IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

TEMEKE SUB-REGISTRY

(ONE STOP JUDICIAL CENTRE)

AT TEMEKE

MISC. APPLICATION NO. 7 OF 2021

(Originating from probate and Administration Cause No. 3 of 2021)

IN THE MATTER OF THE ESTATE OF THE LATE JOHN KACHELI MALLYA

AND

IN THE MATTER OF REVOCATION OF THE PROBATE AND ADMINISTRATION OF THE ESTATE OF THE LATE JOHN KACHELI MALLYA GRANTED TO MARIAN JOHN MALLYA

BETWEEN

MIRIAM JOHN MALLYA.....1ST APPLICANT

BRIGHTON JOHN MALLY.....2ND APPLICANT

CHARLES KASUMBAI MALLYA.....3RD APPLICANT

GRACE JOHN MALLY.....4TH APPLICANT

VERSUS

MARIAN JOHN MALLYA (*Executrix of the estate of the late* ***John Kachel Mallya***) **.....RESPONDENT**

RULING

Date of last order: - 08/09/2022
Date of the ruling: - 15/12/2022

OPIYO, J.

The applicants herein, on 13th December 2021 lodged an application for revocation of the grant of probate in regard to the estate of the late John Kacheli Mallya issued to Marian John Mallya, costs for the

application and any other relief this honourable court deems just and equitable to grant.

The application is made pursuant to section 49(1) (a), (b) and (c) of the Probate and Administration of Estate Act, Cap 352, R.E 2002 and Rule 29(1) of the Probate Rules, GN. No 10 and is supported by the joint affidavit of Miriam John Mallya, Brighton John Mallya, Charles Kasumbai Mallya, and Grace John Mallya.

This application was disposed of by written submission. Arguing for the applicants, learned counsel Sigbert Ngemera submitted that, the applicants prays for revocation of the grant of probate issued to the respondent vide Probate Cause No. 3 of 2021 which was issued by this court on 23rd November 2021. He prayed for the court to adopt a joint affidavit sworn by the applicants. He further stated that, the clashes can be traced since after the death of late John Kacheli who died 17th March 2010, the parties have tried to seek for the letters of administration since 2010 to date vide Probate and Administration Cause No. 38 of 2010, Probate and Administration Cause No. 18 of 2016 and lastly Probate and Administration Cause No. 3 of 2021.

Mr. Ngemera continued to submit that this court is vested with the jurisdiction to revoke any grant or letters upon good cause being adduced in terms of section 49 of the Probate and Administration of Estate Act (supra. His argument is that all the children are entitled to the estate of their parents (**Kristantus Msigwa v Mary Masuba, Probate and Administration Appeal No. 06 of 2019 HC, Mbeya)**. And case the parent desires the exercise of his right to disinherit any person

entitled to his/her estate (including his children), there is a need of stating reasons for doing so (**Hyasintha Kokwijuka Felix Kamugisha v Deusdedith Kamugisha, Probate Appeal No. 04 of 2018, HC, Bukoba).** In the alleged will the applicants have been excluded from their father's estate. He contended that not only that, but also the proceeding to obtain the grant were defective in substance, since the validity of the will was not ascertained on the reasons that it has left behind the applicants as beneficiaries without any reasons as reflected on paragraph 4.1 of their joint affidavit.

The counsel stated that the respondent was aware of the fact that the will is discriminatory and he had a duty to reveal that to the court before hand, but she concealed this material fact possibly out of ignorance as this fact is not new given the chain of disputes concerning this same estate. He drew this court's attention to Probate and Administration No. 38 of 2010 between Imelda John Mallya v Charles John Mallya and Another, High Court of Tanzania, Dar es Salaam, where a court dealt in length with the need to test the validity of a will. In that matter respondent was a key person (see page 10, 11, and 12 of annexure JMK4 to the joint affidavit). That means the respondent obtained the grant by means of untrue allegations of facts essential in point of law to justify the grant. He ought to have known that the will that did not state any legal reasons for depriving other beneficiaries of their entitlement under the estate is void. Therefore, for secretly filing the application for grant and failure to reveal the weakness of the will to the court, the remedy is to revoke the grant gotten through untrue allegation of facts. He so prayed.

