

**IN THE HIGH COURT OF TANZANIA
(AT DAR ES SALAAM DISTRICT REGISTRY)
MISC. CIVIL APPLICATION NO. 134 OF 2021**

*(Arising from Misc. Civil Application No. 4 of 2021 arising out of
Probate and Administration Cause No. 101 of 2020)*

**IN THE MATTER OF THE ESTATE OF THE LATE GOSBERT
STANLAUS MUTAGAYWA**

**IN THE MATTER OF AN APPLICATION FOR
REVOCATION/ANNULMENT OF THE GRANT OF
ADMINISTRATOR *PENDENTE LITE* TO EVELYN VANESSA
MUTAGAYWA MADE BY THIS COURT ON 26TH JANUARY
2021**

DR. RUGEMELEZA A.K. NSHALA..... 1ST APPLICANT

PAULINA MATHIAS..... 2ND APPLICANT

**BARBARA ATUGONZA GOSBERT MUTAGAYWA (A
MINOR) SUING THROUGH (A NEXT FRIEND ANETH
RAPHAEL MKONO) 3RD APPLICANT**

VERSUS

EVELYN VANESSA MUTAGAYWA..... RESPONDENT

Date of last Order: 5/11/2021

Date of Ruling: 13/05/2022

R U L I N G

MGONYA, J.

The Application before the court, is brought under **sections 49 (1) (a)-(c) of the Probate and Administration of Estates Act, Cap. 352 [R. E. 2019], sections 2 (1) and (3) of the Judicature and Application of Laws Act, Cap. 358 [R. E. 2019] and section 95 of the Civil Procedure Code, Cap. 33 [R. E. 2019]** where the Applicant prayed to the court for orders to suspend or remove or annul the Respondent's appointment as the Administratrix *Pendente lite* of the estate of the late Gosbert Stanslaus Mutagaywa which was granted by this honorable Court and its subsequent orders thereto.

Upon service to the Respondent herein, the Counsel to the daughter of the deceased, raised the following points of objections on points of law:

- 1. That the application has been brought under the wrong and inapplicable provision of the law;***
- 2. That the honorable court has no jurisdiction to entertain this application,***
- 3. That the application is improperly before the court as the applicants have already caveats against Probate and Administration Cause No. 101 of 2020 which is pending in court,***

- 4. That sequel to the above point, the current application is an abuse of the court process since there are caveats pending in court, and the applicants having filed Misc. Civil Application No. 21 of 2021 before the District Court of Kinondoni being a revision against Probate Cause No. 7 of 2021 of Kawe Primary Court and the same revision having been dismissed, the current application is brought to challenge the decision of the District Court of Kinondoni through a back door,**
- 5. That the chamber application is bad in law for being accompanied by defective affidavits which contain falsity, being hearsay, which do not disclose the sources of information and the supporting affidavits of the named persons, and**
- 6. That the application by the 2nd and 3rd applicants are not maintainable as they are not supported by affidavits.**

At the hearing of this application, both parties prayed to dispose off the application by way of written submissions. In this Application, the Applicants have been represented by Mr. Melchisedeck Lutema and Mr. Nyaronyo Mwita Kicheere while Mr. Edward Chuwa, Mr. Alex Mashamba Balomi and Mr. Joseph Kiyumbi Sungwa learned Advocates one representing the Respondent respectively.

The Respondent submitted in support of the preliminary objections on the **first, second** and **third points** together

that the court having no jurisdiction to grant the orders sought for **SUSPENSION, REMOVAL** or **ANNUL** of the Respondent's appointment as *Administratrix Pendente Lite*. The provisions of **Sections 49 (1) (a)- (c) and (2) of the Probate and Administration of Estates Act, Cap. 352 [R. E 2019]** the cited provisions above do give the court's power only to grant the orders for revocation or annulment for the grant of Probate and Letters of Administration and not administration *Pendente lite*.

Further, the Respondent submitted on the **fourth point** of objection that the Affidavit of the first Applicant at paragraph 8 and 9 that he was appointed as an Administrator of the estate by the Kawe Primary court, on **03rd February, 2021**. Later on, he applied for Revision through **Misc. Application No. 21 of 2021** at Kinondoni District Court, an application which came for ruling on **25th March, 2021**.

