

**THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
MBEYA DISTRICT REGISTRY
AT MBEYA
MISCELLANEOUS CIVIL APPLICATION NO. 8 OF 2023
(Originating from Probate and Administration Cause No. 3 of 2022)**

SAMWEL TUSEKELE KAMWELA.....APPLICANT

VERSUS

**JOHN TUSEKELE KAMWELA (Administrator of the
estate of the late Tusekele Samwel Kamwela).....RESPONDENT**

RULING

Dated: 30th March & 28th April, 2023

KARAYEMAHA, J.

This is an application taken at the instance of the applicant, namely, Samwel Tusekele Kamwela. He is in fact urging this court to suspend and or remove the appointment of the respondent one John Tusekele Kamwela who was appointed the administrator of the estate of the late Tusekele Samwel Kamwela (hereinafter the deceased) by this court. He is further seeking this court to appoint him the administrator and order the respondent to return Tshs. 5,500,000/= which arose from the selling of the deceased's cattle and house rent.

The historical back ground leading to this application is that on 20/6/2022 the respondent petitioned vide Probate and Administration Cause No. 3 of 2022 to be appointed the administrator of the deceased's estate. The applicant was one of the persons who appeared in court to support him and cemented that he was a fit person to administer the estate of the deceased's estate. Basing on what was gathered from witnesses, this Court appointed the respondent to administer the deceased's estate on 23/9/2022. He was ordered to return to court on 23/3/2023 for filing the inventory and closing the case.

Midway on 21/11/2022 before the respondent could file the inventory, his sisters namely, Aneth Stanley Mangulu and Monica Tusekele Kamwela knocked on this court's doors seeking for orders of revoking and annulling the letters of administration appointing the respondent as a sole administrator of the deceased's estate. They further beseeched this court to order the respondent to surrender the letters of administration. It is gleaned from their affidavit supporting their application that they were aggrieved by the steps taken by the applicant and the respondent accusing them that the petition was tainted with fraud. However, on 15/2/2023, the application was withdrawn at the instance of Aneth and Monica.

Soon after the withdrawal of Misc. Civil Application No. 46 of 2022, the applicant came with the instant application.

It is worthy noting that the applicant, the respondent and Aneth Stanley Mangulu and Monica Tusekele Kamwela are brothers and sisters of same father and mother.

The applicant's major complaints are discerned under paragraphs 5, 6, 7, 8, 9, 10 and 11 of the application which are reproduced as follows:

- 5. That, the respondent while excising his duties I noticed that his misappropriating and or misusing the estate of the late Tusekele Samwel Kamwela.*
- 6. That, the said misappropriation is to the account that the respondent is collecting rent from deceased's houses and the proceeds are used by the respondent for his personal needs.*
- 7. That, on diverse dates the respondent sold deceased's cattle but the money obtained has been used by the respondent for his person needs at the detriment of the beneficiaries the applicant inter alia.*
- 8. That, the Respondent has been misappropriated deceased's money about Tanzania shillings Seventy four million (Say Tsh 74,000,000/=) the money left by the deceased in his bank account and or its distribution has been made at the Respondent's wishes and or favour and not accordance to the law as some of the beneficiaries the respondent inter alia inherited large sum of money without any legal justification.*
- 9. That, the Respondent has breached his duty as administrator on the account that he not transparent to the beneficiaries as the Respondent has been leased the houses one located at Dar es Salaam and two located at Iwambi Mbeya contrary to the paramount duty of distribution of deceased estate to the beneficiaries.*

10. *That, the Respondent have monopolized the deceased's properties and use them as his won and or dissipate them.*

11. *That, the Respondent from the date when granted letters of administration has become a source of misunderstanding between the family members for the purpose of continuing misusing the deceased's estates.*

The applicant was represented by Ms. Jalia Hussein assisted by Mr. Ibrahim Athuman both learned Counsel whereas the respondent enlisted the legal services of Mr. Luca Ngogo, learned Counsel.

It is gathered from the affidavit deposed by the applicant and the submission marshalled by Ms. Jalia and Athuman that the thrust of the applicant's complaint is pegged on misappropriation and misuse of the deceased's estate. It is argued that the respondent was collecting rent from the deceased's houses, to wit, one house located in Dar es Salaam and two located at Iwambi in Mbeya and then using the money for personal needs.

It was contended further that the respondent sold the deceased's cows contrary to law and without notifying other beneficiaries. The money realized therefrom was used by the respondent for his needs at the detriment of other beneficiaries.

Ms. Jalia submitted further that the respondent acted without transparency in sharing the deceased's Tshs. 74,000,000/= left in different banks accounts of NMB. It was stated that the respondent made unequal

distribution of that money and allocated a large amount to himself without justification.

It was asserted further that the respondent lacked transparency in leasing the deceased's houses contrary to his duties as the administrator of the deceased's estate of distributing it to the beneficiaries. In so doing, it was stated, the respondent contravened section 66 of the Probate and Administration of Estate Act, Cap. 352 R.E 2019 (the PAEA). Counsel for the applicant invited this court to visit the High Court decision in the unreported Miscellaneous Civil Application No. 60 of 2019- **Mrs. Fransisca Joseph Chua v. Mr. