IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM SUB DISTRICT REGISTRY)

AT DAR ES SALAAM

PROBATE AND ADMINISTRATION CAUSE NO. 15 OF 2017

IN THE MATTER OF AN APPLICATION FOR LETTERS OF ADMINISTRATION BY TABU RAMADHANI MATTAKA.....PERTITIONER/PLAINTIFF

VERSUS

FAUZIYA HARUNI SAIDI MGAYA.....CAVEATOR/DEFENDANT

RULING

Date of last order: 08/12/2022

Date of ruling: 17/02/2023

E.E. KAKOLAKI, J.

On 1st March, 2022 the Court of Appeal in Civil Appeal No. 456 of 2020 in which the petitioner had appealed against the decision of this Court dated 30/03/2020 that dismissed her petition, allowed the appeal by quashing the impugned judgment and set aside the dismissal order while remitting back to this Court the case file for composition of the fresh judgment or before that hear parties on the competence of the petition. In execution of the Court of Appeal orders on 04/08/2022, parties were summoned before this Court with view of informing them of the Court of Appeal orders and its execution, in which the caveator/defendant moved the Court to be heard on the competence of the petition before resorting to composition of the judgment

as directed by the Court of Appeal. It is from that prayer which was cordially granted this ruling seeks to address the preliminary objection raised by the caveator/defendant that the petition before the Court is incompetent.

The facts leading to this petition in a nutshell are imperative to be stated. The petitioner is the widower of the late Ajuza Shabani Mzee, who during her life time had two children, Fauzia Haruni Saidi Mgaya and the second one who is deceased now but survived with a child going by the name of Hakika Shabani Mzee. The petitioner herein applied for probate and administration of the estate of his late wife, the petition which faced opposition from the deceased's daughter, Fauziya Haruni Saidi Mgaya, one of the reasons been that, the petitioner is not trustworthy. However, the reasons advanced by her were considered meritless by this Court (Masabo, J) when composing its judgment before the issue was raised suo moto on the competence of the petition and decided on it without availing parties with the right to be heard, the fact which triggered the successful petitioner's appeal to the Court of Appeal of Tanzania. In that appeal one of the grounds was that the trial judge having formed opinion that the petition is incompetent grossly misdirected herself in fact and in law for proceeding to determine the incompetent petition on merits and dismissed the incompetent

petition. Having heard the appeal on merit and allowed the same, it was the Court of Appeal's decision that, the file be remitted to this Court for composition of judgment. It was further directed that, if this Court so wishes could allow parties to address it on the issue competence of the petition and decide on it.

As alluded to above when the matter came before me, the caveator prayed that this court hear both parties on competence of the petition, the prayer which was granted and hearing date set. The matter was heard viva voce as both parties were represented, the petitioner being represented by Mr. Ludovick Nickson whilst the caveator enjoyed the services of Mr. Riziki Walburga, both learned advocates.

It was Mr. Walburga who took the floor first and submitted that, the issue of incompetence of the petition emanates from the affidavit in lieu of consent filled by the petitioner. He argued that, the said affidavit is against Rule 39 (f) of the Probate and Administration of Estate Rules (the Probate Rules) which requires the petition for letters of administration subject to compliance with the provisions of Rule 71 and 72 of the Probate Rules amongst others, to be accompanied with the consent of heirs. He contended that, in this petition there were three heirs, the petitioner himself, Fauzia Haruna Said

and Hakika Mzee Shabani, of which the only available consent is that of Hakika Mzee Shabani whilst that of Fauzia Haruna Said is missing. He said, under Rule 72(1) of the Probate Rules, it is the requirement of the law that, where such consent of heirs is not available the petitioner shall file an affidavit giving the full names and address of the person whose consent is not available together with reasons as to why such consent has not been obtained.

He went on submitting that, the purported filled affidavit in lieu of the consent of Fauzia Haruna Said contravened the provisions of Rule 72 (1) of the Probate Rules for not including the address of the said heir, and the reasons as to why her consent could not be secured. To reinforce his argument, Mr. Walburga contended section 53 (2) of the Interpretation of Laws Act, provides that where the word "shall" is used, the same makes mandatory performance of the function. It was his take that, as under Rule 72 (1) of the Probate Rules, the disclosure of address of the heir and the reasons as to why his consent was not secured is mandatorily invoked by the use of the word *'shall'* in the provision, hence its non-compliance is fatal and renders the petition incompetent. To buttress his position, he referred the Court to the case of **In The Matter of Estate of the late Col. Secilius**

kutisa Fussi (Deceased) and In the Matter of Application for Grant of Letters of Administration by Dorah Kawawa Fussi, Probate and Administration Cause No. 57 of 2010 (HC – Unreported) at page 10, where this Court held lack of consent of heir prejudiced the rights of beneficiaries hence refused to grant the petition.

