IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

PROBATE AND ADMINISTRATION CAUSE. NO. 75 OF 2020

In the Matter of the Estate of the Late

SHABANI MUSSA MHANDO

AND

In the Matter of the petition for letters of administration by

ESTHER MSAFIRI MHANDO

Date of Last Order: 01/06/2021

Date of Judgment: 16/07/2021

JUDGMENT

L. M. Mlacha, J.

This judgment is going to examine the history, legality and importance of clan/family meetings in the process of appointing administrators of estates. It is also a scenario showing the effects of failure to write wills, a situation which explains why we argue people to write Wills, for things which could have been decided by the deceased at leisure are now left to be decided by the clan or family meeting which is divided at the great disadvantage of

heirs. It is the story of a young lady, ESTER MSAFIRI MHANDO (38), hereinafter referred to as the petitioner, who filed a petition for letters of administration in respect of the estate of the late SHABANI MUSA MHANDO who was her husband. Shabani died intestate on 29/4/2020. She is fighting against a brother of the deceased and daughter from another wife.

Citation was issued and published in the government gazette and Nipashe newspaper as directed by the court. The court received two caveats; the caveat of ABDALLAH MUSA JUMA (brother) and the caveat of Dr. SHEILA SHABAN MHANDO (a daughter) opposing the appointment. The caveate of Dr. Sheila was dropped later.

After the filing of the special pleadings as required by the Law, the case took the shape of the civil suit. Ester Msafiri Mhando who was the petitioner, turned to be the plaintiff while Mr. Abdallah Musa Juma, who was the caveator, became the defendant. Dr. Lugaziya appeared for the petitioner/plaintiff while Mr. Deogratius Lyimo Kirita, Martin Sangira, Steven Shitindi and Alfred Kivita appeared for the caveators/defendants. With the assistance of the counsel for the parties, the following issues were recorded;

1. *Whether the petitioner is the fit person to administer the estate alone.*

2. *If the first issue is answered in the negative, whether the caveators can be appointed to act as joint administrators.*
3. *To what reliefs are the parties entitled to.*

Upon further withdraw of the caveat, of Dr. Sheila joined forces with Mr. Abdallah Musa Juma against the petitioner. The parties were then called to present their respective evidence to support their cases.

DW1 Ester Msafiri Mhando (38) was led by Dr. Lugaziya to give the following testimony. That, she is the wife of the late Shabani Musa Mhando. She has 4 children namely; Jibril Shabani Mhando, Rehema Shabani Mhando, Neema Shabani Mhando and Baraka Shabani Mhando. Three of them, Rehema, Neema and Baraka are triplite twins. She went on to say that the deceased had other children namely; Zaina Shabani Mhando, Sheila Shabani Mhando, Musa Shabani Mhando and Masika Shabani Mhando. She was not living with them. They were living with their mothers, she said. Some of them were not known to her. She was just told of them by the deceased.

Giving reasons as to why she should be appointed to act as administratrix of the estate, she said that she had lived with the deceased for 11 years and therefore aware of all the assets of the deceased. She also knew the children

of the deceased whom she can give their respective shares of the estate without a problem.

PW1 proceeded to tell the court that she called the relatives of the deceased to attend the meeting scheduled to appoint an administrator but they could not attend the meetings. The meeting was conducted and proposed her to be the administratrix of the estate. She tendered copies of the minutes which were received as exhibits P1 and P2. She added that she was called to attend another meeting in Tanga but could not go because she was sick. It was also difficult to go with the triplite twins who were only two years old. She was not called to attend the Tanga meeting officially. She just received a call from a brother in law, one Ali Cheche who called her to attend the 40th day burial ceremonies (Arobaini) in Tanga.

