

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA
DODOMA DISTRICT REGISTRY
AT DODOMA

DC CIVIL APPEAL NO. 36 OF 2022

(From the District Court of Dodoma in Probate and Administration Cause No. 178 of 2022)

CHARLES SIMON MALOMELE APPELLANT

VERSUS

PIUS SIMON MALOMELE.....1ST RESPONDENT

LUCAS SIMON MALOMELEE.....2ND RESPONDENT

JUDGMENT

Last Order: 12th October, 2023
Judgment: 10th November, 2023

MASABO, J.:-

The appellant is disgruntled by the ruling of the District Court of Dodoma in Probate and Administration Cause No. 178 of 2021 which dismissed his appellants application for revocation of the respondents' letters of administration of the estate of the late of Saimon Malimi Malomele. The record has it that, following an interstate demise of Saimon Malimi Malomele, (the deceased), who was the biological father to the appellant and the respondents, the respondents successfully petitioned for letters of administration in Probate Cause No. 178 of 2021 before the District Court of Dodoma. After the grant of the letters on 12th April 2022 they embarked in the administration during which, a dispute ensued between them and the appellant who is their brother. The appellant was enraged. He sought to for

revocation of the respondents as administrators of the estate. In his chamber summons he stated that the letters be revoked as: **one**, the proceedings by which the respondents obtained the grant were defective; **two**, the grant was frequently obtained by making a false suggestion or concealing some material facts and **three**, the grant was obtained by means of untrue allegation of a fact essential to the grant. In the end, the trial court dismissed the application after it held that the provisions of section 49(1)(a)(b) and (c) pertaining to revocation of grant were not satisfied. This finding has enraged the appellant hence the present appeal based on the following grounds of appeal:

1. That, the Honourable Magistrate erred in law and in facts in not holding that the Respondents were properly appointed Administrators of estate of the late Saimon Malimi Malomele in the circumstances of the case.
2. That, the Honourable Magistrate erred in law and in facts in not holding that the respondents improperly applied to be appointed administrators of the estate without adhering to section 82 of the Probate and Administration of Estates Act, Cap. 352 R.E 2002.
3. That, the Honourable Magistrate erred in law and in facts in not holding that the respondents' application for being appointed as administrators did not follow the legal procedures.

Hearing of the appeal proceeded by way of written submissions. Both parties had representation. Submissions by the appellant were drawn and filed by Ms. Josephine Mzava learned counsel whereas those of the respondent were drawn and filed by Mr. Venance Kibulika, learned counsel.

Submitting in support of the appeal, Ms. Mzava gave a thorough background of the matter. He stated that, the deceased one Simon Malimi Mayala Malomele died on 18th June 2001 and soon thereafter, the appellant's late mother one Ester Mayengela was appointed the administratrix of the estate vide Probate and Administration Cause No. 146 of 2001 before Dodoma Urban Primary Court on 21st January 2003. However, the said Ester Mayengela, the administratrix, demised before the closure of the probate. Following her demise, the respondents applied for appointment as joint administrators of the same estate before the District Court of Dodoma. The appellant unsuccessfully challenged the said appointment hence this appeal. She submitted that the appointment of the respondents was improper because, the probate cause before Dodoma Urban Primary Court was still pending as it had not been closed. Hence, the new probate matter and the grant were res subjudice to Probate and Administration Cause No. 146 of 2001 which was still pending before Dodoma Urban Primary Court hence contrary to section 8 of the Civil Procedure Code and the case of **Wengert Windrose Safaris (Tanzania) Limited vs. The Ministry for Natural Resources and Tourism and the Attorney General**, Misc. Commercial Case No. 89 of 2016, High Court Commercial Division (unreported).

It was her submission further that the appointment of the respondents contravened section 56(1) (f) of the Probate and Administration of Estate Act Cap 352 which postulates that the petition for letters of administration should show that there are no other proceedings commenced or pending over the administration of estates. The respondents concealed this fact in

their application. Hence, it was improper to hold that their application was properly done.

