

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**DAR ES SALAAM -SUB REGISTRY**

**AT DAR ES SALAAM**

**PROBATE AND ADMINISTRATION CAUSE NO. 08 OF 2021**

**IN THE MATTER OF THE ESTATE OF THE LATE Dr. MASUMBUKO  
ROMAN LAMWAI**

**AND**

**IN THE MATTER OF THE APPLICATION FOR LETTERS OF  
ADMINISTRATION WITHOUT WILL BY MERCEDES BENJAMINI  
KIMARYO**

**AND**

**IN THE MATTER OF THE CAVEAT FILED BY GERVAS MASUMBUKO  
LAMWAI AND ADAM ROMAN LAMWAI**

**JUDGEMENT**

29<sup>th</sup> August & 29<sup>th</sup> September 2023

**Rwizile, J.**

The late Dr. Masumbuko Roman Lamwai died intestate on 5<sup>th</sup> May 2020. He was survived by a widow, one Mercedes Kimaryo, and several children. Since his demise, his estate has never been administered. This is because the widow and her stepchildren have been at loggerheads mainly on who should be appointed to administer the estate.

When she petitioned this court for letters of administration, a caveat was filed objecting to her appointment on grounds that; she discriminates against other children born out of wedlock and that she has hidden some of the deceased's property from the estate.

This disagreement, however, necessitated a hearing which has unnecessarily taken too long. At first, two matters were at issue, that is who should administer the estate and second was whether the deceased left children other than those listed in the petition. Interestingly however, parties resolved it before a hearing date on 15<sup>th</sup> May 2022, when Joshua Ibrahim, Pendo Emmanuel Shao, Aman Emmanuel Shao, and Julius Emmanuel Shayo were listed among others named in the petition.

At the hearing, therefore, parties were tasked to assist this court to know who between the petitioner and Gervas is better placed to administer the estate of the deceased.

To prove this issue, the petitioner testified (Mercedes Benjamin Kimaryo-Pw1) and tendered one witness Roman Selasin Lamwai (Pw2), while for the caveat, five witnesses testified, as Adam Roman Lamwai (Dw1), Gervas Masumbuko Lamwai (Dw2), Roman Salama Masumbuko Lamwai (Dw3), Anna Roman Selasin (Dw4) and Joseph Roman Selasin (Dw5).

Mr. Imam Hassan Daffa of Apex Attorneys Advocates is the advocate for the petitioner. In his closing written submission argued two issues on the suitability of the petitioner to administer the estate of the deceased and on children not listed in the petition.

He argued that the petitioner being a widow is suitable for appointment by citing the decision of this court in the case of **Mary Mchome Mbwambo and Another vs. Mbonea Gilliad Mbwambo and Another**, Probate and Administration Cause No. 63 of 2007, where it was held that, the widow having participated in acquiring the estate of the deceased is better placed to administer the same. He argued, that the caveator and other stepchildren, despite having raised them, still, they are planning to fix her if appointed to administer the estate. He said, in the strength of the case of **Flora Augustine Mbanda vs. Abdul Daudi Chang'a**, Civil Appeal No. 243 of 2021, it is not a legal requirement to hold a family meeting for appointing an administrator. It was his view therefore that, the failure of the caveator and other children to attend the meeting was not an act of discrimination.

In the second issue, it was argued that Dw5 told the court that the deceased had over 22 children.

It was stated that the only children who were introduced to the family before the death of the deceased were only to be legally accepted as the deceased children. It was Mr. Daffa's view that there was enough evidence from the parties to consider the issue of children even though it was resolved at some earlier stage as held in the case of **Chantal Tito Mziray and Another vs. Ritha John Makala and Another**, Civil Appeal No. 59 of 2017. This court was asked, to appoint the petitioner, the administratrix of the estate of the late Dr. Masumbuko Roman Lamwai, and therefore dismiss the caveat.

Mr. Killey Mwitasi learned advocate who stood for the caveators, submitted as well on two issues. To begin with, he said, once appointed, the administrator/ administratrix has enormous powers that cannot be controlled by the court or the beneficiaries on how to distribute the estate. He said, the same is free to do anything he likes in respect of the estate as held in the case of **Joseph Shumbusho vs. Mary Grace Tigerwa and 2 Others**, Civil Appeal No.183 of 2016, (CA), and the case of **Ibrahim Kusaga vs. Emmanuel Mweta** [1986] TLR. 26.

He asked this court therefore not to appoint the petitioner because of her discriminative behavior against the stepchildren which is against sections 5 and 10 of the Law of the Child Act, 2009.

