

IN THE HIGH COURT OF TANZANIA
TEMEKE SUB – REGISTRY
(ONE STOP JUDICIAL CENTRE)
AT TEMEKE
PROBATE AND ADMINISTRATION CAUSE NO. 155 OF 2022
IN THE MATTER OF THE ESTATE OF THE LATE NALAILA LAZARO KIULA
AND
IN THE MATTER OF AN APPLICATION FOR LETTERS OF ADMINISTRATION BY
AMANI NALAILA KIULA

RULING

Date of last order: 21/07/2023

Date of Ruling: 23/08/2023

OMARI, J.:

The deceased in this matter, the late Nalaila Lazaro Kiula died intestate on 13 January, 2022. He left surviving him five relatives who are the beneficiaries including the Petitioner who is his son.

When the Petitioner filed the Petition seeking to be appointed as the Administrator of his late father's estate, on 04 August, 2022 the matter turned contentious after Elia Kingu the deceased's widow and Bahati Nalaila Kiula the deceased's son lodged a Caveat on 29 September, 2022 which was followed by the Petitioner's application for Citation to the Caveator under section 59(2) of the Probate and Administration of Estates Act Cap 352 RE

2019(the PAEA) and Rule 82 of the Probate Rules, 1963 (the Probate Rules) on 06 October,2022. After the Citation was duly issued on 31 October,2022 the Caveators entered Appearance on 22 November,2022 vide Affidavits that they each deponed. The Petitioner filed his Counter Affidavits on 06 December,2022 and on 15 December,2022 the Petitioner also filed a Notice of a Preliminary Objection seeking to raise an objection on the following points.

1. That the Caveat filed by the 1st and 2nd Caveator is incompetent for having been supported by an incurably defective Affidavit sworn by the Caveators.
2. That the Affidavit of the 1st and 2nd Caveators are incurably defective for containing defective verification clause, sentiments/has arguments, opinions and conclusions.

On the basis of the above the Petitioner prayed for the Caveator's Appearance to be struck out/dismissed and the letters of Administration be granted to the Petitioner as prayed.

When the matter was called for hearing on 23 February,2023 the counsel for the Petitioner informed the Court that even though they had filed a Notice

of a Preliminary Objection; counsels have advised their clients no settle the matter. On his part Gabriel Masinga, the Caveators advocate confirmed this averment and prayed for an adjournment to allow for the settlement.

It would seem that the idea of a settlement did not impress the 2nd Caveator who refused to settle while the 1st Caveator was amenable to the settlement and had signed the prepared deed.

On 21 July, 2023 when this matter was set for hearing of the points of the preliminary objection the Petitioner still had the services of George Masoud, the 1st Caveator had the services of Elianami Daniel while the 2nd Caveator was represented by Faisal Ally Seif all of whom are learned advocates.

In his submission the learned counsel for the Petitioner began by describing how the Affidavit supporting the 2nd Caveator's Appearance is defective and cannot qualify to support the Caveat against the Petitioner's appointment. The Counsel averred that the said defectiveness can be found in paragraphs 7,8,9,11,13,14 and 15 of the said Affidavit. Counsel went on to argue that the offending paragraphs all contain untrue allegations. Stating further that in paragraph 10 of the Affidavit the 2nd Caveator is accusing the Petitioner of selling a 6 foot shipping container left by the deceased. According to

counsel the 2nd Caveator's averments are that the Petitioner is not a person who qualifies to be an Administrator and to cement this he attached Annexure BNC-2 to his Affidavit but the same does not have the deceased's signature nor source of the said document. Counsel argued further that it is therefore clear that the 2nd Caveator is making untrue allegations against the Petitioner and this goes on to paragraph 12 of the Affidavit.

Further attacking the said Affidavit counsel added that the same contains a prayer for the appointment of the Administrator General to administer the said estate in lieu of the Petitioner, this, counsel averred is in contravention to the principles governing Affidavits. Counsel went on to support his submission by pointing out that the identified paragraphs offend the laws governing Affidavits particularly Rule 3(1) of Order XIX of the Civil Procedure Code Cap 33 R.E 2019 (the CPC) which clearly stipulates that Affidavits should be confined to facts not fabrications, speculations, arguments or laws. He added that the said paragraphs also contravene section 62(1)(a)(d) of the Law of Evidence Act Cap 6 RE. 2022 (the TEA) which qualifies an Affidavit as a written evidence that is substitute to oral evidence and as such it has to be direct evidence with no hearsay or speculations.

