

**IN THE HIGH COURT OF TANZANIA
TEMEKE SUB-REGISTRY
(ONE STOP JUDICIAL CENTRE)
AT TEMEKE**

PROBATE AND ADMINISTRATION CAUSE NO. 214 OF 2022

In the matter of the estate of the late

MOHAMED SAID ABUDUDECEASED

AND

**In the matter of an application for
revocation of grant of letters of administration**

JAMMALE MOHAMED SAID.....ADMINISTRATOR

VERSUS

SALIM MOHAMMED SAID BASHAT.....1ST APPLICANT

SAID AWADHI FARAJ.....2ND APPLICANT

ALI MOHAMMED SAID3RD APPLICANT

RULING

Date of last order: 27/11/2023

Date of Ruling: 6/12/2023

OMARI,J.

The Applicants approached this Court vide section 49 (b)(c) and (d) of the Probate and Administration of Estates Act Cap 352 R.E 2002 (the PAEA) and Rule 29 of the Probate Rules GN. No. 369 of 1963 (the Rules) beseeching this Court to revoke the grant of letters of administration granted to Jammale Mohamed Said who was appointed on 13 February,2023.

The said Application is supported by the Affidavits of Salim Mohammed Said Bashat, Said Awadh Faraj and that of Ali Mohammed Said.

When filing her Counter Affidavit, the Respondent filed a Notice of Preliminary Objection while the Applicants also did the same as they filed their reply to the Counter Affidavit. The Respondent's points of objection are to be disposed of first and by way written submission. A scheduling order was entered to which the parties complied. The Respondent's submission was drawn and filed by Mr. Othman Othman of Prime Attorneys while those of the Applicants were drawn and filed by Ms. Mariam Msean of Ismail & Co. Advocates.

The Respondent's points of objection are that:

1. The grounds upon which the Applicant's is based touch on the ownership of the deceased's house this honourable Court has no jurisdiction to entertain and determine the Applicant's Application.
2. The Applicant's Application is incompetent for failure to indicate the name of the drawer.
3. The Applicant's Application is supported by incurably defective Affidavits which contain prayers.

4. The Applicants Application is supported by incurably defective Affidavits which contain legal conclusions, speculations and lies.

On the first ground, Mr. Othman, the Respondents counsel submitted that paragraph 8(i) of the Applicant's Affidavits which states the grant is useless as the only property mentioned in the Petition that is house on L.O. No. 107258 with Title No. 39217 Plot No. 34 Block M Twiga Street Kariakoo is not part of the deceased's estate as the same was gifted to the first Applicant on 12 June,2008. This raises the question as to who is the lawful owner of the said house, making it a land matter. Counsel submitted that in accordance with section 167 of the Land Act Cap 113 RE. 2019 it is the courts listed therein that are empowered to deal with land matters. The same are also listed under section 3(1) of the Land Disputes Court's Act, Cap 216 R.E 2019. According to counsel this being a probate and administration court it then lacks the jurisdiction to determine the issue of ownership of land thus, the Application be dismissed or otherwise be struck out with costs.

The second point of objection is that the Application contravenes the provisions of section 44(1) of the Advocates Act, Cap 341 RE 2019 as it does not name the person who drew the Chamber Summons and supporting Affidavit. Counsel is arguing that the Application be dismissed or otherwise

be struck out. He submitted on the third point of objection that the Affidavits by the Applicants are defective for containing to prayers in Paragraphs 9 and 10 in contravention of the law an Affidavits as was held in **Uganda v. Commissioner of Prisons, ex parte Matovu** (1966) EA 514. Consequently, counsel is arguing that the Application should be dismissed or struck out with costs.

On the last point of objection that the Applicants' Affidavits are defective for containing legal conclusions, speculations and lies. Counsel submitted that it is clear that paragraph 8(i) to (vii) of the Applicants' Affidavits have the statement:

'...the grant has become useless, obtained by means of untrue allegations; false suggestions; wilfully concealment and lack of reasonable cause.'

These according to Mr. Othman are legal conclusions and should not be contained in the Affidavits thus, contravening Rule 3(1) of Order XIX of the Civil Procedure Code, Cap 33 RE. 2019 as stated in the cases of **Mathias Daffa and 27 Others v. Permanent Secretary Ministry of Works and 2 others**, Misc. Land Application No. 502 of 2017 and **Fem Construction Co. Ltd. v. Nkululeko Karanja**, Civil Appeal No. 168 of 2005 wherein it was held that an Affidavit should only contain facts not arguments,

reasoning, heresy evidence, speculations and lies. And, it is for that reason that the Respondent's counsel is praying the Application to be dismissed or otherwise struck out.

