

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
THE SUB-REGISTRY OF MWANZA
AT MWANZA**

MISC. CIVIL APPLICATION NO. 99 OF 2022

[From Probate and Administration Cause No. 04 of 2013]

GERALD KAMKALA ----- 1ST APPLICANT
GEORGE KAMKALA-----2ND APPLICANT
ESTER KAMAZIMA-----3RD APPLICANT
VICTOR MUJUNI-----4TH APPLICANT
ANTONY SIMON-----5TH APPLICANT
JULIETH MARCUS-----6TH APPLICANT

VERSUS

CORNELIS HENDRICK VIANEN ----- RESPONDENT

RULING

August 3rd & 30th, 2023

Morris, J

Thirteen years ago, one Jane Gervas Kamkala (herein also, 'the deceased') passed on. For almost a decade, administration of her estate by the respondent has never been uneventful. The deceased's estate has been subject of recurrent courts proceedings ever since. In the present matter, the applicants are moving this Court to revoke the appointment of the respondent from administration of the subject estate.

The application was filed under section 49(1) (e) of ***the Probate and Administration of the Estates Act***, Cap 352 R.E. 2002 (elsewhere, ***the Act***) and rule 29 (1) of ***the Probate Rules*** GN. No. 369 of 1963 (***the***

Rules). It is supported by the joint affidavit of the applicants. The applicants' depositions are contested by the respondent's counter affidavit.

In briefly, the matter is traced from the death of the deceased on 11/09/2010. Through Probate and Administration Cause No. 04 of 2013, the respondent was appointed administrator of the estate of the deceased by this court (Hon. Bukuku, J). Apparently, his petition was contentious. The above 1st applicant had lodged the caveat. He was, however, unsuccessful. Thus, the respondent was appointed to the post effective 1/11/2016. The first rival move against his administration started two years later. He was challenged by the 1st applicant through Misc. Civil Application No. 10 of 2018 (Hon. Mdemu J). The subject application was dismissed.

Still resolute to unseat the respondent from his designation herein, the 1st applicant, once again, filed the-like application (Misc. Civil Application No 49 of 2021). It was also dismissed by my brother, Hon. Manyanda J. Nevertheless, this Court also ordered the respondent to file both inventory and accounts within 6 months from the date of that ruling (30/12/2021). On record, the respondent did not heed to such timeline. Nine months later, on 7/9/2022, the present application was filed.



When the matter was tabled for hearing, Advocate Remigious Mainde appeared for the applicants. The respondent, however, was represented by Advocate Deya Outa. As per the usual procedure, Mr. Mainde took the pursuit first. He submitted that the objective of the present application is to have the respondent's appointment into administration of estate revoked. In the respondent's replacement, the 1st applicant should be appointed. To the applicants' counsel, the respondent has failed to live by his call of administration cast upon him by the court.

He argued further that the major grounds for his removal from administration, include, his failure to file inventory; failure to provide the checklist of deceased's property; and dishonesty. The applicants' counsel also submitted that the respondent has repeatedly been failing to fulfill the requirements of the law and/or court orders. He cited, as an example, that the respondent was given last extension for 6 months from 30/12/2021. However, while awaiting allocation and distribution of estate to beneficiaries, it came to the heirs' knowledge that the administrator had sold one of the deceased's properties described as Plot No. 188 and 189 Block "X" Capri Point Area-Mwanza to one Octavian Joseph Kidima without consent of the beneficiaries-heirs.



It was argued further that, upon official search at the offices of the Registrar of Titles, it was revealed that the respondent double-sold the same plot to Vedasto Lukago Ngasa whose caveat was officially entered into the register. Therefore, with such background, the administrator was considered by the applicants as having seriously failed to perform his duty cast upon him by the court. Also, it was stated that the respondent had no evidence to prove that he was married to the deceased. To the applicants, the mere cohabitation between the respondent and deceased did not pass property to either party from the counterpart.