The Counsel further averred that, the Applicants were dissatisfied with the lower court's decision hence brought numerous applications in different ways and still insist that the 1st applicant is the one who is entitled to administer the estate of the deceased and not the Respondent. The Respondent suggests that If the 1st Applicant so believes, the proper cause is to pursue an appeal against the ruling of the District Court of Kinondoni on **25th March, 2021**.

Further, the Respondent's counsel submitted on the **fifth point** of objection that this application was filed on the **25th March, 2021**, the same date which the ruling in **Misc. Civil Application No. 21 of 2021** of the District Court of Kinondoni was delivered at 08:30 a.m. Further, under paragraph 11 of the affidavit of the 1st applicant that the deponent has misdirected the court that the Respondent participated in the family meeting while he admits that she did not sign the minutes.

It is revealed by the Respondent that, the paragraphs **2** and **3** of the affidavit of the third Applicant (a Next Friend) contained untruth statement by deposing that the 3rd Applicant Barbara Atugonza Gosbert is the daughter of the deceased and was born on **15th of April 2014** at Amana Hospital while the Baptism Certificate annexed to the affidavit shows that Barbara Holy Gosbert (not Barbara Atugonza Gosbert) was born on **15th April, 2013** at Vingunguti. Also, the Certificate of proof of Birth shows that the 3rd Applicant had a place of abode at Sinza not Vingunguti.

Further to the foregoing, the verification clause does not state the source of information in paragraph **4, 7 and 17** of the affidavit of first Applicant, paragraph **6, 8 and 12** of the affidavit of second Applicant and paragraph 5 of the same does

not disclose as to proof of examination of paternity of the 3rd Applicant.

Moreover, the Respondent submitting on the **sixth point of objection** that, the affidavit of second and third applicants have not been endorsed by the court as they are annexures to the affidavit of first Applicant, hence the application is incompetent before the court and since the application has three applicants. They therefore humbly pray that this court find it just to dismiss the entire Application with cost.

On the contrary, the Applicants maintained that the provisions they cited are the ones that vest the Jurisdiction of the Court to determine the matter. That the matter has been brought under proper provisions of laws and it is wrong construction only with reference of of **sections 49 (1) (a)-(c) and (2) of the Probate and Administration of Estates Act, Cap 352 R. E 2019**. The spirit within **sections 2 (1) and (3) of JALA and 95 of CPC** vest powers of the High Court to entertain cases. The Applicants challenging the appointment of the Respondent *Pendente Lite* under the provisions of **sections 49 (1) (a)-(c) and (2) of the Laws** which empowers the dissatisfied person with position to challenge the appointment by way an application to suspend, revoke, or annul the grant and that cannot defy the rights of Applicants.

Further, the Applicants asserting that the application challenges the grant of *Pendente Lite* powers unto the Respondent and not a Revision Application. As far as no law that prevents the Applicants from filing the application to suspend or annul the grant of the Respondent's *Pendente Lite* appointment. The Applicants therefore prayed to the court to dismiss the objections with costs.

In respect of the **fifth point of objection**, it was stated that the issues of verification clause which did not disclose source of information, non participation of the Respondent in the Family Meeting and date of born of third Applicant (minor) were matters of evidence which requires court to inquiry and not a point of law. No lies or false statement have been proven through objection. The Applicants averred that they verified on information stated from their own knowledge due to their positive participation.

The Applicants further stated on the **sixth point of objection** that there was neither endorsement to the affidavit of second and third applicants by the court to be annexures to the first Applicant's affidavit nor facts raised by the Respondent that the fees were paid to shift the liability to the shoulders of the Applicants. The Affidavits were to be signed by the Court's clerk thus was the court's negligence. The Applicants prayed the court to overrule the Respondent's points of objections.

After going through the parties' submissions, this court finds out that, the main issue to be determined by this court here is whether the objections raised by the Respondent have merit or not. The facts depicts that, the major point of objection is centered on the jurisdiction of the court to determine the matter which is technically designed to be the heart of this application. This application was filed and sought for Court's orders of suspension, or revocation, or annulment the Respondent's *Pendente Lite* order granted.

