IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CIVIL REVISION NO. 57 OF 2004

MAHMUD SHAMTE.....APPLICANT

VERSUS

MARY SHAMTE .....RESPONDENT

RULING

A. Shangwa,J.

On 14th May, 2004, learned counsel for the applicant Ms Magdalena Rwebangira filed an application for extension of time within which to file an application for revision of the judgment and decree of Kisutu Resident Magistrate (Hon. Magere, RM) dated 2nd June, 2000 in Matrimonial Cause No.66 of 1996. On 12th December, 2005, I ordered that this application should be argued by way of written submissions.

Learned counsel for the applicant Ms Magdalena Rwebangira raised two main grounds for this application. One, that the applicant's appeal having been struck out (and not heard on merit), the applicant is not barred to prefer revisionary powers of the High Court. Two, that there were several irregularities in the proceedings of the lower Court which were raised in the Memorandum of Appeal and unless this Court intervenes, the applicant will be condemned unheard and he stands to lose every thing he has worked for all his life.

In her written submissions in support of this application Ms Magdalena Rwebangira contended that as the appellate door has been blocked, the applicant is entitled to have a remedy by way of revision. She said that the delay to file the application for revision to this Court was not a real or actual delay but a technical one. She pointed out that there are

several irregularities in the proceedings of the lower Court as contained in the memorandum of appeal.

In reply, learned counsel for the respondent Mrs Mulebya submitted among other things that an application for revision of the judgment and decree of the Court of the Resident Magistrate ought to have been made immediately after pronouncing the judgment and issuing the decree. She contended that after striking out the applicant's appeal in the High Court, the applicant cannot go around the law and apply for extension of time within which to file an application for revision of the lower Court's judgment and decree.

It is quite plain in this case that the applicant decided to make this application for extension of time within which to file an application for revision of the judgment and decree of the Court of the Resident Magistrate after his appeal to this Court against the said judgment and decree in Matrimonial

Cause No.66 of 1996 at Kisutu had been struck out by Massati, J on grounds that this Court has no jurisdiction to hear appeals originating from the Resident Magistrate's Court in Matrimonial proceedings pursuant to the amendments to the Law of Marriage Act, 1971 introduced by Act No. 23 of 1973 and 15 of 1980 respectively.

It appears that the applicant did not deem it fit to apply for revision of the judgment and decree of the Court of the Resident Magistrate in Matrimonial Cause No. 66 of 1996 at Kisutu immediately after delivering and issuing the same because, he had no grounds to do so. The grounds he had are grounds of appeal and not grounds of revision. That is why he chose to appeal against the judgment and decree of the lower Court instead of applying for revising the same. In my opinion, the grounds of appeal cannot be used interchangeably with the grounds of revision as the applicant seems to believe.

At page 6 of her written submissions, counsel for the applicant Ms Magdalena Rwebangira correctly states that it has been the practice of this Court to admit and hear appeals originating from Courts of the Resident Magistrate in Matrimonial Cases even after the amendment of the Law of Marriage Act, 1971 through Act No. 15 of 1980.

As far as I know, it is still the practice of this Court to do so even after the decision of this Court by my learned brother Massati, J delivered on 16th April, 2004 in Civil Appeal No. 197 of 2001 wherein he held that this Court has no jurisdiction to hear appeals originating from the Court of the Resident Magistrate in Matrimonial Proceedings as per Act, No.23 of 1973 and 15 of 1980 respectively and proceeded to strike it out.

Right now the applicant stands dissatisfied with the decision of the lower Court which gave rise to Civil Appeal

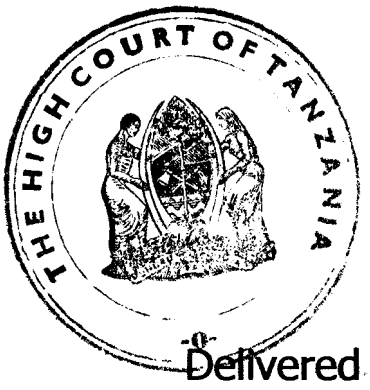
No.197 of 2001 which was struck out. As the said appeal was not heard and determined on merit by this Court, no appeal can lie against Massati, J's decision .

In my view, as it is still the practice of this Court to admit and hear appeals originating from Courts of the Resident Magistrate in Matrimonial Cases, the applicant has to apply for extension of time within which to apply for review of this Court's decision by Massati, J. so that Civil Appeal No. 197 of 2001 which was struck out by him may receive the same treatment like similar other cases which are being admitted and heard on merit by this Court.

