

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

**PC CIVIL APPEAL NO: 155 OF 2020**

(Originating from Probate and Administration Cause No. 31 of 1998 and in the matter of  
an order of E.J Mkasimongwa J., DATED 23<sup>RD</sup> July 2018)

**JANE MACHARIA MACHESS ..... APPLICANT**

**VERSUS**

**LUCY MACHARIA.....RESPONDENT**

**RULING**

Date of last Order: 16/2/2021

Date of Ruling: 3/5/2021

**MASABO, J.:-**

The parties herein contend over the administration of the estate of the late MACHESS Macharia Ess (the deceased) who died interstate on 24<sup>th</sup> December, 1994. It is a common fact between the parties that, the deceased was survived by a widow who is the respondent herein and four children, the applicant herein being the eldest. The record reveal that after the demise of the deceased, a war over the intestacy ensued between the heirs of the deceased and especially between the respondent herein who is currently the administratrix and the applicant who is her step daughter.

Soon after the deceased's demise, the respondent moved the court for appointment as administratrix. After a fierce court battle with the applicant and another person, the respondent emerged successful and was appointed

administratrix on 10<sup>th</sup> November 2003. The wrangle between the parties did not end with the appointment. They continued to frequent the court in pursuit of different actions some of which seeking revocation of the respondent's appointment. This time around, the applicant has moved the court praying for the following orders:

**"INTERIM- EXPARTE**

1. This court be pleased to suspend the letters of administration issued to the respondent pending determination of this application for revocation of her letters of administration:

**INTERPARTY**

1. This court be pleased to revoke the letters of administration issued to the respondent above;
2. This court be pleased to compel the respondent to include the name of JANE MACHESS Macharia ESS in the list of beneficiaries of the estate of the late MACHESS MACHARIA ESS;
3. The Administrator be ordered to account for all the sums she collected from the Bank accounts of the companies of MACHESSS MACHARIA ESS and other sources and the same be distributed at the rate to be agreed in court and by court by depositing the same in the account of each of the beneficiaries.
4. Costs to be in the cause"

Considering the background and nature of the matter, granting of the interim-*ex parte* order was considered inconsistent with the quest for fairness in dispensation of justices.

The applicant's major complaint is that, upon the respondent's appointment as administratrix and upon being made a signatory of the deceased's bank accounts and in charge of the deceased's company assets and personal effects, she collected an amount of Tsh 35,000,000/= which was paid to the judiciary through Mirathi No. 31/1999. However, she has failed to collect a cheque worth Tshs 159,562,700/= payable by the Government through the Export Processing Authority as compensation of the deceased's house which was acquired by the Government. The said cheque, it was deponed, has been laying uncollected since 13<sup>th</sup> November 2013. It was further deponed that, the administratrix has failed to file an inventory within time and the extension of time allowing her to file the inventory with 6 months reckoned from the 27<sup>th</sup> July, 2018 has expired. Lastly, it was complained that the administratrix has misappropriated the funds collected from the estate. Instead of exhibiting an inventory and filing final accounts, she has presented a breakdown distributing  $\frac{3}{4}$  of the money to herself and the rest to her children ignoring other beneficiaries and omitted the name of the Applicant from the list of the beneficiaries. Also, she has misappropriated the money collected by claiming that she pays school fees for her children and she has downgraded the exchange rate for the foreign currency collected in the course of administration.

The respondent ardently disputed all the assertions through her counter affidavit through which she blamed the applicant for stalling the execution owing to endless applications and lack of cooperation. She stated that a sizeable part of the deceased's assets remained in the hands of the applicant and her uncle one Gachuki Kamau and the efforts to collect them have been rendered futile by the applicant's contemptuous conducts. That, even after she was ordered to surrender the same by this Court (Mihayo, J) on 14<sup>th</sup> September, 2009, she has contemptuously refused to surrender the assets whose total value is more than Tshs 153,006,600/.

As for the inventory, it was deponed that a total of 159,562,700/= has been remitted to the court accounts as compensation for the deceased house acquired through the Export Processing Authority and that Tshs 35,000,000/= has already been distributed to the heirs at the ratio of 50% of the said amount to the widow and the remaining 50% to the three children namely Wangare Macharia, Kamau Macharia who both got Tshs 5,833,000 each and Clifton Macharia was allocated Tshs 5,834,000/=. As for the applicant, it was deponed that the administratrix excluded her from the distribution list because the assets which she had contemptuously declined to surrender are worth more than Tshs 150,000,000/.

Hearing of the application proceeded in writing. Both parties had representation. Mr. Barnabas Luguwa learned counsel for the applicant and Mr. M.J.A Lukwaro, Advocate for the respondent.

