

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA
(DAR ES SALAAM SUB REGISTRY)
AT DAR ES SALAAM
MISCELLANEOUS CIVIL APPLICATION NO. 605 OF 2021
IN THE MATTER OF ESTATE OF THE LATE SULEIMAN AHMED
SAEED AS HOUQAN AND
IN THE MATTER OF AN APPLICATION FOR APPOINTMENT OF A
RECEIVER PENDING GRANT OF LETTERS OF ADMINISTRATION BY
GRACE PHILOTEA JOACHIM

RULING

10/8/2022 & 16/9/2022

MASABO, J.:-

The application has been preferred by way of a chamber summons made under section 10 of the Probate and Administration of Estates Act [Cap 352 R.E. 2002] and Rule 25 of the Probate and Administration of Estate Rules. Two main prayers have been fronted in the application, namely:

1. This court be pleased to appoint the Administrator General as a receiver for the shares of the late Suleiman Ahmed Saeed Al Houqani (the deceased) in Katavi Mining Company Limited pending the appointment of an administrator of the estate of the deceased who died interstate leaving behind the shares.
2. Subsequent to the appointment of the receiver, the court be pleased to order sale of the shares by the Receiver who shall also serve as

custodian of the proceeds realized from the sale pending the appointment of the administrator of the estate.

Bracing the application is an affidavit deposed by Grace Philotea Joachim, who has deposed that, the deceased Suleiman Ahmed Saeed Al Houqani, was at the time of his death domiciled in Dhab. It is deposed further that the deceased had shares in Katavi Mining Company Limited and for about 5 years since his death, his Two Hundred Sixty-Two Thousand One Hundred Seventy-Three (262,173) with a total value of Tshs Twenty-Six Billion Two Hundred Seventeen Million Three Hundred Thousand only (Tshs 26,217,300,000/=) have not been probated anywhere in Tanzania and have been lying in the company with no better administration.

Moreover, it is deposed that, for the period of 5 years since the deceased's demise several attempts have been made to contact the beneficiaries of his estate who are all not domiciled in Tanzania has shown no interest to obtain letter of administration for the respective shares in spite of being prompted by the company. It is further deposed that the delay in the appointment of the administrator is injurious to the shares and the company. The shares are at the risk of being wasted and for the company, her performance has been negatively affected hence a resolution to apply for an appointment of a receiver who shall oversee the interest of the deceased's shares.

Upon the application being filed, summons were issues to the beneficiaries of the estate who are listed in the affidavit. As they are all non-residents, a

substituted service by way of registered mail (DHL) was employed whereby the summons were delivered at a company styled as Al Hooqan International Group based in Oman as per the receipt dated 13th July, 2022 as filed in court by the applicant. As none of the beneficiaries entered appearance, the hearing was ordered to proceed *ex parte*.

At the hearing, the applicant was represented by Mr. Hussein Kitta Mlinga, learned counsel. Opening his submission, he prayed to withdraw the second prayer. His prayer was granted and the 2nd prayers was thereto marked withdrawn. He then briefly submitted that under the circumstances of the application, the appointment of the receiver is a fundamental step in the protection of the deceased's estate and facilitation of the company's operation which has been inhibited by the delay in the appointment of the administrator. He clarified that the company intends to increase its share capital a development which will implicitly dilute the deceased's shares in the company. In conclusion, he submitted that as this court is vested with powers to the appoint the Administrator General as receiver, it is in the interest of justice that the prayer be granted and the Administrator General be accordingly appointed.

Invited to the address the court, Ms. Clementina Lishela who appeared for the Administrator General, confirmed that the Administrator General is ready to execute the duties of the Receiver should the court appoint her.

I have considered the chamber summons, its supporting documents and the submission made by the learned counsel. The only issue for determination in this uncontested application is whether the application merits the appointment of a receiver.

Section 10 of the Probate and Administration of Estates Act under which the present application has been preferred states thus:

Where any person dies leaving property within Tanzania, the court may, if it appears on the application of the Administrator-General or of any person claiming to be interested in such property, or having the custody or control thereof at the time of the death of the deceased, or being at such time an attorney of the deceased, that there is danger that such property may be wasted, appoint the Administrator-General or such other person as the court thinks fit, to be a receiver of such property pending a grant of probate or letters of administration.

