

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR-ES-SALAAM DISTRICT REGISTRY)

AT DAR-ES-SALAAM

MISCELLANEOUS CIVIL APPLICATION NO. 434 OF 2022

(Arising from Probate Cause No. 54 of 2010)

DR. HELLEN SHANGALI KUSSAGA APPELLANT

VERSUS

JOSEPH M. KUSSAGA (Administrator of the estate

of the late **ALEX NKAMA KUSSAGA**) **1st RESPONDENT**

JUDITH T. KUSSAGA (administratrix of the estate

of the late **ALEX MKAMA KUSSAGA**) **2nd RESPONDENT**

RULING

Date: 17/02 & 01/03/2023

NKWABI, J.:

The chamber summons in this application is brought under the provisions of section 65 of the Probate and Administration Act, Cap. 352 R.E. 2019. The following orders are sought by the applicant:

1. That this honourable Court be pleased to make an order directing the administrators of the estate of the late Alex Mkama to server the Applicant's matrimonial share of the properties jointly acquired between the Applicant and the late Alex Mkama Kussaga to with; Plot No. 49 Jangwani Beach, Kinondoni Municipality (the matrimonial home), Premises on Plot No. 14/31N Morocco area Kinondoni Dar-es-

Salaam, House on plot No. 310, Njiro Hill, Arusha Municipality, Plot No. 50 Block 6, CT No 69466 Kisota-Kigamboni, Dar-es-Salaam, Plot No. 239, Block 1, CT 65401 Kisota- Kigamboni, and plot No. 24 Block 8 Mwongozo, Temeke Municipality, Dar-es-Salaam, 4000 shares in TOL Limited under Certificate No. 4187, 5000 shares in Tanzania Cigarette Company Limited under CDs acc. No. 42560 and serial No 4201, 3162 shares in Tanga Cement Company Limited in CDs acc No. 55802 and Serial No. 18292, 10,000 shares in Tanzania Cement Company (Wazo Hill) with Serial No 18003, 10,000 shares in Tanzania Breweries Limited under certificate 5289447 shares under DAHACO Swiss Company with Serial Nuber 16741, 10,000 shares under the Unity Trust of Tanzania under Certificate No. UOOOO30524 and 20,000 shares in National Microfinance Bank (NMB) pending a hearing of and determination of the main case.

2. That the Administration of the estate of the late Alex Mkama Kussaga be ordered to give 50% of the interest in each of the assets mentioned in prayer (1) above to the Applicant as her matrimonial share before they proceed to distribute as per the Will of the deceased.

3. For any other order(s) and or relief(s) as this Honourable Court may deem fit and just to grant.

The application was duly resisted by the respondents who filed their respective counter-affidavits. The applicant married the deceased on 3rd November, 1991. The deceased passed away on 3rd November, 2009. The deceased left a Will while the respondents were appointed executors of the Will on 07/12/2010. The order of the Court is clear that there was no caveat filed despite the citation being published in the Guardian and Nipashe newspapers both dated 12/11/2010.

The application was heard by way of written submissions, Messrs. Hussein Kitta Mlinga & Michael Christopher Lugina, learned advocates, argued the application on behalf of the applicant while the respondents enjoyed the services of Messrs. Constantine Anthony Makala also learned advocate teamed up with another advocate from Exellent Attorneys chamber.

It is complained that the respondents started executing the Will without taking cognizance of the Applicant's matrimonial share in the properties which were mistakenly listed as belonging to the deceased alone. It was added that the respondents failed to honour their obligation as executors to

ascertain and sever interests of the Applicant before executing the Will. It is also contended that she did not file a caveat because at the time the petition for probate was filed, she was grieving the loss of her husband. It was proposed that this application is backed by **Mugeta Bwire Bhakome v Monica Nyamakare Jigamba**, Probate and administration Cause No. 41 of 2016 (HC) (unreported) however, no copy was attached in which it is claimed it was stated that:

"Any person, aggrieved by the decision of the family meeting ought to express his grievances by a caveat or other lawful means possible."

Thus, the applicant urges this Court the respondents firstly consider her fights over the properties that were jointly acquired during the subsistence of the marriage citing **Bi. Hawa Mohamed v. Ally Seif** [1983] TLR 32. Also, among other decisions of this Court the decision in **Elizabeth Mohamed v. Adolf Magesa**, Administration Appeal No. 14 of 2011 (HC) where it was stated:

"It is my opinion that if there are properties jointly acquired by the deceased and his/her wife/husband (as the case may

be), the share of the surviving partner must be carefully ascertained and excluded from the list of the deceased's estate ..."

