

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
IN THE DISTRICT REGISTRY OF ARUSHA**

**AT ARUSHA**

**(MISC. CIVIL APPLICATION No. 80 OF 2021)**

*(C/F PROBATE AND ADMINISTRATION CAUSE NO.23 OF 2020 BEFORE THE HIGH COURT OF THE  
UNITED REPUBLIC OF TANZANIA – ARUSHA DISTRICT REGISTRY)*

**TUMSIFU GABRIEL MMARI.....APPLICANT**

**VERSUS**

**EXAUD GABRIEL MMARI.....RESPONDENT**

**RULING**

8<sup>th</sup> April & 6<sup>th</sup> May 2022

**TIGANGA J**

In this application, the applicant moved this court under section 49(1),(a),(b) and (c) of the Probate and Administration of Estates Act,[Cap 352 R.E 2002] and Rule 29(1),(2) of the Probate Rules. He is applying for the following orders;

- i. Revocation of the letters of grant of administration of the estate of the late **Silipa Yetro Lema** issued to **Exaud Gabriel Mmari** by revoking his appointment and order the continuation and determination of Probate Case No. 18 of 2020 in the Maji ya chai

Primary Court as was transferred to the District Court of Arumeru at Arumeru via Application No. 11 of 2020 on 15/09/2020.

- ii. Costs of this application be paid by the respondent.

The brief background of this application is that, this matter did not start at the High Court, it started in the Primary Court of Maji ya Chai of Arumeru District where initially, the respondent herein filed a Probate and Administration Cause No.18 of 2020 seeking to be appointed as administrator of the estate of the late **Silipa Yetro Lema**. That petition was contested by the current applicant. Following that contestation, the applicant did not want the matter to be entertained by the Primary Court, he applied for transfer of the said probate from the Primary Court of Maji ya Chai to the District court of Arumeru.

After he had successfully transferred the said case to the District Court, the current respondent who was the petitioner before Maji ya Chai Primary Court, decided to abandon the matter which the applicant transferred to the District Court of Arumeru and decided file a fresh petition before the High Court that is Probate and Administration of the estate No. 23 of 2020 petitioning for the letter of administration of the estate of the same deceased in which he was appointed as administrator of the of the

estate of the late Silipa Yetro Lema. The High Court did so definitely without the knowledge of the existence of other matter before the District Court of Arumeru. Following his appointment as the administrator of the estate of the said deceased, the respondent wrote a letter to the applicant asking him to surrender the properties of the deceased so that the administrator can do his job. After being so notified through that letter, the applicant made follow up and realized that the matter in which the respondent was appointed, was filed and heard by the High Court without his knowledge.

Following that state of affairs, the applicant filed the application at hand seeking to revoke the appointment of the respondent from administering the estate of the deceased on the ground that the matter is *res sub judice* to Probate Cause No.18 of 2020 which was later transferred from Maji ya Chai Primary Court to Arumeru District Court.

The application was opposed by the respondent by filing the counter affidavit. In that counter affidavit, the respondent does not dispute the fact that there was another Probate Cause No. 18 of 2020 which was filed before the Primary Court of Maji ya Chai but later transferred before the District Court of Arumaru. What he contends is that, he filed the probate

cause before the High Court after realizing that the District Court had no jurisdiction to entertain the matter.

With leave of the court, parties argued this application by way of written submissions. In the submission in chief, the counsel for the applicant submitted that, section 8 of the Civil Procedure Code, [Cap 33 R.E 2019] prohibits the filing of the same suit twice in either the same court or other courts with competent jurisdiction to entertain such matter. He further submitted that the Probate and Administration Cause No. 23 of 2020 which was filed to the High Court in which the respondent was appointed as the Administrator of the Estate of Silipa Yetro Lema is *res sub judice* to Probate Cause No. 18 of 2020 which was filed before Maji ya Chai Primary Court and later transferred to the District Court of Arumeru, therefore the administrator be revoked and an order be made that, Probate Cause No. 18 of 2020 which was transferred to Arumeru District Court from Maji ya Chai Primary Court be heard and determined.

The Counsel for the respondent in his reply submission made in opposition of the application submitted that, since the matter i.e Probate Administration Cause No. 23 of 2020 has already been determined before the High Court, the one which is still pending at Arumeru District Court is

supposed to be withdrawn. The Counsel further submitted that the District Court of Arumeru lacks jurisdiction to preside over Probate Cause No. 18 of 2020 transferred to it. Therefore, since the Probate and Administration Cause No. 23 of 2020 has already been heard and determined, then instead of the same being *res sub judice*, Probate Cause No. 18 of 2020 allegedly pending before Arumeru District Court is *res judicata* to Probate Case No. 23 of 2020.

In rejoinder, the Counsel for the applicant insisted that, the administrator be revoked as he concealed the crucial details leading to contravention of the law by filing same probate twice in two different courts.

