IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM SUB DISTRICT REGISTRY)

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO.469 0F 2022

(Originating from Probate & Administration cause No. 56 of 2014)

IN THE MATTER OF THE ESTATE OF THE LATE AMIRI TABU CHARITY

AND

IN THE MATTER OF APPLICATION FOR REVOCATION OF LETTERS OF ADMINISTRATION MWANAHAMISI RAJABU KIMWERI……ADMINISTRATOR

AND

1. ISMAIL AMIRI CHARITY…… APPLICANT
2. BILAL AMIRI CHARITY…… APPLICANT
3. IBRAHIMU AMIRI CHARITY……APPLICANT
4. MOHAMED AMIRI CHARITY…… APPLICANT
5. ALI AMIRI CHARITY…… APPLICANT
6. ZAINABU AMIRI CHARITY…… APPLICANT

vs

MWANAHAMISI RAJABU KIMWERI……RESPONDENT

R U L I N G

MKWIZU, J.

The Applicants, blood children of the deceased, and legal heirs of the deceased estate are in this court seeking the revocation of the respondent's grant of the probate with a prayer to have the letters of administration granted to Ibrahimu Amiri Charity,3rd applicant. The application is made by a chamber summons under rule 29(1) of the

Probate Rules and section, 49 of Cap 352 RE 2019, and Section 95 of the Civil Procedure Code, (Cap 33 RE 2019) supported by a joint Affidavit of all six Applicants. The application is resisted by the respondent who states that the administration is being conducted in accordance with the laws and prescribed procedures.

At the hearing, Mr. Juma Nassoro learned advocate was in court for the Applicants while Mr. Innocent Mwelelwa also learned advocate was for the respondent, the administratrix**.** Mr. Juma Nassoro first adopted the joint affidavit by the applicants and went further to argue the distribution of the deceased's estate is guided by governing law and the administrator has no absolute discretion to distribute the deceased estate according to her wishes. His point here is that the deceased in this application was professing Islam and there is no evidence that he denounced his faith at any point before his death therefore distribution of his estate ought to be governed by Islamic law. He challenged the filed inventory for being filed without considering the deceased belief contrary to the well-established principles of the law. Relying on the case of **Amina Taratibu Mbonde V Selemani Ahmed Ntalika**, (2000) TLR 56, particularly pages 61- 62 Mr. Nassoro elaborated that Islamic law has placed the value of each lawful heir from the deceased estate. He stressed that the administrator was required to immediately after the appointment to conduct the necessary valuation of the estate to establish the value of each property subject to distribution and have the estate distributed according to the values provided for each heir under Islamic law. He maintained that, since the account of the deceased estate (annexture ILA 1 to the Counter affidavit) was filed without any value of the properties purported to have been

distributed to the heirs, it is difficult to tell if the estate was properly distributed to the heirs.

On the second ground, Mr. Nasoro condemned the administratrix for distributing to herself a larger share of the valuable properties while distributing to other heirs' properties of less value. He gave an example of Item 1 in the account of the deceased estate stating that the administratrix distributed to herself five properties including the house in Mbezi Beach while giving three children of the deceased in Item No. 2 of the same account a share of five properties and five properties to two children in item 3 of the account demonstrating the unfair distribution of the estate by the administratrix. He invited the court to revoke the appointment and appoint Ibrahim Amiri Charity, the third Applicant to be the administrator of the deceased estate with specific directives that the deceased estate be administered under Islamic law.

Mr. Mwelelwa Advocate was on the other hand of the view that the applicant's submissions are baseless to support the application for revocation of letters of administration. Like the applicant's advocate, the respondent's counsel also adopted the counter affidavit to form part of his submissions and went further to state that the main reasons for the application are listed in paragraphs 2, 4,5, and 6 of the joint affidavits. He said the issue of the debt worth 64,000,000/= by Mr. Seif Dhihabi raised in paragraph 5 of the joint affidavit is baseless and has no backing in the law because the duty to pay debts is on the administrator of the estate and not the beneficiaries. He believed that the debtor ought to have registered his concern to the administrator and filed an affidavit together with the applicant's affidavit in support of the claim. He was of the view

that failure to file an affidavit to back up the assertion in this paragraph makes the entire facts hearsay more so because even the verification clause doesn't tell where the applicants got the said information.

