IN THE HIGH COURT OF TANZANIA

(MWANZA SUB-REGISTRY)

AT MWANZA

PROBATE AND ADMINISTRATION CAUSE NO. 10 OF 2023

(Arising from Probate and Administration of Estate No.2 of 2003)

IN THE MATTER OF THE ESTATE OF THE LATE WILLIAM BUSIGASOLWE

(THE DECEASED)

AND IN THE MATTER OF APPLICATION FOR LETTERS OF

ADMINISTRATION MADE BY

EMMANUEL WILLIAM.....PETITIONER

VERSUS

WILLIAM MASUNGA.....1ST CAVEATOR

JOSHUA WILLIAM.....2ND CAVEATOR

RULING

Date of Last Order:18/09/2023

Date of Ruling:29/09/2023

Kamana, J:

Following the death of Ms. Modesta Charles Ndaki who was the administrator of the estate of the late Mr. William Busigasolwe, Mr. Emmanuel William, the petitioner, petitioned for letters of administration of the estate of the late Mr. Busigasolwe under section 46 of the Probate and Administration of Estates Act, Cap. 352 [RE.2002] (PAEA) on the

ground that Ms. Ndaki left part of the deceased's property unadministered.

The petition was opposed by the caveat filed by Messrs. William Masunga and Joshua William, brothers to the petitioner. Further, the caveators raised preliminary objections premised on the following:

1. That the petition/amended petition is bad in law, misconceived, and incompetent before the Court.
2. That the petition/amended petition is time-barred.

As the practice dictates, the Court resorted to disposing of the preliminary objections before hearing the petition on merits. At the instance of the parties and leave of the Court, the preliminary objections were argued by way of written submissions.

Submitting in support of the first preliminary objection, Mr. Said Omary, learned counsel for the caveators, contended that the petition is bad, misconceived and incompetent before the Court. In amplifying the argument, the learned counsel contended that the petition offends the provisions of section 46 of the Probate and Administration of Estates Act, Cap.352 [RE.2002] (PAEA) and rule 46 of the Probate Rules, 1963 (GN No. 10 of 1963) by failing to attach an affidavit stating that such deceased administratrix was the sole administratrix.

Mr. Omary argued further that the petition contravenes rules 39(f), 71 and 72 of the Probate Rules as there is no consent of all heirs except for one heir who consented. In that case, the learned counsel opined that the petitioner, in the absence of the consent of all heirs, was required to file an affidavit contemplated under rule 72 of the Rules. In buttressing the opinion, the learned counsel cited the cases of **In the Matter of Petition for Grant of Letters of Administration with the Will Annexed by Simon Keitanga George**, Probate and Administration Cause No. 4 of 2015 and **Tabu Ramadhan Mattaka v. Fauziya Haruni Saidi Mgaya**, Probate and Administration Cause No.15 of 2017.

Mr. Omary went on to assail the petition as incompetent as it offends rule 39(d) and 66 of the Rules and section 67 of the PAEA for not attaching administration bond. In the same spirit, the learned counsel faulted the petition for not attaching an affidavit that shows the petitioner is the sole administrator contrary to rule 39(g) and rule 42 of the Rules. Likewise, the learned counsel contended that the petition was defective for not attaching minutes of the family or clan meeting.

Concerning the second preliminary objection, Mr. Omary submitted that the petition is time-barred as it was required to be filed within sixty

days from the death of the administratrix as per Item 21 of Part III of the Schedule to the Law of Limitation Act, Cap.89 [RE.2019]. Augmenting the argument, the learned counsel contended that between 11th April, 2023 when the administratrix died and 26th June, 2023 when the petition was filed, there are almost 75 days that make the petition time-barred.

He summed up his submission by imploring the Court to dismiss the petition with costs.