PW1 went on to say that one day she got a letter from the Local Government (Mtoni Kijichi) which accused her of refusing to give co-operation in opening the probate matter. When he came there, she was told that it was Mr. Abdalah who had lodged the complaint that she was resisting to release the death certificate which was needed in opening the probate. She told them that she had already opened a probate matter in this court. She left thinking that things had ended there but that was not the case. They came to this

court to oppose. She said that, people should not doubt her because she has no bad intensions with the other children. That, if she had bad intensions, she could not list all the children in the petition. She said that she knowns all the children except Masika Shabani Mhando whom she was yet to see, but is in the list. She said that Zaina is aged 31 years old and is living in German. Sheila is aged 29 years and lives in Temeke Flats. Musa lives with his mother but was studying in Kenya. The three children were introduced to her but were living with their mothers. She added that Abdalah was introduced as a relative but had no love or close relation with the deceased.

Speaking of the details of the sickness of the deceased before he died, she said that, they never knew that it was Covid -19. He was just sick and she sent him to Kijichi Hospital. He was feeling bad. She thought of calling Abdalah but the deceased stopped her. He called him privately (faragha). He came. She also phoned Dr. Sheila, the daughter of the deceased, who come. The later applied for a discharge to Rabinsia Hospital Tegeta. She could not engage her on the issue. She was very high for a discharge for she had sensed that it could be Covid-19. They left to Rabinsia Hospital where he was received. They put him on oxygen. He was discharged two days later, that is on 27th and came at home. All these were done by Sheila without

involving her. The situation turned bad at home. She phoned Abdallah and told him that the situation was bad but he could not come. She remained there with his two sisters. Sheila was there but left. They phoned Dr. Mzava who sent an Ambulance. She was weak and crying, she could not go. He left with his two sisters to the hospital but died later in the day. She received a call at 1:00 PM informing her that he had died. It came from someone in Dodoma not Abdalah or Sheila. They came at home but could not tell her. They said that he was ok. Someone came later and told her that he was dead and could be buried by the government. They were required to stay aside. Later in the day, he got a call from Mloganzila Hospital requesting her to come at the hospital to receive the burial permit. She went to the hospital, picked the paper and went home. She could not get the wallet and phone of the deceased. She was told that they had been picked by his daughter, Sheila. Sheila could not handle them to her.

She proceeded to say that Sheila came with her aunt at home and demanded the burial permit. She declined to handle it to them. They spoke harsh words and left. Abdallah never came at home.

PW1 concluded by saying that she is the fit person to administer the estate of the deceased. She can take care of the children fairly. Each will have his

or her right. She is not ready to work with Abdallah. She accused him of collecting rents from some houses.

During cross examination PW1 repeated that Abdalah had no good relations with the deceased. And that she is not in good terms with the family of the deceased. She then said that he had justification to call the meeting which proposed her to administrator the estate. She got the minutes and moved to court to open the probate.

DW1 Abdalah Musa Juma was led by Mr. Deogratius Lyimo Kirita to tell the court that the deceased is his brother. They share the father. Their relation was good, a brotherly relation. And that his wife (PW1) is aware of their good relations. They were all living in Mtoni Kijichi Dar es Salaam. He proceeded to say that PW1 is the widow being the last wife of the deceased. That, the deceased had two other wives before Ester; one is dead and the other was divorced. He went on to say that his relation with his brother was good. The problem was his wife, PW1 who never needed the deceased to have a relation with his children and relatives.

Giving evidence on the sickness and death of the deceased, he said that he received a call from PW1 who said that he was sick. He went to hospital and met him. He took over the matter and from that moment the sickness fell to

him and Sheila. PW1 never went to hospital. She never participated in anything more. She does not know even the place where he was buried.

DW1 went on to say that believing that it was Covid -19, he was also put to a home quarantine. Adding that PW1 never stayed in the quarantine because she moved to Mlonganzila to bring the death certificate. He could not get a copy of it when he needed it. He only got the burial permit and buried him at Kisutu.