It was Mr. Walburga's argument that, in this case, the affidavit in lieu of the consent only mentioned the names of beneficiaries (3 of them), but failed to indicate why the consent of Fauzia Haruna Said was not obtained which the mandatory requirement of the law. In winding up, he submitted that, much as the petitioner failed to comply with the mandatory requirement of the law, their petition be struck out for being incompetent.

In rebuttal, Mr. Nickson implored the Court to dismiss the objection and continue to compose the judgment as the petition is competent before it. He advanced two reasons on that account saying, **One**, the provisions of Rules 39, 71 and 72 of the Probate Rules, collectively require the petitioner to have consent of the beneficiaries when petitioning, and where the consent is not obtained, the petitioner is required to file an affidavit in lieu of consent of heirs, which according to him was accompanied to the petition as it was filed in Court on 24/02/2017. On that note he was of the view that, the

requirement of filing the affidavit was complied with. **Secondly**, he contended, the affidavit has the names of all beneficiaries and the caveator is listed as the 2nd beneficiary. In justifying his contention the Court was refferred to paragraph 3 (1) of the affidavit which shows only two beneficiaries out of three consented. According to him this means that the caveator did not give her consent. Mr. Nickson admitted that, the affidavit does not include the address of the non-consenting heir and the reasons as to why she has withheld her consent. However, he took the view that, the arguments of non-compliance of the law for not including those two aspects in the affidavit at this stage does not hold water as it has been overtaken by event basing on the reason that, the aim of the affidavit having address of the caveator is to enable service to the caveator to make her attend the Court, but rather in this case the caveator was before the Court and gave her evidence as now the case is for judgment. On that note it was his submission that, there is no need or use of that address at this stage anymore.

As regard to the absence of the reasons for non-consenting party it was his submission that, the caveator gave reasons during the trial as to why she withheld her consent. He contended that, the said reasons are also reflected

in the Court of Appeal judgment at page 2, where it was stated that the petitioner is not trustworthy and that caveator was not invited to the family meeting. On that note he submitted that, this petition cannot be rendered incompetent for those reasons, as to find otherwise will amount to opening a pandora box of an endless litigation by parties.

Regarding the use of the word 'shall' in the claimed mandatorily coached provisions allegedly contravened by the petitioner, it was his argument that, the learned counsel is applying literal meaning. He implored the Court to apply mischief or golden rule of interpretation of statutes to see the mischief aimed to be cured by those rules. He added that, it is the wish of the Court of Appeal that this Court proceed to compose the judgment instead of striking out the petition before it. He referred the Court to page 6 of the said judgment, where the Court of Appeal refused to strike out the appeal instead continued to determine it on merit so as to see to it that this matter is dealt with to its finality. It was his submission therefore that, should this Court find that, what is contended by the caveator contains an irregularity, then be pleased to find out that such irregularity does not hinder it Court to continue determining the controversy between the parties. He fortified his stance by citing the case of **Gasper Peter Vs. Mtwara Urban Water**

Supply Authority (MTUWASA), Civil Appeal No.35 of 2017 (CAT)-unreported) at page 13, where the Court held that, the law does not demand a hundred percent perfect record of the proceedings, but rather adequate record that can answer issues raised on appeal. In that regard, he prayed the Court to disregard the said non-compliance of the law and proceed to compose the judgment. Concerning the cited case of **Victoria Jacob and Another vs Israel Makinda,** Misc. Land Application No. 57 of 2020 relied upon by the caveator, it was his submission that the same is distinguishable to the circumstances of this matter, as it was decided basing on fact that there was no consent obtained at all while in the present matter there was affidavit in lieu of consent. In winding up his submission, it was his prayer that, in the event the Court finds that the irregularity affects the competence of the petition itself, then the petitioner be allowed to file a supplementary affidavit to cure that irregularity.

In a short rejoinder, Mr. Walburga attacked Mr. Nickson submission that the issue of non-compliance of the law is overtaken by event since the caveator was in Court and presented evidence. In his view that does not justify breach of the law as the law ought to have been complied with to the letters, which is why even the order of the court of appeal was clearly made for this court

to hear the parties on the competence of the petition. He then maintained his prayer that this petition be struck out for being incompetent.

I have cautiously and keenly considered the contending submissions by the learned counsels from both sides as well as revisiting the complained of petition duly filed in Court on 24/02/2017. From the parties' splendid submissions, the crucial issue to be resolved by the Court is whether the present petition is incompetent as claimed by the caveator.

