IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF DAR ES SALAAM)

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 85 OF 2020

(Arising from PROBATE AND ADMINISTRATION CAUSE NO. 59 OF 2014)

IN THE MATTER OF THE ESTATE OF THE LATE ALLY KLEIST SYKES

AND

IN THE MATTER OF APPLICATION BY ABRAHAM ALLY SYKES FOR REVOCATION OF THE PROBATE GRANTED TO ZAINAB SYKES, ABDOUL SYKES AND ALHAJ ARAF SYKES

AND

IN THE MATTER OF AN APPLICATION BY ABRAHAM ALLY SYKES FOR THE GRANT OF LETTERS OF ADMINSTRATION OF THE ESTATE OF THE LATE ALLY KLEIST SYKES TO REPLACE ZAINAB SYKES, ABDOUL ALLY SYKES AND ALHAJ ARAF SYKES

BETWEEN

ABRAHAM ALLY SYKES ..... APPLICANT

AND

MLUGURU PAULA SYKES & KHWEMAH ALLY) SYKES *(Administrators of the Late ZAINABU SYKES*) **..... 1st RESPONDENT**

ABDOUL SYKES ..... 2ND RESPONDENT

ALHAJ ARAF SYKES ..... 3RD RESPONDENT

RULING

20th April, & 30th May, 2022

ISMAIL, J.

The appellant in this application is one of the beneficiaries and son of Ally Kleist Sykes, the deceased. The late Ally Kleist Sykes passed on at Aga Khan Hospital in Nairobi, Kenya, where he had been hospitalized. He died on 19th May, 2013. The deceased left a Will which appointed the respondents as Executors in whose hands his vast estate was placed.

Upon a petition filed in this Court and, pursuant to the order of the Court, issued on 16th March, 2018, the respondents were granted a probate that effectively gave them the mandate to execute the Will.

Administration of the estate and filing of inventory and accounts of the estate took longer than expected, an act that the respondent considered to be an infraction of the law. His attempt to use this as the basis for initiating an ouster of the respondents from their office as executors fell through. The Court (Hon. De Mello, J) took the view that the prayer was predicated on an inventory which was yet to be filed. Dismissal of the application went

simultaneous with an order for filing of an inventory within one month of the decision.

Filing of the inventory brought up yet another issue which touched on its authenticity that triggered the filing of the instant application. The application is intended to move the Court to grant several orders as follows:

1. *That the Honourable Court be pleased to issue an order revoking the Probate granted to Zainab Sykes, Abdoul Sykes and Alhaj Araf Sykes on account that the above mentioned executors have wilfully and without reasonable cause, exhibited an inventory which is untrue in a material respect and that respondents have not filed accounts concerning the estate of the late Ally Kleist Sykes within time.*

2. *That this Honourable Court be pleased to issue an order removing Zainab Sykes, Abdoul Sykes and Alhaj Araf Sykes from administering the Estate of the late Ally Kleist Sykes on account that the above mentioned executors have wilfully and without reasonable cause, exhibited an inventory which is untrue in material respect and that respondents have not filed accounts concerning the estate of the late Ally Kleist Sykes within time.*

3. *That this Court be pleased to grant letters of administration of the estate of the late Ally Kleist Sykes to Abraham Ally Sykes as Administrator of the Estate of the late Ally Kleist Sykes to replace Zainab Sykes, Abdoul Sykes and Alhaj Araf Sykes as executors of the estate of the late Ally Kleist Sykes.*

4. *That this Court be pleased to order respondents to hand over all properties, reports, documents, full inventory, accounts and income from bank accounts and tenants that they have already collected and received concerning the estate of the late Ally Kleist Sykes to the applicant for continuation of administration, distribution and accounting of the estate of the late Ally Kleist Sykes, or that the respondents should submit to the Court all the said properties, reports, documents, full inventory and income from bank accounts and tenants that they have already collected and received concerning the estate of the late Ally Kleist Sykes to enable the applicant to continue with administration, distribution and accounting of the said estate.*

5. *Costs of the application be in the cause.*

The application is supported by an affidavit affirmed by the applicant himself, deponing to a factual account and grounds on which the prayers are sought. These grounds are deponed in paragraph 9 of the affidavit which lists several incidents of non-inclusion or misstatement of actual values of some of the assets constituting the estate of the applicant's deceased father.

The application was fervently opposed by the respondents. In their joint counter-affidavit, the appellants have taken a serious exception to the prayers and averments made by the applicant. Reasons for the delay in filing the inventory have been averred through a chronology of events most of

which relate to court proceedings which were commenced at the instance of the applicant. There is also a deposition with respect to the inventory filed in Court and responses on the alleged non-disclosure and misstatement of the values of the assets.

