

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

**PROBATE AND ADMINISTRATION CAUSE NO. 11 OF 2022
IN THE MATTER OF THE ESTATE OF THE LATE COSMAS ANTHONY KESSY
AND
IN THE MATTER OF APPLICATION FOR LETTERS OF ADMINISTRATION BY
FRIDA AGAPITI KESSY AND DAMIAN ANTHONY KESSY
AND
IN THE MATTER OF CAVEAT AGAINST THE GRANT OF LETTERS OF
ADMINISTRATION RAISED BY EMMANUEL COSMAS KESSY**

FRIDA AGAPITI KESSY 1ST PLAINTIFF

DAMIAN ANTHONY KESSY 2ND PLAINTIFF

VERSUS

EMMANUEL COSMAS KESSY DEFENDANT

JUDGMENT

23rd August & 07th November, 2023

KAMUZORA, J.

The Plaintiffs herein Frida Agapiti Kessy and Damian Anthony Kessy petitioned for the grant of letters of Administration of the estate of the late Cosmas Anthony Kessy, who died at Arusha Lutheran Medical Centre

herein Arusha on 21st July 2021. The deceased died interstate and was survived by a wife and seven children.

Emmanuel Cosmas Kessy filed a caveat against the grant of letters of administration on 24th April 2023. The record shows that the Defendant is the son of the late Cosman Anthony Kessy hence, one among beneficiaries to the estate of the deceased. The 1st Plaintiff herein is the wife of the deceased while the 2nd Plaintiff herein is the twin brother to the deceased. The Defendant objects the Plaintiffs' appointment as administrators of his father's estate on ground that they are not faithful persons as they are still in possession of letter of administration that was issued to them by the Arusha primary court despite their appointment being revoked by the District Court. He contended that, the Plaintiffs were not appointed by family meeting and they hate him thus, will not be fair. That, the 2nd Plaintiff has no any interest in the deceased estate but owns and deals with similar business to that of the deceased hence, he will not be firm to administer the deceased's estates.

Following the caveat raised by the Defendant, this matter turned into a contentious proceeding thus, this court invoked the provision of section 52(b) of the Probate and Administration Act Cap 352 R.E 2002

which requires the matter to take a form of a civil suit. In that regard, the Petitioners were treated as the Plaintiffs and the Caveator as the Defendant. The above procedure was also discussed by the Court of Appeal in the case of **Monica Nyamakere Jigamba Vs. Mugeta Bwire Bhakome & another**, Civil Application No 199/1 of 2019 [2020] TZCA 1820 (16th October 2020) (Tanzlii).

On first date of hearing the following issues were framed to guide parties and assist the court in its determination: -

- 1. Whether the Petitioner are fit persons to be appointed as administrators of estate of the late Cosmas Anthony Kessy*
- 2. Whether the Caveator/Defendant is an interested person to be appointed as administrator of the estate of the late Cosmas Anthony Kessy.*
- 3. In any other case to what reliefs are parties entitled to.*

Both the Plaintiffs and the Defendant paraded three witnesses each in need to support their positions. As a matter of legal representation, Mr. Dismas Lume and Mr. Imran Juma appeared of the Plaintiffs while Mr. David Makatha and Mr Anold Wilson appeared for the Defendant.

PW1, Frida Agapiti Kessy testified that she is the wife of the deceased whom they celebrated their Christian marriage on 10/01/2014. The marriage certificate was admitted as exhibit PE1. That, they were blessed with six issues of marriage and only 2 children are currently

above 18 years. Six birth certificates were admitted as Exhibit PE2 and the death certificate was admitted as exhibit PE3. PW1 testified further that they lived peaceful as a family together with the Defendant who is her husband's child borne by another mother. That, misunderstanding between her and the Defendant started after the demise of her husband.

With regards to the properties owned by the deceased, PW1 listed various properties including houses and motor vehicles and she and tendered 22 motorcycle registration cards that were admitted as exhibit PE4. She added that they had a family meeting which appointed them to apply for administration and that the Defendant also attended the meeting. PW1 insist that the Plaintiffs are fit to be appointed as administrators of the estate and doing so will assist them in running the business and take care of deceased's children and give them their needs on time.

