

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM SUB DISTRICT REGISTRY)
AT DAR ES SALAAM**

MISC. CIVIL APPLICATION NO. 211 of 2020

(Arising from Probate and Administration Cause No.28 of 2018)

IN THE MATTER OF THE ESTATE OF THE LATE MUSSA HUMU MBOGO

AND

**IN THE MATTER OF AN APPLICATION FOR ORDERS OF REVOCATION OF
LETTER OF ADMINISTRATION GRANTED TO CHRISTINA ALEXANDER
NTONGE IN RESPECT OF THE ESTATE OF THE LATE MUSSA HUMU MBOGO**

BETWEEN

LIMI MUSSA MBOGO.....1ST APPLICANT

ROSE (NG'WALU) MUSSA MBOGO.....2ND APPLICANT

EMMANUEL MUSSA MBOGO.....3RD APPLICANT

AND

CHRISTINA ALEXANDER NTONGE.....RESPONDENT

RULING

Date of Last order: 09/08/2022

Date of ruling: 09/09/2022

E.E.KAKOLAKI,J

The applicants herein have preferred this application under Section 49 (1) (a) and 49 (2) of the Probate and Administration of the Estate Act, Cap 352 R.E. 2002 and Rule 29 of the Probate Rules seeking for an order of revocation of the grant of letter of administration in respect of the estate of the late **Mussa Humu Mbogo** to Christina Alexander Ntonge (Respondent/Administratrix) on the ground that the proceedings in Probate

and Administration Cause No. 28 of 2018 were defective in substance for want of heirs consent. They further move the Court for orders that, having revoked her appointment the said Respondent be removed from the office and in lieu of **Limi Mussa Mbogo** or any another applicant be appointed as her successor in office and that, the respondent be ordered to hand over all properties and documents in respect to the estate to the appointed successor, costs of the applicant and any other order which the Court deem fit to grant. The application is supported by joint affidavit sworn by the applicants stating the reasons for their application. When served with the application the Respondent vide his advocate Mr. Roman Selasini Lamwai, filed the counter affidavit strenuously resisting the applicants' prayers and calling them to strict proof of their assertions. He averred the respondent decided to file a fresh petition as applicants were not cooperative as are enjoying the estate without limitation, hence it couldn't be possible for their consent to be secured.

Briefly as garnered from both applicants who were four in number when filing this application, Limi Mussa Mbogo Rose, Mussa Mbogo, Joyce (shija) Mussa Mbogo and Emmanuel Mussa Mbogo as 1st, 2nd, 3^r and 4th applicants respectively are biological children of the late **Mussa Humu Mbogo** who

died intestate on 20th day of July, 2015 at Dar es salam while the respondent is the deceased wife. Following the demise of their father and husband respectively, the family held a meeting and proposed two persons, **Limi Mussa Mbogo** and **Christina Alexander Ntonge** (Respondent) to file a petition for letter of administration of estate. Without going into details on what happened it appears successful petitioned at the primary court of Temeke in Probate No. 274 of 2016, where they were jointly granted a letter of administration. As they assumed the powers in the office it appears things did not go well with the Respondent as was accused of misusing the estate by the applicants before the trial court the result of which was removed from the office while the 1st applicant remaining the sole administrator of the estate. Discontented the respondent unsuccessfully filed a Civil Revision No. 17 of 2016 in the District Court of Temeke as the Primary Court decision was upheld. Not pleased she further appealed to this Court vide Pc Civil Appeal No. 11 of 2017 which nullified the two lower courts proceedings for want of the jurisdiction of the trial court to entertain the matter as the estate was not governed by neither customary nor Islamic laws. Parties were advised to prefer a fresh petition in the Court of competent jurisdiction in which the Respondent complied with by filing Probate and Administration Cause No. 28

of 2018 before this Court and granted with letters of administration in tis ruling dated 16/10/2018 and proceeded to assume the office. It is further learnt that, applicants went unaware of that appointment of the Respondent until on 11th day of February, 2020, when a summons was received in respect of Misc. Civil Application No. 565 of 2019 between Christina Alexander Ntonge and Limi Mussa Mbogo instituted by the respondent praying the Court among the prayers an order for the 1st applicant to hand over to the respondent some documents relating to the estate. And that, upon search made to the Court it was revealed that the respondent had obtained letters of appointment as administratrix of the estate of the late **Mussa Humu Mbogo**, vide Probate and Administration Cause No. 28 of 2018 without any document showing that she had obtained consent of applicants as heirs. It is from that omission this application has been preferred.

