

IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM REGISTRY)

AT DAR ES SALAAM

MISC. APPLICATION NO. 196 OF 2020

(Arising from Probate and Administration of Cause No. 9 of 2020)

In the matter of the Estate of the late **Ali Abdul Mufuruki** (Deceased).

AND

In the matter for grant of Probate by **KALOKOLA BWESHA** and
CECILIA BONIFACE SHIYO.

AND

In the matter of application for grant of Probate **pedente lite.**

RULING

11th May & 5th June, 2020.

E. E. KAKOLAKI J

This application was filed ex-parte for appointment of **Kalokola Bwasha** and **Cecilia Boniface Shiyo** pedente lite as executor and executrix of the estates of the late **Ali Abdul Mufuruki** who died testate at Morningside Hospital, Johannesburg, South Africa on the 8th day of December, 2019 pending determination of the Petition for grant of probate. It is preferred under S. 38 of the **Probate and Administration of Estates Act**, [Cap. 352 R.E 2002] and rule 14(1)

and (2) and rule 50 of the Probate Rules, Sections 68(e), 95 and Order XLII Rule 2 of the Civil Procedure Code, [Cap. 33 R.E 2002] supported by joint affidavit of **Kalokola Bwasha** and **Cecilia Boniface Shiyo** with annexures thereto. The annexures are death certificate of the late Ali Abdul Mufuruki annexure A, list and estimates of assets left by the deceased as estate annexure B and copies of newspapers for citation as annexure C.

It is important to mention that the deceased who died testate survived with a widow one Ms. **Saada Ibrahim** and four children namely **Leila Mufuruki, Zahra Mufuruki, Sophia Turunesh Mufuruki** and **Abdulrazak Tegnagne Mufuruki**. He also left some properties forming part of the estates which the applicants are seeking to administer. In summary the known and disclosed estates as per annexure B are companies such as Equity in IIG companies and Equity Holdings, Equity and Stocks Investments in thirteen companies, loans and debts, six motor vehicles, jewelleries, two firearms, cash instruments in Norwich Union Fund, Volks bank, Standard Chartered Bank and HSBC Capital China Bonus Fund, more than nine (9) family landed properties and various projects such as two projects under Infotech Place Project and three under IIG Properties.

Prior to filing of this application the applicants on the 27/01/2020 filed in this court a petition for grant of the probate of the estate of the late Ali Abdul Mufuruki which was duly registered as Probate and Administration Cause No. 9 of 2020. Citation was made in accordance with the law in which a Caveat was filed by one **Jalliya Felix Rutaihwa** through her advocate one **Nafikile Elly Mwamboma** on 24/03/2020. On the

Ms Ngasane went on to state that the family in attempt to contact the developers in the said foreign investments were informed that in the meantime could not contact or deal with any other person than the deceased unless the court order is issued allowing and endorsing someone to act on behalf of the deceased. That there is financial obligations which were to be discharged by the deceased on the on-going developments of the foreign investments whose contracts are at risk of being terminated by partners and engage new developers should there be no someone appointed by the court and allowed to contact them and settle the pending issues. And that the grant should be under court supervision or as the court may direct. For the foregoing reasons she was of the prayer that the application be granted for preservation of the estates.

Responding to the submission by Ms Ngasane for the applicants, Mr. Mosha for the Caveator prayed first to adopt the counter affidavit filed on 07/04/2020 in opposition of the application. He intimated that following the petition for grant of probate by the applicants on the 24/03/2020 a Caveat was filed through him. That, on the 30/04/2020 he received a citation through which he was duty bound to file a statement as to whether the caveator supports the grant of probate or not by 29/05/2020. And that it is through the said statement where the caveator could appear before the court and state what rights or interests she has in the estates.

Mr. Mosha went on to state that while appearing in court to watch brief pending the process of Caveator's appearance in court to state her rights or interest in the petition pending in court, on 21/04/2020 he came across applicant's application seeking for grant of probate pendente

lite. That as the process of caveator's appearance in court in the petition was incomplete in this court, it was the caveator's prayer that this court should not entertain anything with regard to the grant of probate pendente lite as doing so will render the caveator's rights and interests prejudiced since it is yet to be dissolved as to whether she is intending to challenge the will or the appointment of executor's themselves. He was of the view that the filed caveat in the main application in its nature is an objection, and that it is a principle of the law that once the preliminary objection is filed it has to be determined first. He supported his stance with the case of **Director General, Regional Manager (Iringa) NSSF Versus Machumu Mkama**, Civil Appeal No. 5 of 2018 (CAT-unreported). Mr. Mosha in addition urged this court to take the position of the law as provided in section 52(b) of the Probate and Administration of Estates Act, [Cap. 352 R.E 2019] stating that where in any case which there is contention court will take a form of the normal suit. Therefore he prayed the court to take a normal procedure by considering and determining the objection first before proceeding to the hearing of this application.