It is well known that the High Court has jurisdiction in all Civil and Criminal matters. This is supported by the provisions of **sections 2 (1) and (3) of the Judicature and Application of Laws Act, Cap 358 [R. E. 2019] and section 95 of the Civil Procedure Code, Cap. 33 [R. E. 2019]**. The orders sought by the Applicants under the provisions of **sections 49 (1) (a)-(c) and (2) of the Probate and Administration of Estates Act**, provides that:

"49 (1) The grant of probate and letters of administration may be revoked or annulled for any of the following reasons...

(a) that the proceeding to obtain the grant were defective in substance;

(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 an untrue allegation of a fact essential in point of law to justify the grant, though such allegation was made in ignorance or inadvertently;

(2) Where it is satisfied that the due and proper administration of the state and the interest of the person beneficially entitled thereto so require, the High court may suspend or remove an executor or administrator (other than the Administrator-General or the public Trustee) and provide for succession of another person to the office of such executor or administrator who may cease to hold office, and for the vesting in such person of any property belonging to the estate”.

The above provisions are properly applied for the application. The construction on provisions of law on administration of the deceased estates only confined to the probate and letters of the administration. The *Pendente Lite* grant is always issued when there is special purposes for the interest of justice to protect the heirs or beneficiaries from any worsen situation concerning the administration of the deceased estates.

However, the person who is the grant issued, might attempt to misuse or misbehave the said power that will therefore be subject to revocation, suspension and or annulment. In my view, the provisions of **sections 49 (1) (a)-(c) and (2) of the Probate and Administration of Estates Act** did not contravene the law which applied to the grant of *Pendente Lite*. Thus, this court has jurisdiction to grant the orders sought for **SUSPENSION, REMOVAL or ANNULMENT** of the Respondent's appointment as Administratrix *Pendente Lite*, upon reasons which will be advanced by the Applicants in the main application, and upon court's satisfaction thereto.

In connection with the **fifth point** of objection, the issues of verification clause that did not disclose source of information and the date of birth of 3rd Applicant, these facts as depicted in the pleadings, requires court inquiry and evidence. The affidavits of the applicants substantiate that they were verified on information stated from their own knowledge. This court will not go far into discussion which will amount to discuss the merit of the application rather than the points of objection raised. Hence, are not points of law to be determined by this court.

Further, this court considering the **sixth point** of objection that the affidavit of second and third Applicants were

not signed by the Court's clerk and no details found in the records; Without taking much time, it is my view that was fault of the court itself because all Applicants' affidavits compiled to a single document. In the case of ***MSASANI PENINSULAR HOTEL LIMITED AND SIX OTHERS VS BARCLAYS BANK TANZANIA LIMITED AND 2 OTHERS, Civil Application No. 192/2006 CAT at Dar es Salaam (unreported)*** was held that:

".....once the necessary fees for lodging the document had been paid, the responsibility of the applicant ended, what was left to be done was entirely the domestic affairs of the court; the applicant cannot be penalized for the inefficiency of the court. The fault is to be traced to the door step of the registry of the court. The Applicant cannot be made a scapegoat".

The Applicants' duty was to present documents to the clerk for filing and paying requisite fees, failure of assessment and perusing the documents presented is courts' neglect.

In the event therefore, from all that has been said above, **the preliminary objection by Counsel for the Respondent is overruled and the Application before this Honourable Court is hereby placed for hearing on merit.**

Cost in due course.

It is so ordered.




L. E. MGONYA

JUDGE

13/05/2021

Court:

Ruling delivered before Honourable **J. Luambano Deputy Registrar** in the presence of the 1st Applicant in person, Mr. John Chogolo Advocate Holding brief of Mr. Nyaronyo Kicheche for 2nd and 3rd Applicant, Mr. Joseph Kiumbi Sumbi Learned Advocate for Respondent and Mr. Richard RMA this 13th May 2022.




L. E. MGONYA

JUDGE

11/03/2022