

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

MISCELLANEOUS CIVIL APPLICATION NO. 783 OF 2016

(Originated from Probate and Administration Cause No. 43 of 2015)

IN THE MATTER OF THE ESTATE OF THE LATE SELEMANI OMARY KIPWIMBWI

AND

IN THE MATTER OF APPLICATION FOR REVOCATION OF GRANT OF LETTERS OF

ADMINISTRATION OF THE LATE SELEMANI OMARY KIPWIMBWI

BY PILI SELEMANI KIPWIMBWI AND MAHINGA SELEMANI KIPWIMBWI

RULING

Date of Last Order: 27.03.2020

Date of Ruling: 31.03.2020

Ebrahim, J.:

This is an application for revocation of letters of administration of the estate of the late Selemani Omary Kipwimbwi granted to Hamisi Selemani Kipwimbi by this court vide **Probate and Administration of Estates Cause No. 43 of 2015**. The application has been brought under **Rule 29(1) of the Probate Rules (made under section 49 of CAP 352 RE 2002)**, and **Section 68(e) and 95 of the Civil Procedure Code, Cap 33 RE 2002**. The application is supported by an affidavit jointly affirmed by the applicants. The applicants who are also daughters of the deceased are praying for the orders that this court be pleased to

revoke the grant of letters of Administration issued to Hamisi Selemani Kipwimbwi.

The reason for application for revocation advanced in their affidavit is that the appointed administrator who is also their brother has no good will towards the beneficiaries of the two families left by the deceased. According to their averments, the deceased left two wives and he died leaving behind a Will, (testate) which is still in the hands of their Cousin. However the appointed administrator while knowing that there is a Will and the family has appointed Sultan Mohamed Mwimbe to be an executor of the Will, filed and was granted letters of administration. It is their contention that the current Administrator has failed to exhibit an inventory and statement of accounts hence their prayer for revocation so that the existing Will could be read in the presence of both families.

When this application was called for hearing, Mr. Chambuso learned advocate represented both applicants, while the respondent appeared in person, unrepresented. The Court ordered parties to argue the application by way of written submission and set a schedule thereto. Both parties adhered to the set schedule.

Counsel for the applicants began his submission by arguing the issue of caveat of which has been criticized by the Counsel for the respondent. Counsel for the applicant went on defending his assertion in rejoinder. I must say on the outset that Counsel for the applicant is mixing up issues and indeed this application does not fall within the purview of caveat. Had the applicants wanted to file caveat, they would have done so after the respondent had filed general citation on application for letters of administration in terms of **Section 58 of the Probate and Administration of Estates Act, Cap 352 RE 2002**. Otherwise I ignore all his assertions and submissions on the issue of caveat as it is misplaced and misguided and I concentrate on what is before the court for determination.

I have carefully followed the submissions by both parties for and against the application.

According to the averments by the Counsel for the applicants, the decease, the late Selemani Omari Kipimbwi was survived by two wives and 6 children when he died testate on 14th April 2015. He stated that the deceased left behind two houses; one house No. 17 at Njunju Street, Tandika, Dar Es Salaam and another house No. 35 at Minawandu Street Temeke Mikoroshini Dar Es Salaam. He submitted

further that the Will is still unread and under the custody of one Shabani Alley Kipimbwi. He submitted further that Hamisi Selemani Kipwimbwi concealed to the court when making application for administration by claiming that the deceased died intestate. He argued therefore that this is a fit case for revocation under **Section 49(1)(b) of the Act** where grant is obtained fraudulently and **Section 49(1)(e)** read together with **section 107 (1) of the Act** for failure to exhibit inventory for a period of three years. He stressed that the grant by the respondent was obtained by means of untrue allegations hence fit for revocation under **section 49(1) (c) of the Act**. He finally prayed for the court to revoke the grant and order for a family meeting to read the Will.

Adopting the contents of the Counter Affidavit in support of the submissions, Counsel for the respondent basically challenged the application on the basis that there are no sufficient reasons for revocation. He recounted the series of events and contended that there is no such Will as the same was not read before the Clan and the applicants refused to sign the document when the meeting was called. The applicants also refused to sign the consent and insisted that the house which the widow is living in is theirs.

Establishing the reason for failure to exhibit the inventory (**section 49(1) (e) of the Act and in accordance to Part XI of Cap 352**), Counsel for the respondent argued that soon after the respondent's appointment on September 2016, the applicants filed the present application in November 2016 which frustrated the process of inheritance. Therefore he could not distribute the same following the pendency of the present dispute.

He recanted the allegations of fraud and contended that the applicants were all aware with the petition and all procedures were followed but none of the applicant lodged any objection. He prayed for the application to be dismissed.