Rule 24 of the Probate Rules operationalizes the above provision deals with modalities for appointment of a receiver and provides that;

- (1) An application for appointment of a receiver under section 10 of the Act shall be made by a chamber summons supported by an affidavit or affidavits showing—
 - (a) the date of the death of the deceased;
 - (b) the domicile of the deceased;

- (c) whether the deceased died testate or intestate;
- (d) Whether an application for grant of probate or letters of administration has been made to any court and if so by whom;
- (e) the names and addresses of person entitled to inherit the estate;
- (f) the estimated gross value of the estate;
- (g) the description and value of the property in respect of which the application is made;
- (h) the reasons for making the application; and
- (i) except where the proposed receiver is the Public Trustee or the Administrator-General, that the person proposed to be appointed as receiver is a fit and proper person to be so appointed.

In the present application, it has been deponed that Suleiman Ahmed Saeed Al Houqani, a citizen of Oman is now deceased. As per the copy of a certificate of death appended affidavit of Ms. Joachim he died on 9th January 2017 at Tawam Hospital in Abu Dhabi. It has further been established through a search report from the Business Registration and Licensing Agency (BRELA) that Suleiman Ahmed Saeed Al Houqani is one of the shareholders of Katavi Mining company a fact which is shown in copies of the Minutes of the Extra Ordinary General Assembly Meeting of Katavi Mining Company Limited held in AL HOOQAN INTERNATIONAL GROUP on 15th January, 2018.

These two documents shows that Suleiman Ahmed Saeed Al Houqani has/had Class Ordinary 262,173 shares in Katavi Mining Company.

It has been observed further that, pursuant to the requirement of Rule 24(1), the applicant has listed the names of the heirs of the deceased and their address in paragraph 5 of the affidavit which shows that the deceased is survived by 17 heirs all domiciled out of Tanzania. The nature and gross value of the asset for which the receivership is sought that is, 262,173 shares with a total value of Tshs Twenty-Six Billion Two Hundred Seventeen Million Three Hundred Thousand only (Tshs 26,217,300,000/=) has been disclosed.

The reasons in support of the application have been advanced in paragraph 8 of Ms. Joachim's affidavit which I reproduce below for easy of reference.

8. That there is danger that the said property may be wasted because;

- i. The supposed beneficiaries are not based in Tanzania and since the demise of the Deceased, they have ignored, neglected and/or failed to proceed with seeking grant of probate or applying for Letters of Administration with respect to the shares of the deceased.
- ii. Katavi Mining Company Limited has on numerous occasions attempted to contact the Beneficiaries to no avail. *Herein attached are e-mail conversations between the Company and the supposed beneficiaries discussing on the way forward regarding management of the shares*

*of the Deceased, newspaper advertisements and dispatch of summons to the beneficiaries for appearance in Court marked as **Annexure "C"** for which leave is craved to form of this Affidavit;*

- iii. Katavi Mining Company Limited wishes to proceed with business without affecting the estate of the deceased by diluting his shares in Katavi Mining Company Limited. *Attached herein are minutes dated 29th October, 2017 and 15th January, 2018 of the surviving shareholders of the Company marked as **Annexure "D"** resolving to increase share capital of the Company for which leave is craved to form part of this Affidavit.*

According to the verification clause, the deponent has no personal knowledge of the information contained in this paragraph as it was obtained "from the General Manager of Katavi Mining Company." Three anomalies are obvious.

Much as is true that this court is clothed with discretion to appoint a receiver pending grant of probate, the discretion need be judiciously exercised upon the applicant satisfying the requirement of the law. In my scrutiny of the affidavit to ascertain whether the applicant has complied with the relevant provisions, I have observed as follow.