On the second ground it was submitted that the respondent was to apply for revocation and the appointment of new administrators of the estate in the primary court which appointed the late Ester Mayengela as administratrix of the estate. Pursuant to section 82 of the Probate and Administration of Estate Act, the district court can only revoke the appointment it has previously made and not the appointment made by a primary court. Therefore, the application for revocation ought to go to the same primary that appointed Ester Mayengela as administratrix and not to the district court.

Regarding the third ground of appeal, it was submitted that the District Court had no jurisdiction over the matter as the deceased lived a customary way of life. Citing section 18 and 19 of the Magistrate Court's Act and item 1 and 2 of the Fifth Schedule to the Magistrate Courts' Act, Cap 11 RE 2019 and the case of **Leila Suleiman Yange vs. Rahma Mohamed Mabrouk**, Probate Appeal No. 11 of 2022, TZHC 16814 TanzLII and **Sabato Maiga v Malemi Kubwela Msukula**, PC Probate Appeal No. 2 of 2021, HC at Shinyanga, she argued that, it was the primary court which had jurisdiction over the matter as the mode of life test demonstrated clearly that the deceased lived customary life, with 4 wives. In conclusion she argued the court to allow the appeal with costs and nullify the appointment of the respondent as it was contrary to the law.

Mr. Kibulika also opened his reply with a factual background. He submitted that on 27th October 2021 the family members of the late Saimoni Malimi Malomele convened a family meeting which among other things identified the deceased's properties and proposed the names of the persons to be appointed as administrators of the deceased estate. The appellant herein was among the members who attended the meeting at which the respondents were proposed by the family members to be the joint administrators of the deceased's estate. After this endorsement, the respondents applied for letters before the District Court of Dodoma vide Probate and administration Cause No. 178 of 2021 and at the conclusion of the matter on 12th April 2022 the respondents were, appointed as joint administrators of the estate. Surprisingly, on 9th June 2022 the appellant lodged an application under section 49 of the Probate and Administration Act and rule 29(1) of the Probate Rules seeking for their revocation. On 22nd August 2022 his application was dismissed for what of merit hence this appeal.

He then proceeded that the appellant's submissions are inconsistent with his complaint before the trial court. In the trial court, his prayer for revocation was based on the fact that some of the properties listed in the petition for grant of letters were his property.

As regards the grounds of the appeal, starting with the first ground of appeal he submitted that it has no merit. The respondents' appointment was proper on the following reasons: First, despite the fact that the late Malomele left fourteen children, it is only the appellant who knew the existence of probate

Cause No. 148 of 2001. Secondly, there is no proof if the alleged administratrix administered the estate fully by filing inventory and final account as required by the law. Thirdly, there are no records as regards the alleged probate cause from the primary court. When the appellant was asked to bring them before the District Court he failed to do so. Consequently, in the absence of such documents, the court had no basis to decide that there was a previous probate matter. Thus, there is nothing to fault the trial court for appointing the respondents as new administrators because section 46 of the Probate and Administration Act allows interested person to apply for letters of administration of the residual estate (unadministered estate). Therefore, the respondents being interested in the probate had a right to apply for the letters of administration as they did.

As regards the argument that the probate application before the district court was sub judice to the one in the primary court, Mr. Kibulika submitted that it is with no merit as it has been raised from the bar. It was neither raised during trial nor in the grounds of appeal. Thus, this court should not deliberate upon it. On the complaint that the application for appointment violated section 56 (1) (f) of the Probate and Administration of Estates Act, he submitted that the argument is misplaced as there was no evidence to show that indeed the late Ester Mayengela was appointed the administratrix of the estate. Form No.4, the letter allegedly granted to the said Esther Mayengela, did not sufficiently prove the appellant's claims. For purposes of proof, Form No.5 and 6 ought to have been produced but they were not. Even the ruling by which the said Ester was granted the letters was not produced. Further, he argued that it is questionable if indeed there was

such grant of letters as the letters appear to have been granted on 21/1/2003 whereas the probate matter bears a 2021 number, that is No. 146 of 2001. Lastly, he submitted that the appellant wrongly cited section 82 of Cap 352 in support of this appeal as the district court did not revoke the appointment of the late Ester Mayengela. The citation, is therefore, lucidly misplaced.