PW2 Damian Antony Kessy testified that the deceased is his twin brother. That, the deceased had a wife who is the first Plaintiff herein and they were blessed with six children. That he knows that the Defendant is also the deceased's son from another woman. That, the Defendant was sent by his father to live with their parents in the village

and later brought to Arusha to live with his father and family after he had completed standard seven. That, by that time, PW2 was living in the same house with his twin brother herein Arusha and they later decided to have different houses but built in the same compound. That, after the demise of his brother, they had a family meeting that appointed them to apply to be administrators of the deceased's estate. The minutes for family meeting was admitted as exhibit PE5.

Responding on the caveat raised by the Defendant, PW2 stated that the same is baseless as they deserve to be appointed as administrators. That, as they are trusted by the family members that they can administer the estate fairly. When cross examined, PW2 denied the allegation that he had conflict of interest to the deceased's business. He admitted doing similar business with that of the deceased but insisted that it has nothing to do with his capacity in administering the deceased's properties.

PW2 testified further that the Defendant is not a faithful person as he has already taken possession of some of deceased's properties which are guest house, car wash and bar even before distribution. That, before his father's death, the Defendant was assigned to supervise his father's business which were two shops but they collapsed in his hands thus, his

father decided to support him establish his own business. That, the Defendant was living at his father's house before his death but after his father's death he went to leave somewhere else for no reason. PW2 insisted that the Defendant cannot be trusted because he is a greedy person interested to the properties thus, prayed for the Defendant's objection to be struck out.

PW3 Peter Nicolaus Kessy is the relative to the deceased. He testified that he was the secretary to the family meeting that appointed the Plaintiffs to apply as administrators to the deceased's estate. That the meeting appointed the deceased's wife who also suggested the deceased's brother to assist her in the administration. He supported their appointment because they were approved by the family meeting, they are fit people to be appointed as the administrators. PW3 acknowledged the Defendant as the deceased's son. That the Defendant was living in the village before his father brought him to join his family here in Arusha. PW3 doubted the Defendant's trustfulness on account that he was not supportive with the family before and after his father's death. To him, the Defendant is only interested to the properties as he started to misuse his father's properties when his father was sick. He was of the

view that the Defendant is not a fit person to be appointed as an administrator as he had already tried to misuse the deceased's estate.

On the defence side, Emmanuel Cosmas Kessy testified as DW1. He stated that he is the son to the deceased together with other six children born by the deceased. He testified that his father left properties including two bars, two guest houses, carwash, a total of 21 cargo motor vehicles and small cars, two residential houses, farms, motorcycles and money in bank. That, he is the one supervising bar business which belong to the deceased as he has been running that business since 2018. That he was also assisting his father in spare parts shop and cargo vehicles and when living the supervision of cargo vehicles, the deceased had 14 vehicles.

DW1 further testified that, after his father's death they attended a family meeting and they were issued with a paper to record their names and when they came back to town, the Plaintiffs' instituted a probate matter and were appointed as administrators before the Primary court in Probate No. 268 of 2021. That, their appointment was however revoked by the district court in Revision No. 2 of 2022. The judgment of the district court was admitted as Exhibit DE1. That, after being appointed by the primary court, the Plaintiffs made distribution and he was only

given one small car, one cargo vehicle, 1.5 acres of farm and 3 million out of 500 million that were in the deceased's account. That, the Plaintiff failed to stick on the administration limit as they issued notice to the employers at the bar which was being supervised by the Defendant without following proper procedures. DW1 believes that since he was the eldest son of the deceased and director to the bar, the Plaintiff were bound to inform him of the process before they issued notice to employees. He added that he was also issued notice to leave the bar within 14 days. A total of 22 notices were admitted as Exhibit D2.

