

**IN THE HIGH COURT OF TANZANIA
(DOODOMA REGISTRY)
AT DODOMA**

CIVIL REVISION NO. 03 OF 2019
(ARISING FROM PROBATE CAUSE NO. 24 OF 2019, DODOMA DISTRICT COURT)

BETWEEN

SARAWEKI ISRAEL SALEMA..... 1ST APPLICANT
MANG'ANA RASHID MANG'ANA.....2ND APPLICANT
NURDIN RASHID MANG'ANA.....3RD APPLICANT
SHABANI RASHID MANG'ANA.....4TH APPLICANT

VERSUS

NEEMA GABRIEL MAJALIWA.....RESPONDENT

JUDGEMENT ON REVISION

Mansoor, J

Date of JUDGEMENT - 07TH AUGUST 2020

The application made under section 72 (1) and (2) of the Probate and Administration of Estates Act, Cap 352 R:E 2002, and section 71 (1) (c) of the Civil Procedure Act, Cap 33 R:E 2002 praying for the following orders:

1. To call for records, revise and set aside the proceedings, Ruling and Orders of the District Court of Dodoma in Probate Cause No. 24 of 2019.
2. The 1st applicant who was the deceased wife be declared as the beneficiary of the estates of the late Rashid Mang'ana Marwa.
3. Nullification of the appointment of the respondent as the Administrator of the deceased estates.

Brief facts of the case are that the late Rashid Mang'ana Marwa died intestate at JKCI Hospital at Dar es Salaam on 14th November 2017. Saraweki Israel Salema , the first applicant herein claims to be the wife of the deceased having celebrated customary marriage in 1991, and blessed with three issues, namely Mang'ana Rashid Mang'ana (the 2nd applicant), Nurdin Rashid Mang'ana (3rd applicant), and Shabani Rashid Mang'ana (4th Applicant). He also had another wife in Dodoma, the respondent herein who had a son namely Jordan Rashid Mang'ana. While the applicants

are residing at Morogoro, the respondent resides at Dodoma.

Soon after the death of Rashid Mang'ana Marwa, the respondent applied for the letters of administration, and she was appointed by the District Court as the administrator of the deceased estates. The first applicant claims that she was not listed as one of the beneficiaries in the application made by the respondent in court thereby disentitling her to inherit. The 1st applicant claims to have filed a caveat in the Probate Court, that she filed the caveat on 3rd June 2019, but the Court struck it out because it was lodged out of time. The court then proceeded to grant the letters of administration to the respondent herein as if the application was not contested.

Neema Gabriel Majaliwa countered the application, in her counter affidavit she denied the 1st applicant as the legal heir of the deceased, she needed proof of the customary marriage between the 1st applicant and the deceased although she acknowledged the three children that were

born by the 1st applicant to be her late husband's children, and she has in fact included them as the beneficial heirs of the deceased estates. She stated at paragraph 7 of the counter affidavit that Robert Mang'ana Makwaia and Mwita Marwa had petitioned for letters of Administration before the Makole Primary Court, Mirathi No. 20 of 2018. The duo was appointed as the joint administrators, but the respondent herein was aggrieved and so she filed an appeal before the District Court of Dodoma Probate Appeal No. 6 of 2018. The District Court quashed and set aside the proceedings and the letters of appointment of the said Robert Mang'ana Makwaia and Mwita Marwa. The respondent then decided to apply for letters of administration at the District Court. The three sons of the deceased from the 1st applicant refused to sign the consent and the court had dispensed with that requirement of the law and granted the letters of administration to her.

The applicant claims that since the deceased was Christian he was only allowed one wife, and that he

contracted a Christian marriage with the respondent on 20th February 2008 at Kibaha, and since 2000 they had been cohabiting under the same roof until his demise in 2017. She also said the family meeting held in which the 1st applicant was recognized as the wife of the deceased, but that meeting was nullified by the District Court in Probate Appeal No. 6 of 2018. She also avers that the Probate Cause No. 24 of 2019 was cited in the newspaper and on 08th May 2019, there was a caveat filed by Robert Mang'ana Makwaia, the first son of the deceased, but this caveat was withdrawn. The second caveat filed by the applicants was filed late as the General citation was issued in Nipashe Newspaper on 21st March 2019 and the expiry date to file any caveat was on 10th April 2019. At paragraph 14 of her affidavit, the respondent acknowledges the 2nd, 3rd and 4th applicants as the children of her late husband and she has listed them as the beneficiaries of the estate of her late husband, the late Rashid Mang'ana Marwa, but she says they were born out of wedlock.