Regarding the issue that the administrator has apportioned a large and valuable share to herself, Mr. Mwelelwa said that section 107 of the Probate and Administration of Estate Act does not make the issue of valuation a mandatory requirement. The administrator is only required to show the estimated value of the estate. To him, the administrator filed in court the inventory and accounts on 24/10/2016 which was served to the applicants since then to the extent that some of the applicants were paid school fees from the properties distributed to them and there has been no complaint at all. He lamented that this application is a move by the applicant to restrain the administrator from acting in the completion of the administration of the deceased estate. He contended that, whenever the administrator moves to complete the administration of the estate, applicants move in to stop that action that this is a third application filed in court, and that it was filed in court immediately after the administrator had asked the court to order the applicants to surrender original documents, the Title deed, and the Original vehicle Registration cards to allow the transfer of the distributed properties to the beneficiaries in compliance with the court order by Tiganga DR, dated 5/8/2019. The respondent advocate went further to argue that the complained inventory was blessed by this court in 2019 and therefore the question of unfairness is a misconception. If the applicants had an issue, they could have taken action in 2016.

Mr Mwelelwa was also of the view that the issues raised in the 4th paragraph of the supporting affidavit, showing that the garage equipment was excluded from the inventory and that the administrator is using the deceased estate for her benefit in the exclusion of other beneficiaries are also without merit because the garage items are indicated in item 7 of the inventory and are also well indicated in item one of the Accounts filed in court. There is no evidence brought before the court either through the affidavit or otherwise establishing the asserted fact. He was emphatic that, the applicants were required to establish with evidence items that the administrator is using for her benefit in the exclusion of the other beneficiary the evidence which is missing leaving the points unestablished.

The respondent counsel also urged the court to find the issue that the deceased was a Muslim, and that his estate ought to have been governed by Islamic laws as baseless on the ground that, the heirs have accepted the distribution and have been maintaining and using the distribute asserts without any complaint. He amplified that an application for revocation is guided by the law and to him, the applicant's chamber summons contains none of the reasons prescribed by section 49. He relied on the decisions in Civil Appeal No 181 of 2020, **John Sylvester Ngutuse and Others V Anna Lori Sulle,** and Civil Appeal No 61 of 2020 between **Heriet Peter Shemweta V Beatrice Joel Mkumbwa** pages 4 to 5 (All Unreported) where this court listed reasons that may lead to revocation of the grant. He finally prayed for the dismissal of the application for lack of merit.

In his short rejoinder, Mr. Juma Nassoro said**,** the applicants have never accepted the filed inventory which is why they are in court challenging

the same plus the accounts filed in court. He said the respondent's counsel has admitted that the administrator is required to show the estimated value of the properties involved in the deceased estate and neither the inventory nor the accounts have any such estimate meaning that the administrator has apportioned to herself a larger share and the court is entitled to draw negative inferences against the administrator.

I have serenely considered the application. The court in this application is asked to revoke the probate letter granted to the respondent. As settled such a move is only taken where the applicant displays sufficient grounds. Thus, to tell whether the application is meritorious or not the court will assess the grounds, the evidence attached to them and the law to ascertain whether the applicants have advanced sufficient grounds for revocation. Section 49 lists the grounds that may lead to revocation as follows:

> "*49 (1) The grant of probate and letters of administration may be revoked or annulled for any of the following reasons–*
>
> *(a) that the proceedings to obtain the grant were defective in substance.*
>
> *(b) that the grant was obtained fraudulently by making a false suggestion, or by concealing from the court something material to the case;*
> *(c) that the grant was obtained through an untrue allegation of a fact essential in point of law to justify the grant, though*

such allegation was made in ignorance or inadvertently. (d) that the grant has become useless and inoperative.

(e) that the person to whom the grant was made has wilfully and without reasonable cause omitted to exhibit an inventory or account by the provisions of Part XI or has exhibited under that Part an inventory or account which is untrue in a material respect."

The respondent's grant in this application is being grilled on three main grounds:

i. *Unfair distribution of the deceased's estate in disregard of Islamic law.*
ii. *The administratrix's use of the deceased estate for her benefit.*
iii. *The administrator's failure to consider the deceased creditors mentioned in paragraph 5 of the joint affidavit.*

On the first ground, Mr. Nassoro was emphatic that since the deceased was professing Islamic faith, the distribution of his estate ought to have been guided by Islamic laws. Section 88 (1) (a)Probate and Administration of Estate Act, Cap 352 R: E 2019 will assist the court on this point. The section says:

" The estate of every deceased person by which an order or direction under Part IX applies shall be administered according to the following provisions–

(a) The estate of a member of a tribe shall be administered according to the law of that tribe unless the deceased at any time professed Islam religion and the court exercising jurisdiction over his estate is satisfied from the written or oral

declarations of the deceased or his acts or manner of life that the deceased intended his estate to be administered, either wholly or in part, according to Islamic law, in which case the estate shall be administered, either wholly or in part as the case may be, according to that law".