Pursuant to an order of the Court, dated 20th April, 2022, disposal of the application took the form of written submissions the filing of which conformed to the schedule drawn by the Court and on concurrence of the counsel for the parties.

The applicant's submission was preferred by Dr. Chacha Murungu, learned counsel. He submitted that the application is predicated on the provisions of section 49 91) (e) and (2) of Cap. 352, which empower the Court to revoke probate or letters of administration and replace the executors or administrators, as the case may be, and discharge them from performing their obligations. Dr. Murungu argued that this position has been underscored in the case of ***Joseph Shumbusho v. Mary Grace Tigerwa & Another v. David Rugaimukamu***, CAT-Civil Appeal No. 183 of 2016 (unreported), in which it was held that the power of revocation of probate or letters of administration and to discharge of the executor or administrator can be exercised without there being an application or without a petition.

Learned counsel argued that removal of the executors in dealing with the deceased's estate is irrespective of the persons named in the Will as executors. This is done where the Court is satisfied by evidence, in an affidavit, that the executors have acted in a manner that is detrimental to the interests of the beneficiaries. In the instant case, the applicant's counsel contended, the applicant has proved that he is the beneficiary of the estate of the late Ally Kleist Sykes and that it has been proved that the respondents have acted in a manner that is inconsistent with the law by misappropriating and concealing some of the properties forming part of the estate; not filing true inventory and accounts of the estate; and failing to file inventory within six months as the law and probate conditions demand. He argued that this was done in a haste and without consulting all the beneficiaries of the estate.

It was Dr. Murungu's further contention that failure to take actions enumerated above constituted a breach of the respondents' fiduciary duty towards the applicant, an abhorrent act which exhibits lack of truthfulness and transparency. On this, he implored the Court to be inspired by the decision in the ***Shumbusho's case*** (supra), in which it was held that prudence requires that consultation be made for smooth administration and conclusion of administration.

The applicant maintained that, being the son of the deceased who is deserves an equal share in the deceased's estate, he is entitled, under section 49 (2) of Cap. 352, to be appointed the administrator of the estate of his late father. He argued further that he is fit to take up the mantle of administration of the estate. He prayed that the application be granted.

The respondents' submission was equally potent and was preferred by Mr. Daniel Welwel, learned counsel. He prefaced his rebuttal arguments by giving a background to the matter and the long journey that the matter has walked before the applicant's choice to prefer the instant application. Learned counsel argued that this Court lacks jurisdiction to determine the instant application. This is in view of the fact that Probate and Administration Cause No. 53 of 2014 and Probate and Administration Cause No. 59 of 2014, both of which were consolidated, were heard and determined. Mr. Welwel argued that the decision was not to the applicant's liking hence the latter's decision to file a notice of intention to appeal. He argued that, since the notice of appeal, which signals commencement of the appeal is still pending then this Court ceases to have powers over the matter. It requires that proceedings in this Court be halted to allow for the appeal process to proceed. On this, he cited the decisions in ***Aero Helicopter (T) Ltd v. F.N. Jansen*** [1990] TLR 142; ***Arcado Ntagazwa v. Buyogera Bunyambo***

[1997] TLR 242; and ***Exaud Gabriel Mmari (as Legal and Persona Representative of the Estate of the late Gabriel Banabas Mmmari) v. Yona Seti Akyo & Others***, CAT-Civil Appeal No. 91 of 2019 (unreported).

Still on jurisdiction, Mr. Welwel argued that since the respondents are executors of the deceased's Will, their replacement can only be done by executors. This, he said, is consistent with section 49 (2) of cap. 352. He submitted that this reasoning is consistent with the holding in the case of ***Ahmed Mohamed Al Laamar v. Fatuma Bakari & Asha Bakari***, CAT-Civil Appeal No. 71 of 2012 (unreported). He argued that the rationale behind this finding is that the executor implements the Will of a deceased, unlike an administrator whose appointment is not backed by a Will. He argued that appointment of an administrator will be tantamount to abandoning the deceased's valid Will.

With regards to the late filing of the inventory, Mr. Welwel argued that filing of the accounts is yet to be done, and this is mainly because the estate is vast and information has to be sourced from multiple locations. He argued that the applicant has been briefed at each stage of the matter. He also attributed the delay to the applicant's commencement of several court

actions against the executors, thereby delaying the distribution of the estate to the beneficiaries.

Addressing the allegation of concealment or correctness of the inventory, learned counsel disputed the allegation of concealment or falsification of the inventory exhibiting the assets constituting the estate of the deceased. Mr. Welwel termed the allegations as baseless, wild and unfounded, and that conclusions on the expenditure are premature as final accounts are yet to be prepared. He argued that cash sums in the accounts were transferred to Judiciary Mirathi account and eventually distributed to the beneficiaries, including the applicant, while the balances have been exhibited in the inventory. The respondents' counsel argued that information regarding the bank accounts was circulated to beneficiaries as exhibited in the minutes of the family meeting and were openly discussed. He referred me to Annexures AS7 and AS8.

