordered that the preliminary objection should be argued by way of written submissions. The parties presented their written submissions as ordered by the Court. The applicant filed hers on 25.1.2005 and annexed thereto a notice of withdrawal of the notice of appeal from the Court of Appeal.

In her written submissions in chief, the respondent dropped the second point of objection in which she had earlier stated that the matters raised by the applicant in paragraph 5 are res-judicata. However, she maintained the first point of objection that this court has no jurisdiction to hear the applicant's application on grounds that the matter is pending in the Court of Appeal..

It was contended by Mr. Mkatte on behalf of the respondent that although the notice of appeal has been

withdrawn, so long as there is no Court order marking it to have been withdrawn, matters stand as they are, and that until the Court of Appeal makes an order of withdrawal, this court continues to lack jurisdiction.

On the other side, learned Counsel for the applicant Mr. Kilule submitted that this court has jurisdiction to hear the applicant's application and that the respondent's preliminary objection is devoid of merit and that it should be dismissed with costs. He contended that as there was default in lodging an appeal within sixty days from the date when the notice of appeal was lodged, the appeal is deemed to have been withdrawn. In his contention, he relied on S.84 of the Tanzania Court of Appeal Rules, 1979 which Provides as follows:

“Rule 84. If a party who has lodged a notice of appeal fails to institute an appeal within the appointed time-

(a) he shall be deemed to have withdrawn his notice of appeal and shall, unless the Court orders otherwise, be liable to pay the costs of

any persons on whom the notice of appeal was served arising from that failure to institute the appeal.”

He stated that as the notice of appeal is deemed to have been withdrawn under the above mentioned provisions of law and as the appellants themselves withdrew it, then, the matter is no longer pending in the Court of Appeal.

Indeed, as a matter of fact, I believe there is no appeal which is pending in the Court of Appeal against this Court's decision in which the respondent was appointed as administratrix and granted the letters of administration of the late professor William Josbert Makene's estate.

Although, there is no order of the Court of Appeal to show that the notice of appeal has been marked as withdrawn with or without costs, so long as the notice of appeal is no longer there, the question of the existence of

an appeal in the Court of Appeal against the decision of this court has to be ruled out. I accordingly rule it out and hold that this court has jurisdiction to hear and determine the applicant's application.

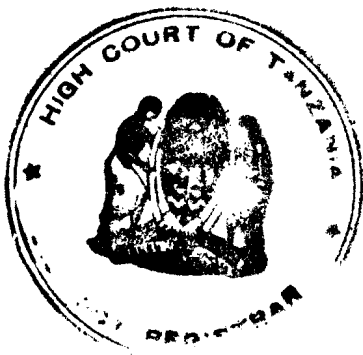
I therefore dismiss the respondent's point of objection but I order that each party should bear its own costs.


A. Shangwa

JUDGE

4.3.2005

Delivered in open Court at Dar es Salaam this 4th day
of March, 2005.




A. Shangwa

JUDGE

4.3.2005