Giving details of the family, DW1 said that the deceased had eight (8) children. The widow has four (4), the rest come from different mothers. They were living with their mothers but used to visit their father. They stopped to come after the marriage of PW1. He added that, they used to visit him but could not stay longer to avoid conflicts with PW1. He (DW1) was close to the children indirectly, through his relation with their father. He added that two of them were more close to him. They used to visit him while with their father.

DW1 went on to say that PW1 knows the assets but that does not mean that she took part in acquiring them. He added that he is not an heir and has no personal interest in the matter. He just wants to assist the children.

DW1 proceeded to say that PW1 was not sick to the extent of failing to attend the burial. He did not even believe that she had Covid-19. He added that sometimes later he received a call from Mzee Kajembe, the guardian father of Shabani of Tanga demanding the details of the assets. He advised them to wait till the 40th day (Arobaini). He also communicated this to the widow whom she gave the date the the Arobaini. She said that it was ok. The meeting was to be conducted at Muheza, Tanga. He communicated the date in May to PW1. She replied through an sms that she could not come but could accept the decision of the meeting. They then moved to Muheza and sat the meeting which appointed him to administer the estate. He notified her of what had transpired in the meeting. He tendered a copy of the minutes and list of people who attended the meeting which were received as exhibits D1 and D2.

DW1 proceeded to tell the court that he went to Mbagala Primary Court but could not open the probate because he had no *death certificate* which was with PW1. He moved to the local government to complain. She was summoned only to tell them that she had already opened a probate matter in this court. She was not ready to speak further. DW1 wondered as he was not aware of the place where she got the clan minutes which assisted her to

open the probate matter. He went through the minutes tendered by PW1, exhibit P1 and said that they have no relative of the deceased except his wife. They were just relatives of PW1 who appointed her to administer the estate. He added that, he had no report of the meeting.

DW1 could not oppose the appointment of PW1. He only requested the court to appoint him as a co-administrator saying the relation of PW1 and the rest of the children is not good. He did not want PW1 to be dropped but argued the court to add him as a co-administrator.

DW2 Sheila Shabani Mhando informed the court that she is the second born in the family of eight children. She had a good relation with her father whom she could visit as she wished. She could visit her regularly. She got the report of sickness from PW1. She then moved to see him in hospital. She narrated her story on what happened during the sickness, burial and in the meeting, which appointed Mr. Abdallah. She also said what happened thereafter. Her evidence resembles what was said by DW1 to a great extent. It also has similarities with some parts of the evidence of PW1, for example what happened at the family during the sickness and thereafter, events which provoked the use of harsh words between her and PW1. She admitted that

there were instances of harsh words. She said that her relation with PW1 is bad but her relation with the children of the deceased is good.

She joined hands with DW1 that, there was need of appointing a second administrator because PW1 was not in good terms with the rest of the children.

The court invited the counsel to file final submission which were dully filed. Submitting for the appellant, Dr. Lugaziga said that, in view of the obvious conflicts between them, the only person who can administer the estate is the widow. He attacked the minutes which were tendered submitted by Mr. Abdallah proposing him to administer the estate saying that, they are forgeries due to contractions of names and the existence of hand and typed parts which have no good explanation. He invited the court to discard them and appoint his client.

Submitting for the caveator, Mr. Deogratious Lyimo Kirita informed the court that there a high level of mistrust between the parties which can be resolved by appointing a co-administrator who is DW1. He refereed the court to the minutes tendered by PW1 which came from her relatives arguing that they were not genuine minutes. He said that the correct minutes were those coming from the caveator because they come from the family of the

deceased. He said that PW1 was summoned to attend but declined to do so. He invited the court to be guided by the decision of this court in **Elias Madata Lameck v. Joseph Makoye Lameck**, PC Probate and Administration Appeal No. 1 of 2019 (High Court Musoma, unreported) which followed the decision of this court in **Hadija Saidi Matika v. Awesa Said Matika**, PC Civil Appeal No. 2 of 2016 (High Court Mtwara, unreported). The decisions emphasized the importance of clan or family minutes, he argued. He said that it was the family of Mhando which was supposed to sit and propose the administrator and not the petitioner's family. He could not see any problem with exhibits D1 and D2. He went to say that it was important to appoint the two people jointly but if that could not please the court, then the administrator General should be appointed *suo motu* to take over the administration as a neutral party.

