

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

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 178 OF 2022

(Originating from Probate Cause No. 56/2016)

NAUSHAD AHMED SIWJI.....APPLICANT

VERSUS

AKBER AHMED SIWJI.....RESPONDENT

Date of Last Order: 02/08/2022

Date of Judgment: 17/10/2022

R U L I N G

MGONYA, J.

This is a ruling in respect of an application filed before this Court under a Certificate of urgency where the Applicant prays for:

- 1. The Administrator be ordered to disclose the undisclosed Estate of the deceased;***
- 2. The Administrator be condemned to give the rightful shares to the Applicant as per the deceased's Estate;
and***
- 3. Any other orders that this Honourable Court may deem fit to grant.***

The Application was supported by an affidavit that was dully signed by **NAUSHAD AHMED SIWJI** the Applicant herein. Both

parties before this Court enjoyed the services of being represented by learned Advocates whereas **Mr. SAULI SANTU** Learned Advocate represented the Applicant. On the 07/06/2022 while appearing in Court Mr. Santu held brief for the Respondents' Advocate who was absent on notice; the Court under such circumstances ordered for the matter to be disposed off by way of written submission and after the submissions were in place , this Court then determines the Application.

The Applicant in his application avers that the Application is made under **Section 49 (c), (d), (e) and subsection 2, Section 52 (1), Section 107 (5) of the Probate and Administration of Estate Act Cap. 352 [R. E. 2002] and section 95 of the Civil Procedure Code Cap. 33 [R. E 2019].**

The Applicant being a beneficiary to the deceased's estate with the right to bequeath the same states that the Respondent who is the Administrator of the deceased's Estate has not disclosed some of the deceased's Estate naming the same to be bank accounts. It is the Applicant's averment that the Administrator has not done so in the Inventory that has been filed before the Court on **30/08/2022.**

The Applicant's Counsel further states that the Respondent has revealed only three bank accounts out of nine bank accounts that belonged to the deceased which forms part of the estate.

The three banks disclosed are those under paragraph **5B (iv), (v) and (vi)**; And the said remaining bank accounts that have not been disclosed contain huge amounts of money.

It was also the Applicant's Counsel submission that the Respondent in his Counter affidavit denied to have been aware of the existence of the undisclosed Bank Accounts. From such denial it raises the question as to whether the Respondent is a fit person to administer the deceased's Estate taking into consideration that he is unaware of some of the properties in deceased's Estate. It was in the submissions that the Respondent claims Bank Accounts listed under paragraph 5B (viii) and (ix) are his personal accounts. Evidence was required to prove such fact but the Respondent has not availed any evidence to prove the same.

The Applicant submits that the immovable properties listed under items 1 to 6 of the filed inventory and Accounts of the Estate are claimed by the Respondent to be the only estate which are yet to come to his hands. However, there are other properties in his hands hence the Applicant questions as to when will he be given the share of USD 400 \$ from the deceased Estate by the Administrator. It was the Applicant's submission that the value of the properties reflected in the inventory are from the notion of the Respondent since no evaluation has been done by a competent authority with the rights to do so.

The Applicant averred in his submission to have taken efforts in search for the Bank Accounts of the deceased to the non-operating banks whereas details are found at the Bank of Tanzania especially the undisclosed Bank Accounts by the Respondent as stated under paragraph 8 of the Applicants affidavit. However, the Bank of Tanzania (BOT) informed him that he cannot access the said details since he is not an administrator of the deceased's Estate.

From the said circumstance, the Applicant avers that he is the fit person to hold the office of Administrator so as to manage properly the deceased's Estate and distribute the same to the heirs. The Applicant prayed for this Court to revoke the Administrator and appoint him instead. The case of ***FRANCISCA JOSEPH CHUWA VS MR. KENEDY JOSEPH CHUWA, Misc. Civil Application No. 60 of 2019*** was cited to support the argument.

In his submission, the Applicant informed this Court that, Annexure NAS-2 shows net money available to be distributed to the beneficiaries amounted to **USD 335,782** and the same is to be distributed to 10 beneficiaries. Each beneficiary is required to get **USD 33,000** approximately but looking at the inventory the beneficiaries have been awarded **USD 11,913** of which is unbelievable. This amount is disputed and the Respondent is

wanted to reveal where he has taken the money then each beneficiary is to get a share of USD. 400,000.

In reply to the Applicant's submission, the Respondent stated that, the Applicant has alleged that he has undisclosed almost nine Bank Accounts with huge amount of money. However, **Section 110 of the Evidence Act Cap. 6 [R.E 2019]** requires whoever that desires any Court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. Further, the Applicant's claims of communicating with the Bank of Tanzania have not been proved by letters nor by an affidavit to show that he was informed not to be availed the required information since he is not the Administrator.