The revision was argued by written submissions. In support of the application for revision Counsel Fadhili Ndwatera filed a lengthy submission. The Counsel argues that the general citation for the Probate Cause was issued on 21st March 2019, and the deadline for any objection was on 10th April 2019. He argues further that on 09th April 2019, there was a caveat filed by Robert Mang'ana Makwaia in which he objected the non-inclusion of the 1st applicant as the beneficiary as well as the lack of consent of the heirs.

The Counsel argues further that there was no consent of the heir's contrary to Rule 39 (f) of the Probate Rules and so the Petition before the Probate Court was incompetent and ought not to have been entertained.

He argues further that Rule 71 (1) of the Probate Rules, GN No. 163 of 1963 requires the Petitioner for letters of administration to file an affidavit in court giving full names and addresses of the persons whose consents are not available and reasons why such consent has not been procured. He said, the petition was filed on 20th March

2019 at the District Court, and the affidavit which was in compliance of Rule 72 (1) of the Probate Rules is dated 12th June 2019, which means that the affidavit was filed later and it was not filed together with the petition for grant. Again, the petition was defective as it was not accompanied with the consent of the heirs at the time it was filed in court. The consent of Robert Makwaia was filed later after the petition for grant was already filed in court, and Jordan Rashid Manga'na was a minor , he was only 15 years old at the time the petition was filed in court, and so he was incompetent to give his consent. Rule 71 (3) provides for guidance when a minor is needed to give a consent in that the consent may be given by his or her guardian in his or her behalf, thus, argues the counsel that the petition faulted the requirement of Rule 39 (f) of the Probate Rules, and the Court should have rejected it.

The Counsel referred the court to the case of **Rashid Hassan vs Mrisho Juma (1998) TLR 134**, in which the appointment of the administrator was declared null and

void since the petitioner failed to comply with the provisions of Rule 39, 73 and 75 of the Probate Rules.

He further argues that the petition also did not disclose that the deceased had two wives contrary to the minutes of the family meeting held on 19th November, 2017 in which both the 1st applicant and the respondent were recognized by the family of the deceased as the wives of the late Rashid Mang'ana Marwa.

The Counsel argues further that the applicants herein had lodged a caveat on 03rd June, 2019, and so the Court ought to have turned the petition into a suit as required by Section 52 (b) of the Probate and Administration of Estates Act, Cap 352 R:E 2002 and Rule 82 of the Probate Rules. There was no notice issued to the Caveator by the Registrar of the Court as required under the Probate Rules in which it would have given a chance to the Caveator to state before the Court if they support or oppose the petition. The applicants also were not given a chance to enter appearance before the Probate Court in Probate Cause No. 24 of 2019

filed by the respondent herein. The Counsel cited the case of **Revenath Eliawory Meena vs Albert Eliawory Meena and Aneth Eliawory Meena , Civil Revision No 01 of 2017**, Court of Appeal (unreported) where it was held that *“it is worthy pointing out that, the stages as set out by the law in rule 82 of the Probate Rules were made with a purpose and such, compliance is mandatory and not optional as can be inferred from the word “shall” which has been used.”*

Also the case of **Professor (Mrs.) Peter Mwaikambo vs Davis Mwaikambo and others, Civil Appeal No. 52 of 1997** (unreported) in which the court said that *“ the omission by the Registrar to issue citation to the respondents caveators, made them to fail to enter appearance, which would have rendered the matter contentious and hence bring it within the ambit of section 59 (3) of the Probate and Administration Ordinance.”*

The respondent who is represented by Advocate Christopher Malinga objected the submissions of the

applicants, and he confirmed that the respondent was married to the deceased and they celebrated a Christian marriage. They married in 2008 at Kibaha. That 21 days before the marriage the church announced for objections, but none objected and thus they married legally and were living under the same roof from 2008 till his death on 14th November 2017. He also argues that it is true that the son of the deceased one Robert Mang'ana Makwaia filed a caveat, but he later withdrew it, and so the matter was not a contentious matter. The Counsel argues that the second caveat filed by the applicants was filed beyond the notice period advertised in the citation.