Submitting in support of the application, Mr. Luguwa opened his submission by stating the facts giving rise to this application which I do not intend to reproduce as I have already summarized them. He further cited section 107 (1) & (2) of the Probate and Administration of Estates Act on the administratrix's duty to file an inventory. He further cited section 101 of the same Act which requires that the inventory and evaluation of property must be lodged not less than seven days before the date fixed for hearing of the application and section 107 (3) and (4) of the same Act which states the consequences for omission, neglect or refusal to file inventory. Based on this he argued that, the failure to file inventory constitutes a criminal offence punishable on conviction for a term not exceeding seven years imprisonment. Having cited these provisions, he proceeded to argue that, since the extension of time granted to the respondent expired in January 2019 before she filed the inventory and final accounts, she has become due for punishment owing to her neglect or omission to comply with the mandatory legal requirement. He further argued that the administratrix should be held criminally liable for concealing the details of the deceased's bank accounts and especially those with foreign currencies. I support of this point, she complained that the administratrix has inflated the foreign exchange rates in her favour.

As for the assets worth more than Tshs 153,006,600/= which the applicant has allegedly retained in contempt of court orders, instead of answering the allegation, Mr. Luguwa argued that while it true that there is court order by

Mihayo J, the said order is unreasonable as the assets ordered to be surrendered to the administratrix through a court broker is none other than the house which was acquired by Export Processing Authority and which is the subject of the cheque worth Tshs 159,000,000/= .

Regarding the applicant's inclusion in the list of beneficiaries, Mr. Lugua Submitted that, the respondent has apportioned herself a lion share of Tshs. 79,752,500/= and she has apportioned Wangari Macharia, Kamau Macharia and Clifton Macharia Tshs 26,584,166.60 each while her, the applicant who is the eldest daughter of the deceased has not been apportioned a share.

In reply Mr. Lukwaro, learned counsel, narrated the fleet of court action between the parties, which I need not cite and proceeded to blame the applicant for incumbering the administration of the state. He then submitted that the relief sought by the applicant in the present application are similar to prayers fronted in two previous actions before this Court and the Court of Appeal in which the applicant unsuccessfully moved the court to revoke the respondent's appointment. In view of this, he argued that, the prayer for revocation is untenable and should be rejected.

On the second prayer that this court be pleased to compel the respondent to include the applicant's name in the list of beneficiaries of the estate of the late MACHESS MACHARIA ESS, he briefly submitted that this prayer is misplaced and should not be entertained because when the respondent submitted her petition for letters of administration, she has listed five



beneficiaries, the applicant herein being among them. Thus, it is absurd how the court can compel the inclusion of a person who is already recognized beneficiary as one the beneficiaries of the estate.

As for the distribution of the money obtained from the Export Processing Authority, Mr. Lukwaro argued that the only reason for exclusion of the applicant is her continued contemptuous act through which she has retained a substantial share of the estate. Regarding the foreign currencies, he argued that while complaining that the rates used are incorrect, the applicant has not rendered proof of the correct rates to assist the court to arrive at her desired verdict. In conclusion of his submission Mr. Lukwaro adopted the contents of the respondent affidavit and the annextures thereto as part of his submission and rested his submission by praying that the application be found unmeritorious.

I have dispassionately considered the submissions and all the documents filed for or against the application and I am now ready to determine the application. As I embark on this delicate undertaking, the main prayers fronted by the applicant in the second tranche of prayers are three prayers, namely (i) revocation of the letters of administration issued to the respondent; (ii) an order compelling the respondent to include the applicant's name in the list of beneficiaries (iii) an order compelling the respondent to account for all the sums she collected from the estate and the distribution thereof. In view of these prayers, I will be guided by the following issues in determining the application:

- (i) Whether the letters granted to the respondent have become due for revocation owing to the failure to exhibit inventory and final accounts;
- (ii) Whether the applicant was wrongly omitted from the list of beneficiaries;

The applicant's case with regard to the first issue is that the administratrix has failed to exhibit an inventory and final account contrary to the provision of section 107 of the Probate and Administration of Estates Act. In support of this issue, she has argued that the administrator was granted an extension of six months within which to exhibit the inventory out of time. This time lapse in January 2019 and by 12<sup>th</sup> September 2019 when this application was being lodged, the administratrix had neither exhibited the inventory nor filed the final account.

On her part, the respondent ardently resisted the applicant's prayer for revocation of her appointment. She has contended that the Appellant had previously filed two applications for revocation of the grant of letters of administration to respondent but they were all dismissed thus, the application is an untenable.

Upon perusal of the record, it has come to light that, indeed the Applicant had previously unsuccessfully sought for revocation of the respondent's appointment. This time around, she has premised her application on the respondent's failure of to exhibit an inventory and final accounts in defiance



of the order for extension of time. In my firm view, since the respondent's failure to exhibit an inventory within the duration of 6 months extended by leave of court was never at issue in the previous court matters and since I have not been supplied with any information that the failure to exhibit the inventory within the said duration is substantially in issue in a pending court action, the respondent's argument that the previous futile attempts to revoke the respondent's appointment suffices as a bar to this application is a lucid misdirection.