On his part, Mr. Outa submitted for the respondent that, there have been various unsuccessful proceedings before this Court in 2019 and 2021 (Hon. Manyanda, J and Mdemu, J respectively). He also contented that prior to that, the 1st applicant was the caveator in the Probate No. 4/2013 but he too failed to challenge the respondent's appointment. To him, it is evident that the 1st applicant has been hindering the smooth administration of estate because of his endless court litigations since 2013. Therefore, the 1st applicant and his colleagues herein should not be allowed to benefit from their own wrong.



The respondent also argued that, under paragraph 2 of the petition from which this matter originates, it is indicated that the deceased left no survivors. Hence, the petition was granted on the basis that the petitioner-respondent was a widower. According to Mr. Outa, the argument that deceased was survived by none was determined by this Court (Bukuku, J) in 2016. And that, it cannot be raised at this stage as no appeal or revision was initiated to establish the applicants' interest in the deceased's estate. Hence, in this regard, there is no any other heir apart from the respondent himself. The applicants are sheer strangers to the estate.

Reacting to the contention over sale of Plot No. 1884 Block "X" Capri point; the respondent submitted that the applicants' advocate was confusing two aspects: filing of caveat and sale of the property. He argued that Vedatsus Lukago filed the caveat against the property but disposition was in favour of Octavian Kidima. To him, filing of the caveat in the land registry does not establish title conclusively. Currently, the title is in the name of Octavian Kidima the existence of caveat notwithstanding.

Advocate Outa also submitted that the administrator does not need heirs' consent prior to disposition of the deceased's property. That is, in this case, there are no any other heirs than the respondent himself

because, if they exist, they should have given their consent at the time of petitioning. Further, the respondent argued that once the administrator has been appointed, in law, he is not bound by any rule to seek consent of beneficiary/heir whatsoever. He accordingly prayed for the application to be dismissed with costs.

In rejoinder, it was submitted that there has not been any reason why the respondent has not finalized the administration role. The respondent's argument that endless litigation prevented him was contested. To applicants, the respondent was given 6 months from 1/11/2016 but he did not heed. So, until 2018 when the first application for revocation was filed, he was already out of time for about two (2) years without filing the inventory. However, he secured extension of 6 more months from 2019 to finalize the administration. He did not complete the exercise, either. Subsequently, he has never been compliant with the court-given time lines. Consequently, the applicants prayed for the application to be allowed.

I have impassively considered rival submissions of both sides. The major issue for determination hereof is whether the respondent has failed to discharge his duties of administrator. For the applicants, he is no longer



qualified as he has failed to file the inventory and accounts; and he is not trustworthy as he double-sold one property of the deceased. On his part, the respondent blames the 1st applicant for endless litigations which hinder performance of his duties and finalization of the administration.

This being the Court which appointed him, it has mandate to revoke the respondent's appointment. In particular, the applicants are seeking assistance of this Court under section 49 (1) (e) of **the Act**. This provision reads that;

*"49 -(1) The grant of probate and letters of administration may be revoked or annulled for any of the following reasons—
(e) that the person to whom the grant was made has **willfully and without reasonable cause omitted to exhibit an inventory or account** in accordance with the provisions of Part XI or has exhibited under that Part an inventory or account which is untrue in a material respect"* (emphasis added).

From the above excerpt, the major elements to consider are, *inter alia*, the administrator's omission to exhibit an inventory or accounts. Further, such omission must be willful and without reasonable cause on the part of the administrator. So, the critical interrogation hereof is whether the respondent is falling within the said traits. In my view, he does. I



demonstrate with five factors. **First**, it is undisputed that he has not, to date, filed the inventory and/or accounts since his appointment in 2016. **Second**, he has not, on his own motion, applied for Court's extension of time in order to complete the assignment. **Third**, the Court has on various occasions extended time for him to achieve the intended objective but he has not been compliant howsoever.