First, the law is settled that if an affidavit mentions another person that other person should also take an affidavit (see the decision of the Court of Appeal in **Franconia Investments Ltd Vs. TIB Development Bank Ltd**, Civil Application No. 270/01 of 2020 and **Sabena Technics Limited Vs. Michael J. Luwunzu**, Civil Application No. 451/18 of 2020 (all unreported). As demonstrated above, the affidavit of Ms. Joachim mentioned the General Manager of Katavi Company. Going by the authorities above, it was crucial for Ms. Joachim's affidavit to be supplemented by another affidavit deposed by the General Manager for Katavi Company but none is on record. The absence of such affidavit has reduced the deposition in paragraph 8 of the affidavit into hearsay and devoid of any legal value. As the deposition in this paragraph goes to the root of the application, the omission to render the supplementary affidavit is injurious to the application.

Second, the affidavit is silent on relationship that the applicant/deponent has to the shares thus it is uncertain whether she personally interested in such property, has custody /control of the shares or an attorney of the deceased hence competent to institute the instant application. Assuming that she is the company's counsel as the record seems to suggest, her affidavit

entertain some question as in law, much as an advocate can swear an affidavit on behalf of a client, he/she can only competently do so on matters within her personal capacity. Elucidating this principle in **Lalago Cotton Ginnery and Oil Mills Co. Ltd Vs. The Loans and Advances Realization Trust (LART)** Civil Application No. 80 of 2002, the Court of Appeal stated that:

'An Advocate can swear and file an affidavit in proceedings in which he appears for his client, but on matters which are in the advocate's personal knowledge only. For example, he can swear an affidavit to state that he appeared earlier in the proceedings for his client and that he personally knew what transpired during those proceedings.'

Applying this principle in **Issa H. Samma Vs. AG and Another** Misc. Civil Cause No. 74 of 2001 (unreported), this court having cited the above paragraph proceeded to state that:

"These are the limits within which an advocate can make an affidavit in proceedings in which he is an advocate for a party. The affidavit in support of the present application, however, is a far cry from what the passage above from the Court of Appeal ruling

demands. Indeed, the affidavit is the foundation of the entire application of the applicant. And it is made on instruction from the client. I am of the opinion that he cannot be both an advocate and a witness for a party in a cause or matter.

Looking at the affidavit deposed by the Ms. Joachim, it is obvious that it fails the test above as the matters she has deposed including, among others, the date of the death of the late Suleiman Ahmed Saeed Al-Houqan; his heirs and their respective names are in my firm view matters that the company's advocate cannot competently

Lastly, the averments in paragraph 8 of the affidavit, appears to be inconsistent with record as the Minutes of the Extra Ordinary General Assembly Meeting of Katavi Mining Company Limited held in AL HOOQAN INTERNATIONAL GROUP on 15th January, 2018 (Annexure C) to the affidavit show that, the heirs of the estate of the late Suleiman Ahmed Saeed Al Houqani, have not been irresponsive as alleged. Page 2 of these minutes have demonstrated that, Sheikha Suleiman Ahmed Al-Houqan who appears in serial (m) of the list of heirs shown in paragraph 5 of Ms. Joachims's affidavit, attended the meeting in her capacity as '*partner with share of her inheritance (one of the heirs of Sheikh Suleiman Ahmed Saeed Al-Houqan..)*'. Also in attendance was Nasser Suleiman Ahmed Saeed Al-Houquan (serial (g) in the list of heirs) who attended the meeting '*in his personal capacity and as an agent of heirs of the Sheikh Suleiman Ahmed Saeed Al-Houqan..)*'. Another heir, Mona Suleiman Ahmed Saeed Al- Houqan (serial (g) in the list

of the heirs), who was absent at the meeting was identified as *partner with her share of inheritance (Sheikh Suleiman Ahmed Saeed Al-Houqan..)*’.

There three anomalies, considered conjointly, have fatally affected the application. It need not be stressed that, the powers vested in this court by section 10 of the Probate and Administration of Estate Act are discretionary powers and, as it is with the rest of judicial discretion, must be exercised judiciously, in this case, upon the applicant satisfying the requirements set out under section 10 and rule 24 a requirement which in my firm view is not extinguished by the fact that the application is uncontested.

In the view of the three anomalies above, the application fails and is dismissed.

DATED at DAR ES SALAAM this 16th day of September, 2022.

X



Signed by: J.L.MASABO

J.L. MASABO

JUDGE

16/09/2022