On the shares in Sykes Insurance Consultants Ltd, the contention by Mr. Welwel is that the deceased was a shareholder of the company and that this has been exhibited, while property on Plot No. 15 Block E Goliondoi, Arusha is owned by the said company, making it exclusive from the estate of the deceased. Regarding the house on Plot No. 195 Mbezi Beach, the

argument is that the same moved to the 1st respondent, a joint owner who enjoyed the right of survivorship.

Learned counsel concluded that, overall, the estate of the deceased has been fully accounted for and that the application is devoid of merits. The respondents prayed that the same be dismissed with costs.

I have read the application, the parties' rival depositions and submissions. The singular question distilled from all that is whether grounds exist for revocation of the probate and, whether, upon revocation, the applicant can be appointed to take up the administration of the estate.

As unanimously agreed by the parties, the respondent's appointment to serve as executors was pursuant to instructions left by the testator of the Will, in this case the deceased. It is also unanimous that, upon appointment, the respondents did not comply with the requirements of section 107 (1) of Cap. 352 which provides as hereunder:

> *"An executor or administrator shall,* ***within six months from the grant of probate or letters of administration****, or within such further time as the court which granted the probate or letters may from time to time appoint or require, exhibit in that court an inventory containing a full and true estimate of all the property in possession, and all the credits, and also all the debts owing by any person to which the executor or administrator is*

entitled in that character, and shall in like manner, within one year from the grant or within such further time as the court may from time to time appoint, exhibit an account of the estate, showing the assets which have come to his hands and in the manner in which they have been applied or disposed of." [Emphasis is added]

It is on account of such failure that the Court enlarged time by a month, to allow the respondents to exhibit the said inventory which they did. It is the information that is in the inventory which has raised a few eyebrows. The contention is that the exhibit is falsified and it contains some concealments.

As stated by counsel for the applicant, the law is clear on circumstances under which grant of probate or letters of administration may be revoked. It is on satisfaction by the court that any of the events under section 49 (1), and the case of ***Joseph Shumbusho v. Mary Grace Tigerwa & Others*** (supra) serves to exemplify such powers. In the instant case, the contention is that the inventory has fallen short and, in some cases, it has concealed or understated the assets constituting the estate. In short, the respondents' fiduciary duty towards the applicant and other beneficiaries is being questioned. This is the contention that the respondents valiantly oppose.

The argument is that everything operated above board and the applicant was involved at every step of the way.

But before I delve into the thick of the parties' contention I will address the issue of belated filing of the inventory. I find this to be a non-issue, precisely because the delays complained about were sufficiently addressed in the ruling delivered by Madam Justice De-Mello in Misc. Civil Application No. 104 of 2019, culminating in an extension of time for filing the inventory for one more month. The inventory was finally filed in Court as ordered, and this is what is now the basis for the applicant's quest for revocation of the probate. It would not augur well, if the applicant was to introduce this issue, once again, while he knows that the matter was dealt with.

With respect to the filing of the accounts of the estate, I subscribe to the reasoning by Mr. Welwel, who argued that multiple applications on this matter had the effect of distracting the parties and deal with nascent issues which were questioning the very tenure of the respondents in the office. This put the filing of the accounts to the buck burner, and it would not be possible for the embattled respondents to file accounts while integrity of what they exhibited in the inventory was on the line. Noteworthy, the applicant's quest for revocation of the respondents' grant came barely a month from the date the inventory was exhibited. There was hardly any time to effect the

distribution and file the accounts. I find the complaint by the applicant lacking any material basis and I do not consider this to be a delay attributed to the respondents.

Turning on to the substance of the application, the issue calling for the Court's attention is whether this is a fit case for issuing an order of revocation of the probate.

The law requires that an administrator or executor of a will, duly appointed to administer the deceased's estate must not only conform to the demands of the testator as contained in the Will, but, in so doing, he has a fiduciary duty of ensuring that he executes his duties with utmost good faith, honesty, trust and confidence towards those that are connected to the estate of the deceased. This should also be manifested in the manner in which he accounts for the assets and liabilities that fall in his hands; and the manner in which he settles liabilities and distributes the residue to the beneficiaries. In our case, this is the duty cast upon the respondents who at whom a finger is pointed as having displayed the opposite of what was expected of them.