In my view, the application for extension of time within which to review this Court's decision by Massati, J has an overwhelming chance of success. In the event the application for review of this Court's judgment is refused then the applicant will have a right to appeal to the Court of

Appeal of Tanzania which will consider and conclusively determine the question as to whether or not this Court has jurisdiction to hear appeals originating from the decision of the Court of the Resident Magistrate in Matrimonial matters.

At any rate, a revision of the lower Court's decision should not be used as a substitute to an appeal which has been struck out . For this reason, I do not find it of any use to grant this application. I hereby reject it but I make no order as to costs.



A. Shangwa,J.

24/5/2006.

Delivered in open Court this 24th day of May, 2006.

A. Shangwa,

JUDGE

24/5/2006.

IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

PC. CIVIL APPEAL 213 OF 2004.

ASHURA M. MASOUD ..... APPELLANT

VERSUS

SALMA AHMAD ..... RESPONDENT.

Date of last Order: 14/12/2006
Date of Judgment: 14/09/2007

JUDGEMENT.

Mlay, J.

This is an appeal from the decision of the District Court of Kinondoni in Probate and Administration Cause No. 52 of 2004. SALIMA MOHAMED applied for letters of administration of the estate of the JUMA KAUNDA in the District Court of Kinondoni. One OMAR SEIF purporting to act for himself and another, filed a counter affidavit to oppose the grant of letters of administration to SALIMA AHMED, substantially on grounds that ***"the applicant has no relationship whatever with the said Chausiku Seifu"*** (the lawful heir of the deceased who was apparently suffering from a mental illness) and that the applicant has never taken care

of the said Chausiku Seifu. He further alleged in the said counter affidavit that "***the applicant has alternative motives of confiscating property that does not belong to her. She has no any good intention of maintaining Chausiku Seifu***".

The matter came up for hearing before MAKWANDI RM who, in a judgment dated 23/09/2004, found "***that the objections have no merits at all***". The court also found that ***"the rightful heir of that late Bimkubwa Seifu (in law of of Kauda Juma) si Chausiku Seifu who is alleged to be morally sick. I therefore agree that the applicant is entitled to be appointed an administrative of the estate of Bimkubwa Seifu on behalf of Chausiku Seifu who is mentally sick as her cousin".***

One of the two Respondents ASHURA MASUDI (the first respondent Omar Seif having died before the matter was heard by the District Court), has appealed to this court on two grounds, namely:-

1. That the Resident Magistrate misled herself in admitting the fact that the step mother of the appellant one Chausiku is suffering from mental illness without the same being proved by medical practitioner.
2. That the trial Magistrate misled itself in admitting the respondent is the sister of the late Chausiku Seif.

At the hearing of this appeal the Respondent was represented by Mr. Mtanga, learned advocate while the appellant appeared to argue the appeal in person. She submitted on the first ground of appeal, that it is not true that Chausiku Seif was mentally sick. She argued that the respondent did not prove that Chausiku Seif was not mentally ill. Lastly, on the second ground of appeal, she submitted that the respondent was not the sister of Chausiku Seifu. She argued that there was no evidence that she was her sister.

Mr. Mtanga advocate for the Respondent, on the first ground submitted that, the matter before the court did not involve the mental state of Chausiku Seifu.

He argued that what was before the court, was an application for letters of administration of the estate of BIMKUBWA SEIF who was the widow of the late Juma Kaunda. He further argued that BIMKUBWA SEIF was survived by her younger sister CHAUSIKU SEIF whose health was not good and did not know what to do because of mental instability. He argued that there was evidence of the Respondent and PW1 SAIDI MWINCHANDE that the respondent is the cousin of BIMKUBWA SEIF.

On the second ground of appeal Mr. Mtanga submitted that there were no reasons in evidence given to show that the respondent was not a relative of BIMKUBWA SEIF. He contended that the objector/ appellant merely alleged that they did not see the respondent at the house.

At the close of the submissions the court asked Mr. Mtanga to assist the Court on whether the District Court of Kinondoni had jurisdiction in the administration matter. Mr. Mtanga replied, and I quote, ***"If the presiding magistrate was a District delegate the court had jurisdiction. I do not know if the Magistrate was appointed District Delegate. If he was not so appointed the court has no jurisdiction and the proceedings would be a nullity".***

The issue of jurisdiction being a purely legal matter, the appellant was not called upon to submit on the matter.

