IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

TEMEKE -SUB REGISTRY

(ONE STOP JUDICIAL CENTRE)

AT TEMEKE

PROBATE AND ADMINISTRATION CAUSE NO. 37 OF 2022

IN THE MATTER OF THE ESTATE OF THE LATE JOEL SIMBO KIRUNDWA

AND

IN THE MATTER OF APPLICATION FOR LETTERS OF ADMINISTRATION WITHOUT WILL BY ANNATH ATHUMANII MASEKO

VERSUS

ANNE MICHAEL MUSHI.....1st CAVEATOR

REHEMA RAMADHANI MRASSI.....2nd CAVEATOR

JUDGEMENT

02th & 25th August 2023

Rwizile, J.

On 14th March 2021, Joel Simbo Kirundwa died intestate. He was laid to rest a few days thereafter in tranquility by his family members. Seemingly when that was on, not all members of his extended family were mourning him. Some, I think were meditating on how to quench their wealth thirst in his estate. True to the above, immediately after the funeral, Lilian Kirundwa Rajab rushed to the district court of Kinondoni and was successfully appointed an administratrix of his estate in Probate Cause No. 133 of 2021,

on 30th July 2021, but by presenting some false information in respect of Juliana Joel Kirundwa, Joan Joel Kirundwa, and Jesca Joel Kirundwa that they are relatives of the deceased instead of children. According to the judgement of this court in Civil Revision No. 1 of 2021, the proceedings in respect of the Probate and Administration Cause No. 133 of 2021, were tainted with forgery and misinformation. When the same was nullified, this petition was filed, followed by a caveat, hence this judgement.

The petitioner faced a caveat in respect of the grant from Anne Michael Mushi and Rehema Ramadhan Mrassi who once lived with the deceased in concubinage and mothered with him one child each. The reasons advanced are that the petitioner undervalued the estate of the deceased for her selfish goals and as mothers of the children they are not sure if their children who are the only beneficiaries will be fairly treated, and that, she deliberately excluded many other properties of the deceased estate for her selfish interests. I was asked to appoint the Administrator General to do the duty for and on behalf of the family. At the first hearing of the case, one issue was agreed upon which is; *whether the petitioner is a fit person to be appointed an administratrix of the estate*

The petitioner in presenting her case, in relation to the contentious matter, said, that being a wife of the deceased is better placed to administer the estate of the late husband. According to her evidence, which she testified as Pw1, the deceased was not only her husband but also a business partner since 1996. They lived together as husband and wife only that they did not have children. It was her evidence that she did not know the caveators. They were not identified to her as such by the deceased.

About the children, it was her evidence that she only knows one Juliana Joel Kirundwa because she used to come to her house and the deceased introduced her to her. On the other children, she said, she has no problem if it is proved by DNA that they belonged to the deceased, she will accommodate them. She asked this court to appoint her as the administratrix of the estate of the deceased.

On the part of the caveators, it was testified by Anne Michael Mushi (Dw1) that the deceased left no wife. This means, the petitioner is not the wife of the deceased and so should not be appointed as such. She went further and said the petitioner is not fit for appointment because she undervalued the property of Mbezi and did not include the share of the deceased in ANJO furniture company and the property at Dodoma. In similar terms,

Rehema Ramadhan Mrassi (Dw2), testified in support of Dw1. She testified that the petitioner should not be appointed for undervaluing the deceased properties and for excluding some of it for her selfish goals. In all, the court was asked to appoint the administrator General to administer the estate instead of the petitioner. When the case was finally heard, closing submissions were filed as scheduled.

Answering the only issue, for the petitioner Mr. Felix Edward Makene learned counsel argued that the evidence by the caveators is tainted with speculations, rumors, and biases. The evidence according to him, is like from the mercenaries, hired to destroy the case for the petitioner. According to his submission, the appointment of the administrator is guided by section 33 of the Probate and Administration of Estates Act.

He added the appointment goes to the person who has greater interest and immediate. I was referred to the case of **Hemed Said vs. Mohamed Mbilu** [1984] TLR 113. Further, he argued, the caveators, have not advanced any reasons why the Administrator General should be appointed. Doing so, in his view, conflicts with a proviso to section 5 of the Administrator General (Powers and functions) Act [Cap. 27 R.E 2019]. I was asked to dismiss the caveat.

On the part of the caveators, it was submitted by A.M Magee in answer to the issue at hand that the petitioner is not a fit person for appointment because she undervalued the house on Plot No. 609. He argued, that being a storey building, it was estimated at 150,000,000.00TZS when its value is over 200,000,000.00TZS. In this, I was referred to the case of **Annath Athumani vs. Lilian Kirundwa Rajabu**, Civil Appeal No. 01 of 2021, High Court of Tanzania, where the court dealt with the undervaluation of the same property at the instance of the same parties. The learned advocate submitted, under section 49(1)(b) of the Probate and Administration of the Estates Act, the revocation has to be made if the grant is obtained fraudulently by false suggestion or by concealing material information from the court. I was further referred to the cases of **Safiniel Cleopa vs. John Kadeghe** [1981] TLR 984, **Mare Artan Ismail and Another vs. Sofia Njati**, Civil Appeal No. 75 of 2008, (CA).

He further held the view that the petitioner did not include money from IFM, ANJO company, as well as a motor vehicle, a house at Namanga, land at Dodoma, and a matrimonial house.

