

IN THE HIGH COURT OF TANZANIA

DODOMA DISTRICT REGISTRY

AT DODOMA

DC. CIVIL APPEAL No. 17 of 2022

*(Originating from Probate and Administration Cause No. 117/2021 of Dodoma
District Court at Dodoma.)*

DORICE MPOLI APPELLANT

VERSUS

MWAJUMA LAWRENCE MATEE RESPONDENT

Date of Last Order: 07th March 2023

Date of Judgment: 17th April 2023

KHALFAN J.

JUDGMENT

Dissatisfied with the decision of the Trial Court, the Appellant appeals to this Court on the following grounds:

1. That, the Trial Court had gravely erred in law for entertaining the matter before it in total disregard of laws and procedures governing contentious probate.
2. That, the Trial Court erred in law and in fact by involving assets that do not belong to the deceased and proceeded to declare the same as part and parcel to the estate of the deceased.

The Appellant wherefore prays to this court to allow the appeal by quashing the judgment and its proceedings and setting aside the orders therein.

At the hearing of this appeal on 7th November 2022, the Appellant was represented by Mr. Emmanuel Bwile, Learned Advocate; and the Respondent appeared in person without legal representation. While at the hearing, the Appellant through his Advocate stated that; according to section 58 and 59 of the Probate and Administration of Estates Act, [Cap 352 R.E 2002], (hence-forth "PAEA") and Regulation 82 of the Probate Rules G.N 10 of 1963, (hence-forth "the Rules") it is required that the Trial Magistrate follows the directives in that law. However, the way the matter was heard, did not follow the said provided rules especially Regulation 82 of the Rules which stipulates in details on how such matters are to be dealt before the court.

The Appellant insisted that after submitting the caveat, the Trial Magistrate was required to give the Civil Suit a Number and treat the matter as a civil suit but in the trial proceedings and the judgment, the Trial Magistrate failed to treat the matter as such and he cited the case of **REVENANTH ELIAWORY MEENA vs ALBERT ELIAWORY MEENA and Another**, Civil Revision No. 1 of 2017 as referring to page 13 and 19

it provided on how to deal with the proceedings particularly section 58, 59 of PAEA and Regulation 82 of the Rules.

After the Caveator entered appearance, the Respondent failed to reply in form of counter affidavit and the Trial Magistrate proceeded with hearing in that way the procedure was not followed in dealing with the contentious matter and to cure that the matter is required to return to the Trial Court and to rectify the error and proceed, he cited a case of **EVA NDIMANGWA MRUTU vs. MKUNDE PETER KITUNGA**, Civil Case No. 68 of 2017.

The Appellant continued to contend that the Trial Court erred in law and in fact by involving assets that do not belong to the deceased and proceeded to declare the same as part and parcel to the estate of the deceased, those properties which were declared includes:

- i. A house at Handali Village in Chamwino District.
- ii. A pharmacy located at Area C within Dodoma City.
- iii. Landed property at Ipagala area within Dodoma City.

The Appellant stated that the said properties were not supposed to be included as part of the deceased's properties and should not be included as part of the deceased's estate; and that he prayed for this court to grant this appeal.

On reply, the Respondent stated that they considered the Appellant as their mother because she was married to his father after their biological mother passed away and had one child from their father; and disagreed that the properties mentioned by them solely belonged to the Appellant. This is because the Appellant had acquired them while she was living with the deceased, and she wondered at her denying since she was with their deceased since 1998; as both were appointed by the Trial Court to administer the deceased estate but the Appellant was not faithful in administering the deceased estate and do justice to the deceased, and prayed what he stated in her reply to be considered with costs.

In rejoinder, Mr. Emmanuel Bwile, reiterated what he had stated earlier and added up that the Respondent introduced the issue of joint efforts and that is not the right place to bring such a matter as it concerns with the issue of Matrimonial and what he required to state was the percentage of the deceased's estate otherwise it remains to be the Appellant's properties. Finally, he prayed for this court to grant this appeal.

Having analysed both parties' submissions, I find it pertinent to determine the issue raised by the Appellant on the ground that the Trial Court had entertained the matter without following the laws and procedures governing contentious probate.