Mr. Masoud then finished his submission by stating that if the Affidavit of the 2nd Caveator contains allegations, prayers and extraneous matters then the Appearance by the Caveator is incompetent and the remedy available is for it to be struck out. He contended that the Court of Appeal of Tanzania in a similar situation in **Jacqueline Ntuyabaliwe Mengi and 2 others v. Abdiel Reginald Mengi and 5 others**, Civil Application 332/01 of 2021 struck out the Affidavit for being defective and in essence the whole striking out the whole application. Counsel went on to state that if the Affidavit of the 2nd Caveator is struck out then there will be no Caveat against the Petitioner and because the matter is long standing and the estate does not have an Administrator thus, in danger of being wasted he prayed for this court to appoint the Petitioner to administer the estate and distribute the same to the beneficiaries.

When it was his turn counsel for the 1st Caveator stated that he is in agreement with what Mr. Masoud counsel for the Petitioner has submitted. And, when it was his turn the counsel for the 2nd Caveator submitted that he is leaving it for this court to decide on the points of the preliminary objection raised by counsel for the Petitioner. He further added that he had nothing to argue.

Having considered the submissions by the parties; being that the 2nd Caveator has not in very clear terms conceded to the objection the only issue for this court's determination is whether the points of objection is meritorious and if so what is the way forward.

As already stated this matter turned contentious when the Caveators lodged their Caveat and as per section 52 (b) of the PAEA the matter is to take as nearly as possible the form of a suit whereby the Petitioner is the Plaintiff and the Caveator(s) the Defendant(s) and, the parties file special pleadings. Part of this is that the Caveator has to enter Appearance as per S. 59 of the PAEA and Rule 82(4) of the Probate Rules. The said Appearance done so by the Affidavit of the caveator. In this particular case the Petitioner's advocate is contending that the said Affidavit is defective for among others having paragraphs that offend the laws as regards to Affidavits. The Petitioner's advocate identified specific paragraphs that is 7,8,9,10,11,13,14 and 15.

Looking at the identified paragraphs, they contain various averments. For instance, in paragraph 7 the 2nd Caveator depones that he is opposing the appointment of the Petitioner for not being fit, faithful and capable of administering the estate of the deceased Nalaila Lazaro Kiula. In the following paragraphs the Caveator depones that the Petitioner sold a house

that is part of the estate to the detriment of the widow and other heirs, to evidence the sale he attached pictures of the said house and as Annexure BNK – 1 to paragraph 8 of the said Affidavit. In paragraph 9 he deponed that the Petitioner has been collecting rent totaling TZS 104,840,000 which he has been using himself. While on paragraph 10 he deponed that the Petitioner sold a 6-foot shipping container that is part of the estate. Neither paragraph 9 nor paragraph 10 is with any evidence in support of the allegations.

Furthermore, in paragraph 11 of the Affidavit the 2nd Caveator deponed that the Petitioner was neither proposed nor consented to by the whole family to Petition for letters of administration. Moreover, the 2nd Caveator deponed that the Petitioner did not get along with his father. As evidence, the 2nd Caveator annexed Annexure BNK-2 which is an alleged statement of the deceased. On this statement the Petitioner's counsel contended the statement had no signature of the deceased nor does the 2nd Caveator provide for a source of the document let alone the fact that the Petitioner is contending the telephone number identified as his is not and has never been his telephone number.

Paragraph 12 is a continuation of what is in paragraph 11. While paragraph 13 contains allegations of the Petitioner not caring for the deceased when he was ill. In paragraph 14 the 2nd Caveator has deponed that the Petitioner had complained to the District Commissioner for Kinondoni regarding the condolence monies and attached a reply letter summoning the 2nd Caveator and the deceased's widow to the District Commissioner's office as Annexure BNK 3. Lastly, in paragraph 15 the 2nd Caveator depones that the Petitioner is not fit and prays the Administrator General to be appointed as administrator of the estate in his stead.

Having gone through the contents of the Affidavit I find it prudent to consider the provisions of Rule 3(1) of Order XIX of the CPC which I reproduce as hereunder:

'Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications on which statements of his belief may be admitted: Provided that, the grounds thereof are stated.'

Furthermore, I am mindful of section 62 of the TEA which is to the effect that oral evidence must be direct and what would be needed for an Affidavit to be considered as the substitute of oral evidence and to stand in Court.

The case referred to by the Petitioners counsel that is **Jacqueline Ntayabaliwe Mengi and 2 others V. Abdie Reginald Mengi and 5 others** (supra) is one among many Court of Appeal decisions Canvassing the issue of defective Affidavits and what is to happen to the same after it has been found to be defective. See also **Director of Public Prosecution v. Dodoli Kapufi and Patson Tusalile**, Criminal Application No. 11 of 2008 (unreported), **Lisa E. Peter v. Al- Hushoom Investment**, Civil Application No. 147 of 2016 (unreported) and **Anatol Peter Rwebangira v. Principal Secretary Ministry of Defence and National Service and Hon. Attorney General**, Civil Application No. 548/04 of 2018 (unreported).

