

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB- REGISTRY OF DAR ES SALAAM
AT DAR ES SALAAM
MISC. CIVIL APPLICATION NO. 195 OF 2022
IN THE MATTER OF ESTATE OF THE LATE HUGO TIMOTH KIWALE
AND
IN THE MATTER OF APPLICATION FOR REVOCATION OF GRANT OF THE
LETTERS OF ADMINISTRATION BY

DIONISIA ALBERT MARO 1ST APPLICANT
MARTINA TIMOTH KIWALE 2ND APPLICANT
ATANASIA STEVEN CHUWA 3RD APPLICANT
MARTA TIMOTH KIWALE 4TH APPLICANT

AND

STEPHEN PETER MUSHI (As Administrator
of Estate of the late Hugo Timoth Kiwale) RESPONDENT

(Arising from Probate and Administration Cause No. 38 of 2012)

RULING

25th July and 12th August, 2022

KISANYA, J.:

This application stems from Probate and Administration Cause No. 38 of 2012 in which Stephen Peter Mushi was granted letters of administration of the estate of the late Hugo Timoth Kiwale on 14th November, 2013. The applicants, Dionisia Albert Maro, Martina Timoth Kiwale, Anastazia Steven

Chuwa and Marta Timoth Kiwale have moved this Court for the revocation of the respondents' grant of letters of administration. The application is made under section 49(1)(d) and (e) of the Probate and Administration of Estate Act, Cap. 352, R.E. 2002 and rule 29(1) and (2) of the Probate Rules and supported by the affidavits of each applicant. The reasons which prompted the applicants to file the application at hand are well stated in paragraphs 3, 4, 5, 6, 7 and 8 of their respective affidavits. They can be paraphrased as follows: -

1. The administrator has failed to file an inventory and account of the estate of the deceased.
2. The administrator has misappropriated the estate of deceased.

The respondent intensely resisted the application in his counter affidavit. He averred that the inventory was not filed on time due to difficult exercise of identifying the properties left behind by the deceased. He further deposed that the delay was actuated by a suit filed at the District Land and Housing Tribunal of Kinondoni at Mwanyamala (Application No. 419 of 2016) in respect of the deceased's house. He disputed other reasons for revocation.

The hearing of this application was preceded by way of written submissions. The applicants were represented by Mesres Flavian John and

Adolph Temba, learned advocates, whilst Ms. Lucy Nambua, learned advocate represented the respondent.

Submitting in support of the application, the learned counsel for the applicant started with the ground on misappropriation of the deceased's estate. It was submitted that the respondent has misappropriated the estate of the deceased. As it will be apparent later, their submission was based on the document appended to the counter affidavit of the respondent. The applicants' counsel went on contending that the administrator turned himself as the beneficiary of the deceased and that he has not distributed any of the deceased's properties. The Court was referred to the case of **Joseph Shumbusho vs Mary Grace Tigwera and 2 Others**, Civil Appeal No. 183 of 2016 (unreported) where the Court of Appeal had this to say on the role of administrator of estate of the deceased:-

"In the performance of his duty as a legal representative, the law requires him to act in accordance with his oath. And what does this mean? Section 66 of the Probate and Administration Act requires the grantee of the probate or letters of administration to take an oath that he/she will faithfully administer the estate of the deceased and will account for the same. That is the administrator will faithfully administer the deceased's estates by first paying

the just debts of the deceased, distributing the residue according to the law, making and exhibiting a full and true inventory of the deceased's properties and credits and rendering a true account of the administration. The rationale of exhibiting the inventory and accounts is to keep the beneficiaries informed and to have transparency in the execution/administration of the deceased's estates...."

The applicants' counsel submitted further that the respondent has failed to file inventory and account of the estate of the deceased for more than nine years thereby contravening section 107(1) of the Probate and Administration Act (supra). It was argued further that the grant of letters of administration has become useless and inoperative due to the respondent's failure to exhibit an inventory and account in accordance with the law and the order of this Court. Referred to section 49(1) (d) (e) of the said Act, this Court was called upon to revoke the grant of letters of administration of estate of the deceased to the respondent.

Submitting in rebuttal, Ms. Nambua adopted the whole contents of the affidavit to form part of her submission. At the outset, she submitted that the applicants lied in their affidavit in respect of their place of residence. It

was her submission that, the respondent's contention that the applicants reside in Kilimanjaro Region and not Dar es Salaam was not challenged by applicant.

Ms. Nambua conceded that the respondent had failed to file the inventory within the time specified by the law. However, she argued that the respondent has advanced the reasons which actuated the delay to be the difficult exercise of identifying the properties and the case filed to claim the deceased house. The learned counsel pointed out that the case was delivered in favour of the respondent on 3rd September, 2021. She urged me to consider that the said fact was not contested by the applicants.