Needless to say, the principle of *res judicata* as embodied under section 9 of the Civil Procedure Code, Cap 33 RE 2019 which operates as a bar to subsequent suits can only be invoked if, among other things, it is demonstrated to the satisfaction of the court that the matter directly and substantially in issue in the contemplated suit is the same as the one heard and determined by a competent court in the previous suit [see **George Shambwe v Tanzania Italian Petroleum Co. LTD** [1994] TLR 9. Therefore, while it is not in dispute that the relief sought in the previous applications is one and similar with the first prayer in the instant application, the cause of action is different and so is the law applicable. For instance, the ruling delivered by Mihayo J on 28/5/2007 shows that revocation was sought on allegations of concealment of material facts as to the number of beneficiaries and their relationship with the deceased contrary to section 49(1) (b) of the Probate Act whereas the present application being premised on the respondent's failure/omission to exhibit inventory and final account falls

under section 49(1)(e) of the same Act. This being said, the respondent's argument is rejected.

Coming to the merit of the prayer, as correctly argued by Mr. Luguwa, in probate and administration causes, exhibition of inventory and filing of final accounts is a mandatory legal requirement. Its omission or neglect constitutes an offence punishable under section 107 (3) and (4) of the Probate and Administration of Estates Act. Upon perusal of the records, I have observed that the respondent has ably demonstrated that having obtained the extension of time on 27/7/2018 she did not go sleep. On the 15<sup>th</sup> August, 2018, her counsel, Mr. Lukwaro, vide a letter with ref: LC/ADV/LUCY/17 presented in this court an inventory showing the amount collected from cheques and the expenditure/distribution thereto. On 19/11/2018 he filed another document showing the intended distribution of Tshs 35,000,000/= which had already been paid in court. In this document she stated further that, processes for the remaining sum of Tshs 124,562,700/= was still ongoing. In my considered view, it would be certainly wrong to condemn the respondent for defying the court orders and for violating the provisions of section 49(1)(e) while it is vividly clear from the record that upon obtaining the leave, she did not sit idle but proceeded to file the inventory well within the time. To this extent, the first issue is answered in the negative.

Having answered the first issue, I would naturally move to the next issue. However, for the sake of completeness and expeditiousness, before I move

to the following issue, I will briefly remark on the irregularity observed in the course of perusing the inventory filed in court by the respondent. Inventories and accounts are filed in a manner prescribed under Rule 106 and 107 of the Probate Rule and as per Form 80 and 81 of the Probate Forms. Pursuant to these rules, an inventory filed in court must show the assets and liabilities of the deceased and their respective value as per Form 80. Similarly, when filing accounts, the administrator or administratrix must specifically show the estate realised, the gains or loss if any, the expenditure (which may include funeral expenses, debts and administration expenses); the net estate available for distribution and the distribution thereof or plans for distribution of the estate to the entitled beneficiaries. The inventory filed by the respondent is not in conformity with the requirements above as it does not clearly specify the number of assets collected and the debts/liabilities if any.

Coming to the second issue for determination, I have found the payer by the applicant that the administratrix be compelled to include her name in the list of beneficiaries of the estate of the late MACHESS MACHARIA ESS, odd and unfounded as the document appended to her affidavit and marked as Annexure A vividly demonstrates that she has all along been part of the estate. When the respondent filed her application for probate on 3<sup>rd</sup> March 1998, she listed the applicant, JANE MACHARIA who was then 18 years as a surviving beneficiary. As argued by the respondent, it is incomprehensible how can this court compel the inclusion of a person who is already legally recognised as a beneficiary of the estate.

While reading the applicant's affidavit and supporting submissions, I have observed the applicant's attempt to change her gear by inviting the court to compel her inclusion in the distribution list a prayer which was not placed before the court. I have further observed that, in fortifying her attempt, she has made a contradictory account suggesting that there is a purported inventory/account which shows that she has been excluded from the distribution list and she has assigned a reason for her purported exclusion. She has alleged that; the respondent has excluded her owing to an unfounded allegation that she has contemptuously declined to surrender a substantial part of the estate. Owing to this anomaly, I will not allow my self to be detained by this self-defeating point.

Inconceivably, instead of responding to the allegations fronted against her by the respondent, the applicant's counsel while knowing that the orders in question are from this court hence, I am *functus officio* in so far as the said orders are concerned, he proceeded to attack the order by Mihayo J as "an unreasonable order". With respect, this was a lucid misdirection as this is not the appropriate forum for airing the discontentment if any. Needless to say, a party aggrieved by the decision or order of this court has a constitutional right to challenge it in the Court of Appeal whose doors are constantly wide open to receive such appeals. A party who waives such right has no one but himself to blame.

In the upshot, the application is dismissed. To remedy the defects observed in the inventory filed by the respondent, leave is hereby granted to the

respondent to amend his inventory and file a proper inventory and final account within 2 months. Costs to be shared.

Dated at Dar es Salaam this 3<sup>rd</sup> day of May 2021.



A handwritten signature in blue ink, consisting of a stylized 'J' and 'M' with a horizontal line through them.

J.L. MASABO  
JUDGE