- i. The issue which this court is called upon to decide is whether there is any ground for revoking the administrator in Probate Cause No. 23 of 2020?

I find this to be the only issue which the court must resolve because the main prayer of the applicant is the prayer to revoke the appointment of the administrator appointed in probate cause No. 23 of 2020. The

application was filed under section 49(1)(a)(b) and (c) which provide for the grounds/reasons upon which revocation can be made. It provides that,

*"The grant of probate and letters of administration may be revoked or annulled for any of the following reasons–*

- (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;"*

The ground for revocation advanced by the applicant in this application is that, the application under which the applicant was appointed was *res sub judice* and the respondent while aware that there was other Probate before the District Court did not disclose to the High Court.

The concept of *res sub judice* as relied upon by the applicant, is a statutory principle imported in our laws from common law, enshrined in section 8 of the Civil Procedure Code [Cap 33 R.E 2019]. For purpose of clarity and easy reference I hereby reproduce it in verbatim that;

***"No court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or any other court in Tanzania having jurisdiction to grant the relief claimed."***

This legal doctrine has also been interpreted in the case of **Wengert Windrose Safari (Tanzania) Limited versus The Ministry for natural resources and Tourism and The Attorney General**, Misc. Commercial Case No. 89 of 2016, High Court Commercial Division (**unreported**), in which it was held that;

*"There are four essential conditions upon which section 8 of the Civil Procedure Code applies (Res sub judice). The conditions are;*

- a) That the matter in issue in the second suit is also directly and substantially in issue in the first suit.*
- b) That the Parties in the second suit are the same or parties under whom they or any of them claim litigating under the same title.*
- c) That the court in which first suit is instituted is competent to grant the reliefs claimed in the subsequent suit.*
- d) That the previously instituted suit is pending."*

The court went on to hold that,

*"The commonality of sections 8 and 9 of the Civil Procedure Code is that, they both **bar continuation of a suit** which is directly and substantially in issue with either a previously filed suit or previously filed and determined suit."*

Reading between lines the provision above referred and the interpretation given to it by my Senior brother, Mwambegele, J, (as he then was) in the case of **Wengert Windrose Safari (Tanzania) Limited versus The Ministry for natural resources and Tourism and The Attorney General**, (supra) , it goes without saying that, the doctrine of *res sub judice* bars the continuation of hearing the suit or matter in which the issues involved are directly and substantially in issue in another suit or matter filed prior to it before a court of competent jurisdiction. This means in essence, once the court before which such a suit is filed has been informed of the existence of another suit or matter of similar nature before itself or another Court of competent jurisdiction to grant the relief or claim, the court will automatically be bared to proceed with the trial of the suit or matter before it.

From the provision, and the elaborate made herein above, after the court has been so informed its power is to abstain from continuing trying

the suit or matter, and therefore struck out the suit on that base. In my considered view that power does not extend to the court nullifying the proceedings which have already been finalized with the decision of the subsequent Court which proceeded without the knowledge of the existence of the previously filed suit, the doctrine does not operate to the already determined case. In my view, where the court has already been decided, then the only remedy is for party aggrieved either to file the application for review before the same court on the ground that the court proceeded without knowledge of the existence of certain facts, which had he been brought to the attention the court would have decided otherwise, or appeal or ask for revision before the higher court. In this case the records show that Probate and Administration Cause No 23 of 2020 was filed, heard and finally determined on 7<sup>th</sup> September 2021.

In the light of the discussion and findings herein above, this court being the court which heard Probate and Administration Cause No. 23 of 2020 has no power without an application to revisit its decision without a proper application for review. In this case since the base of revoking the administrator is the plea of *res sub judice*, this court finds it to be not a valid ground for revocation, especially at this stage and to say least, by

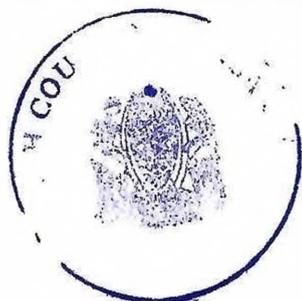
way of passing, plea if granted will not only affect the administrator, but also the proceedings, the course of which this court has powers to do.

Furthermore, even if we find for the sake of arguments, that there is a matter pending before the district court, then the applicant was duty bound among others things to prove that, the District Court of Arumeru has jurisdiction to entertain the matter something which the applicant has never proved.

That said, I find the applicant to have failed to adduce the ground upon which the respondent can be revoked from being an administrator of the estate in Probate and Administration Cause No. 23 of 2020 on the ground of *res sub judice*. Having held as herein above, the application is hereby dismissed with costs for being destitute of merit.

It is accordingly ordered

**DATED** at **ARUSHA** this 06<sup>th</sup> day of May 2022



**J.C.TIGANGA**

**JUDGE**