Reacting on the ground of misappropriation, Ms. Nambua contended that the applicants have failed to justify the allegation laid against the respondent. Her contention was premised on the reason that the applicants were expected to demonstrate what was misappropriated by mentioning the properties or the amount of money. It was her further submission that the list of items sold to various people is not contested and that the applicants ought to have produced evidence to rebut the same. That being the case,

she concluded that there is no proof to the allegation of misappropriation by the respondent.

With respect to the second ground, the respondent's counsel reiterated that the delay was caused by the case in which one of the estates (house) of the deceased was involved. She contended that the said case was determined in favour of the respondent in September, 2021 and that, he (respondent) had not secured a potential buyer of the house. That said, Ms. Nambua urged this Court to dismiss the application with costs.

Rejoining, the applicants' counsel reiterated their submission in chief. As regards to the allegation of lies in the applicants' affidavit, the learned counsel submitted that the applicants reside in Dar es Salaam and Moshi Kilimanjaro. It was also submitted that the respondent had not proved that the applicants are residents of Kilimanjaro and how did the said fact prejudice him.

On the issue of failure to file the inventory, the applicants' counsel argued that the respondent was required to file inventory. It was therefore submitted that the respondent had contravened the law and this Court's order.

As to the ground of misappropriation, it was reiterated that the counter-affidavit signifies misappropriation on face of record. He contended that the administrator underestimated the properties and sold the same to himself and other people before filing the inventory.

Having examined the chambers summons, affidavits in support of the application and counter-affidavit and considered the rival submissions of the counsel for both parties, the issue for this Court's determination is whether the grounds advanced by the respondents justifies for the revocation of the respondent's granted letters of administration.

Before embarking on determination of the reasons for revocation of letters of administration granted to the respondent, I find it apt to address the contention that the supporting affidavits contains lies. It is the position of law set out under Order XIX, Rule 3 of the CPC that, an affidavit, being an evidence should be confined to statement of facts and circumstances to which the witness deposes either of own knowledge or from information which he believes to be true. The law is also settled that an affidavit tainted with untruth or false information is no affidavit at all. Therefore, it cannot be relied upon to support the application. This position was stated by the Court

of Appeal in the case of **Ignazio Messina vs Willow Investment SPL**, Civil Appeal No 21 of 2001, CAT (unreported).

In the instant application, Ms. Nambua submitted that the applicants lied in respect of their residence. Pursuant to the supporting affidavits, all applicant introduced themselves as residents of Dar es Salaam. The fact was disputed by the respondent who deposed in the counter affidavit that the applicants reside in Moshi, Kilimanjaro Region. It is settled law that a person who alleges on existence of certain facts must prove the same on the balance of probabilities. The respondent did not produce evidence to support his contention. He was expected to prove how each applicant resides in Moshi, Kilimanjaro. Since this was not done, the respondent's claim that the supporting affidavits contain lies lacks merit. It is accordingly dismissed.

Reverting to the merit of the application, the revocation of the letters of administration is governed by the law. The reasons upon which this Court is invited to revoke the grant of letters of administration are based on section 49 (1) of the Probate and Administration of Estate Act which provides: -

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

(a) N/A

(b) N/A

(c) N/A

(d) that the grant has become useless and inoperative;

(e) that the person to whom the grant was made has wilfully and without reasonable cause omitted to exhibit an inventory or account in accordance with the provisions of Part XI or has exhibited under that Part an inventory or account which is untrue in a material respect."

Starting with the first ground in which the respondent is faulted for having misappropriated the estate, it is important to note here that, the said ground is not provided for under the above cited provision for revocation of the letters of administration. However, the law is settled that an administrator of estate of the deceased is vested with all the deceased's assets. In that regard, he is empowered to exercise the powers which would have been exercised by the deceased over the said assets. Some of his powers are suing in respect of a cause of action that survived the deceased; recovering debts due to the deceased; collecting debts due to the deceased; and paying the debts owed by the deceased. The administrator of the estate is further empowered to dispose of property by way of sale, mortgage,

leasing or otherwise in relation to immovable property as provided for under section 101 of the Probate and Administration Act.

In the course of exercising his powers or duties, the administrator is required to act in good faith for the benefit and interest of the estate of the deceased and to the beneficiaries of the estate including. In so doing, he is expected, among others, to provide information to the beneficiaries and heirs.

In their respective supporting affidavits, the applicants deposed that the respondent misappropriated the deceased's estate "by using administration expenses which were very high than the reality". However, as rightly argued by Ms. Nambua, the applicants did not produce evidence to prove their allegation. It was their duty to prove how the administration expenses were high and to what extent. This was not done. In lieu thereof, the applicants relied on the documents appended to counter affidavit. The said documents show the properties sold by the respondent, request to transfer monies in applicants' accounts, and the amount of monies alleged to have been paid to the applicants. The applicants did not file a reply to the counter affidavit to contest the said facts.