To support the point, he asked this court to refer the case of **Hyasinta Peter Mosha vs. John Peter Mosha and Catherine Peter Mosha,**

Civil Appeal No. 260 of 2021, High Court of Tanzania. Mr. Magee was clear that failure to list the deceased property as she did is in contravention of section 56(1)(d) of the Probate and Administration Estates Act. He argued with similar force in respect of other properties not mentioned such as a house at Namanga which according to him, is in contravention of section 159(5) and 161(1) of the Land Act [Cap. 113 R.E 2019]. The cases of **Annath Athumani Maseko vs. Lilian Kirundwa Rajabu** (supra) and **Logrine Charles Kessy vs. Charles Henry Kessy**, Land Appeal No. 145 of 2020 in respect of the matrimonial house that it was owned in common and so should have been included. He cemented the point by citing the case of **Mr. Anjum Vicar Saleem Abdi vs. Mrs. Naseem Akhtar Saleem Zangie**, Civil Appeal No.73 of 2003, CA. and the case of **Mwalimu Suleiman (Suing Under Power of Attorney of Mbwana Ali Mzinga) Zaibu Mohamed Kibasila**, Land case No. 319 of 2015, HC. According to the learned counsel, the petitioner is not a person to trust because if appointed with such enormous powers an administratrix will sell the properties at the low price and the children will have lost. He said, since the petitioner rejected the children, she won't do justice to them. I was therefore asked to appoint the Administrator General in terms of

section 5(1) of the Administrator General (Powers and Functions) Act, [Cap. 27. R.E 2019]

Mr. Magee was of the firm view that children and their mothers do not well know the estate of the deceased and so if the petitioner hides anything, they will stand to lose. He asked me not to appoint her.

Lastly, he submitted that the petitioner is not the wife of the deceased. To support this point the learned counsel referred to the case of **Annath Athumani Maseko vs. Lilian Kirundwa Rajabu** (supra). He submitted that in the cited case, it was not conclusively determined that the petitioner was the deceased's wife. He went on to say, there can be no valid marriage between a Christian and a Muslim as held in the case of **Max Hassan Omary vs. Zainabui Kalenga**, Matrimonial Appeal No. 8 of 2020. In his view, a change of religion in the Islamic faith invalidates marriage, and that, there is no presumption of such marriage.

As far as the submissions are concerned, there is no rejoinder from the petitioner. Based on the submissions and evidence, this court is required to deal with one issue, whether the petitioner is a person to trust and appoint an administratrix of the estate of the deceased.

I have to start by stating that in the case of intestacy, as in this case, granting or denying a petition for grant of letters of administration is a legal issue. It is governed by the law, precisely, section 33 of the Probate and Administration of Estates Act. This means, that for one to be appointed, it must be proved that; **first**, a person who would be entitled to the whole or any part of such deceased's estate. In other words, it must be a person who has an interest in the estate. This, as well, depends on the level and degree of consanguinity with the deceased. **Second**, it has to be a person who based on the degree of kinship is in a position to safely keep the estate and that possibly will be a proper person to administer the same. In all cases, the court has, although not absolute, a discretion to appoint such a person.

In the last part of the caveator's submission, which I think was misplaced, Mr. Magee blatantly stated that the issue of whether the petitioner is the deceased wife is debatable, referring to the case between the petitioner and Lilian Kirundwa cited as **Annath Athumani Maseko vs. Lilian Kirundwa Rajabu** (supra). He said this court needs more evidence to hold so, according to him such evidence is lacking. With respect, this is not true.

He, I think, did not read the decision of this court or had his deliberate intention to mislead the court. On pages 46-48 of the judgment, the court made over 8 pronouncements. Paragraph (d) of the same, in respect of the status of the petitioner in relation to her marriage with the deceased. It states as hereunder;

> *"From the available records, the applicant* ***Annath Athumani Maseko*** *is a lawful wife to the deceased capable to be regarded as heir and beneficiary with the three surviving children of the deceased mentioned as Juliana Joel Simbo, Joan Joel Simbo, and Jesca Joel Simbo."*(Emphasis supplied)

It follows therefore that this court on the above decision settled two issues that have been disputed. One on the status of the petitioner's marriage. it was concluded that the same is the wife of the deceased. I have no power to run away from that decision since it was made by this court. such powers are reserved to the Higher court. Second, the children of the deceased have been so named, the petitioner was of the evidence that she would accept them upon DNA examination.

This is wrong and the court has named them as I have shown. Since there is no decision of the Higher Court that overruled it, it remains standing.

Further, it is clear in my mind that despite his submission, Mr. Magee, made contradicting views, while arguing that the petitioner is not the wife of the deceased. He held the view that he left the matrimonial house out of the listed items to form the estate of the deceased. From my understanding, there cannot be a matrimonial property without marriage. to acknowledge that the house at Namanga is a matrimonial house is in itself admitting that the two were in marriage.

But still, the same submission rightly stated that the petitioner knows better the estate of the deceased than the caveators and their children. This point, apart from the law cited before, places the petitioner in a better position to best administer the estate if appointed than anybody else. There is no dispute that the two owned different properties or did business together as partners.

The fact that the properties listed were undervalued remains the opinion of the caveators, there is no evidence that has been procured throughout the case on the actual value of the property allegedly undervalued. This, I think has never been a ground for no appointment but perhaps might be a ground for revocation. Therefore, with respect to Magee's submission, the cited cases are irrelevant since the petitioner has not been appointed yet to

invoke section 49 of the Act to revoke her appointment. As I have said before, appointments are governed by section 33 of the Act while sections 49 and 56 as submitted by the learned counsel may apply where there is evidence of obtaining the grant by making false assumptions or exhibiting untrue inventory or statement of accounts. This may be dealt with at some later stage, not this time.

From the foregoing, this court finds no reasonable explanation to accept the invitation to decline appointing the petitioner. That being the case therefore the caveat is dismissed. The petitioner **ANNETH ATHUMANII MASEKO** is appointed to administer the estate of the late **JOEL SIMBO KIRUNDWA.**

A. K. RWIZILE

JUDGE

25.08.2023