Dr. Lugaziyaa filed a rejoinder and joined issues with the submission from Mr. Kirita. Of essence, he invited the court to follow its decision in **Philipina Wifred Malisa and Robert Wilfred Malisa**, Civil Appeal No. 12 of 2020 (High Court Dar es Salaam, unreported) which gave guidance on situations where the parties have failed to call a meeting. He argued that his client had

justification to call a meeting from her family to get the minutes which proposed her. He could not see any problem with the minutes.

Having considered the evidence adduced by the parties and submissions made carefully, I have the view that it is important to address myself to the question of the Clan/Family minutes to some details before addressing the issues. It is an area of confusions which needs clarification to the parties and courts below. A discussion of this aspect will also make the discussion on the issues simple.

I had time to read the decisions cited to me which were also known to me. As was said in the decisions, there is no statutory requirement or rule on this aspect. It is only a principle which was developed by the courts through practice. Its relevance was put clearly by this court in **Philipina Wilfred Malisa** (supra) at pages 7 and 8 where it was said thus;

> *"**Family clan meetings are encouraged by courts because they act as forum to filter things before going to court**. They tell the court that a person before it has **support from the family/clan**. **They make the work of court easy** for it will not deal with issues which have already been delt with at the clan/family level. The meetings and **minutes are therefore important and must also be attached to the petition**. But*

much as the minutes are important and needed in filling petitions, ***this does not mean that a person without the minutes cannot file a probate matter. He can still file the case but must make a statement giving reasons why he could not obtain the minutes****. Reasons may include failure to convene the meetings due to* ***conflicts and misunderstandings and the family****. The court will usually allow him to file the case save where it appears that he is evading the process deliberately. He or she can also come to court as an objector and get the same remedy.* ***The rule is that, every petition for probate of a will or probate and administration must be accompanied by the minutes of the clan/family expect where it has been impossible to obtain them reasons beyond the control of the petitioner****". (emphasis added)*

The court pointed out a number of things namely; **one**, the meetings are important because they act as a forum to filter things before going to court. They make the work of court easy because it will not deal with issues which have already been resolved at the family. **Two**, it tells the court (something which may not be correct always) that the person before it has support from the clan/family. **Three,** that a person who have failed to get the minutes for some reason can still file his case provided he makes a statement (by affidavit or otherwise) stating the reasons why he could not attach the

minutes. Reasons may include the existence of conflicts and misunderstandings at the family. **Four**, that the minutes being so important, must be attached to the petition save where it has been impossible to obtain them on reasons beyond the control of the petitioner.

But a question may arise; which clan or family should sit? This is another area of confusion which needs guidance from this court. I will attempt to do so.

This question may be answered, in my view, by a look at the scheme provided under **The Local Customary Law (Declaration) order 1963, GN 279 of 1963.** Much as most of what is provided under this law have been out dated and overtaken by events, calling for a repeal and or extensive amendments to fit the present society which is no longer based on tribes, but still there are some useful pieces. Reading through the second schedule, I could come across the words, *"Urithi hufuata upande wa ukoo wa mume"*, meaning that inheritance follows the side of the man. This was for patrilinear societies which comprise of most tribes of Tanzania Mainland. Matrilinear societies are limited among the Zaramo, Luguru, Kaguru, Nguu and a few others. See **The Matrilinear People of Eastern Tanzania**, by T.O. BEIDALMAN, Ethnographical Survey of Africa, East Central Africa, London

International Institute 1967, available online at https//anthrosource.onlinelibrary.wiley.com. But even in those tribes, I am not sure if they are still practicing it in the strict sense today.