DW1 testified also that he was raised by his stepmother (PW1) and his father (the deceased) as he started living with them in the same house since he was 14 years old. DW1 added that since PW2 is the twin brother to the deceased, he is not the heir thus, he had no any interest to the deceased's estate. He objects the appointment of the Plaintiffs on account that they initiated the probate matter without seeking his consent as the elder son of the deceased. That, PW2 has similar business with that of the deceased thus, he will not be firm in supervising the deceased's estate. He condemned PW2 for assigning his vehicle for the business that was to be performed with the deceased's

vehicle. He also alleged to have seen the invoice in relation to that transaction.

Alternatively, DW1 prays to be appointed as co-administrator to the deceased's estate on ground that PW1 alone cannot properly administer the estate which is too big. On being cross examined DW1 stated that, PW1 is responsible in taking care of his young siblings. He admitted to have signed a paper but the fact that the Plaintiffs were appointed by the family meeting to administer the estate. That, before his father's death, he was managing bar business and reporting all collections and expenditures. That he was also controlling all purchases and paying employees' salaries. He denied the allegation for misuse of deceased's money and insisted that he stood in his position as director of the bar.

DW2, Ally Ayubu testified that, he is manager to the bar called Blue Pub located at Daraja Mbili as he was working for Cosma Kessy since 2007. That, after Cosmas Kessy became sick, he introduced Emmanuel Cosmas (DW1) as their new director who will be supervising the business, and that was 2000. That, after Cosmas passed away in 2021, all employees including DW1 were issued with notice to leave the bar. DW2 supports the appointment of DW1 as administrator of the estate

because he believes that he is a trustworthy person for he was faithfully paying employees' salaries and running the business properly.

DW3, Dorothea Anthony is the deceased mother and grandmother to DW1. She testified that the deceased was survived by 7 children. That, Emmanuel (DW1) was sent by his father Cosmas to live with her in the village when he was 7 years old. That, after DW1 completed standard seven he was brought in Arusha to live with his father after he got married to PW1. That, DW1 and PW1 were living in the same house but after Cosmas died DW1 left the house and she is not aware of what happened between them. That, she was asked to come to court as DW1 was claiming for his right. She requested this court's permission for the matter to be discussed at the family level as she wants the son and the mother to have peace. Upon being cross examined, DW3 testified that she knows that PW1 has right over her husband's properties but traditionally, the elder son should be allowed to supervise the deceased's properties. She however did not object the Plaintiffs from being appointed as administrator to the deceased's estate.

From the above analysis of evidence, this court is bound to determine the merit of the caveat. In doing so, I will start my deliberation with the first issue of whether the Petitioners/Plaintiffs are

fit persons to be appointed as administrators of the estate of the late Cosmas Anthoy Kessy. The following are the reasons posed by the Defendant in objecting the Plaintiffs; one, is the Plaintiffs instituted a probate matter before the primary court without notifying him while he is the elder son of the deceased, two, that the Plaintiffs' distribution to the properties before primary court was not fair, three, that the Plaintiffs issued notice to employees at the bar which he was supervising without following proper procedures and four, that the 2nd Plaintiff has conflict of interest and cannot fairly supervise deceased's business.

On the first reason, the Defendant claimed that the Plaintiffs were not appointed by any family meeting to be administrator and that they initiated probate proceedings without consent from the Defendant who is the eldest son of the deceased. It must be noted that the requirement for minutes from family meeting has been matter of practice which in my view, is the best practice for purpose of avoiding duplication in the matter and reducing complaint from family members. But that is not the rule of thumb where a party is able to justify why the same could not be procured.