Mr. Mosha submitted further that the applicants in paragraph 7 of their joint affidavit stated that there are acts of interference and grabbing of estates by the deceased siblings or sub sibling. That it is his submission that the said claims were not substantiated as no person has been mentioned to have grabbed or interfered with the estates nor are the foreign properties/investments mentioned anywhere in the affidavit. He was of the view that the applicants contravened the principle of the law for failure to state each and every fact in support of the application for the court to grant the orders sought in grant of probate pendente lite.

Lastly he submitted that this application is out of context as it was filed after the main petition was filed. So the court ought to have concentrated with the main petition. For the foregoing he was of the submission that should the court feel that there is a need to grant the application a neutral emperor would be preferable and this be the Administrator General, pending determination of the caveat filed as companies are running themselves. And that it is in the interest of justice of both parties that the application be rejected.

In a brief rejoinder to the submission by Mr. Mosha, Ms Ngasane contended that the caveator in her counter affidavit in opposition of grant of the probate which was adopted by Mr Mosha in his submission has shown no any reason as to why she is opposing the grant except the reason that there is a caveat filed in the petition pending in court. That as pedente lite is a procedure provided by the law, caveat cannot prevent the court from granting the application as it is there to ensure that justice is done and deceased properties are preserved. With regard to the submission that this application is out of context for being filed after the petition was filed she was of the response that it was because when this application was filed they were not aware that caveat was filed. And further that the complaint is unfounded for where there is a dispute over appointment of administrator one has to be appointed pedente lite to collect and reserve the estates. On the submission that should this application be granted the caveator's caveat will be rendered meaningless she was of the response that what the court is being asked to grant will be in the interest of justice and serve the interest of caveator, petitioners or anyone else as the application is for preservation of the estates.

Ms Ngasane went on to state further in her rejoinder submission that, as to the identification of assets to be collected and preserved she referred to the list of properties in annexure "B" and those not listed including the ones mentioned in the affidavit. And with regard to none mentioning of the persons involved in the interference and grabbing of estates as stated in paragraph 7 of the affidavit she said she was informed of those facts by the family. On the submission that the objection by way of caveat should be disposed first which was supported by the case of **Director General, Regional Manager (Iringa) NSSF** case stressing on hearing of the preliminary objection first she responded that caveat does not necessarily mean objection as can as well be in support of the application, therefore the cited case is irrelevant. And on the invitation by Mr. Mosha to this court to adopt and apply the provisions of section 52(b) of the Act, she was of the response that this is an application for grant of probate *pendente lite* and not main petition in which that section applies. As to the suggestion for appointment of the Administrator General as neutral person to both parties for the reason that the companies intended to be administered are running themselves, she responded that as the deceased was a shareholder and director directly involved in running the said companies' business then proper directions are needed from executors. And furthermore that even the applicants who are executors are neutral persons for not being beneficiaries of the estates. All that said she reiterated her prayers in submission in chief.

Having gone through the submission of both parties which I am grateful for their convincing arguments, I now turn to consider and determine them. It is Ms Ngasane submission that grant of this application is so important for collection and preservation only of the estates which are

found within the country and in foreign countries such as South Africa, Dubai and Germany as mentioned in annexure "B" of the application and the affidavit in support of the application. That the foreign investment need a family spokesman to communicate the co-investors and give instructions on behalf of the deceased. Mr Mosha is challenging the grant of probate in that there is a caveat filed in the Petition No. 9 of 2020 which in itself serves as an objection in this application. And that as per the case of **Director General, Regional Manager (Iringa) NSSF** it is a principle of law that once the preliminary objection is filed it has to be determined first. Therefore hearing of this application should be stayed pending hearing and determination of the objection raised through caveat in the petition. With due respect to Mr Mosha I am not prepared to buy this argument of staying the application pending hearing and determination of the caveat in petition No. 9 of 2020. This application and petition No. 9 of 2020 are two independent matters which are to be treated differently. The objection in the petition cannot under no any circumstance be considered as objection in this application. Being an independent application the objector ought to have filed or raise her objection through the counter affidavit filed. As correctly submitted by Ms Ngasane the submission which I subscribe to there is nothing material raised or indicated in the counter affidavit filed by Mr. Mosha disclosing caveator's rights and interests in this application which could have enabled this court consider staying the proceedings pending determination of the objection in the petition pending in court. I am therefore in support of Ms Ngasane's submission that the caveator has failed to advance any reason as to why she is opposing the grant except a mere assertion that there is a pending caveat in the petition.

The caveator ought to have stated reasons as why she is opposing the application apart from merely stating that there is a caveat in the pending petition yet to be determined which leaves the reasons for objection undisclosed. It follows therefore that the cited case of **Director General, Regional Manager (Iringa) NSSF** is inapplicable in the circumstances.

With regard to the assertion that in this application section 52(b) of the Probate and Administration of Estates Act, [Cap. 352 R.E 2019] applies and where there is any contention on the grant of probate or letters of administration court must take a form of the normal suit, Ms Ngasane replied that the same was inapplicable for this is an application for grant of probate *pendente lite* and not main petition in which that section applies. In this point I share Ms Ngasane's contention that the said section is inapplicable in the circumstances of this matter. Section 52(b) of the Probate and Administration of Estates Act, [Cap. 352 R.E 2019] provides that:

"52.Except as hereinafter provided, and subject to any Probate Rules made in that behalf:-

(a)NA.