Regarding the consent, the counsel for the respondent argues that the consent of Robert Mang'ana Makwaia and that of Jordan Rashid Mang'ana were legally obtained and satisfied the requirements of Rules 71 and 72 of the Probate Rules. He argues further that the 2nd, 3rd, and 4th applicants refused to give their consent and the petitioner filed an affidavit to explain as to why the consent of the heirs was

not available. He argues that the court had invoked Rule 116 of the Probate Rules to grant the petitioner leave to file the affidavit in lieu of the consent of the three applicants herein above explaining as to why the consent of the three applicants herein was not available, and thus the petition was in compliance with Rule 72 (1) of the Probate Rules.

With regards to the consent given by Jordan Rashid Mang'ana, the counsel for the respondent cited the case of **R vs Elizabeth Kimemeta @ lulu, Criminal Session No. 125 of 2012**, in which the Court observed that despite her age, the accused knew her obligations to tell the truth and not to tell lies, and so he was competent to give his consent, and that Rule 115A of the Probate Rules empowers the Court to order or require the Petitioner to file a fresh petition or to amend it if it finds out that the petition or any document therein was defective but shall not render the proceedings void.

I have read and carefully considered the arguments of the applicants and the respondent. There are in fact three issues to be decided:

- whether the 1st applicant was the wife of the deceased, and whether the family of the deceased recognized her as the wife of the deceased.
- whether the respondent had the consent of the heirs to administer the deceased estates.
- whether the court erred to reject the caveat filed by the applicants filed on 3rd June 2019.

1. Whether the 1st applicant was the wife of the deceased, and whether the family of the deceased recognized her as the wife of the deceased.

There was an averment by the 1st applicant that she was the first wife of the deceased having been married traditionally since 1998, and they had three children together, which are the 2nd, 3rd, and 4th applicants herein. Even the family meeting which was held after the death of the deceased recognized the first wife who was married traditionally long before the

Christian Wife was married in the church. There was no proof that the traditional marriage was dissolved. A Traditional marriage is not a monogamous one. The man may lawfully be the husband of many wives at the same time. It is therefore a ceremony inconsistent with marriage as understood in Christendom that the husband should have more than one wife. It is also not been disclosed by any of the parties herein in which religion the deceased professed before he became a Christian in 2008, or whether he became a Christian at all to entitle him to marry a Christian wife in church in 2008. It is the case of the 1st applicant that although her husband married in church in 2008 but he continued to cohabit with her in Morogoro and even his burial was in Morogoro. If the deceased had converted into Christianity, the conversion of the deceased to Christianity would not dissolve or make void the husband's previous marriages, and the previous traditional marriage could not become adultery. A Christian marriage is marriage of one man and one woman to the exclusion of all others, but this is applicable only if the man had not married before or the marriage was dissolved. The

traditional marriage was a valid marriage according to the customary law and polygamy is therefore lawful under the customary law. It was not the case of the respondent that her and her late husband were both single and that her husband was never married before, the only contention by the respondent is that there was no objection in the church when she married her husband under Christianity. There was no averment from the respondent that after the Christian marriage, the deceased renounced his tradition, and the marriage to his traditional wife was dissolved, and her husband was declared free to marry again.

In 1998, the deceased married the first applicant as a traditional wife under customary rites. In 2000 the late deceased commenced to live in adultery with the respondent, to whom she has since borne one child. In 2008 the respondent married the deceased in church at Kibaha celebrating Christian Marriage. After the Christian Marriage, the deceased continued to live with the 1st applicant or continued to maintain his first family in Morogoro until his

death, and even the deceased burial was in Morogoro at his first wife residence. Upon these facts, the 1st applicant was the lawful wife of the deceased, and she is entitled to inherit.

- whether the respondent had the consent of the heirs to administer the deceased estates.

It is not in dispute that the deceased died intestate leaving him surviving as his only heirs his five sons, one known as Robert Mang'ana Makwaia, three sons from the 1st applicant herein and one son from the respondent. He also left behind two wives, one from the tradition marriage, the mother of three sons, and another from Christian marriage, the mother of one son. The respondent applied for and obtained from the District Court letters of administration to the property of the said deceased via Probate Cause No. 24 of 2019. By reason of the death of deceased the only persons now entitled to the estate of the deceased are his five sons and his two wives.