Opposing the submission learned Counsel Mguga Jonathan stated that, the respondent was appointed on 23/11/2021. That, his appointment was preceded by citations both in the Government gazette and in Mwananchi Newspaper of 22/10/2021 and 19/10/201 respectively. Once the petition is filed any other person asserting the interest was to file a caveat against the probate or letters of administration, he contends, but the applicants did not do so. He argued that the validity of a will should not be challenged through the application of revocation of the executor. This should be done before the appointment (**Martha Basil Dismass @Hafsa Sumana Weera v Danaranjani Sumana Weers & Ano. Misc. Civil Application No. 220 of 2019 (unreported)**.

He argued that the applicants are claiming to be beneficiaries of the estate who were not included in the estate, as they are questioning the validity of the will, the applicants were to establish their interest by filling caveat. In absence of such caveat they are strangers to the estate of the deceased they are herein objecting.

He argued citing the case of **Re Estate of Julius Mimamo (Deceased) eKLR, the High Court of Kenya (**interpreting section 76 of the Law of Succession Act of Kenya which is similar to our section 49 of the Act) in any revocation, there must be evidence that the proceedings to obtain the grant was obtained fraudulently by making a false statement or by concealment of something to the case or the grant was obtained by means of an untrue allegation of the fact of essential points of law or the person named in the grant has failed to apply for conformation or to proceed diligently with the administration of the estate. In the current matter, the applicants were aware of the will in all

those years, but they never took a step or any measure to revoke the named executor. Their application is therefore an afterthought, he argued. More so neither of the applicants has claimed that the procedures to secure the probate was faulted as required by law. Above all, failure to provide beneficiary in a will does not invalidate the will as argued by the applicants. The deceased being Christian it is the Indian Succession Act 1865 that is applicable. Under section 46 of the Act, the testator is given powers and there is no law which provides restrictions, hence no good cause have established by the applicants to warrant revocation as they were supposed to file a caveat challenging the validity of the will. He prayed for the dismissal of the application.

In rejoinder, the counsel for the applicants submitted that the court is vested with the power to revoke the grant upon good cause. And the good cause is not in this case is that the will is not only defective in substance, but also illegal before the eyes of the law. The respondent also does not dispute that the applicant are beneficiaries and the will is contravening the principle of the wise for not including reasoning for disinheriting other beneficiaries. He finally reiterated prayers made in chief.

The above submissions from both sides have been dully considered. From the records it is not in disputed that the parties herein started to knock the doors of the court back in 2010 through Probate and Administration Cause No. 38 of 2010 before Honourable Massengi, J (Rtd), whereby the letters of administration was granted to Charles John Mallya and Raymond John Mallya. In that case, one Imelda John Mallya applied for revocation of the letters of administration granted to the

mentioned parties. This court on 2/5/2013 revoked the letters of administration after it was been made aware of the existence of the will.

There was another petition vide Probate and Administration Cause No. 18 of 2018 before Honourable Mlyambina, J filed by Miriam John Mallya who petitioned for letters of administration. On 30/05/2019 the same was dismissed as the petitioner was supposed to file a petition for administration with the will annexed and whoever is interested was to challenge the same.

Mirian John Mallya filed an application for a grant of probate vide Probate and Administration Cause No. 3 of 2021 on 23/11/2021 this court appointed him the executrix of the deceased estate, hence this application for his revocation.