Fourth, in the present matter, he has not deposed to the actual cause averting him to comply with both the law and Court orders. That is, the respondent was given six months from 30/12/2021 by this Court to file inventory and accounts. In his affidavit, there are no reasons for his non-compliance of the Court order. However, in the course of submissions, the counsel for him argued that the respondent failed to comply due to endless litigations to date. It has been held a countless time that, submissions are not evidence. Matters deposed in affidavit must be controverted in the opposing affidavit. See, cases of *Trade Union Congress of Tanzania (TUCTA) v Engineering Systems Consultants Ltd and 2 Others*, Civil Appeal No. 51 of 2016 (unreported).

Fifth, undeniably too, after the decision of this Court by Hon. Manyanda J on 30/12/2021, no case between the parties herein was filed

regarding this matter. Therefore, from 30/12/2021 to 7/9/2022 the respondent was undisturbed with any litigation as he would wish to cogently assert. That is over 9 months; 3 months beyond the time allocated to him, to be precise. He has not even deposed on the steps so far taken since the said extension of time. His affidavit is silent in this aspect too. The respondent should have realized that, in his capacity, technically expressing it; he is acting as the court officer. To transgress such title is to put the judiciary into disrepute.

Further, the applicants are of the view that the respondent cannot be the heir of the deceased property by virtue of cohabiting with the deceased. On his part, the respondent contended that the respondent is the widower and only surviving heir of the deceased. Both submissions, in my considered view, are misplaced. After the death of the deceased, no issue of marriage or matrimonial affairs is determinable. The only remaining concern is who are rightful heirs of the estate of the deceased in accordance with applicable laws. I am guided by ***Leticia Mtani Ihonde v Adventina Valentina Msonyi (Administrator of the Estate of the Late Buhacha Bartazari Kichinda)***, Civil Appeal No. 521/2021; and ***Mr.***



Anjum Vical Saleem Abdi v Mrs. Naseem Akhtar Saleem Zangie,
Civil Appeal No 73/2003 (both unreported).

It was also the submissions by the respondent that, Hon. Bukuku, J decided on the contention that that the deceased was survived by none. I have read the subject judgement. All I gather therefrom is a conclusion that the respondent's submissions in this regard are misleading. It was stated at page 13 that the truth as to whether the deceased left no surviving relatives would come out after appointment. In the judgement, Hon. Bukuku, J appointed the respondent to administer the estate for the reason that the latter knew the deceased. It was stated at pages 11 and 12 that;

"..one of the objection raised by the defendant at paragraph 3 of his affidavit in support of the caveat is that, the plaintiff is not a widower of the deceased but a mere boyfriend. As much as that can be true, it is certain that, under normal circumstances, the administrator might come from amongst the beneficiaries of the estate, but he has to be very careful and impartial in the way he distributes the estates. Furthermore, it must by now be very obvious to all as already intimated, that such an administrator must be a person who is very close to the deceased and can therefore, easily identify the properties of the deceased."

I also need to determine the concern in the submissions that the respondent disposed the landed property of the deceased without consulting the heirs. Indeed, under the law, as it was correctly submitted for the respondent; the administrator has no duty to consult heirs. **Joseph Shumbusho v Mary Grace Tigerwa and 2 Others**, CoA Civil Appeal No. 183 of 2016 (unreported) is accordingly followed. Likewise, whether the respondent has sold the same to more than one person, such aspect cannot be proved by the stated official search. Afterall, the report thereof is usually brief, non-committal and with insufficient information.

The above analysis in perspectives, the application has advanced the necessary reason for evocation of grant of letters of administration. I have arrived to such conclusion because the respondent has failed to comply with the court's order of filing the inventory and accounts within both statutory and court-fixed timelines. Therefore, this is a fit case to invoke section 49 (1) (e) of **the Act**.

The above findings notwithstanding, this Court was further moved by the application to appoint the 1st applicant in the office of administrator of the estates of the deceased. The respondent's affidavit did not actively



object this move. Under sections 3 and 49(2) of ***the Act***, this court has power to appoint an administrator after revocation of his predecessor.