When it was her turn the Ms. Msean replied to the Respondent's submission by going through the four points of objection as submitted by the Respondent's counsel.

On the first point of objection the Applicant's Counsel commenced her submission with a definition of what jurisdiction is as it was defined in the case of **Independent Television Limited v. Tanzania Communication Regulatory Authority**, Civil Application No. 798/20 of 2018 arguing that the Applicants have not called this court to determine the issue of ownership as the disposition was known by all the heirs, thus, the Administrator should not have sought the grant in respect of the property. Counsel further submitted that paragraph 8 of the Applicant's Affidavit was merely informative that this Court should not bless the distribution of the said property for it is not the deceased's. And, in the event the issue of ownership does arise then this Court has jurisdiction to determine the same as was stated in **Kagozi Amani Kagozi (As an Administrator of the late Juma**

Selemani) v. Ibrahim Seleman and 6 Others, Land Appeal No. 2 of 2019.

Counsel went on to state that the Application before this court is for revocation of the Administrator which is within the court's jurisdiction, for the letters were acquired by concealing material truths as the Administrator was aware the property did not belong to the deceased.

On the second point of the objection counsel submitted that the Applicants' pleadings indicate that they were drawn and filed by the Applicants' advocate, duly signed and the address of the firm indicated therefore, the objection is misconceived. Counsel referred to the case of **Nassoro Yahaya Nyongoly v. Satayi Ntambi Kaungu**, Land Appeal No. 10 of 2020 where in this court referred to the decision of the Court of Appeal in **George Humbu v. James M. Kasuka TBR**, Civil Application No. 1 of 2005 where it interpreted section 44(1) of the Advocates Act and ruled that it is only unqualified persons who have to provide their names thus, revealing the drawer. Counsel then stated that the Applicants pleadings were not drawn by an unqualified person to warrant the Application of section 44 of Application of section 44 of the Advocates Act, Cap 341 R.E 2019 thus, this point of objection also lacks merit.

As regards the third point of objection the learned counsel for the Applicants submitted that what is in paragraph 9 and 10 of the Affidavits supporting the Chamber Summons are not prayers rather they are facts which are in the Applicants' knowledge. And, as the law in this area has evolved, even if the said paragraphs were to be deemed to contain extraneous matters then the consequence of that is to expunge the offending paragraphs which would not render the Application incompetent as was stated in the case of **Jamal S. Mkumba and Another V. Attorney General**, Civil Application No. 240/01 of 2019. This, according to counsel means even if the said paragraphs are found to contain prayers they can be expunged and the Application be determined based on the remaining ones.

In so far as paragraph 8(i) through to (vii) are concerned, counsel for the Applicants submitted that the Respondent's counsel is cherry picking words from the stated paragraphs, thus it is evident their argument lacks merit. According to counsel, the said paragraph does not contain conclusions, speculations and lies rather it is facts within the knowledge of the Applicants. Further, counsel submitted that the Applicants have demonstrated facts warranting the revocation of the Administrator as stated in section 49 of the PAEA for reasons of the facts as known and stated by the Applicants

accordingly, there is nothing extraneous in the identified paragraphs. Counsel then went on to state that if the said paragraphs do contain speculation and lies as the Respondent's counsel is asserting then this court would have to delve into evidence to ascertain that, which is outside the realm of a preliminary objections as was stated in the case of **Ibrahim Abdallah (the Administrator of the Estate of the late Hamisi Mwalimu v. Selemani Hamisi (the Administrator of the estate of the late Hamisi Abdallah)**, Civil Appeal No. 314 of 2020 therefore the fourth point of objection also lacks merit.

Counsel concluded her submission by stating that the preliminary objection raised by the Respondent is devoid of merit therefore should be dismissed with costs.

In his rejoinder the Respondents' Counsel disputed what the Applicant's counsel has submitted then went on to rejoin on the four grounds as submitted by the Applicant's counsel.

On the first point of objection counsel reiterated his contention that this court does not have the jurisdiction to entertain the issue of ownership of land as the 1st Applicant has testified that the said house is his. Counsel then went

on to distinguish the **Kagozi Amani Kagozi (As an Administrator of the late Juma Selemani) v. Ibrahim Seleman and 6 Others** (*supra*) case stating that in the present Application it is only the first Applicant that is trying to establish himself as the owner of the property while in the cited case it was two Administrators each alleging the property belongs to their respective deceased person.