In the matter at hand, the Plaintiffs proved by submitting the minutes showing that the family meeting was held and they were

proposed to apply for administration. The evidence reveals that after burial process, the family had a meeting which the Defendant does not deny. He only denies the fact the Plaintiffs were appointed in that meeting to apply for administration. The evidence from Plaintiffs and their witness confirmed that the meeting was intended for the administration of the estate of the deceased. Exhibit PE5 which is the minutes contain a heading 'KIKAO CHA FAMILIA JUU YA MIRATHI YA MAREHEMU COSMAS ANTONY KESSY LEO TAREHE 17/07/2021'. The Defendant admitted to have signed a paper and his name can well be found at page 2 number 30. After list of names, it follows the minutes of the meeting and among the agenda were issue for probate matter. The Plaintiffs' names were listed as people approved by the meeting to apply for administration. Since, the Defendant did not deny attending the meeting, he cannot claim that he did not know what was discussed during the family meeting. His claim that he only signed a paper without starting what was discussed during the meeting does not make a conclusion the agenda under the minutes were not discussed and if the Plaintiffs approved were not approved in that meeting. I therefore find that the Plaintiffs were approved by the family meeting to apply for administration.

Again, the Defendant's claim that the probate matter before the primary court was initiated without his consent is baseless. The same was filed in court based on the agreement made during the family meeting which, the Defendant was also a member. In filing a probate matter before the primary court the Plaintiff were not bound to file another consent document from the heirs rather to publish the notice. since no proceedings for the primary court were brought before this court to justify the claim that procedures were not adhered to, this court finds that the Defendant's allegation is unproven.

On the argument that the Plaintiffs are not fit to administer the estate, I will be guided by the law. Section 33 of the probate and Administration of estate Act Cap 352 requires the letters of administration to be granted to a person who has interest to the deceased estate. In the matter at hand, the Defendant herein does not dispute the fact that the 1st Plaintiff has interest to the estate as the wife and legal heir of the decease. His objection is much based on the 2nd Plaintiff whom he claims to have no interest to deceased's estate for not being among the deceased's heirs. Such fact is not disputed by the 2nd Plaintiff himself as he admits to be the deceased's twin brother and not heir to his estate. His petition is intended to assist the deceased wife to

administer the estate. The question is whether his lack of interest to the estate makes him incompetent in the administration of the deceased's estate.

The law under subsection 2 of section 33, gives powers to the court to appoint more than one person to administer the deceased's estate. Under subsection 3 of the same provision, the court may appoint any other person which it thinks can properly and fairly administer the estate. The said provision read: -

*33.(4) Where it appears to the court to be necessary or convenient to appoint some person to administer the estate or any part thereof other than the person who under ordinary circumstances would be entitled to a grant of administration, the court may, in its discretion, having regard to **consanguinity, amount of interest, the safety of the estate and probability that it will be properly administered**, appoint such person as it thinks fit to be administrator; and in every such case letters of administration may be limited or not as the court thinks fit."*

In the case of **Sekunda Mbwambo Vs. Rose Ramadhan** [2004] TLR 439 the Court of Appeal of Tanzania while discussing the issue as to who is a fit person to be appointed to administer the estate, it has this to say;

"An administrator may be a widow or widows, parents or child of the deceased or any close relative; if such people are not available

or if they are found to be unfit in one way or another, the court has the power to appoint any other fit person or authority to discharge this duty".

From the above quoted provision and the cited decision, apart from having interest to the estate, the court may appoint any person as administrator who it thinks as trustworthy person and who will act faithful and unbiasedly in the whole process of administration. Thus, the contention by the Defendant that only heirs to the estate has right to administer the deceased's estate is unwarranted. The 2nd Plaintiff by virtue of the above provision and case law may still be appointed to administer the estate if the court finds him a trustworthy and capable person in administering the estate of the deceased.

The Plaintiffs' witness supported their appointment as they are trusted by all family members as trustworthy persons. The evidence also reveal that the Plaintiffs were able to demonstrate that they possess sufficient knowledge to the estate of the deceased and nothing was proved against their trustworthiness in administering the estate. Even the deceased mother does not dispute their appointment despite her proposal for the matter to resolved harmoniously. The Defendant was ready to administer the estate with the 1st Plaintiff on ground that the estate is too big to be administered by the 1st plaintiff alone a fact which

shows that he acknowledges that the 1st Plaintiff is a fit person to administer the estate. As well pointed out in my discussion above, there is no sound evidence presented by the Defendant to weaken the 2nd Defendant's capacity in acting as co-administrator. I therefore find the first reason by the Defendant that the Plaintiffs are not fit to administer the estate is weak hence, not allowed.