It was also argued that if the Applicant's rights to the matrimonial property is denied, it will be a violation of the women fundamental right to equality, property and adequate standard of living, family and dignity under the Tanzania Constitution and the binding international Conventions and article 13(5) of the Constitution of the United Republic of Tanzania which prohibits discrimination on the basis of gender. The counsel too cited Protocol to the African Charter on Rights of Women in Africa of 2005 particularly article 21.

Then the applicant's counsel took refuge in the decision of the Court of Appeal of Tanzania in **Leticia Mtani Ihinde v. Adventina Valentina Mosonyi** (Administratrix of the estate of the late Buhacha Bartazari Kichinda), Civil Appeal No. 521 of 2021 where it was held:

"... however, the principle pronounced in the above holding is clear and applicable in the present case, that where the husband has died the surviving spouse cannot seek distribution of matrimonial assets in a matrimonial cause,

and any claims or perceived rights thereto must be sought in a Probate and Administration Cause."

The counsel for the respondents rejected the above submission saying that the applicant was present in Court, she even received the share of monies from the bank and signed. The counsel for the respondents referred this Court to **Theofrida Mhagama v. Njegafilimbi Mponjoli Mwaikugile** (as legal representative of Jackson Reuben) and **Mwaikinda**, Civil Appeal No. 160 of 2020 which quoted with approval the decision of **Revenanth Eliawory Meena v. Albert Eliawory Meena and Another**, Civil Revision No. 1 of 2017 where it was stated:

"A person with interest in the estate of a deceased in which, a petition for grant of probate or letter of administration has been lodged, is required to enter a caveat in terms of section 58 (1) of the Probate and Administration of Estates Act, Cap. 352 of R.E. 2002."

It was further elaborated at page 16 thus:

"Since the Appellant failed to challenge the Will in accordance with the law when she had the opportunity to do so, she cannot be heard to complain now because neither

the trial Court nor this Court is the rightful forum to raise that issue. Without prejudice to the foregoing, it is in record that, the issue of disputed house being a matrimonial property was canvassed by the trial court following the appellant raising it in her affidavit in support of the applicant. It is our considered view that the trial court had no mandate to decide that issue because it ought to have been raised in the application for grant of the probate by the respondent. As such these grounds are equally devoid of merit.”

Submitting in rejoinder submission, the counsel for the applicant argued that the case of **Bi Hawa Mohamed** (supra) is persuasive on the rights of women to properties, though it dealt with divorce or separation.

I think that if this application is granted, it will lead to opening the flood gates of such kind of applications for no good ground. The probate application was cited after more than a year after the death of the deceased, the applicant cannot be heard to claim that she was still overwhelmed by grief and was still grieving. In other words, I am not persuaded by her claim. I take that she slept over her right to file a caveat and this Court cannot

come into assistance of the party who slept over her rights. I can exemplify the decision in **Zilaje v. Fembera** [1972] HCD No. 3, Kisanga, Ag. J. held:

"I am, therefore, of the view that the appellant sat on her rights for too long, and that she has not given any sufficient ground which would warrant interference by this Court and accordingly the appeal is dismissed."

I accept the contention of the counsel for the respondents that the application is overtaken by events, thus, it is untenable. I am also of the view that the case laws cited by the counsel for the respondent are relevant and applicable to this application. On my view, the Articles of the Constitution and the Protocol to the African Charter on Human Rights of women in Africa of 2005 were brought out of context because there is a clear forum (avenue) to challenge the Will or register one's interests via a caveat but the applicant did not bother.

With the greatest respect to the counsel for the applicant, the submissions and arguments to support the application were drawn out of context. They appear to suggest that the applicant had no avenue (forum) to get her rights

while that is not true. She ought to have raised a caveat to protect those interests in the properties if any.

I should note here that this (application) too is not a proper forum for deciding on matters pertaining the disposition of the property which is part of the estate of the deceased by the applicant. Section 99(1)(b) and section 102(1)(a) of the Land Registration Act Cap. 334 R.E. 2019 is referred out of context, that applies too to the cited cases of **Bi Hawa Mohamed** (supra) and **DPP v. Jitesh Jayantilal Ladwa and Elly Chirongo Musyagi**, Criminal Appeal No. 111 of 2022. At this point, I am tempted to think this application is mere abuse of the Court process.

That said and done, this application is found to be wanting in merits. It is dismissed with costs.

It is so ordered.

DATED at DAR-ES-SALAAM this 1st day of March, 2023



J. F. Nkwabi
J. F. NKWABI

JUDGE