On the second point of objection counsel maintained that there is no name so no indication as to the person who drew the documents to know if they are qualified or otherwise. Counsel distinguished the cited cases and reiterated that the same contravenes sect 44 of the Advocates Act, Cap 341 RE 2019.

On the third point of the objection Counsel contended since Counsel for the Applicant agreed that the Affidavits contain prayers, then it be dismissed or otherwise struck out for contravening the law on Affidavits. He then went on to rejoin on the last ground stating that he did not cherry pick words but the Affidavits do contain legal conclusions and lies thus the objection should stand.

Having dispassionately considered the opposing submissions by both counsels, there is only one issue for this court's determination, that is, whether the points of objection by the Respondent are meritorious. I shall commence with the first point for it centres on jurisdiction.

After the heading paragraph in paragraph 8 of the first Applicant's Affidavit

(i) states as follows:

'The grant has become useless as the only property mentioned in the Petition that is one house located at L.O.No. 107258 Title No. 39217, Plot No. 39217. Plot No. 34 Block "M" Twiga St. Kariakoo, Ilala District Dar es Salaam Region is not part of the deceased's estate as the same was granted to me via a DEED OF GIFT dated 12th day of June, 2008. Copy of Deed of Gift and Transfer of Right of occupancy are hereby Annexed and collectively Marked "C".'

The same paragraph in the Affidavits of the 2nd and 3rd Applicant is almost a duplication save for ending in the following manner:

'... as the same was already granted to Salim Mohamed Said Bashat via...'

The Respondent is arguing that the first Applicant is asserting ownership therefore raising the question as who is the lawful owner of the house and in counsel's opinion this court has no jurisdiction to determine this question for it is essentially one for a land court. The Applicants are refusing that they

have called this court to determine the ownership as the disposition (that the said property was given to the first Applicant) is known by all heirs thus, the ground for revocation in 8(i) was merely informative for the Court not to bless division of property not belonging to the deceased. In her submission counsel for Applicants stated:

'In the event the issue of ownership arises and is to be determined, this court has jurisdiction to determine the dispute as stated in the case of Kagozi Amani Kagozi.'

Then went on to emphasize:

'The Application is for revocation of the Administrator on grounds that the letters were acquired by concealing material truths as the administratrix was aware that the property was not the deceased's.'

In his rejoinder the Respondent's counsel reiterated that there being a question of ownership of the land this court lacks jurisdiction. He also distinguished the the **Kagozi Amani Kagozi (As an Administrator of the late Juma Selemani) v. Ibrahim Seleman and 6 Others** (*supra*).

In my view and with due respect to the Applicant's counsel, she is attempting diversions with the aid of semantics on one hand submitting that the Applicants (more specifically the first Applicant) is not calling upon this court

to determine the issue of ownership and on the other hand, she is contending this court has jurisdiction to determine ownership in the event the issue of ownership arises. In this respect, I seek to agree with the Respondent's counsel that this Application is distinguishable from the part of the **Kagozi Amani Kagozi (As an Administrator of the late Juma Selemani) v. Ibrahim Seleman and 6 Others** (*supra*) case that the Applicants seek to rely on that is the statement:

'My finding on this ground is that since neither Amri Ibrahim nor the respondents claimed ownership over the dispute property, but each tried to establish that the property in question belongs to their respective deceased persons, then the suit at the trial tribunal was not purely a land dispute whose jurisdiction is vested in the probate and administration court and not a land court.'

In addition to the above quoted paragraph from the **Kagozi Amani Kagozi (As an Administrator of the late Juma Selemani) v. Ibrahim Seleman and 6 Others** (*supra*) case, this court went on to state:

'It is only the probate court which is vested with powers to determine whether the dispute property belongs to the deceased person or not through a probate cause by way of petition for letters of administration and objection there of if any... This is a clear position of the laws as it was decided in the case

of Mgeni Seifu (supra). The Court of Appeal in the said case at page 14 held that; "where there is a dispute over the estate of the deceased only a probate and administration court seized of the matter can decide on the ownership.'

This interpretation was further elaborated by this court in **Malietha d/o Gabo v. Adamu s/o Mtengu**, Misc. Land Appeal No. 21 OF 2020 where in this court had this to say:

'when they are read as a whole, the principle established is clear that when the claim of title to land listed as part of the deceased does not stem from the right of inheritance or purchase for value from the Administrator of the estate the dispute is a pure land matter which must be determined by the land court.'