On the second reason, the Defendant claimed that the Plaintiffs' distribution to the properties before primary court was not fair. He claimed that out of several properties of the deceased, Plaintiffs gave him only one small car, one cargo vehicle, 1.5 acres of farm and 3 million out of 500 million that were in the deceased's account. It is unfortunate that no document was presented to justify the alleged distribution. Moreover, the said decision was also nullified for want of jurisdiction and not on account of failure to properly distribute the estate thus, the same cannot be the basis for determination of the Plaintiffs' competency in administration of estate. I therefore find this reason unjustified.

On the third reason that the Plaintiffs issued notice to employees at the bar which the Defendant was supervising without following proper procedures, I find the same wanting. There is no doubt that the said bar

is the deceased's property and that was well conceded by the Defendant in his testimony. There is no dispute that at the time the Plaintiff issued notices to the bar employees, they were appointed administrators and their appointment were still valid. Since they acted in administration capacity and the notices shows that they intended to improve the business, it cannot be said that their administration capacity could be doubted for that.

On the fourth reasons, it was the Defendant's contention that the 2nd Plaintiff will not be firm in supervising the deceased's business as he has conflict of interest for, he is running business similar to that of the deceased. I do not see how having similar business weaken the 2nd Plaintiff's capability in administering the estate of the deceased. The Defendant assumed that upon being appointed a co-administrator the 2nd Plaintiff will be responsible in running the deceased's business but that is not the purpose of administration. The administrators' basic duties is to collect all deceased's properties, pay debt and distribute the estate residues to the heirs of the deceased. Thus, the contention by the Defendant the 2nd Plaintiff will not be firm in running the deceased's business is weak. Again, the claim by the Defendant that the 2nd Plaintiff assigned his vehicle for the work earned for the deceased's vehicle is

unsubstantiated with evidence. The mere allegation by the Defendant that he saw invoice, in itself does not justify his claim that the 2nd Plaintiff robbed business meant for the deceased's vehicle. In my view, despite the fact that the 2nd Plaintiff is not the immediate heir to the estate of the deceased, the court still may to appoint him as administrator if satisfied that he is a trustworthy person in administering the estate of the deceased. I therefore conclude the first issue in affirmative that the Plaintiff are fit persons to be appointed administrators of the estate of the deceased.

The second issue is to whether the Caveator/Defendant is an interested and fit person to be appointed as administrator of the estate of the late Cosmas. There is no dispute that Defendant is the son of the deceased hence, one of the deceased's heirs with interest to the estate. His prayer for appointment is opposed by the Plaintiffs on account that he is not a trustworthy person for he took possession for some of the deceased's properties even before they were distributed to him. They believe that the Defendant is only greedy and interested in squandering the properties than being just and fair in administration of estate.

Although no tangible evidence proving the Defendant's misappropriation to properties, the fact that he admits taking possession

of some of the properties and not allowing Plaintiff to have access to the same presupposes that he had formed interest which can be interpreted as personal interest not to the benefit of all beneficiaries. He was not trusted by the family member and appointed during family meeting. He has admitted to have moved out of the family house without any reasonable ground, a fact which suggest that if appointed jointly with the 1st Plaintiff as he suggests, there is a likelihood that the administration will be ineffectual for lack of cooperation between administrators. Thus, the circumstance of this case does not make the Defendant a fit person in administering the deceased's estate.

In concluding the third issue on reliefs, this court in considering the above analysis of evidence is satisfied that the Plaintiffs are fit persons to administer the estate of the late Cosmas Anthony Kessy. Their petition should therefore proceed on determination. The Defendant caveat is found to have no merit hence, dismissed. Since the suit originated from probate matter and between family members, I will not make any order for costs.

DATED at **ARUSHA** this 07th day of November, 2023.




D.C. KAMUZORA

JUDGE