(b) In any case in which there is contention, the proceedings shall take, as nearly as may be the form of a suit in which the petitioner for the grant shall be plaintiff and any person who appears to oppose the proceedings shall be defendant."

From the above cited provision of the law, this being an application originating from the main petition cannot turn to be a normal suit as Mr

Moshi would want this court to believe for that procedure is applying to main petition only when challenged.

On the assertion that this application is out of context for the applicants filed it in existence of the petition in which this court should concentrate on, Ms Ngasane argued that the same was not. She was of the view that the complaint is unfounded for where there is a dispute over appointment of administrator one has to be appointed *pedente lite* to collect and preserve the estates. I also share hands with Ms Ngasane on this point. Section 38 of the Probate and Administration of Estates Act, [Cap. 352 R.E 2019] provides that:

"38. Pending the determination of any proceedings touching the validity of the will of a deceased person or for obtaining or revoking any probate or any grant of letters of administration, the court may appoint an administrator of estate of such deceased person; who shall have all the rights and powers of a general administrator other than the right of distributing such estate and every such administrator shall be subjected to immediate control of the court and shall act under its direction."

Guided by the above cited provision of the law, appointment of administrator *pedente lite* is done where there is a pending petition before the same court challenging the grant of probate or letters of administration of estates. So the application has to be preceded by the petition. This application meets the condition as it was filed after the petition was filed. This complaint lacks merit. With regard to none mentioning of the persons involved in the interference and grabbing of

estates, Ms Ngasane stated that she was told that information by the family. However, after going through the affidavit the source of this information was not acknowledged the fact which makes the said information unreliable. On this I share Mr. Moshi's assertion that the said facts were not proved. Nonetheless, absence of that information does not affect the competence of application as there are other reasons advanced already in support of it, example the collection and preservation of assets mentioned in annexure "B" and foreign investment.

On the suggestion for appointment of the Administrator General as neutral person to both parties, Ms Ngasane is of the submission that even applicants who are executors of the will are neutral persons for not being beneficiaries of the estates. So they would administer the estates in favour of both parties. There is a point in Ms Ngasane's argument. The applicants who are believed to be neutral have never been challenged by the caveator as persons with personal interests to the estates or incompetent to administer the estates. This court would have considered and treat them otherwise had there been advanced any objection against their appointment. What has been raised and ruled out is that this application should be stayed pending hearing of the petition. I am therefore of the firm findings that the applicants in this application are neutral persons and remain unchallenged in terms of competence and their integrity. The Administrator General would have been the option in the circumstances where their competences or integrities were put into question something which is not the case here. This suggestion also fails.

Lastly is on the submission that should the court refrain from staying this application the caveator's interest will be prejudiced and the said caveat rendered meaningless. In this it was Ms Ngasane response that this application is meant to serve interest of both heirs, caveator and other beneficiaries if granted. I do not agree with Mr Moshi that the caveator's interest will be prejudiced and the said caveat rendered meaningless. I don't see how the caveator will be affected by appointment of administrator pendente lite which is temporary pending grant of probate. The purpose of appointing administrator pendente lite is to collect and preserve estates and not to distribute them. He can be performing his duties under court's supervision to make sure that there is no misappropriation or mismanagement of estates. Should any misconduct be reported to court that attracts revocation of the appointment court has powers to so do. It follows therefore that appointment of administrator pendente lite is aimed at providing an assurance that during the period of hearing and determination of the petition pending in court the deceased estates are preserved until when the administrator or executor is appointed to administer and finally distribute the estates. Therefore this claim also fails.

In the upshot, I am satisfied the applicants have managed to advance sufficient reasons to move this court to grant the application. The caveator can still successfully challenge the grant of probate in the main petition by stating the reasons for objecting the grant of the petition and her rights and interest therein.

In the circumstances and for the foregoing reasons, I do hereby grant the application by appointing **Kalokola Bwasha** and **Cecilia Boniface Shiyo** pendente lite to administer (Execute) the estates of the late **Ali**

Abdul Mufuruki pending determination of Probate and Administration Cause No. 09 of 2020 in this court. The administrator (executor) and administratrix (executrix) of estates will be subjected to immediate control of the court and shall act under its directions as required by the law.

It is so ordered.

DATED at DAR ES SALAAM this 5th day of June, 2020.



E. E. KAKOLAKI

JUDGE

05/06/2020

Delivered at Dar es Salaam this 05th day of June, 2020 in the presence Ms. Magreth Ngasane advocate for the applicant and Mr. Mr. Justine Mosha advocate for the respondent and Ms. **Lulu Masasi**, Court clerk.

Right of appeal explained.



E. E. Kakolaki

JUDGE

05/06/2020