

**THE UNITED REPUBLIC OF TANZANIA**

**JUDICIARY**

**IN THE HIGH COURT OF TANZANIA**

**MOROGORO DISTRICT REGISTRY**

**MOROGORO**

**PROBATE APPEAL NO. 01 OF 2023**

*(Originating from Probate cause no. 56 of 2022 at Morogoro District Court)*

**AHMADI DAUD NYABU** (*the Administrator of the Estate of the late Daud Mathew Nyabu*) ..... **APPELANT**

**VERSUS**

**REHEMA JOHN LYIMO** (*the administratrix of the Estate of late Jamila Daud Nyabu*)  
..... **RESPONDENT**

**RULING**

**Date of last order 06/02/2023**

**Date of ruling 21/02/2023**

**MALATA, J**

This is a ruling in respect to the preliminary objection raised by the respondent on probate application no. 56 of 2022. The objection raised is to the effect that Probate appeal no. 1 of 2023 is taken by event. since Probate no. 3 of 1985 has already been closed since 22<sup>nd</sup> December, 2022 and the administrator has discharged her duties.

When this matter came for hearing of the preliminary objection the appellant was represented by Mr. Bartalomew Tarimo, assisted by Ms.

Sophia Omary while the respondent enjoyed the service of Mr. Mkilya Daudi, learned Counsel.

Submitting on preliminary objection, Mr. Mkilya stated that the appeal is overtaken by events as the said Probate Cause has already been closed executed and closed since 22/12/2022, as such, the administrator is no longer accountable for it.

He submitted that, the basis of their submission is section 107 of the Probate and Administration of Estate Act. Cap. 352, R.E.2019 read together with Rule 106 and 107 Of GN. 369 of 1963.

Mr. Mkilya further submitted that, the decision to appoint the respondent was made on 20/12/2022 and the present appeal was filed in court on 9/01/2023. As such the appeal was filed nineteen (19) days later after the closure of Probate no. 3 of 1985.

He submitted that, when the inventory of the deceased is closed this court can do nothing to remove or annul what has already executed.

To support his submission Mr. Mkilya referred to the case of **Mariam John Mallya and 3 others vs. Marian John Mallya** Misc. Civil Application no. 7 of 2021, HCT – Temeke, page 9 and 10 of the judgement. He, however stated that since the referred judgement is not binding in this court, it's the respondent's prayer that in order to enhance consistence of court decision the decision is highly persuasive.

On 07/01/2023 before Hon. Lyatuu, Resident Magistrate, the court was informed by the Respondent on the steps about to be taken that is closing the Probate, Mr. Tarimo prayed for adjournment to 12/01/2023 where it was expected of him to file objection if any, but none was filed.

As there was no objection, the Resident Magistrate closed the account on Probate no. 3 of 1985 and ordered for return of letter of administration. It is the respondent's submission that, the prayer to close Probate was given 07/01/2023 in the presence of Mr. Tarimo.

Mr. Mkilya submitted that, the presence of the appeal had nothing to do with the pending appeal before the court. To support his submission, he cited the case of **Edna Mfuruki vs. Grace Mfuruki**, PC Civil Appeal no. 16 of 2021, HC Bukoba at page 6 where the Court, referred the Court of Appeal case of **Mohamed Ahmed Almar vs. Fatuma Bakari and another** Civil Appeal no. 71 of 2012 quote.

He submitted that, in the present case the inventory was filed on 22/12/2023 and up to the date of filing appeal on 09/01/2023 there was no objection on the inventory filed on 22/12/2022. The appellant was served with inventory on the same date and prayed to work on it but he did not do so. However, he preferred an appeal before this court challenging the main decision of Probate Cause no. 3 of 1985 issued on 20/12/2022 on revocation of administrator.

The administrator had no capacity to be sued following the closure and order of return of letter of administration. He cemented his submission by citing Civil Case no. 320 of 2021 **Andrew C. Mfuko vs. George C. Mfuko** page 5

Given the nature of the preliminary objection as per Section 107 of Probate and Administration of Estate Act, the probate case get closed filing of upon closure the closure and return of letter of administration.

The second point is that, when the court is marking the matter closed is not a matter of Law but practise, that is done as custodian of justice. In this case the inventory was filed on 22/12/2022 all the beneficiary signed save for the appellant who however has not challenged the inventory and statement of account. On 09/01/2023 Mr. Tarimo prayed to be served with the inventory and statement of account to see if he can object or not. On 17/01/2023 when the matter came for hearing the appellant did say anything in respect of inventory and statement of account, but he informed the court that there was an appeal in the High Court.

Mr. Mkilya stated that the remedies available to the appellant are stated in the case of **Mohamed Ahmed Almar (supra)**, he prayed for this appeal to be dismissed with costs.