It was argued further that since the petitioner told this court that the deceased estate has been distributed already, and yet she listed some of the properties, this shows how she speaks with two tongues and is therefore incapable of administering the estate properly. She should not be appointed, the learned counsel added. In reference is the case of **Africarriers Ltd vs. Mellenium Logistics Limited**, Civil Appeal No.185 of 2018, CA. Gervais, according to the learned counsel, is the firstborn of the deceased, was close to him, worked as his driver, has the support of other children, and knows secrets of his father should be appointed a sole administrator or be appointed a co-administrator with the petitioner. I was referred to the case of **Ritha John Makala and Another vs. Chantal Tito Mziray and another**, Probate and Administration Cause No. 62 of 2014. Or else, it was argued, the Administrator General as a more neutral person be appointed as held in the case of the Late **Donati Mwası Kezirahabi vs. Benedict Museso Kezirahabi**, Probate and Administration Cause No. 4 of 2010.

On the second issue of the children left out in the petition, this court was asked to take the 13 children listed in the caveat as agreed by both parties before the hearing of the case as the deceased's children.

Having heard the parties through evidence and submissions, I have to say an issue that is not disputed does not need evidence to prove it. In respect of the beneficiaries of the deceased estate, this matter was settled by the parties as I have shown before that is on the 15<sup>th</sup> of May 2022, Joshua Ibrahim, Pendo Emmanuel Shao, Aman Emmanuel Shao, and Julius Emmanuel Shayo were listed among others named in the petition. But the caveat has listed more than four children. In my view, evidence was brought to prove that all children listed in the caveat are the deceased's children, and I do not see any reason why they should not be added. Therefore, the deceased left the following 13 children; Gervas, Roman, Selasin, Benjamin, Catherine, Mary, Neema, Baraka, Adam, Joshua, Pendo, Julius, and Aman. This is enough to settle a dispute on who the children of the late Dr. Masumbuka Roman Lamwai are.

Before determining the first issue of who is better placed to administer the estate of the deceased, I have the following to say. It is not true as submitted by the caveator's advocate that when appointed, the administrator may distribute the estate in the manner he likes without any controls. The position of the law as stated in the cases of **Joseph Shumbusho vs. Mary Grace Tigerwa and 2 Others** and **Ibrahim Kusaga vs. Emmanuel Mweta** (supra) is that, it is not a legal requirement for the administrator to consult

the beneficiaries when holding the office of the administrator and that it is as well not the duty of the court to distribute the estate of the deceased.

However, the position of the law is clear on the duties of the administrator and the jurisdiction of the court to check how such powers are exercised. In other words, when the administrator does not execute his duties properly may be subject to revocation under section 49 of the Probate and Administration of the Estates Act (PAEA). Such instances are, when he abuses his office by rendering the grant issued to him inoperative, or when he fails to exhibit or exhibits an inventory and accounts that are not true.

Further, it can be stated that holding the office of the administrator is a duty that can be done by any reasonable person. However, the law provides under section 33 of the PAEA that persons who are beneficiaries or in any way related to the deceased may be appointed. In case that is not viable even a stranger as I have said may be appointed. This court has powers to appoint such persons as the Administrator General to act as such. This is because the main duty of the administrator is to distribute the estate, which he does under the guidance of the court.

I am quite certain, that the distribution of the estate may be governed by Islamic law, which is explicit on who should inherit and the amount of the

estate to be inherited by beneficiaries, or under customary law; this depends on the customs of the tribe in question and that as well depends on the lifestyle of the deceased. Where Islamic law or customary law does not apply, the Indian Succession Act may apply. In some cases, as well, beneficiaries can agree on how the estate may be distributed. If there is an agreement that complies with the law, then there is no court interference on the matter.

In the matter at hand, with certainty, I can rule out that the deceased being a Christian and having married under Christian rites it cannot be said, that his estate should be administered under Islamic law or customary law.

Therefore, the Indian Succession Act is to be brought into play which is why this case was perhaps filed before this court. To me, it does not matter therefore who is appointed to administer the estate, between the two competing sides, because if the widow is appointed shall apply the same law that would be applied by the caveator or the Administrator General. To be precise, therefore is no way, the administrator may choose to distribute the estate in the manner he likes. In this case, for instance, it is crystal clear that the beneficiaries of the estate of the deceased are the one widow and 13 children as I have shown before.



Sections 26, 27, 28, 29, and 30 of the Indian Succession Act provide that the widow takes one-third and the remaining two-thirds is to be distributed equally among the children. Therefore, I do not think whoever is appointed has the discretion in the absence of the agreement among beneficiaries to go below or beyond the dictates of the law.

Having said, what I have said, because there is no dispute that Gervas is the firstborn to the deceased, that he was a driver of the deceased for some time, and that there is an allegation that the petitioner has omitted to list some properties of the estate, I think, for better carrying of the officer of the administrator, I will appoint both, MERCEDES BENJAMINI KIMARYO and GERVAS MASUMBUKO LAMWAI to administer the estate of the late DR. MASUMBUKA ROMAN LAMWAI. Let the grant be issued.



  
**ACK. RWIZILE**  
**JUDGE**  
**29.09.2023**