Interpreting the above section this court in **Salum Said Mtiwe @ another Vs Nurdin Mohamed Chingo,** PC Civil Appeal No. 129 of 2019, HC Dar es Salam Registry(unreported) said:

> "***Islamic Law is not applied automatically in probate matters involving Muslims****. The application of Islamic Law in the primary courts is done after some tests. It borrows the tests contained in section 88 (1) The Probate and Administration of Estates Act. While describing most of us as members of tribes (referring to tribal customary Law in context), …**Islamic Law is applied after going through three tests; One**, where there is an intention of the deceased expressed in a WILL or otherwise, **two,** where the lifestyle of the deceased was such that if he had a chance to be asked to give his opinion, he should have said that Islamic Law should apply, and **three**, where the heirs have reached an agreement that it should apply. If any of the tests or a combination of them exists, then the court should apply the Law. Failure of the three tests takes the court to Customary Law…"*

The applicant's point is that the deceased was a Muslim all along and had never denounced that faith until his death. I think this argument doesn't have a legal basis. It is just a statement brought to court as an

afterthought. The records indicate that the respondent is the original petitioner in Probate Cause No. 56 of 2014. Expressing their discomfort with the respondent on the petitioned posts, the applicants filed a caveat under section 58 (1) of the Probate and Administration of Estate Act which was later withdrawn by mutual agreement on 05/12/2014 by the applicant advocate and the beneficiaries (applicants) who were personally in court except one, Ali Amiri (5th Applicant). Withdrawing the caveat on 5/12/2014 The applicant's (caveator) advocate, Mr. Ndomba by then was on the proceedings recorded to have said:

> *"Madam Judge, having been aware that the petitioner-Mwanahamisi Rajabu Kimweri petitioned this Court to be appointed the Administrator of the estate of the late Amiri Tabu Charity who died intestate at Bagamoyo Region on 20th July 2014, the beneficiaries of the estate of the deceased filed a caveat ….*
>
> *Upon Mutual agreement which has been reached by the caveators (who are beneficiaries of the estate of the deceased) with the petitioner, who is also one of the beneficiaries of the deceased estate, that the Caveat be withdrawn, and Kedenge Tabu Kondo be appointed the administrator of the Estate of the late Amiri Tabu Charity together with the wife of the deceased Mwanahamisi Rajabu Kimweri..."*

This prayer was granted followed by the appointment of the respondent and one Kadeghe Tabu as co-administrator of the deceased's estate. Until this time, the deceased's belief in respect to the administration of his estate was not at issue.

There is no doubt that the deceased died intestate leaving no WILL. There is no evidence in the entire proceedings, brought either by the administrator or the applicants, suggesting that the deceased had intended to have his estate administered under Islamic law and /or that his lifestyle was such that if he had a chance to be asked to give his opinion, he should have said that Islamic Law should apply. There is also no agreement by the heirs that Islamic law should be applied in the administration of the deceased estate, which is why, I believe that this ground is being brought to court as an afterthought.

Paragraph 6 of the affidavit raises another pertinent issue regarding the unfair distribution of the deceased estate by the respondent. Applicants contend that the administrator has been using the deceased estate for her benefit, she distributed to herself a larger share of the valuable properties while distributing to other heirs' properties with less value. The paragraph is drafted thus:

> *"6. That the respondent has distributed to herself valuable estate, for example, a house situated at Mbezi Beach Dar es salaam which was acquired before her marriage to the deceased and gave the applicants few and valueless properties unjustifiably"*

In his efforts to convince the court on this point, the applicant's counsel gave a comparison between the properties listed in item one of the accounts of the estates filed in court allocated to the respondent visa vis the list of properties allocated to applicants in items 2 and 3.

It is not in dispute as also rightly conceded by the respondent's counsel that the filed inventory and accounts of the estate do not contain the

estimated values of the properties as required by the law under section 107(1) of the Probates Act. The critical question would however be whether the omission to include the estimated value of the properties in the inventory is fatal. The requirement of the inventory is, in my view, for transparency and guidance purposes only. It is aimed at revealing to the court and the beneficiaries the assets and liabilities of the deceased. These are not my words but the decisions of the Court of Appeal in **Joseph Shumbusho V Mary Grace Tegerwa** and others, Civil Appeal No 183 of 2016, Unreported) at page 18 where it was stated that:-

> *"... the inventory is filed to show the assets and liabilities of the deceased whereas the accounts are filed in order to show the administration of the deceased's assets ..."*

And at page 22 they concluded 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."*

The practice of the court has been that after the inventory and accounts are filed, the beneficiaries and any interested parties are notified and allowed to inspect the documents and raise queries if any. This is the position in **Nuru Salum and Husna Ali Msudi Jurna**, PC Probate Appeal No. 10 of 2019 (Unreported) where this court(Rumanyika J, as he then was) held:

> *"In practice, in a good system of administration of justice, once they are filled, the court must cause the same to be known to heirs, debtors, and creditors and ask them to file objections against them, if they so wish. If there is an objection, the court will be at liberty to return them to the*

administrator for rectification as was said by this court in or proceed to hear the parties and make a ruling on the matter,"

This procedure serves two purposes in my view, one, it makes the whole process open to the beneficiaries, and secondly, it allows rectification of the errors if any at the earliest possible time before any further step is taken to close the probate.