According to the law, section 58 of PAEA states that:

Any person having or asserting an interest in the estate of the deceased may enter a caveat against the probate grant or letters of administration.

A caveat may be entered with the High Court or, where the deceased at the time of his death had his fixed place of abode within an area for which a District Delegate has been appointed or application for probate or letters of administration has been made to a District Delegate, with that District Delegate.

Immediately on a caveat being entered with a District Delegate he shall send a copy thereof to the High Court.

Where a caveat lodged with the High Court discloses that the deceased at the time of his death, has his fixed place of abode within an area for which a District Delegate is appointed, the Registrar shall send a copy thereof to that District Delegate.

A caveat shall remain in force for four months after the date upon which it was lodged (unless sooner withdrawn) but, subject to the provisions of section 59, may be renewed.

Also, section 59 of PAEA states that:

Save as provided in this section, no proceedings shall be taken on a petition for probate or letters of administration after a caveat against the grant or a copy thereof has been entered with a court to whom application has been made so long as the caveat remains in force.

Where a caveat has been entered, any person who petitions for a grant of probate or letters of administration shall apply for the issue of a citation to the caveator calling upon him to state, within such time as may be specified therein, whether he supports the grant of probate or letters of administration to the petitioner and, if he does not, requiring him to enter an appearance to the petition.

Where a caveator enters an appearance, the court shall proceed with the petition in accordance with paragraph (b) of section 52.

Where a caveator gives notice that he supports the petition, or where he fails to give notice to that effect and fails to enter an appearance to the petition within the time limited therefor, the caveat shall be deemed to have been withdrawn and no further caveat may be entered by or on behalf of the caveator.

Section 52 (b) of PAEA states that:

in any case in which there is contention, the proceedings shall take, as nearly as may be the form of a suit in which the petitioner for the grant shall be plaintiff and any person who appears to oppose the proceedings shall be defendant.

However, Regulation 82 of the Rules clearly states as follows:

A caveat shall be in the form prescribed in Form 62 set out in the First Schedule and shall be attested by a person before whom an affidavit may be sworn.

An application under section 59(2) of the Act for a citation to a caveator shall be in writing in the form prescribed in Form 63 set out in the First Schedule.

This means that, if there had been a caveat entered, in terms of the provision of section 59 (1) of PAEA, the proceedings on a petition for letters of administration could not have proceeded. The caveat remains in force for a period of four months, unless sooner withdrawn, from the date when it was lodged (see section 58 (4) of PAEA. However, in this Application, the Trial Magistrate failed to consider it.

Basically, a party who alleges to have interest in the estate of the deceased and wishes to assert her interests, she has a right to enter a

caveat against the grant of the probate or letters of administration (see section 58 (1) of PAEA). After the caveat has been filed, the procedures enumerated under Rule 82 of the Rules have to be followed including the filing of an application for issuance of a citation to the caveator or calling upon him to state his stance as to whether he/she supports the grant of probate or letters of administration or not, (see section 59(2) of PAEA).

Failure to comply with the prescribed procedure of the issuance of the citation to the caveator renders the proceedings a nullity. As stated in the case of **Monica Nyamakare Jigamba vs Mugeta Bwire Bhakome** as administrator of the Estate of Musiba Reni Jigabha and Another; Civil Application No. 199/01 of 2019, CAT at Dar Es Salaam (see the case of **Professor (Mrs) Peter Mwaikambo v. Davis Mwaikambo and Others**, Civil Appeal No. 52 of 1997).

It is clearly stated on the above cases that once a caveator appears and opposes the petition for probate or letters of administration then sub-section 3 of section 59 of PAEA requires the court to proceed with the petition in accordance with paragraph (b) of section 52 of the PAEA which provides that:

"... in any case in which there is contention, the proceedings shall take, as nearly as may be the form of a suit in which the petitioner for the grant

shall be plaintiff and any person who appears to oppose the proceedings shall be defendant."

This means that, where a petition has been opposed, the probate or administration proceedings change, as nearly as can be, into an ordinary civil suit, where the petitioner becomes the plaintiff and the caveator becomes the defendant and parties are required to file special pleadings.