In reply to the point objection raised by the respondent, Mr Tarimo learned counsel stated that the objection has no merit, the decision sought to be appealed was delivered on 20/12/2023. This appeal was filed in accordance with section 72(1) and (2) of Cap 352, R.E 2019.

On 22/12/2022 was the filing of an inventory and the parties were summoned to appear on 09/01/2023. Both parties were present and the Mr. Tarimo prayed to the court to be served with copy of inventory and statement of account and was accordingly served on same date, on 09/01/2023. The matter was scheduled for necessary orders on 17/01/2023 including raising objection if any.

On 17/01/2023, Ms Sophia learned Adv appeared before Hon. Lyatuu, RM where she informed the Court that, they have filed an appeal contesting the decision of Probate no. 56 of 2022, it is not correct that once the inventory is filed in court then it cannot be challenged. As per section

107(4) of PAEA, the appellant challenged the decision of the inventory and final accounts by filing Probate Appeal no. 1 of 2023. The filing of inventory and final accounts is not a bar but court order closing the probate which in our case was done on 17/01/2023.

However, the appellant did not apply for stay of inventory and statement of account. The appeal is challenging revocation made on 20/12/2022 via probate No.56 of 2022. He prayed for the Preliminary Objection to be dismissed with costs.

By way of rejoinder Mr. Mkilya reiterated the submission in chief, that after filing an inventory and final accounts neither heirs challenged the inventory and final accounts. On 09/01/2023 there was an order of the court for the appellant to address on the inventory but he did not do so. For the appeal to stand as an objection to the inventory and final accounts, is uncalled for as the closing of the probate was on 17/01/2023 and the appointment was on 20/12/2023. The fact that there is a pending appeal as claimed by Mr. Tarimo is not a bar to closing of inventory and statement of account and return of letter of administration.

For a probate matter to be closed the inventory and final accounts has to be filed in court in accordance with section 107(1) of the Probate and Administration of Estate Act, Cap 352, R.E 2019 which states that;

*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.*

In probate or administration matters the administrator is given power by the court to collect assets and liabilities of the deceased and file the inventory form under Rule 80 Of the Probate Rules and file account of estate of the deceased under form number 81. Upon filing of inventory and final statements the beneficiary is entitled to be given copy of any inspect and raise objection if any. Section 107(5) of the PAEA provides that;

*(5) Any beneficiary under a will, person entitled to a share under an intestacy or unsatisfied creditor shall be entitled to inspect the inventory and accounts of an executor or administrator.*

In a simple language, this means that, heirs and creditors have a right to inspect the inventory or accounts of estate once filed. It is their right and it has a big purpose behind. The court has to make sure that they are accorded this right. The court underscored the right of inspection and file objection in **Walter Frank Mongi and 2 others vs. Frank Mrekio Mongi**, Misc. Civil Application no. 566 o 2021 (Kakolaki J) where it said thus:

*'When the inventory and accounts are filed, beneficiaries will retain the right to inspect them and file their objections over the same, if any.'*

Further the Court of Appeal in the case of **Joseph Shumbusho vs. Mary Grace Tigerwa and two others**, Civil Appeal no 183 of 2016, the court emphasised on the importance of keeping the beneficiaries informed about inventory and accounts of deceased estate by stating that;

*The rationale of exhibiting the inventory and accounts is to keep the beneficiaries informed and to have transparency in the execution/administration of the deceased's estates. It is therefore implicit in the Probate and Administration Act that a legal representative owes a fiduciary duty to the heirs and beneficiaries.*

It is my settled view that, where the administrator is in breach of section 107 of the Probate and Administration of the Estate Act [Cap. 352 R.E 2002] for failure to file inventory or accounts, the court in terms of section 49 of the Act can revoke the letters of administration either suo motu or upon application by any beneficiary.

From the court's records the revocation and appointment of the new administrator the respondent was made on 20/12/2022, on 09/01/2023 the respondent had completed the task of collecting and distributing the estate of late Daud Mathew Nyabu. This is evidenced by filed forms no. 80 and 81 in the court's records.

On 09/01/2023 the appellant was served with copies of inventory and final accounts in compliance with section 107 of the PAEA with directive should he had objection raise the same and the matter was adjourned to 17/01/2023. No objection was raised by any of the heirs regarding the inventory and final accounts of the estate except that the appellant did

not sign but filed an appeal challenging revocation made on 20/12/2022 not the inventory and final accounts.