While I take note of the allegations of concealment of properties and falsification of the inventory, the applicant has not given any semblance of evidence that proves that the list of assets exhibited through inventory was falsified or concealed with a view to defrauding the beneficiaries, specifically

the applicant. If anything, annexures AS 7 and AS 8 tell an exact opposite story to that applicant's contention. Annexure AS 7 reveals the applicant's participation in a meeting at which deliberations with respect to the estate of the deceased were made. The applicant, the only disgruntled beneficiary of the estate who alleges to have been shortchanged, ought to have gone beyond listing the assets which were allegedly excluded from the inventory by giving concrete evidence, not only of their existence, but also that of the respondents' *malafide* intention of defrauding the applicant. He ought to have also shared some evidence to show that what was deliberated on 6th October, 2018 was not what was implemented, or that he was not in attendance or a party thereto. Doing that would go a long way in discharging the burden cast on the alleger in proving what he alleges.

It would be consistent with the requirements set out under section 110 of the Evidence Act, Cap. 6 R.E. 2019, as elaborated through various judicial pronouncements. In the Court of Appeal of Tanzania's decision in ***Paulina Samson Ndawavya v. Theresia Thomas Madaha***, CAT-Civil Appeal No. 45 of 2017 (unreported), the upper Bench took an inspiration from the commentaries made by the legendary in his work titled: Sarkar on Sarkar's Laws of Evidence, 18th Edn., ***M.C. Sarkar, S.C. Sarkar and P.C. Sarkar***, published by *Lexis Nexis* (at p. 1896). In discussing burden of proof as

enshrined in the provisions of the Indian Evidence, 1872, the following commentary was made:

> ***"…. the burden of proving a fact rests on the party who substantially asserts the affirmative of the issue and not upon the party who denies it; for negative is usually incapable of proof****. It is ancient rule founded on consideration of good sense and should not be departed from without strong reason …. Until such burden is discharged the other party is not required to be called upon to prove his case.* ***The Court has to examine as to whether the person upon whom the burden lies has been able to discharge his burden. Until he arrives at such a conclusion, he cannot proceed on the basis of weakness of the other party…"*** [Emphasis added].

Guiding on the manner in which such burden is discharged, the superior Court borrowed a leaf from a scintillating reasoning by the doyen of judicial pronouncements in the name of Lord Denning who, in the case of ***Miller v. Minister of Pensions*** [1937] 2 All E.R. 372, held as follows:

> *"If at the end of the case the evidence turns the scale definitely one way or the other, the tribunal must decide accordingly, but if the evidence is so evenly balanced that the tribunal is unable to come to a determinate conclusion one way or the other, then the man must be given the benefit of the doubt. This means that the case must be*

decided in favour of the man unless the evidence against him reaches of the same degree of cogency as is required to discharge a burden in a civil case. That degree is well settled. It must carry reasonable degree of probability, but not so high as required in a criminal case. If the evidence is such that the tribunal can say – We think is it more probable than not, the burden is discharged, but, if the probabilities are equal, it is not ….”

In my considered view, the applicant has made no efforts to convince the Court that what is considered to be a missing list of the assets is really in existence and constitutes part of the deceased's estate. Unclear and unverified, as well, is the contention that non-inclusion of the said assets constituted a concealment of such assets with a view to defrauding the applicant or all of the beneficiaries.

The applicant has denied that he was involved in the discussions on the list of properties which constituted the inventory. The denial is contained in the rejoinder to the respondents' submissions, and termed the respondents' arguments as weightless. While it may be true that the respondents' contention is weightless, nothing is inspiring in the applicant's contention that the respondents' fiduciary duty was breached. It is difficult to comprehend how the respondents would apply an exclusionist approach

by having all the beneficiaries roped on one side and cast away the applicant alone.

It should be noted, here and now, that revocation of a grant of probate is such a weighty and agonizing decision that cannot hinge on sketchy or flimsy grounds which are lacking in any concrete proof of the executors' wrong doing or ill motive that borders on breach of fiduciary duties. It is a lot more complicated when the allegation of wrong doing borders on a criminal undertaking which, as Dr. Murungu argued, has the potential of attracting a penal sanction. It requires a higher degree of proof than normal allegations in civil cases. This position is fortified by the decision of the Court in ***Omar Yusuph v. Rama Ahamed Abdulkadir*** [1987] TLR 169. It was held:

> *I think it is now established that when the question whether someone has committed a crime is raised in civil proceedings that allegation need be established on a higher degree of probability than that which is required in ordinary civil cases, the logic and rationality of that rule being that the stigma that attaches to an affirmative finding of fraud justifies the imposition of a strict standard of proof…. In my assessment and as demonstrated above, the evidence that was led against the purchasers and Mr. Ismail fell short of the required standard."*

I take a solid view that the applicant's arguments on this have fallen short of the threshold which would trigger exercise of the Court's power to order revocation of the grant of probate and strip the respondents of the executorship. The contentions are too whimsical to form the basis for granting orders sought. Accordingly, the application is dismissed.

No order as to costs.

Order accordingly.

DATED at **DAR ES SALAAM** this 30th day of May, 2022.

M.K. ISMAIL

JUDGE

30/05/2022