Responding, Mr. Fidelis Mtewele, learned counsel for the petition prefaced his arguments by contending that the preliminary objections do not meet the test of what amounts to a point of law. In that regard, he cited the celebrated case of **Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors Ltd** [1969] E.A 1 which stated:

> *'….a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point dispose of the suit.'*

On the first preliminary objection, the learned counsel submitted that the same is devoid of merits as all required documents were attached to the petition. He amplified that the consent of heirs was filed

as per the requirements of rule 39 (f) of the rules. Regarding an affidavit in respect of consent that was not obtained, Mr. Mtewele contended that the same was filed accordingly. He went on to submit that the administrator's bond and minutes of the clan meeting were attached to the petition.

Concerning the second preliminary objection, the learned counsel contended that there is no specific time for filing a petition for letters of administration. Bolstering his position, the learned counsel invited the Court to consider the cases of **Majuto Juma Nshahuzi v. Issa Juma Nshahuzi**, PC Civil Appeal No. 9 of 2014 and **Rehema Mwakyoma v. Teni Mwakajila**, PC Probate Appeal No. 5 of 2019.

Lastly, Mr. Mtewele beseeched the Court to overrule the objections with costs.

Having heard the parties, I thought it relevant to start with the second preliminary objection. As a matter of general principle, issues relating to the limitation of time for instituting actions before the courts are governed by the Law of Limitation Act, Cap. 89 unless specific laws provide for time limitation.

When I read the Law of Limitation Act, I found no provisions regulating time limitations with respect to applications for letters of

administration. However, the provisions of rule 31(1) of the Rules require the application for letters of administration that is filed for the first time at the expiry of three years from the death of the deceased to be accompanied by a statement explaining the delay. It further provided in rule 31(2) that the court may require further proof if it is not satisfied with the explanation given for the delay.

That being the position of the law, it is my considered view that matters relating to time limitation in relation to the application for letters of administration are also not provided for in the Rules. What the Rules provide for under rules 31(1) and (2) is the scrutinization process with a view to satisfying the court that the application is not tainted with any suspicious motives considering the fact that the period of three years is long enough for unscrupulous persons to plot against the deceased's estate.

The laxity of the law in terms of time limitation traces its originality to the functions of the administrator of the estate of the deceased person. Principally, when the deceased's estate is left without a legally appointed administrator, the ill effects are inevitable to the beneficiaries and creditors. Given that, it is of utmost importance to ensure at all times that the deceased's estate is administered according to the law

without due regard to the limitation of time for applying for letters of administration. In taking this position, I am inspired by the decision of the Court of Appeal in the case of **Mwaka Musa v. Simon Obeid Simchimba**, Civil Appeal No.45 of 1994 where the Court stated:

> *'We agree with Mr. Maira's submission that in view of section 31(1) of the Probate and Administration Ordinance, Cap 445, (the Court must have been referring to the Probate Rules) the Law of Limitation Act, 1971 is not strictly applicable in matters of probate. In that section, it is provided that in any case where probate or administration is for the first time applied for after three years from the death of the deceased, the petition shall contain a statement explaining the delay.'*

Having taken the position that applications for letters of administration may be applied at any time provided sufficient reasons for delay are provided, I asked myself whether rules of limitation apply to applications preferred under section 46 of the PAEA. With due respect to Mr. Omary, learned counsel for the caveators, applications under section 46 of PAEA are immune from the rules of limitation. An application with no period of limitation is indeed subjected to Item 21 of Part III of the

Schedule to the Law of Limitation Act which requires them to be filed within sixty days, the application under section 46 of PAEA is not caught by such provisions.

The reason for that position is not too far to fetch. Since the application for letters of administration of the deceased estate that is filed for the first time is immune from rules of limitation, the application for letters of administration of the unadministered assets of the deceased person under section 46 of the PAEA cannot be subjected to rules of limitation as provided in the Law of Limitation Act. In that case, the preliminary objection is overruled.

Coming to the second preliminary objection, I think it is relevant to reproduce the provisions of section 46 of the PAEA as follows:

> *'**46**. On the death of a sole or sole surviving executor who has proved the will or of a sole or sole surviving administrator, letters of administration may be granted in respect of that part of the estate not fully administered,* ***and in granting such letters of administration the court shall apply the same provisions as apply to original grants:*** *Provided that where one or more executors have proved the will or letters of administration*

with the will annexed have been issued, the court may grant letters of administration under this section without citing an executor who has not proved the will. (Emphasis added).