After painstakingly going examining the series of litigations in this matter, the court is duty bound to determine whether there was good ground raised by the applicants for revocation of the grant of probate. One of the grounds raised is that the respondent concealed the information that the will did not include all the deceased children and no reasons were stated. It was submitted that the respondent had the duty to inform the court, and above all the will itself is invalid for not stating the reasons for excluding other children. After the conclusion of the matter before Mlyambina, J. anyone interested was eligible to petition the court for being authorized to administer deceased estate. Respondent resisted this application claiming that after she applied for the grant of probate she followed all the requirements including publication of general citations. That, her petition was not objected as no caveat was entered, the fact which made the court to appoint her to

be the executrix of the deceased estate. The allegation of concealing the information that the will did not include other heirs is not her duty to discharge as there is a general citation issued for whoever interested to raise caveat. To the respondent the challenge on the will from those who did not file caveat after appointment is an afterthought.

The assertion by the respondent is correct that, as a general rule, after appointment, those who failed to enter caveat cannot be heard to complain against appointment and challenging things that could only be done in consideration of caveat if entered like validity of the will. This assumes compliance with all the initial procedures both before and after filing the petition. This calls for the need to find out why the applicants who seems to have close interest to the estate failed to take necessary action at the right time. The issue whether the applicants had a chance to intervene the proceedings before the appointment of the executor in this case but decided to keep quiet is of importance here. The respondent insisted having published general citation as required by the law calling upon anyone interested person to enter caveat. That means, he relied in publication of general citation to inform the lawful heirs of the deceased, applicants inclusive, of the existence of the matter in court for whoever interested to file caveat. This means the matter was undoubtedly taken to court without applicants' knowledge. They were expected to be informed through general citation. In my considered view, this connotes failure to comply with initial procedures before filing the application. The application for administration of the estate of the deceased must be filed with knowledge of all the lawful heirs. The general citation is for general public, not for the heirs or those whose

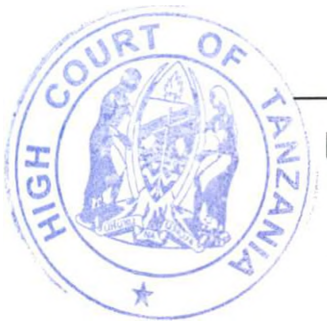
direct interest to the matter is well known to the petitioner like deceased children in this matter.

From the records, these parties had long history of knocking court doors battling over the same thing, estate of their deceased father (from 2010 when he died). Each time the issue of deceased will come up, until when they were told to file for grant of probate or letter of administration with the will annexed as the existence of contested will was noted. It is noted that this battle is between the legal heirs of the late John Kacheli Mallya. When the court directed whoever interested to file a petition, it did not intend the same to be filed secretly from other legal heirs with whom the battle have always been staged over the issue. For this, the respondent's defence that the applicants did not file the caveat if they were objecting the petition before her appointment is unfounded. This is because the applicants were not given a chance to intervene before appointment by being notified about the existence of the petition. In my view, in absence of personal notice or citation to all legal heirs on the filling of petition for probate, general citation is not sufficient notice to the legal heirs whose interest are well known to the petitioner. Given a chance to intervene was the only way the disputed rights or interest of the applicants to inherit from the deceased estate could have been established by filing caveat. This has always been their centre of cry in previous litigations. This was to be notified to the court to be able to cite them. But this was purposely not done. In this particular case where the parties had been in series of litigation over the same thing denying the others chance to intervene and at the same time concealing the alleged controversy to the court indeed amount obtaining grant fraudulently by concealing from the court something material to the case reflected

under section 49(1) (b) of the Probate and Administration of Estates Act (*supra*). This justifies revocation of grant to the respondent.

For the reason, grant of probate to the respondent, Marian John Mallya is hereby revoked vide section 49(1)(b) of the probate and administrations Act (supra). Whoever is interested may file for letters of administration with the will annexed or respondent may file fresh petition for grant of probate. But in all, whoever files for administration of these estates should be mindful not to repeat the same lapses which led to revocation of the grant of probate in this matter. No order as to costs.

It is so ordered.



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