Under item (6) there under has the words:

> *"6. **Baada ya matanga watu wa ukoo hukusanyika** na wanahesabu urithi wa **kushauriana** juu ya madai na madeni yote aliyokuwa nayo marehemu". (Emphasis added).*

There is no provision requiring them to propose a fit person to administer the estate, which was merely developed by the court through case law, but the meetings have their background from this rule, that, *'Baada ya matanga watu wa ukoo hukusanyika ... na kushauriana* '. That, the clan will usually meet after burial ceremonies to discuss the affairs of the deceased with a focus on debts and credits. As time went on, and particularly on the development of urban life, intermarriages and mixed cultures, we no longer have a clan meeting as such. Most people are organized in groups which cannot be said to be clans in the true meaning of the words as it were in 1963. That is the reason why we call them Clan/Family meetings because the clans no longer exist as units of tribes. In most cases the meetings will

comprise of an extended family of the man who is dead or bereaved. His wife and a few members from her family may also be invited.

It a rule which have its root in GN 279 of 1963. It is thus clear that, the family which will sit in the meeting is the family from the male side and not the family from the female side. This is applicable in all situations save for a few families which are organized from the female side, the matrilinear societies, which as was hinted above, are very few. It was thus wrong, with respect to Dr. Lugaziya, to attach minutes of a meeting from the female side to the petition, without any proof that the deceased came from a matrilinear society.

I will now come to the second question as to what should have been done by the petitioner who was confronted with difficulties as pointed above. I think the case of Philipina Wilfred Malisa (supra) spoke it all. She could file her petition accompanied with an affidavit stating the reasons as to why she could not attach the minutes. The other side could lodge a caveat, if need be, followed by an affidavit supporting or opposing what has been said by the petitioner. The matter could then role into a civil suit and be resolved accordingly. I think this is what could have been done.

Now can it be said that her petition was defective by reasons of attaching minutes from a wrong meeting? I would say no, for as I said earlier, there is no legal provision demanding their existence. It is just an arrangement developed by the court through practice to assist it in dealing with probate matters. The significant of it have been pointed out above. I think the biggest punishment which could have been given to the petitioner, if there had been a preliminary objection on the issue, could be to struck out her petition with an order directing her to go through that process. But now that there has been no preliminary objection, and taking into account the wider interest of justice particularly on the aspect of delay, and further in the spirit of the overriding objectives brought by section 3A of the Civil Procedure Code Act, Cap 33 R.E. 2019, the defect can just be neglected, for it has caused no harm to anybody.

That said, can I say that, the petitioner is the fit person to administer the estate? Or should I appoint the two as joint administrators? Or should I shift the matter to the Administrator General as requested? These are the issue which should be discussed now.

There is evidence from both parties that the petitioner and the caveator are not in good terms. At least, at the moment, each of them agree that, they

are not in good terms. They are potential enemies, so to say. There is also evidence from the petitioner that her relation with DW2 Dr. Sheila Mhando, the daughter of the deceased, is bad. DW2 admits this fact and adds that she exchanged harsh words with PW1 during the processes of burying the deceased. She says that, she has not returned home since then. Despite her enemity with the Petitioner, her relation with DW1, is good. So, there is the Petitioner on one side and DW1 and DW2 on the other side. They are at longer heads. They are all looking forward to the estate of the deceased. We could not receive the evidence of other children of the deceased but the obvious picture is that, the Petitioner stands for her children while the two stand for the other children.

It was a broken family in the days of the deceased who could not bring all his children to live with him at the family. He lived with the Petitioner with her four children leaving the other children out with their mother and uncles. He created the gap which is now disturbing us. Worse, he could not leave behind any Will to guide the family. The gap was small and has now widened. Issues which could be resolved by the deceased by writing a Will are now left to the family which is divided. That is the problem before me.