Of essence from that provision is the fact that in granting the letters of administration of the unadministered assets of the deceased person, courts are required to apply the provisions regulating applications for letters of administration that are filed for the first time.

This position of the law takes me to the provisions of rule 39 of the Rules which provides for the procedures of petitioning for the letters of administration. The rule reads:

*'**39**. A petition for letters of administration shall be in the form prescribed in Forms 26 or 27 set out in the First Schedule, whichever is appropriate, and shall be accompanied by the following documents–*

(a) subject to the provisions of rule 63 a certificate of death of the deceased signed by a competent authority;

(b) an affidavit as to the deceased's domicile;

(c) an administrator's oath;

(d) subject to the provisions of rule 66, an administration bond;

(e) a certificate as to the financial position of the sureties;

(f) subject to the provisions of rules 71 and 72, consent of the heirs; and

(g) in the case of an application for a grant to a sole administrator, an affidavit as required by rule 32.'

Further, section 46 of the PAEA takes me to rule 46 of the Rules which also set conditions to be met before granting letters of administration within the purview of the said section. The rule reads:

*'**46**. A petition under section 46 of the Act for grant of letters of administration in respect of unadministered estate upon the death of a sole or sole surviving executor or a sole or sole surviving administrator shall be in the form prescribed in Form 33 set out in the First Schedule and shall describe and state the value of the estate remaining unadministered and shall be supported by a certificate of the death or an affidavit as to the death of the executor or the administrator and by an affidavit*

stating that such executor or administrator was the sole or sole surviving executor or administrator, as the case may be.'

Without repeating the substance of the quoted provisions, it is obvious that the said provisions set mandatory conditions for the petitioners to adhere to when petitioning for letters of administration of the unadministered estates.

Submitting in support of the second preliminary objection, Mr. Omary listed several documents that were not attached to the petition, and based on that, he opined that the application was incompetent before the Court. In rebutting, Mr. Mtewele contended that the application was competent before the Court as the listed documents were attached to the petition.

Starting with an affidavit that is required to depone that the deceased administratix was the sole surviving administratix, such affidavit is the mandatory requirement of rule 46 of the rules. I have gone through the petition and the annexures, such an affidavit is absent.

Concerning the consent of heirs, that is the requirement of rule 39(f) subject to the provisions of rules 71 and 72. According to the

Petition, the late Busigasolwe was survived with ten sons. Out of the ten sons, only Bahati William's consent was obtained.

In such circumstances, by virtue of rule 72 of the Rules, the petitioner was required to attach to his petition an affidavit that states the particulars of the persons whose consent was not obtained and reasons why the consent was not obtained. My perusal of the petition reveals that the required affidavit under rule 72 read together with rule 39 was not attached to the petition.

On the administration bond, rule 39(d) of the Rules provides that the same be attached subject to the provisions of rule 66 of the Rules. According to rule 66, the administration bond is signed by the petitioner and the sureties who are required to be two unless the court dispenses with such requirement. Having gone through the petition and the annexures, I am satisfied that the administration bond did not form part of the petition.

Regarding an affidavit that states that the petitioner will be the sole administrator, the law is clear that the same must be attached to the petition. This is per rule 39(g) read together with rule 32 of the Rules. From the records, the petitioner petitions for sole administration

of the unadministered assets. Given that, he is required to attach the said affidavit. I have perused the petition and such affidavit is absent.

As I have already pointed out, the requirements of section 46 of the PAEA and rules 39 and 46 of the Rules are mandatory provisions. Having found that the petitioner filed the petition that offends those provisions, I have no option other than finding the petition incompetent before the Court. Unhesitatingly, I struck out the petition with costs. Order accordingly.

Right To Appeal Explained.

DATED at **MWANZA** this 29th day of September, 2023.

KS KAMANA

JUDGE