The applicant's application contains nothing cogent suggesting a lack of transparency by the administrator in the administration of the deceased estate. The complained inventory and accounts were filed in court in May 2016. Parties were all notified of the process. Two years later, in November 2018, the court records show that applicants were granted leave to sort out some issues in the estate out of court. They could not however raise a query to either the inventory or the account prompting an order dated 05/08/2019, blessing the inventory and the account filed by the administrator. A close evaluation of the records also reveals that there is no challenge posed by the applicants against that last order of the court blessing the inventory and the accounts filed. This application was only taken by the applicants on 24/10/2022, as a postscript, six years after the inventory was filed just immediately after an application by the administrator for an order requiring the beneficiaries to hand over legal documents of the properties in their possession to allow the transfer of the same to the respective heirs. Had there been anything to the discontent of the beneficiaries, in this case, who were represented, could have been raised for the court's directives?

Worse, the applicant's statement in the affidavit has remained as an assertion without evidence of how they are affected by the omission to

state in the inventory the estimated values of the properties to render it fatal to the grant. The applicant's counsel's contention during the hearing was that *"in the absence of the valuation of each property, it is likely for the administrator to distribute the estate unevenly to the heirs*". This is a bare assumption without evidentiary value. It is settled that the burden of proof as to any fact, in any civil litigation lies on that person who wishes the court to believe in its existence. See sections 110., 111, and 112 of the Evidence Act, Cap 6 RE 2022. In this matter, the applicants ought to have established their point by evidence. In the circumstances, I hold that the omission by the respondent to state the estimated value of the estate in the filed inventory is not fatal.

On the second ground, the respondent is faulted for the misappropriation of the deceased estate. Paragraph 4 of the applicant's joint affidavit is categorical on this point. It says:

> "*4. That the respondent since her appointment to administer the deceased estate is administering it unfaithfully by squandering the deceased estate for her benefit against the deceased's heirs and creditors. The respondent used her personal benefit garage equipment located at Magomeni Mikumi and for reasons known to her, she did not include it in the inventory. Apart from that fact, the respondent did not include in the inventory home utensils and furthers left by the deceased…"*

I have perused the inventory filed by the respondent. I agree with the respondent's advocate that the garage equipments is listed in item 7 of the said inventory and the rest of the claims in the said points remain unestablished as there is no evidence presented to locate the equipment

mishandled, squandered, or used otherwise for the respondents benefit in exclusion of the other. This point is thus baseless.

Lastly, the respondent is condemned for not considering the debt of TZs 64,000,000 by SEIF DHIHAB owed by the deceased. This claim is exposed to the court by paragraph 5 of the joint affidavit. I have tried to see how the applicants got to know this significant debt. Unfortunately, paragraph 5 of the affidavit is not verified, leaving the court without details on how and when the applicants knew of the debt.

Even assuming that the paragraph was legally valid before the court, which is not the case, still, the applicant's argument would not have earned them credit. The duty to collect debts due to the deceased estate and payment thereof under section 100 of the Probate and Administration Act lies to the Administrator. This duty was as exhibited by the Accounts filed in court fully executed by the respondent. The accounts show the details of the debts identified by the administrator and the deceased creditors who were also accredited by the applicants. In court on 29/11/2018, the applicant's counsel by then Mr. Mbedule supported the prayer by the respondent's counsel for the court's permission to allow her to pay the debts amounting to 16,361, 600/=. The Respondent's prayer on that date was that:-

> *"… According to the parties, we have agreed that the debt due which is about 16,361,600/=… which are for the five creditors we pray to the court to allow the payment of this government department and individuals of claiming from the estate of the deceased…"*

The Applicants advocate responded as follows:

"…all the request as posed by the counsel for the administrator is correct and we have no objection."

There is nothing raised over the omitted debt owed by the deceased. In any case, the creditor(s), if any was under normal circumstances expected to have claimed the debt due from the administrator of the deceased estate and not from the beneficiaries. In any case, having duly informed of the debt, Applicants were also duty-bound to inform the Administrator who is mandated by the law to see that the liability is discharged under section 108 of the Probate Act. As stated earlier, the applicant's affidavit doesn't say how they became aware of the debt and the steps taken to notify the administrator. The silence by the alleged creditor and the applicant on the matter raises doubt about the authenticity of the debt.

In the final analysis, this court finds the application devoid of merit and proceeds to dismiss it in its entirety. The respondent is by this decision ordered to finalize the administration process and close the probate. Being a probate matter, I order each party to bear their costs.

Order accordingly.

DATED at **DARE ES SALAAM** this **15th** day of **SEPTEMBER** 2023.

E.Y. MKWIZU
JUDGE
15/9/2023