From my reading of the Probate Rules, it is the position of law under Rule 39(f) of the said Probate Rules that, subject to the provisions of Rules 71 and 72 of the Probate Rules, a petition for letters of administration shall be accompanied by the consent of heirs. Rule 71(1) of the Probate Rules makes it mandatory that, where an intestacy petition is preferred for grant of letters of administration, then it shall be supported by written consent of the beneficiaries of the estate, unless the Court direct otherwise. For clarity the said Rule 71(1) of the Probate Rules provides thus:

> 71(1) *Where an application for the grant of letters of administration is made on an intestacy the petition* ***shall****, except where the court otherwise orders,* ***be supported by written consent of all those persons who according to the rules for the distribution of the estate of an***

intestate applicable in the case of the deceased, would be entitled to the whole or part of his estate*. (Emphasis supplied)*

Further, Rule 72(1) of the Probate Rules provides for the alternative prerequisite condition where the said consent cannot easily be obtained or is denied by the person supposed to give it. The alternative is for the petitioner to file in Court an affidavit giving full address of the person whose consent is absence and the reasons why such consent has not been secured. The said Rule 72 (1) of Probate Rules states:

72(1) Where a person whose consent is required under these Rules refuses to give such consent, or if such consent cannot be obtained without undue delay or expense, ***the petitioner shall, together with his petition for grant, file an affidavit giving the full name and address of the person whose consent is not available*** *(where such name and address are known) and* ***giving the reasons why such consent has not been produced****. (Emphasis supplied)*

From the above exposition of the law, it is true and I agree with Mr. Walburga's proposition that, the said provisions of the law are coached in mandatory terms for using an imperative or commanding word *"shall"*. The law under section 53 (2) of the Interpretation of Laws Act, [Cap. 1 R.E 2022]

provides that when the word *'shall'* is used to confer function then the same must be performed. Section 53(2) of the Interpretation of Laws Act reads:

> *(2) Where in a written law the word "shall" is used in conferring a function, such word shall be interpreted to mean that the function so conferred must be performed.*

As the word "shall" when conferring function the same must be performed, it is apparent to me in the present matter that, under the provision of Rule 71(1) of the Probate Rules, the respondent was duty bound to annex to the petition filed in this court either the written consent of caveator, or an affidavit duly showing her address and the reasons as to why her consent was not obtained, the latter being daughter of the deceased and the heir of the estate of the late Ajuza Shabani Mzee. As rightly submitted by Mr. Nickson, it is true that the affidavit was filed before the Court accompanying the petition. However, glancing at it, it is noted that the same was in infraction of Rule 72 (1) of the Probate Rules for not containing the name of the person in whose respect it was made, and the reasons as to why her consent could not be procured, the omission which in my firm view is incurable defective rendering the petition incompetent.

Mr. Nickson is of the view that since the caveator was in Court and gave her evidence as to why she did not give her consent, then the omission is cured hence the petition is rendered competent. With due respect to Mr. Nickson, I am not prepared to heed in to that lame excuse as if the law meant so, it could have categorically stated it to be an alternative to dispense with the requirement of consent of heirs or affidavit in lieu of containing address and reasons for denial of consent. In short presence of the caveator in Court does not justify breach of the law as the law ought to have been complied. It is trite law and I need not cite any authority that, rules of procedure are there to be observed strictly by the parties otherwise there would be no meaning of having them in place. That aside, glancing from the provision of rule 72 (1) of the Probate Rules, what is required in substitution of the written consent of the heir is the affidavit of the petitioner, explaining the reasons as to why the consent was withheld, and not justification of the omission by mere presence of the heir in Court explaining as to why she withheld her consent.

In the event it is the findings of this court that, the petition is in contravention of Rule 72 (1) of the Probate Rules, the infraction which I hold renders the petition incompetent.

The follow up question is what the remedy is when the petition/application is held incompetent. The trite position in our jurisdiction is firmly settled in that, the only remedy for such incompetent petition or application is to have it struck out. See the case of **Mic Tanzania Limited Vs. Minister of Labour and Youth Development and Another**, Civil Appeal No. 103 of 2004 (CAT-unreported).

In the event and for the fore stated reason, the petition is hereby struck out for being incompetent.

Each party to bear its own costs.

It is so ordered.

DATED at Dar es salaam this 17th February, 2023

E. E. KAKOLAKI

JUDGE

17/02/2023.

The Ruling has been delivered at Dar es Salaam today 17th day of February, 2023 in the presence of Ms. Ester Mlimandago, advocate holding brief for advocate Nickson Ludovick for the petitioner, Mr. Riziki Walburga, advocate for the caveator/defendant and Ms. Tumaini Kisanga, Court clerk.

Right of Appeal explained.

E. E. KAKOLAKI
JUDGE
17/02/2023.