The main purpose of the said procedure is to facilitate the investigation of a caveator's objection and its effect to enable the entire proceedings. Nevertheless, it should not just be a part of it, rather to be dealt with in totality as in a suit. It should be concluded as one whole, as provided in the case of **Nuru Hussein v. Abdul Ghani Ismail Hussein** [2000] TLR 217.

In the present application, the Appellant filed a caveat but the Trial Magistrate failed to follow the procedure on how to handle when the caveat was entered as provided under section 59 of PAEA. For this application, I agree with the Appellant that the Trial Magistrate failed to comply with the law and proceedings.

As to the second ground, I find that the Trial Magistrate erred when he stepped into the shoes of the administrator. This is because, the

probate or letters of administration, the court has no power to determine the beneficiaries and heirs of the deceased. Similarly, it has no power to distribute the estate of the deceased or to mention the deceased's estate.

The law has vested that power to the grantee of probate or letters of administration. This is clearly provided under section 108 of PAEA, which reads:

*"The executor or **administrator shall**, with reasonable diligence, **collect the property** of the deceased and the debts that were due to him, pay the debts of the deceased and the debts and costs of administration, and **distribute the estate to the persons or for the purposes entitled to the same or to trustees for such persons or for the purposes entitled to the same or to trustees for such persons or purposes or in accordance with the provisions of this Act, as the same may be.**"* [Emphasis is added].

As per the section, it follows that it is the duty of the administrator to collect the properties of the deceased and the debts, pay the debts, identify the rightful heirs of the deceased, to whom the amount of residue of the proceeds of the deceased's estate should be distributed and at what percentage each heir will be entitled to get depending on the law

applicable in the administration of such estate. In the case of **Mariam Juma v. Tabea Robert Makange**, Civil Appeal No. 38 of 2009 (unreported) it was held that:

*"The High Court Judge did not have any mandate to determine who should be a beneficiary from the deceased's estate. This role was to be played by the Administrator of the deceased's estate **appointed by the court.**"*

It is my considered view that the Trial Court went beyond its jurisdiction by mentioning the deceased's estate in its decision and directing the administrator of the deceased's estate to join one Maimuna Maulidi Issa to be one of the beneficiaries as she claimed. This is because, an adverse decision was made against her without being afforded a right to be heard as complained. More so, the Trial Court did not have a chance to hear evidence from both sides for it to adequately and conclusively determine the interests alleged by both parties in the deceased's estate.

There could not be a hearing of the evidence because of the approach taken by the Trial Magistrate after the caveat. In case, the administratrix refused to recognise her, then she ought to have filed a suit against her where she could also have a chance to be impleaded as a party

therein (see the case of **Nuru Hussein v. Abdul Ghani Ismail Hussein** [2000] TLR 217).

It is worthy pointing out that, the stages as set out by the law in rule 82 of the Rules were made with a purpose and as such, compliance is mandatory and not optional as can be inferred from the word "shall", which has been used. The holding of this court in the case of **Professor Mrs Peter Mwaikambo Vs Davis Mwaikambo and Others**, Civil Appeal No. 52 of 1997 (unreported), emphasises the necessity to compliance with the stipulation of the law when it stated that:

"The omission by the Registrar to issue citation to the respondents caveators, made them to fail to enter an appearance, which would have rendered the matter contentious and hence bring it within the ambit of section 59 (3) of the Probate and Administration Ordinance (by then)."

The fact that the proceedings in the above cited case had proceeded without citation of the caveat, it was held that, the subsequent proceedings were a nullity.

Consequently, there is no gainsaying in holding that, all proceedings in respect of Probate and Administration Cause No. 117 of 2021 after the entering of caveat by the Appellant, were a nullity and cannot be left to

stand. In terms of the provision of section 58 and 59 of PAEA and Regulation 82 of the Rules, I do hereby quash them and set aside. In lieu thereof, I order that, Probate and Administration Cause No. 117 of 2021 be remitted back to the Trial Court for continuation from when the caveat got entered by the Appellant before another Honourable Magistrate in strict compliance with the laws governing the administration of estates proceedings. I make no order as to costs.




F. R. Khalfan

JUDGE

17/4/2023