I find it worth noting at this stage and before the determination of this application that, this Court was moved by Mr. Maguha counsel for the applicants under Order XXII Rule of the Civil Procedure Code, [Cap. 33 R.E 2019] to record the death of the formerly 3rd applicant **Joyce (Shija) Mussa Mbogo** who passed away on 20th February, 2022 and proceed with the surviving applicant as the deceased right does not survive her. The prayer

was not objected by the respondent's counsel hence, this Court on 16/09/2022, recorded the said death and removed her name from the records while proceeding with the rest of the applicants.

Hearing of this application by consensus of parties took a mode of written submission and the same were drawn and filed by Mr. Bernard Seleman Maguha and Ms. Mary Masumbuko Lamwai, both learned advocate for applicants and respondent respectively. I appreciate for their brief but comprehensive submissions filed in accordance with the scheduling order set by this court. However, I find no need to reproduce the same as I will be referring them to in the course of my ruling.

I had an ample time to travel through the filed pleadings and submissions from both sides. The main ground for the sought order of revocation of the Respondent's letters of administration is that, the proceedings of the petition in Probate and Administration Cause No. 28 of 2018, were defective for want of heirs consent and in contravention of the provisions of Rule 71 and 72 of the Probate Rules. The main issue for determination by this court therefore is whether there was violation of such provisions of the law by the respondent entitling the applicants to the prayers sought.

It is in Mr. Maguha's submission relying on the annexed chamber summons and affidavit in Probate and Administration Cause No. 28 of 2018, to the applicants' affidavit that, the reasons as to why the applicants are complaining the proceedings before this Court in Probate and Administration Cause No. 28 of 2018 were defective in substance are premised on the requirement of Rule 71 of the Probate Rules, dictating that the grant of letters of administration for intestate succession shall be supported by consent of heirs entitled to inherit the deceased estate. He says in this matter the said heirs are the applicants who consent was not obtained by the respondent when petitioning for letters of administration. And further that if the said consent is not obtained for any reason an affidavit must be sworn and filed in court to that effect as provided under Rule 71 of the Probate Rules the requirement which also the respondent failed to comply with to prove the reason for non-compliance with the requirement of Rule 71 of the Probate rules. For those reasons and relying on the case of **Revenanth Eliawory Meena Vs. Albert Eliawory Meena and Another**, Civil Revision No. 1 of 2017, Mr. Maguha invited this Court to find this Court's proceedings were defective in substance and proceed to revoke the respondent's letters of administration. And further to that, appoint two

amongst the 1st, 2nd and 4th applicants as administrators of estate as per section 49(2) and 51 of the Probate and Administration of Estate Act and order the respondent to surrender the revoked letters of administration.

In rebuttal submission Ms. Lamwai citing the ruling of this Court in Probate and Administration Cause No. 28 of 2018 argued that, before grant of the respondent's letters of administration citation was made within 45 days and there was no objection from the applicants hence their complaint that did not consent to the petition is unfounded. As regard to compliance of Rules 71 and 72 of the Probate Rules Ms. Lamwai argued that, she is aware of that but there was ill relationship between the respondent and applicants and earlier on had objected her co-administration of the estate, that is why an affidavit in lieu of original death certificate was annexed to the petition proving lack of cooperation from the applicants as they were benefiting from the estate. With regard to the cited case of **Revenanth Elianory Meena** (supra) she distinguished the same stating that in the said case the Registrar had omitted from issuing citation while in this matter citation was issued. And on the prayer for revocation of her letters of administration and grant them to the 1st, 2nd and 4th Applicant she contested the prayer while proposing for appointment of the Administrator General as a neutral party

to take over the administration of estate as it was decided by the Court in Probate and Administration Cause No. 14 of 2000 (HC-unreported). In summing up she said, the proceedings in Probate and Administration Cause No. 28 of 2018 correctly followed the requirement of the law so to grant the applicants' prayers will be an abuse of court process and allowing the applicants to keep on enjoying the fruits of the estate. She urged the Court to dismiss the application with cost. In brief rejoinder Mr. Maguha argued that the respondent conceded to the applicants' submission that, the proceedings before this Court were defective in substance and she did not respond any how to that point. As regard to the proposition that the Administrator General be appointed as administrator of the estate he said, the proposal is untenable as the same could be possible if and only where there is no heirs to assume that obligation which in this case the applicants are qualifying. He thus requested the Court to find the application has merit and proceed to grant the prayers sought.