Additionally, the Petitioner is objecting on the basis that the 2nd Caveator's Affidavit has information not in his knowledge and the verification clause does not disclose the source of information. This brings me to Order VI Rule 15 (1) of the CPC which provides:

'Save as otherwise provided by any law for the time being in force, every pleading shall be verified at the foot by the party or by one of the parties pleading or by some other person proved to the satisfaction of the court to be acquainted with the facts of the case.'

Furthermore, Order VI Rule 15 (2) of the CPC provides:

'The person verifying shall specify, by reference to the numbered paragraphs of the pleading, what he verifies of his own knowledge and what he verified upon information received and believed to be true.'

This means that where a person is seeking to rely on information that has been obtained from other sources then the same need to be disclosed. After scrutiny of the identified paragraphs of the 2nd Caveator's Affidavit I am inclined to agree with Petitioner's counsel that the 2nd Caveator's Affidavit does contain information that needs to have had the source(s) disclosed. Accordingly, the verification clause needed to comply with the law, not doing so renders the verification clause defective.

When juxtaposed to the legal provisions and the various case law the 2nd Caveators Affidavit in support of his Appearance contains information for which the deponent has not disclosed the source which renders one to discern is either fabricated or speculations likewise the same has sentiments and feelings as well as prayers. Moreover, the said Affidavit does have a verification clause that does not disclose the source of information that is not in the knowledge of the 2nd Caveator.

It is from the foregoing that I find the Petitioner's points of objection as meritorious and sustain the objection. In that regard the Appearance by the

Caveator is incompetent hence non – existent; thus, the status of the Application for Grant of Letters of Administration is as if there is no Caveat against the Petitioner.

As regards to the Petitioner Counsel's prayer that the Petitioner be appointed as the Administrator of the deceased Nalaila Lazaro Kiula's estate for the same is in danger of being wasted as the matter has been in Court for long. In considering this prayer I seek to go back to the law on the appointment of Administrators. In appointing an Administrator, a probate Court is guided by the PAEA. Section 2(1) of the PAEA defines an Administrator to mean:

'a person appointed by the court to administer the estate of a deceased person when there is no executor or no executor is able and willing to act, and includes, when Part VIII applies and subject to the provisions thereof, a person appointed an administrator under that Part'

From that definition, simply put an Administrator is a person appointed by the court to collect and distribute deceased person's estate when the deceased has died intestate or where there is a Will but it did not appoint an executor or the executor refuses to act. On who should be an administrator, this court in **Benson Benjamini Mengi and 3 others v. Abdiel Reginald Mengi and Another**, Probate and Administration Cause No. 39 of 2019

when referring to the case **of Saleli Doto v. Maganga Maige and Others**,
PC Probate Appeal No. 6 of 2018 had the following to say:

'In appointing the administrator of the deceased's estate, the main consideration is the reputation and capability of such person to act faithfully, diligently and impartially in administering the estate to the rightful owners. Therefore, Court can appoint any reputable person who is not even a member of the family or officer of the Court for that matter to be an administrator of the estate of the deceased.'

The main qualification for an administrator is therefore tested through a reputation and capability to act faithfully, diligently and impartially in administering the estate to the rightful owners. Furthermore, section 33(1) of the PAEA states:

'Where the deceased has died intestate, letters of administration of his estate may be granted to any person who, according to the rules for the distribution of the estate of an intestate applicable in the case of such deceased, would be entitled to the whole or any part of such deceased's estate.'

The section allows any person who has interest in the deceased's estate to petition for the letters of administration and the court may entitle the whole or part of it depending on the circumstances, hence the Petitioner herein being an heir of the deceased's estate is eligible and qualified to petition for

letters of administration by virtue of section 33 (1) of the PAEA. However, the Caveator sought to object this Petition, but, as already explained his Appearance could not stand as it was supported by a defective Affidavit. I therefore see no reason why in the absence of any objection the Petitioner, Amani Nalaila Kiula cannot administer the estate of the late Nalaila Lazaro Kiula. The Petitioner, Amani Nalaila Kiula is hereby appointed as the Administrator of the estate of the late Nalaila Lazaro Kiula. In so doing he shall exhibit the inventory of the deceased's estate and accordingly file the final accounts on the same within the time as shall be prescribed by this court. Due to the nature of the matter I make no orders as to costs. It is so ordered.




A.A. OMARI

JUDGE

23/08/2023

Ruling delivered on 23rd August, 2023.


A.A. OMARI

JUDGE

23/08/2023

Orders:

Grant of letters of Administration to issue.

Inventory of the estate to be filed by 09 October, 2023.

Hearing on 16 October, 2023 at 1100Hrs beneficiaries to be present.

SGD. A.A.OMARI

JUDGE

23/08/2023