On 17/1/2023 the court ordered for closure of inventory and final accounts and return of letter of administration. The closing order has the effect of closing the probate and discharge the administrator from duties. This position was stated in the case of **Andrew C. Mfuko vs. George C. Mfuko (an administrator of the Estate of late Clement N. Mfuko)** that;

*On our part having heard the advocates submission to the question posed. There is no dispute that the order of the High Court in the Probate case closed the matter with the result that the respondent **ceased to be an administrator**. Having vacated the office as administrator he could **not sue or be sued in his capacity as administrator**.*

From the court's records, it is clear that probate no. 3 of 1985 was duly closed on 17/1/2023 as such the administrator ceased to legal role from that date thus incapable of suing or be sued in that capacity.

Much as the appellant did not challenge the inventory and final accounts and return of letter of administration as per order dated 17/1/2023, yet he did not apply for stay of execution of anything ordered from Misc. Probate no. 56 of 2022 pending determination of appeal.

The appeal was filed under section 72 of the Probate and Administration of Estate Act which states that;

*72 (1) An appeal shall lie from an **order granting or refusing probate or letters of administration** made in contentious*



*cases as if such order were a decree, and from any other order made in such cases if an appeal would lie therefrom in a suit according to the provisions of the Civil Procedure Code or any enactment replacing the same.*

The filing of an appeal by the appellant did not apply as an automatic stay of decision made in Misc. Probate no. 56 of 2022. As such, the appellant was required to apply for stay of execution of any order Order XXXIX rule 5 of the Civil Procedure Code, Cap.33 R.E.2019 pending determination of appeal. The above cited Order provides that;

*"An appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the Court may order, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree but the Court may, for sufficient cause, order the stay of execution of such decree"*

It is a settled position of the law that, in probate matters when the inventory has been filed in court by administrator and no objection has been raised by any of the beneficiaries, the probate or administration cause to be closed and letter of administration is accordingly returned. In this case, everything was done thence closure of the same on 17/01/2023.

The closure relinquished the administrator from suing or be sued as such had no more capacity from legally existing as administrator following the closure.

The administrator once the probate is closed lacks legal mandate to sue or be sued under that capacity, it is therefore if the heir has any complaints against the administrator the remedy or proper way would be to proceed either in civil or criminal and meet the standard of proof that fit the kind

of allegation. I am convinced that this is the position provided for in the case of **Mohamed Al Lazaar** (supra) where the court has firmly pronounced on the legal position and remedy after a probate matter is effectively marked closed where the court stated;

*if they are also convinced that he either fraudulently converted some properties forming part of the estate, and/or that he deliberately exhibited a false inventory or account, they are equally free to institute criminal proceedings against him in accordance with the provisions of the governing laws.*

All said and done and based on the afore stated legal principles, it is, therefore certain that, **one**, the administrator was appointed on 20/12/2022, **two**, administrator discharge his duties of collecting and distributing the estate of the late Daud Mathew Nyabu to the heirs the appellant herein inclusive, **three**, on 09/01/2023 the administrator filed inventory and final statement of accounts with the court signed by the heirs save for the appellant herein, **four**, on 09/01/2023 appellant was issued with copy of inventory and final statement of accounts with view of either objecting or not, **five**, as per court directives the appellant was to object before 17/01/2023, **six**, appellant and the rest of the heirs of estate of the late Daudi Mathew Nyabu did not raise any objection to the same, **seven**, on 09/01/2023 the appellant filed appeal challenging revocation of administrator against an order issued on 20/12/2022, **eight**, for the entire period of administration there was no order for stay of any duty discharged by the administrator pending determination of any act either before the court or elsewhere, **nine**, on 17/01/2023 the Resident Magistrates court ordered for closure of Probate No.3 of 1985

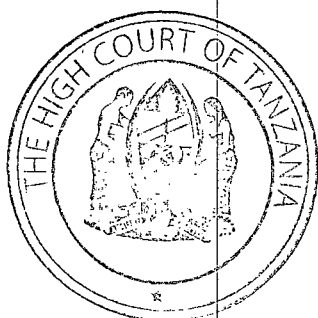
and return of letter of administration, *ten*, upon closure the administrator ceased to exist and being capable to sue and be sued,.

It is therefore in this court's view that, all issues of collection and distribution of the estate of the late Daudi Mathew Nyabu and inventory and final statements of accounts in respect to Probate No.3 of 1985 were legally closed on 17/01/2023. As such, the administrator of the estate of the late Daudi Mathew Nyabu became legally non-existent with effect of that date. Further, Appeal No.1 of 2023 by the appellant challenging revocation cannot therefore withstand against the non-existent legal person. Had the administration stayed, thus no closure of Probate No.3 of 1985, the appeal could have legs to stand on, to the contrary it cannot with stand against the non-existent administrator whose mandate ceased on the closure date.

Consequently, the preliminary objection by the respondent is accordingly upheld and the appeal is hereby dismissed. Cost to follow the event.

It is so ordered.

**Dated at MOROGORO** this 21<sup>st</sup> February 2023.



  
G. P. MALATA

**JUDGE**

21/02/2023