The grounds upon which orders for revocation or nullification of the grant of probate and letters of administration can be issued are listed under section 49 (1) of Probate and Administration of Estates Act, [Cap 352 R.E 2002]. The same includes the circumstances where the proceedings for obtaining

the said grant of letters of administration were defective in substance.

Section 49(1)(a)- (e) reads:

"(a) that the proceedings 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;

(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." (Emphasis supplied)

In the matter at hand, Mr. Maguha contends that, applicants' consent as heirs to the estate of the late **Mussa Humu Mbogo** was dispensed with by the respondent when petitioned for the grant of letter of administration, the act which was in infraction of the provisions of Rules 71 and 72 of the Probate Rules. Ms. Lamwai does not dispute that fact but rather tries to justify that

dispensation in that, the applicants neither respected nor cooperated with the respondent due to their indifferences, hence it was not possible for them to give their consent. She added that, applicants were aware of the petition after citation was issued and did not prefer caveat against her appointment as administratrix, hence this application is devoid of merit and deserves dismissal. **Black's Law Dictionary**, 8th Ed (2004) at page 919 defines the term consent to mean:

"Agreement, approval, or permission as to some act or purpose, esp. given voluntarily by a competent person; legally effective assent."

According to **a Dictionary of Law (Oxford University Press)**, 2006-ISBN 01 at Page 106, the term "consent" is also defined to mean:

"Deliberate or implied affirmation; compliance with a course of proposed action. Consent is essential in a number of circumstances. For example, contracts and marriages are invalid unless both parties give their consent. Consent must be given freely, without duress or deception, and with sufficient legal competence to give it".

Rule 71(1) of the Probate Rules makes it mandatory that, where an intestacy petition is preferred for grant of letters of administration, the same **shall** be

supported by **written consent** of the persons entitled to benefit from the estate, unless the Court direct otherwise. The said Rule 71(1) provides that:

*71(1) where an **application for the grant of letter of administration is made on an intestacy the petition shall, except where the court otherwise orders, be supported by written consent of all those persons** who according to the rules for the distribution of the estate of an intestate applicable in the case of the deceased, **would be entitled to the whole or part of his estate.** (Emphasis added)*

Rule 72(1) of the Probate Rules further provides for the alternative requirement in a situation where the said consent under Rule 71(1) of the Probate Rules, cannot be easily obtained or is denied for any reason to be issued by persons whose consent is required, that the petitioner **shall** file in Court an affidavit stating the reasons for failure to secure the said consent.

The said Rule 72 (1) reads:

*72(1) **Where a person whose consent is required under these Rules refuses to give such consent, or if such consent cannot be obtained without undue delay or expense, the petitioner shall, together with his petition for grant, file an affidavit giving the full name and address of the person whose consent is not available** (where such name*

*and address are known) and **giving the reasons why such consent has not been produced.***

Glancing at both provisions of the law cited above the same are coached in mandatory terms for using an imperative command word "**shall**". The Interpretation of Laws Act, [Cap. 1 R.E 2022] under Section 53(2) on the interpretation and application of the word "**shall**" provides that, when the same is used to confer function must be performed. The provision reads:

*(2) Where in a written law the word "**shall**" is **used in conferring a function**, such word shall be interpreted to **mean that the function so conferred must be performed.** (Emphasis added)*

As the word "shall" when conferring function the same must be performed, in this matter I have no hesitation in holding that, under the provision of Rule 71(1) of the Probate Rules, the respondent was duty bound to annex the written consent of applicants to the intestacy petition filed in this court, the latter being heirs of the estate of the late **Mussa Humu Mbogo**, which as per copy of the application in Misc. Probate and Administrative Cause No. 28 of 2018 annexed to the applicants' affidavit, the said written consent is missing. Ms. Lamwai also in her submission did not dispute this fact as rightly submitted by Mr. Maguha. The defence advanced by Ms. Lamwai that,

disrespect and non-cooperation of the applicants to the respondent were the reasons for respondent's failure to attach the said written consent to the petition, with due respect to her that is lame excuse to be purchased by this Court as the respondent would have resorted to the remedy provided under Rule 72(1) of the Probate Rules by filing or annexing to the petition the affidavit stating such non-cooperation which rendered applicants' written consent impossible, but she failed to exhaust it. Absence of such mandatory document in the respondent's petition which went unnoticed by this Court before granting the letters of administration to her, in my firm view rendered the proceedings before this Court defective in substance which under section 49(1)(a) of the Probate and Administration of Estates Act, amounts to a good ground for revocation of the letters of administration granted to the respondent. I therefore hold the respondent's letters of administration were obtained in violation of the provisions of Rule 71(1) of the Probate Rules.