Having examined the matter critically, I have come to the finding and conclusion that, it will not be in the best interest of justice to appoint the caveator as a co-administrator in this case. At most, if appointed, he will add stress and even bring death to the petitioner. It is out of logic to imagine that he can act with the widow peacefully in the administration of the estate given the hostile mind in him which is open. If that is done, something which I am not prepared to do, the administration of the estate will fall into a crisis which will affect the beneficiaries, particularly the infant children of the petitioner.

I am now left with two choices, the petitioner and the Administrator General. I admit, as correctly pointed out by Mr. Kivita that, the court has power to appoint the Administrator General suo motu, but I don't think that this is the fit moment to do so. The administrator General is appointed as a last result, where there is no fit person to administer the estate or where the administrator appointed by the court has failed to perform his duties and there is no other fit person to do the job. None of the situations apply here. In our case we have the petitioner who is the widow of the deceased. Apart from the fears which have been expressed which are a result of the gap left behind by his late husband, we have no record of his past experiences. She

otherwise a good citizen of this country who have no any criminal records. I think she is the fit person to do the job.

I think it is important to appoint the petitioner as an administratrix despite the difficulties expressed by the caveator and Dr. Sheila because she has a bigger interest than anybody else. She is the widow and has four very young children. What is necessary in my view, is to give directives which will ensure that all the heirs of the deceased get their rights.

Before going to the appointment and directives of the court, it is necessary that I speak about a few other things. The heirs of the deceased under customary law, as interpreted by the court in numerous decisions, are the spouse (husband/wife), children and parents of the deceased. Brothers, Sisters, uncles and aunts are not heirs. They don't inherit as a matter of right. They can receive something at the will of the heirs. They cannot force. Children include children born out of wedlock for the Law of the Child Act, 2009 have removed the discrimination see **Wibard Mathew Senga v. Mkwega George Mather Senga**, High Court Dar es Salaam, Miscellaneous Civil Application No. 394 of 2019. The test is that the deceased must have identified and introduced them to the family or any of the close relatives. It is not necessary that he must have lived with them under one roof. It is not

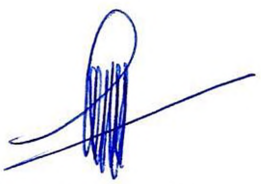
a DN issue. It is the question of identification and introduction to the family or any of the close relatives. And when we talk of parents, we mean the parents (father and mother) of the deceased. They have a right to inherit from their children simply because under customary law parents depend on their children at old age. They turn be children. They should therefore be given their share in the event of death. It is a right which arise from the right of parents to be taken care by their children at old age, a right which does not survive them after their death. It means that, only parents who are alive can be given a share as heirs.

Finally, the widow is given a share over and above her ordinary share as a heir, based on the fact that she must have taken part in the acquisition of the assets or at least gave the deceased some comfort which allowed him to acquire the assets. This must be reflected in the divisions. In some cases, she is given double share. In other cases, she is given the matrimonial home over and above her ordinary share. There is no clear cut formular, it all depends on the circumstances of each particular case.

That said, based on what have been said above, I appoint Ester Msafiri Mhando, to be the administratrix of the estate of the late Shabani Musa Mhando with powers to collect the estates of the deceased, pay the debts

and distribute the balance to the heirs of the deceased who are the widow, the eight children namely Jibril Shaban Mhando, Baraka Shaban Mhando, Rehema Shabani Mhando, Neema Shabani Mhando, Mwahija Shaban Mhando, Dr. Sheila Shabani Mhando, Musa Shabani Mhando and Masika Shabani Mhando and his parents (if any). The administratrix is directed to be fair to all the children who should be given **equal shares without any discrimination**. She must file the Inventory and Accounts of Estate on or before 16/1/2022. It is ordered so.

No order for costs.



L.M. Mlacha

Judge

16/7/2021