On the last ground of appeal, it was submitted that this too is with no merit as the law applied by the court in the grant of letters of administration was proper. The deceased lived a Christian way of life. He had only one wife Ester Mayengele, and not 4 wives as alleged by the appellant. The allegations that he had 4 wives is unfounded as the appellant did not even mention the names of the said wives. The said allegation contravened the settled principle of law that he who alleges must prove as stated in the case of **Eunice Masanja Noventh and Another vs. Ansibert Nkete**, Land Appeal No. 101 of 2020 which cited the decision of the Court of Appeal in **Barelia Karangirangi vs. Asteria Nyalwamba**, Civil Appeal No. 237 of 2017 (CAT). Based on these submissions he prayed that the appeal be found with no merit and be dismissed with costs.

Rejoining on the appointment of Ester Mayengela as administratrix, the appellant's counsel argued that the letter of appointment which was produced in the trial court sufficed as proof. The argument that the appellant must have submitted an inventory and accounts to support his averments is with no merit. He proceeded that, because there was an appointment done by the primary court after the demise of the administrator, the respondents

ought to go back to the primary court for revocation of the letters and appointment of the new administrators but they did not. They opted to go to the district court an option which was legally incorrect. On the argument that the deceased was not a Christian, she referred the court to the applicant's affidavit in support of the application before the trial court. She then argued that all the paragraphs in which he deposed the marital status of the deceased were uncontested. Therefore, there is no gain in insisting that the deceased was a Christian while he was not. He had children with 4 women, the appellant mother being one of them which shows that he abandoned the Christian mode of life.

I have keenly read and considered the arguments raised by both parties in their respective submissions and I have thoroughly perused the records of the trial court. As stated in above, the appeal is built up on three grounds of appeal as set out in the memorandum of appeal. The determination of these grounds will ultimately answer the main issue for determination in this appeal, namely whether the appeal has merit.

From the record, and as stated earlier on, the appellant has prayed for revocation of the respondents' appointment. He set out three grounds in support of the revocation. The grounds were that; **one**, the proceedings by which the respondents obtained the grant were defective; **two**, the grant was fraudulently obtained by making a false suggestion or concealing some material facts and **three**, the grant was obtained by means of untrue allegation of a fact essential to the grant. I have found it apposite to go back to the chamber summon and its affidavit so as to address the preliminary point raised by Mr. Kibulika that, the appellant has changed his gear by

introducing new matters which were not raised in the trial court. When reading the applicant's affidavit in support of his application for revocation, I have observed that further to depositions on the ownership of the houses appearing in paragraph 8 of the affidavit, he alluded to other things including the fact that the deceased had children with four different women (paragraph 3) and that after the death of the deceased his mother was appointed as an administratrix of the estate (paragraph 6). The latter point was deliberated upon by the trial court. Therefore, it is incorrect to argue that the averments made by the appellant in his submission are alien to the proceedings.

Back to the grounds of appeal, the main issue raised is that at the time of their appointment the respondent concealed the fact that the probate has been a subject of another probate matter by which the appellant's mother Ester Mayengela was appointed as administratrix. Because of this the application proceeded *res subjudice* to the earlier probate matter. According to section 49(1) of the Probate and Administration of Estates Act, Cap. 352, letters of administration may be revoked due to the following reasons:

49(1) (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 by means of 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 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.

The appellants complaints fell under the first three factors. As already stated in his chamber summons the appellant stated that there are three reasons why the respondents' appointment should be revoked. First, the proceedings by which the respondents obtained the grant were defective; two, the grant was fraudulently obtained by making a false suggestion or concealing some material facts and three, the grant was obtained by means of untrue allegation of a fact essential to the grant. Also, in support of the first ground of appeal, the appellants counsel, has submitted that the proceedings leading to the grant of the letters of administration to the respondents proceeded oblivious of the fact that the estate was subject to a previous probate proceeding by which letters of administration over the same estate were granted to one Ester Mayengela, now deceased. Hence res subjudice and offensive of section 56(1)(f) of the Probate and Administration of Estates Act.

Section 56(1) (f) which was allegedly offended provides that:

56(1) Application for letters of administration shall be made by petition, stating–

(f) whether any proceedings for the grant of letters of administration, or otherwise for the administration of the estate, have been commenced before any other court or authority, whether within Tanzania or outside it.