That said and done this court finds that, applicants have advanced good and sufficient ground for revocation of the respondent's granted letters of administration in Probate and Administration Cause No. 28 of 2018. I therefore proceed to declare that appointment of Christina Alexander Ntonge

as administratrix of the estate of the late Mussa Humu Mbogo in Probate and Administration Cause No. 28 of 2018, is hereby revoked.

Having so revoked the respondent's letters of administration, the next question for determination is who should be appointed in replacement of the respondent. Mr. Maguha suggests and prays that, two out of the three remaining applicants be appointed to succeed the respondent while Ms. Lamwai proposes that, due to the prevailing odd relationship between parties, appointment of a neutral party would be an ideal course to be taken. She proposed the Administrator General. With due respect to Mr. Maguha, I am not prepared to accept his prayer for appointment of two of the three applicants to replace the respondent. The reason for my refusal is not far-fetched, as it is clearly learnt from the available records that, parties have been trading under odd relationship since 2016, fighting inside and outside courts of law over administration of the deceased estate. Each of the parties has been accusing the other of misuse or misappropriation of the estate something which has made and will continue making it difficult for whoever appointed amongst the parties to discharge his/her duty of administration of the estate. I so say as misconception of the position of the administrator and his duties as well as mistrust amongst the beneficiaries in the administration

of an estate has always been a source of endless battle of beneficiaries of the estate as it was stated by the Court of Appeal in the case of **Naftary Petro Vs. Mary Protas** (Civil Appeal 103 of 2018)[2019]TZCA 357(30 October 2019); www.tanzlii.org, where the Court had the following observation make:

Perhaps, as an epilogue, we should observe that this appeal is sadly anarchetypical illustration of needless problems and long-drawn-out struggles in the appointment of administrators of deceaseds' estates in our country. The battles for appointment are most likely fueled by a misconception of the position and duties of an administrator of an estate. It is purely a position of trust, not personal gain.

The exercise of administrator's duties in the office as collector of estate and discharger of all debts of the decease before distribution of the estate, partly depends on the cooperation and trust he/she is accorded with the beneficiaries to the estate. His appointment therefore invites a need to have a person who is trustworthy and willing to exercise diligence when occupying the office so as to make sure that the estate is distributed to all entitled

beneficiaries as it was held in the case of **Sekunda Bwambo Vs. Rose Ramadhani** [2004] TLR 439. In this case the Court observed that:

“The object of appointing an administrator of the estate is the need to have faithful person who will, with reasonable diligence, collect all the properties of the deceased. He will do so with the sole aim of distributing the same to all those who were dependants of the deceased during his life-time.”

In view of the above deliberation and unpleasant relationship between the parties, for the interest of justice and the need of cherishing the principle of law that, litigation must come to an end, this Court is of the convinced view that, appointment of an impartial person to administer the estate is inevitable as prayed by the respondent’s counsel. That being the position in terms of section 49(2) of the Act, [Cap. 352 R.E 2002], I appoint the Administrator General to take over administration of the estate of the late **Mussa Humu Mbogo** so as to collect and distribute the same to the beneficiaries who indisputably are known. I order that, the respondent shall surrender to the Court within fourteen (14) days of this ruling, the letters of administration issued to her in Misc. Probate and Administration Cause No. 28 of 2018 in terms of section 51 of the Act [Cap. 352 R.E 2002]. And further order that, the Administrator General should be handed with all the estate in possession

of the respondent and any other heirs or person who once came into its possession. The administrator shall file in Court the inventory and accounts of estate within the prescribed time under section 107 of the Act, [Cap. 352 R.E 2002]. The application is allowed to that extent.

Being a probate matter, I make no order as to costs.

Ordered accordingly.

Dated at Dar es Salaam this 16th September, 2022.



E. E. KAKOLAKI

JUDGE

16/09/2022.

The ruling has been delivered at Dar es Salaam today 16th day of September, 2022 in the presence of Mr. Benard Mahguha, advocate for the applicants, Mr. Roman S. Lamwai, advocate for the respondent and Mr. Rashid Umande, Court clerk.

Right of Appeal explained.



E. E. KAKOLAKI

JUDGE

16/09/2022.