It was also the Respondent's submission that the banks named under Part B item (i) and (ii) of the Counter Affidavit the same were not among the deceased Estate since the two accounts were closed by the account owners one being the Deceased before his death. The owners of the said fixed accounts were **Ahmed Mohamedali Swiji, Mohamedi Ahmed Mohamedi Swiji** and **Akber Ahmedali Swiji**. These fixed deposit accounts for the Sterling Pounds Account was for 91 days only from **29/04/2003** to **29/07/2003** while that of USD Account was for 92 days from **27/03/2003** to **27/06/2003**. The Applicant has not shown proof that the said

banks formed part of the deceased's estate at the time he was appointed. In absences of proof, it is said that the banks mentioned by the Applicant remain mere assertions.

The Respondent further countered that the bank accounts stated in (iv), (v) and (vi) to part B of the affidavit have at all times been reiterated in the Respondents affidavit and in the inventory as well.

It was further submitted that, the Applicant has not set forth any complaint on the said accounts together with the outstanding amount of money in the said accounts. Therefore, the allegation on undisclosed accounts is misleading before this Court. It is submitted further that Item (viii) to Part B is in respect of a Bank that at the time of appointment the same was not existing. The Respondent reiterates that FBME was placed under administration and subsequent liquidation over charges related to money laundering associated with terrorism in 2017.

Further, it is said that the bank accounts under (viii) and (ix) belong to the Respondent, and that the Applicant has not brought enough evidence to show that the said accounts are among the deceased's Estate, and that duty to prove the same lie on Applicant since he is the one who alleged so. It was submitted further that's the Bank Account in item (x) and (ix) are in respect of Bank accounts in a bank that was placed under the BOT in 2003 before the deceased is death. Further, the bank

account in item (xi) of part B is not known to the Respondent and there is no any proof by the Applicant that it actually exists. On the other hand, it is said that, the contention that the Respondent is not fit to be an Administrator for unawareness of the named accounts is misguided. Since there is nothing on record that really proves the existence of such accounts.

The Respondent informed this Court that there are still some immovable properties that have not come into his hands and the same are in Zanzibar of which he is still making follow-ups. Some beneficiaries have denied to hand over some of the houses which form part of the deceased's estate. If the administrator is to divide the money amongst the beneficiaries who do not have houses, will not receive what they are entitled as those with the houses will retain a greater share.

It is the Respondent's final submission that, it is reflected from Applicant's submission that, the Applicant together with other beneficiaries are aware of the said fact save that the Applicant has run out of patience. The distribution or the account filed is pursuant to the directions of the Court following complaints by the Applicant. The Respondent prayed that this Court finds the Applicant's application meritless.

Having gone through the Application before me, there are two aspects, I find it of importance to expound on the same at this early stage. **One**, that the Applicant has moved the Court by

citing sections **Section 49 (c), (d), (e) and subsection 2, Section 52 (1), Section 107 (5) of the Probate and Administration of Estate Act Cap. 352 [R. E. 2002] and section 95 of the Civil Procedure Code Cap. 33 [R. E 2019]**.

Having gone through these cited provisions, the same are reflecting **revocation of grants and removal of Executors, procedure in Court for granting Probate and Letters of Administration** together with **Inventory and accounts**. The provisions of law used to move the Court have no relation with the prayers that have been made by the Applicant in the Chamber Summons. Therefore, by saving this Court's time I believe the said provisions were not of interest any more to the Applicant and hence diverged from submitting on them and that interest was in the prayers made in the Chamber Summons.

Failing to plead on the provisions that moved this Court that is seeking the Respondent's Revocation from the position of being an Administrator is impracticable since the same has not been pleaded in the Applicants pleading but has been raised in the Applicants submission and therefore appears to be a new fact. The case of ***JONATHAN KALAZE VS TANZANIA BREWERIES, (Civil Appeal No. 360 of 2019) [2022] TZCA 312, www.tanzlii*** stated that; Each party is strictly bound by their pleadings. Therefore, since revocation of the Applicant was

not pleaded in the pleadings, this Court will hence direct itself to the prayers prayed by the Applicant in the Chamber Summons.

Two, the Applicant has made prayers in his application and revocation was not one of the prayers. In the case of **MELCHIADIS JOHN MWENDA vs GIZELLE MBAGA, (Administrix of the Estate of JOHN JAPHET MBAGA) and 2 Others, Civil Appeal No. 57 2018 (Unreported)**, it was stated that:

"It is elementary law which is settled in our jurisdiction that the Court will only grant a relief which has been prayed for".

It is after the above position this Court will direct itself to the prayers as prayed for in the Chamber Summons. The applicant seeks for this Court to order the Respondent to disclose the undisclosed accounts of the deceased which do appear in the inventory filed in Court and the Respondent be condemned to give the rightful shares to the Applicant as per the deceased Estate. It is from the above, this Court finds the interest of the Applicant underlies in these two prayers.

To begin with the first prayer that ***the Administrator be ordered to disclose the un-disclosed Estate of the deceased.*** The Applicant stated before the Court that the Respondent has undisclosed a number of bank accounts that

belonged the deceased and the same has huge amount of money. The said bank accounts have been itemized under paragraph **i, ii, iii, vii, viii, ix, x, xi** and **xii** of the Applicant's Affidavit. It was also in his application that he attached two Confirmation of deposits one dated **30/04/2003** and another dates **28/03/2003**. All these contain information of accounts that existed for a limited time one was for **91 days** and another was for **92 days**. The said Statement of accounts are of the year **2000** and a fixed deposit Receipt of **2001**.

