IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

MISC. CIVIL APPLICATIONS NO. 310 OF 2021

(Originating from Probate Administration Cause No. 61 of 2021)

NILESH JAYNTILAL LADWA ---------- 1ST APPLICANT

CHANDUL WALJI LADWA ---------- 2ND APPLICANT

JW LADWA (1922) LTD ---------- 3RD APPLICANT

VERSUS

JITESH JAYANTILAH LADWA ---------- RESPONDENT

Date of Last Order: *02/08/2021*

Date of Ruling: *11/08/2021*

R U L I N G

MGONYA, J.

The Applicants herein filed a chamber summons under **section 49 (1) (a) (b) (c) of the Probate and Administration of Estates Act, Cap. 352 [R.E 2019], rule 29, (1), (2) and (4) of the Probate Rules, and section 2 (1) of the Judicature and Application of Laws Act, Cap. 358 [R.E 2019].** They are seeking an order of this court to annul the grant of Letters of Administration granted to **Jitesh Jayantilal Ladwa** in **Probate and Administration Cause**

No. 61 of 2021 granted in his favour by my brother Judge Hon. Mlyambina, J.

The chamber summons is supported by an affidavit of **Robert Rutaihwa,** counsel for Applicants. The Respondent has resisted the application, and has filed a counter affidavit in opposition. He has also raised three grounds of preliminary objection, namely:

1. **That the application is unmaintainable in law;**
2. **That the court is *functus officio* to hear and determine the matter before it; and**
3. **That the affidavit in support of the application contains hearsay information contrary to the law.**

Pursuant to consent orders of this court made on 16th July, 2021, the Advocates for the parties delivered their respective arguments both on the preliminary objections and Application by way of written submissions. It is from that arrangement, I hereby proceed to determine both the points of preliminary objection and the instant Application respectively.

The Parties before this Court have enjoyed the services of learned Counsel where the Applicants have been represented by Mr. Rutaihwa learned Advocate and the Respondent has all along being represented by Mr. Sisty and Mr. Musyangi the learned Counsel.

Submitting on the first ground, the Respondent's counsel argues that the present application is untenable in law because the section cited by the Applicants to move the court are not open for any person to come and challenge this court's decision. In support of their argument, counsel submitted that having gone through the whole text of **the Probate and Administration of Estates Act, Cap. 352 [R.E. 2012], the Probate Rules and the Judicature and Application of Laws Act, Cap. 358 [R.E. 2019]**, they could not locate any provision which states that **"any person can bring application of the sought nature"**. Their research could also not come up with any case law that allows a person who is not a party to any proceeding to challenge the same decision in the same court by way of an application like the present one or an appeal.

The gist of the Respondent's argument is that only parties to the proceedings that culminated in the grant of Letters of Administration to the Respondent could apply for nullification of the grant. Since the Applicants were not parties, they cannot invoke the provisions of **section 49** of the Probate and Administration of Estates Act to have the grant nullified, submitted counsel.

Citing the case of ***MONICA NYAMAKARE JIGAMBA VS MUGETA BWIRE BHAKOME AS ADMINISTRATOR OF THE***

ESTATES OF MUSIBA RENI JIGABHA AND ANOTHER, Civil Application No. 199/01 of 2019 (Unreported), counsel reiterated the rule that for non-parties, the only remedy is to apply for revision in a higher court.

In reply to the submissions filed on behalf of the Respondent, the Applicants' counsel submitted that the application is well founded and that the moving section as cited allow any person to bring the application at hand. To support their argument they have cited **Musyoka W.** in his book titled, ***A Case Book on Law of Succession***, page 474 citing section 76 of the Kenya Law of Succession Act which in principle allow any interested person to apply for annulment of administration of estates. The Applicants' counsel also relied on the Kenyan case of ***In the Matter of the Estate of late HEMED ABDALLAH KAMIKI, HC Nairobi Succession Cause No. 1831 of 1996***, which states that any person who may be interested in the administration of the estate may seek annulment.

The Respondent's counsel's rejoinder basically reiterated their earlier position.

I have considered the submissions and arguments of counsel for both parties. I have also considered the case of ***MONICA NYAMAKARE JIGAMBA VS MUGETA BWIRE BHAKOME (Supra)***, on which the Respondent's counsel has relied as the

authority for the proposition that a non-party cannot seek annulment under **section 49 of the Act**. With respect, I have found myself unable to agree with the argument fronted by the Respondents' counsel that only parties to the probate and administration proceedings can seek revocation or annulment. A careful reading of section 49 of the Act tells me that it is open to any interested person to do so, as counsel for the Applicants have argued. **Section 49 (1)** provides for no restriction at all in terms of who may seek revocation or annulment. It would therefore be an unduly restrictive interpretation of the law to agree with the Respondent's counsel's that one must be a party to the original proceedings to seek an order of revocation or annulment.