In the current matter, the learned counsel for the Applicants, therefore and with respect misconstrued the holding in the **Kagozi Amani Kagozi (As an Administrator of the late Juma Selemani) v. Ibrahim Seleman and 6 Others (supra)** case. It is therefore correct as the Respondent's counsel is arguing that this is not the correct forum to determine this dispute as this court lacks the jurisdiction as already elucidated above.

This means land disputes that are in the jurisdiction of the probate court are those that stem from a right of inheritance and or those regarding purchase for value from the Administrator. This, according to this court in **Malietha**

d/o Gabo v. Adamu s/o Mtengu (*supra*) case was the spirit of the **Mgeni Seif v. Mohamed Yahya Khalfani**, Civil Application No. 1 of 2009 as was decided by the Court of Appeal. In the matter at hand the first Applicant in Paragraph 8(i) of his Affidavit deposed that the house in question was given to him as a gift on 12 June, 2008 which is short of six years preceding the death of the late Mohamed Said Abudu. Making this not a land matter as can be determined by the probate and administration court as it is neither a matter that stems from a right of inheritance nor one that emanates from purchase from an administrator.

Having said the above, I now return to paragraph 8 of the Affidavits which is the core of the Application the deponents are all stating in various terms that the Petition has gross irregularities and untrue allegations thus, the grant made to Jammale Mohammed Said needs to be revoked. The grounds upon which they are fronting for the said revocation are averred in this paragraph of which (i), (ii), (iii) and (vi) all hinge on the property located at L.O No. 107258 with title No. 39217 Plot No. 34 Block M Twiga St. Kariakoo, Ilala Dar es Salaam which the first point of objection relate to.

This leaves grounds stated in paragraph 8 (iv), (v) and (vii) of the Affidavit (s) which do not hinge on the said property. I therefore find the first point

of the objection as meritorious and sustain the same. However, it is only to the extent of (i), (ii), (iii) and (vi) which are about the disputed property.

I shall now move on to the second point of objection which I should not let detain me for as rightly submitted by the Applicants' counsel the said Application is signed by the advocate and has the address of the firm which is in conformity with the law. See the case of **George Humbu v. James M. Kasuka TBR** (*supra*). Thus, the second point of objection is unmeritorious.

Likewise, I shall also refrain from letting the third point of objection detain me for as is the current practice where an Affidavit is found to have offending paragraphs then the same are to be expunged from the record, see **Jammal S. Mkumba and Another v. Attorney General** (*supra*). In the current matter the two paragraphs that the Respondents are alleging to be offensive are 9 and 10 which in the spirit of the **Jammal S. Mkumba and Another v. Attorney General** (*supra*) case are inconsequential if expunged. I therefore find the third point of objection is also without merit.

The fourth point of objection is also hinged on paragraph 8 of the Applicants Affidavit(s). The Respondent's counsel is alleging that the said Affidavits contain legal conclusions speculations and lies and are therefore incurably

defective. The Applicants are contesting this stating they are merely demonstrating facts warranting the revocation of the Administrator as is stated in section 49 of the PAEA. The terms that the Respondent's counsel highlighted are that is the grant has become useless; obtained by means of untrue allegations, false suggestions; wilful concealment and lack of reasonable cause are by and large the parlance of Section 49 of the PAEA and all the same these are matters needing drawn out legal exchanges and evidence thus would not stand the test in the **Ibrahim Abdallah (the Administrator of the Estate of the late Hamisi Mwalimu v. Selemani Hamisi (the Administrator of the estate of the late Hamisi Abdallah)** (*supra*) case that the Applicants have cited but also the renowned **Mukisa Biscuits Manufacturing v. East End Distributors Limited** (1969) EA 696 case which the Court of Appeal has cited with reverence on numerous occasions and the more recent case of **Jackline Hamson Ghikas v. Millatie Richie Assey**, Civil Application No. 665/01 of 2021 wherein the it has maintained that a preliminary objection cannot be raised where there are any facts that need to be ascertained. Therefore, I find this point of objection also lacks merit.

Consequently I find the Respondent's preliminary objection meritorious only as regards to paragraph 8(i),(ii),(iii) and (vi) of the Applicants' Affidavits which leaves intact the remaining reasons for supporting their Application for revocation of the letters of Administration issued to Jammale Mohamed Said. This being a matter emanating from the administration of an estate and one that involves family members, I make no orders as to costs.

It is so ordered.



A handwritten signature in blue ink, appearing to read "A.A. Omari".

A.A. OMARI

JUDGE

06/12/2023

Ruling delivered and dated 06th day of December, 2023 at Dar es Salaam.

A handwritten signature in blue ink, appearing to read "A.A. Omari".

A.A. OMARI

JUDGE

06/12/2023