In countering the above, the Respondent averred that the information of the above accounts are accounts that do not exist and that some of the accounts were closed by the deceased before his demise. And that the Applicant ought to have had more evidence in proving the existence of the said accounts he claims that the Respondent has un disclosed; the same would have applied to the accounts the Applicant disputes to belong to the Respondent.

It was the Respondent's claim that the bank accounts known to him have been pleaded at all times and the same appear in the Inventory. These are bank accounts that appear in Part B of the Applicants Affidavit. These are bank accounts that the Respondent states to be aware of. The some of the accounts had already been closed when the deceased was still in existence. Some are not in existence and the Applicant has not proved the

said accounts that were operating at the time of his appointment and some were placed under Bank of Tanzania (BOT) in 2003 when the deceased was still alive. And lastly that the bank accounts under paragraph (viii) and (ix) are the Respondent's accounts. It was the Applicants duty to bring proof that the said belonged to the deceased.

From the above, I find it of importance to remind the Parties that the office of an Administrator of the deceased's estate is not a full time office. The law has stated the duties of the Administrator of which the same ought to be fulfilled within a period of six months and after that file an inventory and an account of how the estate has been distributed to the heirs.

Probate matters unlike other matters, are not of a competitive nature unless there is a caveat filed. In the circumstance of this application the nature is likely driven into ordering the Respondent who is the Administrator to disclose other accounts apart from three account he admits in his counter affidavit that have all along being admitted.

It is from the submissions that this Court has come to the knowledge that the Applicant seems to be aware of bank accounts that belonged to the deceased of which the Respondent is not aware of. The Applicant being among the heirs claiming to know some of the bank accounts of the deceased **had the duty to inform the Administrator so as to enable**

him collect the same as one of his primary duties and hence make distribution of what is in the bank accounts.

Section 108 (1) of the Probate and Administration Act, Cap. 352, vests the duty to the Administrator to collect among other things the property of the deceased. Having seen the missing accounts in the inventory the Applicant had the right to inform the Respondent of the same so he would make follow ups of the said accounts. And if the Respondent was reluctant then he was obliged to file an application as such with sufficient evidence proving the said accounts exist and that he had informed the Administrator of their existence and the same has not taken any steps.

From the records the Applicant has attached annexures to the application of which after a thorough inspection of the same, I have noted **NAS-3, NAS-4, NAS-5** and **NAS-6** are bank accounts that were for a specific period of time and the Applicant has no evidence that the same still existed at the time he was making follows up of the said accounts. This Court finds that the prayer by the Applicant with regards to the undisclosed accounts; required sufficient evidence that they exist and operate and that the Respondent was aware of the same and decided not to disclose them. The Applicant having knowledge of the said accounts and not stating that he had informed the Respondent that the same exist and lack of proof of their

existence, this **Court finds that the said facts have not sufficiently been proved to warrant this grant of the said prayer.**

Secondly, the Applicant has prayed that ***the Administrator be condemned to give the rightful shares to the Applicant as per the deceased Estate.*** It was the Applicant's averments that he believes the Administrator is aware of the deceased estate and hence he is supposed to divide the same to the heirs whereas the Applicant is among the same. He further stated that he is entitled to a share of USD 400 from the deceased estate. And that the Respondent has made payments as it appears in item 3, 4, 5 and 6 that amounts to almost **Tshs. 1.1 Billion** without any receipts in respect to the source and expenditure of the said amount.

It was also stated by the Applicant that, under item 7 the net estate available for distribution is **USD 335,782.20** but the distribution of the same to 10 beneficiaries does not tally with the amount stated above the same is contradicting.

The Respondent in Reply stated that the distribution made is in accordance to the Will of the deceased, which the same has been availed before the Court by the Applicant accompanying the application herein.

The prayer set before the Court by the Applicant is for the Court to condemn the Respondent to give rightful shares to the Applicant from the deceased estate. I find it to be cautious in determining this prayer by the Applicant. The Court in Petitions of Probate and Administration of deceased's Estate is not vested with the powers to distribute the deceased estate to the beneficiaries. If the Court in any way interferes in distribution of the deceased estates, the said exercise will be rendered null and void. But the Court I believe for the interest of justice can direct what can be done.

Having gone through the Will that has been annexed to the application that the Respondent has claimed to have made distributions pursuant to of which the Applicant shows not be satisfied with; And since the Respondent has already filed the inventory; I am of the view that it is from this stance that a proper procedure has to be complied with by the unsatisfied party. That is for the Applicant herein to file a proper application which is an objection to challenge the said inventory and not to seek for the Court's order to condemn the Respondent to give rightful shares to the latter.

In the event therefore and after stating all of the above, this Court find that this application has no merits and is hereby dismissed.

I make no order as to costs.

It is so ordered.



A handwritten signature in blue ink, appearing to read "L. E. Mgonya", with a horizontal line extending to the right.

L. E. MGONYA

JUDGE

17/10/2022