For these reasons, **I overrule the first ground of preliminary objection.**

The second ground of preliminary objection is that this court is ***functus officio***. Submitting on the same, counsel for the Respondent argued that once a case has been finally decided by the court, the court ceases to have jurisdiction over the same. Counsel argued that in the case at hand, the matter was finally determined on **29th June, 2021** when the court granted the Respondent herein the prayer to be the legally appointed Administrator of the estate of the deceased. To support his position, he cited the case of ***JAMES KABALO MAPALALA VS***

BRITISH BROADCASTING CORPORATION, Civil Appeal No. 43 of 2001.

In reply, counsel for the Applicants strongly submitted that this point of objection is misguided and that the concept of *functus officio* means that the court has no authority to issue the order sought, but that does not apply when the statute confers authority to give and entertain the matters. To fortify his position, he cited the case of ***HALIMA ADEN VS ALI FUNGO (1997) TLR 181,*** in which it was held that any *ex parte* decision in a civil matter does not make the court *functus officio*. The learned advocate distinguished the case of ***JAMES KABALO MAPALALA (Supra),*** arguing that, in that matter, there was a previous judgment which was decided *ex parte* and the same decree holder went to the same Judge for review and amendment of pleadings.

Counsel also contended that a probate matter would only be finally determined when the inventory is filed, that is to say, after the closure of the case file.

The issue for determination on the second point of objection is whether this court is ***functus officio.***

I would respectfully differ from the Applicants' counsel last argument. I do not think that the court would only be considered *functus officio* in a probate and administration matter after the

filing of the inventory. Any decision of the court that finally determines an issue would render the court *functus officio.* What was before the court at the material time was an application for appointment of the then Petitioner (now Respondent) as an Administrator of the estate of the deceased, the **Late Jayantilal Walji Ladwa**. An order in his favour was made by this court (Mlyambina, J.). That must be taken to be the final decision of this court on that issue. As far as the court is concerned, therefore, that matter is closed and it cannot be re-opened. Furthermore, contrary to the applicants' contention, Mlyambina J's decision was not *ex parte*, because there was no other party who should have appeared to be heard at the time. Hence, the case of ***HALIMA ADEN VS ALI FUNGO (Supra)*** is distinguishable.

It has been argued on behalf of the Applicants that **section 49 (1)** of the Act allows the court to nullify the decision. I have no issues with that argument. But the question is, does the subsection allow this same court to nullify its own grant of Letters of Administration, as the Applicants want this court to do herein? I do not think so. I see nothing in **section 49 (1)** of the Act that can be construed to grant this court the jurisdiction to nullify its own decision. The subsection only provides for the powers of the

court, and says nothing about which court can exercise such powers.

If the Legislature in its wisdom had intended to vest such powers in the same court that granted the Letters of Administration, it should have stated so expressly, in clear and unambiguous terms. Since it did not, it would be wrong for a court of law to assume that it has such powers. In my view, only a court above the court that grants the letters of administration can revoke or nullify the grant. In the present instance, therefore, it is only the Court of Appeal that can do so.

In the result, **I would sustain the second ground of the preliminary objection; meaning that this Court is *funtus officio* and cannot nullify its own decision, as it has no jurisdiction to do so.**

This finding renders it superfluous for me to deal with the third ground of preliminary objection.

I have bartered with the idea of whether I should dismiss the Application or strike it out. I understand that it is normally the case that where a matter is decided not on merits, the order is to strike it out. However, it all depends on the reason for the decision. Where the matter involves, for instance, time limitation, the law specifically provides for an order of dismissal. On this, one may wish to see **section 3 of the Law of Limitation Act.**

This is because, being time barred renders the court without jurisdiction. Given the nature of my above decision, this court can under no circumstances exercise jurisdiction in this matter. For that reason, therefore, the proper order to make would be to dismiss the application.

In the upshot, **the instant Application is hereby missed.**

I make no order as to costs.

It is so ordered.

L. E. MGONYA

JUDGE

11/08/2021

Court: Ruling delivered in my chambers in the presence of Robert Rutaihwa, Advocate for the Applicant and Elly Musyangi and Sisty Benard, Advocates for the Respondent and Mr. Richard, RMA this 11th August, 2021.

L. E. MGONYA

JUDGE

11/08/2021