In rejoinder, Counsel for the applicant picked up difference in arguments between the applicants affidavit and counter affidavit. He argued on the date and place of death of the deceased to be on 14th April 2015 at his home in Buguruni instead of 12th April 2015 as alluded by the respondent. He also insisted that the deceased had two wives and the 2nd wife died un-divorced. He insisted on the order of the court to read the Will and that the respondent did not receive cooperation because there was no family meeting prior to the application for letters of administration. He reiterated their prayers.

Indeed, the High Court is bestowed with powers to revoke the grant of letters of administration. The reasons for revocation are provided under **section 49(1) (a) to (e) of the Act**. In our instant case, the applicants are seeking for an order of revocation in terms of **section 49 (1) (b)(c) and (e) of the Act**. The relevant parts to this case before me read:

"The grant of probate and letters of administration may be revoked or annulled for any of the following reasons-

(a) N/A

(b) that the grant was obtained fraudulently by making a false suggestion, or by concealing from the court something material to the case;

(c) that the grant was obtained by means of untrue allegations of a fact essential in point of law to justify the grant, though such allegation was made in ignorance or inadvertently;

(d) N/A

(e) that the person to whom the grant was made has willfully and without reasonable cause omitted to exhibit an inventory or account in accordance with the provision of Part XI or has exhibited

under that Part an inventory or account which is untrue in a material respect"

Further the High Court has powers in terms of **Section 49(2) of the Act** to suspend or remove an executor or administrator for the due and proper administration of the estate and the interest of the beneficiaries.

The above notwithstanding the removal of the administrator cannot be exercised in a whim but rather there has to be established sufficient reasons as stated above. The question now comes as to whether the applicants managed to establish the alleged fraudulent and untrue allegations by the respondent?

I would first address the issue of a WILL. I am obliged to state here that one might argue that the applicants' assertion on the availability of a WILL is farfetched. I am saying so because, the applicants apart from insisting that they had no knowledge of the application for letters of administration, they have not exhibited before this court the presence of the purported WILL. However, the court cannot ignore the strong assertion on the presence of a Will.

Due to such assertion, this Court found it pertinent to ascertain the presence of the said **Will** as it is the procedure that once there is a Will

nothing shall supersede it unless proven otherwise. In view of that on 24th March 2020 I called upon parties to address the court on the presence of the purported WILL. In addressing the Court, I came to learn that there is also a second WILL! Thus, the court summoned one **Shabani Alley** who is said to be the custodian of the **Will** as claimed by the Applicants and **Hassan Iddy Chembela** who is said to be the custodian of the **Will** by the respondent.

On 27th March 2020, Mr. Chembela and Mr. Alley appeared before the Court where the court after affirming them to tell the truth questioned both of them on the presence of the WILLS. Both custodians of the Wills who court named them as CW1 and CW2 explained their positions on how they became to be the custodians of the different WILLS said to be left by the same late Selemani Omary Kipwimbwi. Again both CW1 and CW2 presented before me for Court's observation only, copies of the said WILLS.

Indeed, I had an opportunity to see the extracts of the two Wills. Certainly it is not within my mandate in the instant application to comment on any of the Wills or their validity. However, once there is a WILL a court is obliged to take cognizance of the same and make appropriate orders.

As intimated earlier and without wasting much time, the presence of the WILLS nullifies the letters of administration of the Estate of the late Omary Selemani Kipwimbwi granted to Hamisi Selemani Kipwimbwi by this court on **22.04.2016 vide Probate and Administration Cause No. 43 of 2015.**

In the circumstances therefore, I accordingly annul and revoke the grant of letters of administration of the Estate of the late Omary Selemani Kipwimbwi granted to Hamisi Selemani Kipwimbwi. The reason being that *the grant was obtained by means of **untrue allegations of a fact essential in point of law to justify the grant that there is no WILL** much as such allegation could have been made in ignorance or inadvertently as claimed by the respondent (section 49 (1) (b)(c) and (e) of CAP 352 RE 2002).* I order the respondent i.e. Hamisi Selemani Kipwimbwi to forthwith surrender letters of administration to this court in terms of **Section 51(1) of the Act and Rule 29(4) of the Probate Rules;** and I further order him to account for and deliver all proceeds (if any) obtained in course of the administration of the deceased estates. Ultimately, either person believing to be an executor of the Will or having interest thereof may institute

proceedings for the grant subject to the observations of the legal procedure.

Following the nature of the matter being a probate case, I give no order as to costs.



R.A. Ebrahim
Judge

Dar Es Salaam
31.03.2020