In any case, it is my considered view that the submission by the applicant's counsel that, the respondent did not sell some of the properties, or distribute the money obtained from the sold items to the beneficiaries do not support their ground that the respondent used high administration expenses. For that reason, the ground advanced in the supporting affidavit was not proved.

Further to the above, the law is settled that an administrator who misappropriates the deceased assets or subjects the same to a loss or damage is liable to make good of such loss or damage. This stance was taken in the case of **Safiniel Cleopa vs. John Kadege** [1984] TLR 1981 where the Court of Appeal held that:-

"(i) The sale of property at below the market value and failure to account for the whereabouts of H other properties in the custody of the administrator amounts to misapplication of the estate

(ii) An administrator who misapplies the estate of the deceased or subjects it to a loss or damage is liable to make good such loss or damage."

In the light of above, first ground for revocation of the letters of administration is found not meritorious.

Moving to the second ground on the respondent's failure to file inventory and account of estate of the deceased, I agree with the applicants' counsel that in terms of section 107 of the Probate and Administration of Estates Act (supra), the respondent was required to file an inventory of the deceased's estate within six months from the date and exhibit final account within twelve (12) months from the date of his appointment.

It is not disputed that since his appointment as the administrator on 14th November, 2014, the respondent has not filed the inventory and exhibited the final account of the deceased's estate. Reading from the provision of section 49(1) (d) of the Probate and Administration Act, the revocation is not automatic on failure to file inventory or exhibit the final account. It must be established that the administrator's failure to file the said inventory and account of deceased's estate was made willfully and without reasonable cause.

The applicants did not demonstrate how the respondent acted willfully and without reasonable cause. On his part, the respondent claims that the delay was actuated by difficult exercise of identifying the properties left behind by the deceased. It is also the respondent's case that the delay was

caused by the case in respect of the deceased's house which was terminated in September, 2021. As stated earlier, the applicants did not file the affidavit in reply to the counter affidavit. This imply that the facts advanced were not disputed by the applicants. However, the case in respect of the deceased's house is a reason of failing to exhibit the account. It had nothing to do with the requirement to file the inventory. He ought to have filed the inventory and include the house in dispute in the list of the properties likely to come into his hand. Further to this, the respondent was duty bound to apply for extension of time within which to file the inventory and exhibit the accounts of the deceased's estate.

That notwithstanding, I am satisfied that, it has not been proved that failure to file the inventory and account of the deceased was made willfully in order this Court to exercise its power under section 49(1)(d) of the Act.

On the way forward, I have considered the administration has taken too long. It is the respondent's contention that he has been working with the committee formed by the applicants and that the "applicants were allocated and signed to acknowledge the amount assigned to them." Appended to the counter affidavit are copies of the payment and transfer forms in respect of

the monies alleged to have been paid to the applicants. Apart from the list of properties alleged to have been sold in 2016, there are forms/request for payment of monies. The respondent claims that the monies shown thereto were paid to the applicants.

Given that the applicants did not file a counter affidavit to dispute the said facts, I am of the view that this Court can be guided by the stance taken the Court of Appeal in the case of **May Mgaya vs Salim Saidi (The Administrator of the Estate of the Late Saidi Salehe)**, Civil Appeal No. 264 of 2017 (unreported). Despite that the inventory and account had not been filed, the Court of Appeal went on to hold as follows:-

"The administration having taken too long to be completed, we are agreed with Mr. Waisaka's concern that the appointment of the appellant as a sole administrator will cause more delay, for, everything will have to start afresh including collection of the properties and liabilities. There is eminent danger of misappropriation or deterioration of assets. To that effect, we think and find that to ensure that the interests of the appellant are protected and safeguarded, she is hereby joined as a co-administrator to the respondents. As it seems that the inventory has been prepared, we hereby

direct that both the inventory and final account be exhibited or filed in court within three months from the date of this ruling.”

Applying the above decision in the case at hand, I am of the view that, revocation and appointment of new administrator might cause more delay in the circumstances if the respondent has collected, sold and distributed the deceased assets to the beneficiaries as deposed in the counter affidavit. As the respondent appears to have a list of the inventory, I find it just to direct him to file the inventory and exhibit or file the final account within four months from the date of this ruling.

In the final analysis, the application is hereby dismissed for want of merit. However, the respondent is ordered to comply with the court's directive given herein. This being a probate matter, each party should bear its own costs.

DATED at DAR ES SALAAM this 12th day of August, 2022.



S.E. Kisanya
JUDGE