Before considering the appeal on its merit, there is clearly an issue of whether the District Court of Kinondoni or Makwadi RM who presided over the probate and administration proceedings had jurisdiction to entertain the matter.

Section 3 Cap 445 RE 2002 confers jurisdiction in all matters relating to probate and administration of deceased's

estates and power to grant probates of wills and letters a administration to the High Court. However, under section 5 (1) of the Act, the Chief Justice has the power from time to time, to "***appoint such Magistrates as he there fit to be District Delegates***".

Subsection (2) of section 5 confers jurisdiction upon District Delegates in all matters relating to probate and administration, if the deceased had at the time of death, a fixed abode within the area for which a District Delegate is appointed, in non contentious cases. In contentious cases like the present case in which there were two objectors, the District Delegate can only exercise jurisdiction if he is satisfied that the gross value of the estate does not exceed fifteen thousand shillings, or if the High Court authorizes the delegate to exercise jurisdiction.

In the present case there is no evidence, and infact there is there is no existing record to show tat MAKWANDI RM has been appointed a District Delegate by the Chief Justice pursuant to the provisions of section 5 of Cap 445.

Even if Makwandi RM had been appointed a District Delegate, which is not the case, this being a contentious case, there is no evidence that the value of the estate is only shs.15,000/- or that this court granted permission to the magistrate to

entertain the matter. At any rate contentious proceedings in Probate and Administration matters are governed by the provisions of Rule 82 of the Probate and Administration Rules, and for proceedings before the District Delegate, also by the provisions of Rule 83 thereof which require the District Delegate to forward the record of proceedings in contentious cases to the District Registrar.

The jurisdiction of the District Court as such, in Probate and administration matters, is governed by the provisions of section 6 of Cap 445 RE 2002. Under that section, District courts only have jurisdiction in respect of "*small estates*" and "*small estates*" defined by section 2 (1) of Cap 445, are those whose value does not exceed sh.10,000/= (ten thousand). The estate in this case is a house situated on Plot No. 1 Block "A" Kigogo whose value exceeds shs.10,000/-. In the circumstances, the Kinondoni District Court did not have jurisdiction to entertain the matter.

Since Makwandi RM who presided over the probate and administration proceedings is not a district delegate appointed by the Chief Justice under section 5 of Cap 445 and also that, the estate involved is not a "***small estate***" for which the District Court could exercise jurisdiction, the proceedings in Kinondoni Probate and Administration Cause No. 52 of 2001

and there consequential grant of letters of administration to the respondent, are a nullity, and they are so declared.

It appears from the record that the application for letters of administration was initially filed in Magomeni Primary Court as Probate Cause 193 of 2001 and that the matters was "*transferred*" to the District Court by reason of a request by H. H. Matanga that "***the Applicant intends to employ the service of an advocate and as a matter of law, the Advocate cannot enter appearance in the Primary Court***". This as contained in the advocates letter to the District Magistrate I/C dated 20/9/2001. This was a gross error. The District Court does not acquire jurisdiction in probate and administration matters by reason that a party wishes to be represented by an advocate. Jurisdiction is conferred by the law and not by the wishes of a party.

The law relating to probate and administration demonstrated earlier on, only grants limited jurisdiction to District Courts in this matter, and this matter does not come within small estates in which District Courts can exercise jurisdiction.

The powers of transfer of cases under section 47 (1) (a) of the Magistrates Courts Act Cap 11 RE 2002, can only be used to transfer a case from a Primary Court to a District court or a

Court of the Resident Magistrate "having jurisdiction" . Since the District Court of Kinondoni did not have jurisdiction in the probate and administration proceeding for the reasons given above, the District court was wrong to transfer the proceedings to itself. The reason that the applicant wished to engage an advocate, as I have stated, does not in itself, confer jurisdiction upon the court.

The proceedings being a nullity it is ordered that the proceedings in Magomeni Primary court Probate Cause 193 of 2001 be restored and heard by the Primary Court in accordance with the law relating to administration of estates applicable to primary courts.

Since the proceedings are a nullity there is no appeal worth of consideration on merits. This being and administration matter, I make no order as to costs. It is ordered accordingly.

J. I. Mlay,

JUDGE.

Delivered in there presence of one MATAMA ABDALLAH the niece of the Respondent and in the absence of the appellant this 14th day of September, 2007. Right of appeal explained.

J. I. Mlay,

JUDGE.

14/09/2007

Words: 1,558