

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

**MISC. CIVIL APPLICATION NO. 498 OF 2021**  
*(Originating from Probate and Administration Cause No. 4 of 2008)*

**FLORA CONRADIN.....APPLICANT**

**VERSUS**

**GABRIEL MAIRI MASANDEKO** *(Administrator of the estate of the Late Damian Sinda Masandeko)* .....**RESPONDENT**

**RULING**

Date of last order: - 18/10/2022  
Date of the judgment: - 15/12/2022

**OPIYO, J.**

This is a ruling on the preliminary objection raised by the respondent on the point of law as follows;

1. This honourable court is functus officio to entertain and determine this application.
2. This honourable court had no jurisdiction to decide the following;
  - (a) The legal ownership of the house in dispute, ie house situated at Plot No. 119 Block 46 Kijitonyama area.
  - (b) Whether the applicant is entitled to inherit from the estate of the deceased.

Wherefore, the respondent prays for the application to be struck out with the cost.



The court ordered for the matter to be disposed of by way of written submission of which both parties filed their submissions timely. Supporting the preliminary objection, the respondent stated on ground one that, herein there is an application for the revocation of the administrator so that another administrator may be appointed, the applicant states that the letters of administration were obtained fraudulently by making false suggestions and concealment of some materials. He argued that this issue was fully discussed and determined by this court in Probate and Administration Cause No. 4 of 2008 between the same parties as indicated in the affidavit to support her appearance by the caveator, paragraph 7 as she was the caveator. She prayed to be recognized as beneficiary and the house at Kijitonyama belonged to her son and not part of the deceased estate (*attached is the copy of the appearance and the Affidavit marked as C and D*)

The issue was dealt with in length at the end of the day the applicant through his counsel Maduhu decided to withdraw the caveat and resulting in respondent being appointed administrator of the deceased estate. This concluded the issue was and it cannot be raised or discussed again by the same court (the case of **National Bank of Tanzania Ltd v Bruno Vitalio Swalo, Civil Appeal No. 331 of 2019 (unreported) at page 10** was cited in support).

Further, the applicant stated that this court has no jurisdiction to determine who is to inherit from the estate of the deceased, that is the task of the administrator. He cited the case of **Monica Jigamba v**

**Mugeta Bwire Bhakome, Civil Application No. 199 of 2019 (unreported)** to fortify his argument.

Regarding the ownership of the house, he submitted that probate court cannot decide the issue of ownership (**Shamsha Hassan v Waziri Rajabu, CC No. 32 of 2005 (unreported) page 14**). Thus, the respondent concluded that the application is devoid of merit and should be dismissed with costs.

Replying to the submission the respondent stated that the raised objection does not qualify since there is no law offended and it attracts ascertained of facts which are not proper for the preliminary objection (**Mukisa Biscuits Manufacturing Co. Limited v West End Products Limited (1969) EA 696**). After that he continued to reply to the applicant's advocates arguments by stating that the spirit of the Latin maxim '*functus officio*' is to avoid the court to determine twice but that is only when the matter is determined to its finality (**Kamundi v Republic (1973) TLR 540**). In the instant case, the caveat was not disposed to its finality as the parties agreed to withdraw the caveat.

The argument that the court had no jurisdiction to determine beneficiaries is premature and the respondent intended to invite the court to ascertain evidence on the affidavit which is not the sense of preliminary objection, he argued.

Lastly, the applicant stated that the court was moved by section 49(1)(b) of The Probate and Administration of Estate Act, Cap 352, R.E



2019 and Rule 29(1) of the Probate Rules and in the chamber summons there is no prayer for ownership other than revocation of the administrator due to his conduct, thus the applicant prayed for the preliminary objection to be dismissed.

In rejoinder, the respondent submitted that the argument that the matter was not disposed to finality is not supported by any evidence and the administrator could not be appointed if the caveat would still be in force.

The application under section 49(1)(b) of The Probate and Administration of Estate Act, Cap 352, R.E 2019 and Rule 29(1) of the Probate Rules are initiated when the administrator have not fulfilled his obligation under the same law. In this case the ground advanced by applicant demanding revocation that the letters of administration was obtained fraudulently by making false suggestion and concealment from the court of some facts. This was after the appointment of the respondent was procured after withdrawal of the applicant's the then caveat. This same reason is what was on the caveat. The issue is whether bringing the same reason puts the doctrine of *res judicata* and the court is *functus officio* in to play?

Although as a general rule if the administrator has not discharged his duties by filing inventory and accounts, applications to revoke his appointment for such a misconduct while holding his office are limit less and the principle of *res judicata* may seem not applying on application for revocation of the letters of administration provided there is an

allegation of misconduct on part of the administrator and the file has not been closed **Andrew John Sambo V Nicas Masika** (*As administrator of the Estate of the late John Silvin Sambo*), **Civil Appeal No. 7 of 2022 HC**, Temeke. However, the circumstances of this case suggests otherwise. The ground for revocation here does not involve a misconduct of administrator; rather it challenges his appointment on the same ground that was raised in the withdrawn caveat. In my considered view, by withdrawing the caveat that was based on the same grounds, means the applicant supported the appointment of the respondent then. That is the reason the court appointed him. It will be absurd if the court will sit to look on the same thing that was already withdrawn as a caveat brought back in a new plate. That would amount to reviving caveat through the back door. The applicant who consented to the appointment by withdrawal of caveat cannot turn around to challenge the same appointment on the same ground. This is indeed *res judicata*.

Going through the first ground of the objection it is true that, the affidavit of Flora Condradin in paragraph 4 raised the issue of fraud on the part of the petitioner. On 5<sup>th</sup> July 2013, as the proceedings of Probate and Administration Cause No. 4 of 2008 reflect when the matter was before *Hon. Lila, J*, the counsel for the caveator (*herein the applicant*) stated they were not objecting to the petition, and to that effect the court appointed the respondent. Thus, the caveat was withdrawn. In the circumstances, even the argument that it was not heard to its finality does not hold water. It is a misconception on part of the applicant. The withdrawn matter leading to a decision is tantamount to hearing to finality when the same is sought to be reheard. Things



would be different if applicant was not the one who withdrew caveat based on the same grounds. For the reason the preliminary objection is sustained and application dismissed. No order as to cost due to the relationship of the parties.

It is so ordered.



A handwritten signature in black ink, appearing to read "M. P. OPIYO", is written over a horizontal line.

**M. P. OPIYO,**  
**JUDGE**  
**15/12/2022**