The rationale of this provision is not difficult to find. It serves to inform the court whether there exists an administrator for the same estate, whether the estate has been fully administered and if partially administered, what has remained unadministered. Hence, a vital tool in preventing double/multiple appointments over the same estate. As the provision clearly shows the requirement for disclosure under section 56(1)(f) is a mandatory legal requirement hence, it cannot be overlooked.

I have examined the respondents joint petition for letters of administration to ascertain whether there was any disclosure. In this endeavor, I have observed that much as the deceased died on 18th June 2001 and the petition was filed on 4th November 2021 (20 years later), in paragraph 8 of petition the petitioners intriguingly state that no proceedings were ever commenced with respect to the deceased's estate. Later on and as acknowledged by both parties, the existence of probate proceedings appointing Ester Mayengela as the administratrix of the estate was raised. It was deponed in paragraph 6 of the affidavit in support of the appellant's application for revocation and the respondents have their attention to it. In their joint affidavit they refuted the averment and put the appellant to strict proof.

The appellant reiterated the same in his reply to the counter affidavit and appended to it a letter of administration showing that the estate in question was subject to the Probate and Administration Cause No. 146 of 2001 by which Ester Mayengela was granted letters of administration dated 21/1/2003 by Dodoma Urban Primary Court.

The appellant has argued and I agree with him that the case fell under the provision of section 49(1)(c) of the Probate and Administration of Estate Act which states that the grant may be revoked if it is found that it was obtained by means of an untrue allegation of a fact essential to justify the grant irrespective of whether or not the allegation was made out of ignorance or inadvertently. Thus, even if the allegation that the estate was not subject of any probate proceedings was made ignorantly or inadvertently it rendered the grant a nullity and liable for revocation.

The respondents' counsel and the trial court share the view that the letter of administration produced by the appellant attracted no weight as it was not accompanied by an inventory and final accounts showing that the estate was fully administered. Based on the discussion above, I respectfully differ. In view of section 49(1)(c) of the Probate and Administration of Estates Act, I strongly believe that the inventory and the final account would have been necessarily had the issue at hand been that there are unadministered assets. In the present case, the issue brought to the attention of the court was the existence of a probate matter in a court which has exclusive jurisdiction in probates administered in accordance with Islamic and customary law.

Mr. Kibulika has in the alternative drawn my attention to the provision of section 46 of the Estate and Administration of Estate Act which provides that in the event of the death of a sole administrator of the estate another person may be appointed to administer the unadministered estate. This is indeed the position of law as the demise of the administrator or administratrix has the effect of rendering the grant useless and inoperative as the administratrix cannot administer the estate from her grave. Someone else has to do it. The appointment of a new administrator is well in order if made in accordance with the law. Section 46 state further that the appointment of new administrator should follow the procedure applicable in original grant a requirement which among other things impliedly demands compliance with section 51(1)(f). Accordingly, the argument that section 46 be used as a shield can not hold water.

Needless to emphasize, since the first appointment was made by the primary court, and since the appointment of the new administrator naturally extinguished the letter of administration formerly granted to Ester Mayengela, it was incumbent for the respondents to go back to the same probate court. Being the appointing court, the Dodoma Urban Primary Court would have been best suited to hear and determine the new application. Further and as lucidly acknowledged by both counsels, primary courts enjoy exclusive jurisdiction over estates administered in accordance with Islamic and customary law. Impliedly therefore, the deceased's estate was administered in accordance with Islamic or customary law. This fact was not extinguished by the death of the administratrix as what matters in the

choice of the law and forum is not the administrator or administratrix but the deceased's mode of life.

In the foregoing of what I have demonstrated, I find merit in the appeal and I allow it. The letters of administration of the late Saimoni Malimi Malomele granted to the respondents on 12th April 2022 are hereby revoked. The parties are at liberty to file another petition according to the law. This being a probate matter, there will be no costs.

DATED and **DELIVERED** at Dodoma this 10th day of November 2023



A handwritten signature in blue ink, consisting of a stylized, cursive script that appears to read "J.L. MASABO".

J.L. MASABO

JUDGE