To the said petition , the respondent had annexed the consent of his only son, Jordan, who was at that time a

minor, and thus incompetent to give consent, and as his consent could have been obtained through his guardian, as required by Rule 71 (3) of the Probate Rules. The consent of the 1st son of the deceased was given after the petition was already filed, and I have seen no leave of the court granted to the respondent to file the consent of Robert Mkwaiia on a later date. In essence the petition for letters of administration filed by the respondent was not accompanied by the consent of the heir, and this is irregular and the District Court ought to have dismissed the petition for it was filed in violation of the requirements of the law. As held in the case of **Rashidi Hassan vs Mrisho Juma (supra)**, there is no petition of probate and administration since the petitioner/respondent did not comply with the Probate Rules.

Again, the affidavit which was filed in compliance of Rule 72 (1) of the Probate Rules that the three sons of the deceased had refused to give their consent, firstly, as submitted by the Counsel for the applicants, Rules 71 (1) of the Probate Rules requires the affidavit to be filed together with the petition, and

not afterwards, and secondly, it is not that the consent of the three sons of the deceased could not be obtained without undue delay or expense, the consent could not be obtained since the three sons did not agree for the respondent to administer the property of their deceased father, and thus, it would have been wise for the Probate Court to give a chance to the applicants to hear their objections, the Magistrate ought to have admitted the caveat filed by the applicants herein, convert the petition into a suit and hear the aggrieved heirs before granting the letters of administration to the respondent. Thus, the Petition for letters of administration filed by the respondent was not in compliance with the Probate Rules, and ought to have been dismissed.

On the third issues, section 58 (1) of the Probate and Administration of Estates Act , empowers the Court to issue citations calling upon all persons claiming to have any interest in the estate of the deceased to come and see the proceedings before the grant of probate or letters of administration, and section 58 (1) lays down that "caveats"

against grant of probate or administration may be lodged with the Court. Filing of a caveat is a matter of right on the part of any person interested in the estate of the deceased, and any number of caveats may be so filed. A caveat is nothing more than a notice in writing to the Court that no grant is to be made without notice to the party who has entered the caveat and the Court cannot refuse to receive or take such notice on file, or require an order of the Court for that purpose. Section 59 of the Act and Rule 82 of the Probate Rules lays down that in any case in which there is contention, the proceedings are to take, as nearly as may be, " the form of a regular suit" according to the provisions of the Code of Civil Procedure, in which the petitioner for probate or letters of administration is to be the plaintiff, and the person who has appeared to oppose the grant is to be the defendant.

Rule 82 of the Probate Rules provides for the mode of serving citations and the form of such citation is prescribed by Form No. 64. It requires all persons who claim to have any interest in the estate of the deceased to come and see the

proceedings if they think fit before the grant is made. The law lays down that if the caveat is not filed within that time, the caveat will not prevent the grant of probate or letters of administration, there is no period for citation provided by the law, it could be 30 days or 90 days, and also there is no expiry of the time for a person to lodge a caveat as long as the caveat was lodged before the Court appoints the Administrator. The Caveat filed by the applicants should have been received by the Court , the petitioner for letters of administration should have been called upon by notice to take out a summons, the procedures outlined in Rule 82 of the Probate Rules should have been observed by the Registrar of the Court and the proceedings were to be "numbered as a suit" in which the petitioner was to be the plaintiff, and the caveators the defendants, and the procedure in a suit should have been , as nearly as may be, to be according to the provisions of the Code of Civil Procedure.

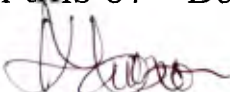
I hold that any number of caveats to the grant of probate or letters of administration to the same estate can be filed in

respect of a petition for such grant the Court must take all of them on file, and that the Court, has no power to refuse to take a caveat on file merely because a caveat has already been filed by some other person. All the caveators must be jointed as defendants to the testamentary suit.

In the view which I have taken above, the applicants are entitled as of right to have their caveat taken on file, however, since the petition violated the law in the sense that the petition was not accompanied with the consent of the heirs at the time it was lodged, the petition ought to have been dismissed, it follows therefore that there was no valid petition for letters of administration filed in court, consequently, the letters of administration granted to the respondent are hereby declared null and void. , I make no order with regard to the costs thereof.

DATED at DODOMA this 07th Day of AUGUST, 2020




MANSOOR

JUDGE

07TH AUGUST 2020