The only remaining question for determination is the suitability of the 1st respondent for the position. In the proceedings before Hon. Mdemu J., the first applicant introduced himself on oath as the brother to the deceased. Such averment was unchallenged by the opposite party. Further in their reply to counter affidavit the applicants attached minutes of clan meeting which tells the 1st appellant to be the brother to the deceased. Therefore, his relationship with the deceased is incontestable.

The 1st applicant is also a person who was familiar to the deceased's estate as stated in the last paragraph of page 13 of the judgement by Madam Justice Bukuku J. In the said judgement, it was recorded by my Learned Sister that the 1st applicant used to work for the deceased and the respondent herein. Therefore, he is fit person to be appointed as he meets the necessary requirements and possesses requisite attributes.

Before I pen off, and without overemphasizing, I hastily record the purpose of appointing the administrator. The appointment aims at having a trustworthy and court-order-compliant person; and who is capable of administering the estates of the deceased without bias. Imprecise to other



peoples' thinking, the administration post does not and is not meant to attract any personal gain to the appointee. However, as stated by my learned Sister, Hon. Bukuku J herein, administration of estate is a burdensome task. It is the position of trust not of gain. See, the case of ***Nyasintha Kokwijuka Felix Kamugisha v Deusdedith Kamugisha***, HC Probate Appeal No 4 of 2018 (unreported) for emphasis.

The law does not excuse an administrator who misappropriates the estates of the deceased or causes any loss by his negligence. Misuse of office of the administrator may equally ditch the responsible person to both civil and criminal liabilities. See the cases of ***Safiniel Cleopa v John Kadege*** [1984] TLR 198; ***Hadija Said Matika v Awesa Said Matika***, Civil Appeal No 2/2016; and ***Ahmed Mohamed Al Laamar v Fatuma Bakari and another***, Civil Appel No 71/2012 (both unreported).

In fine, given the analysis above; and in the light of section 49 (1) (e) of ***the Act***, I hereby revoke the appointment of the respondent, **Cornelis Hendrick Vianen**, as administrator of the estate of the late Jane Gervas Kamkala with immediate effect. In his place, I further proceed to appoint, **Gerald Kamkala**, the 1st applicant to be the administrator of estate of the deceased, **Jane Gervas Kamkala**.



That said and done, therefore, with this appointment which has the effect of replacing the respondent whose appointment has been revoked; the 1st applicant is further ordered to administer the estate honestly and diligently. Also, he is duty bound to file the inventory and accounts timely and accurately. To be precise, the newly appointed administrator (1st applicant) is ordered to file inventory and accounts in three (3) and six (6) months respectively. In addition, it is ordered that the Administrators Oath of Gerald Kamkala; the Administrator's Bond with Sureties; and the Certificate as to Sureties' financial position should be filed within 14 days of this ruling.

In the upshot, the application has merit; it is accordingly granted. Parties to shoulder own costs. It is so ordered. Right of Appeal fully explained to the parties.

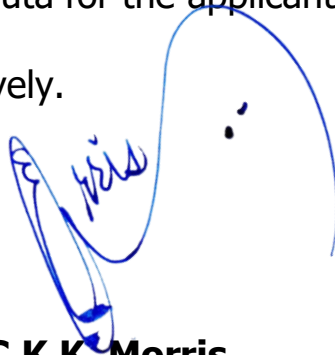


C.K.K. Morris

Judge

August 30th, 2023

Ruling delivered this 30th day of August 2023 in the presence of Advocates Remigious Mainde and Deya Outa for the applicants and respondent (who also is in attendance) respectively.

A handwritten signature in blue ink, appearing to read 'C.K.K. Morris', written over a large, faint blue circular scribble.

C.K.K. Morris

Judge

August 30th, 2023

A small, handwritten mark in blue ink, consisting of a curved line and a small dot.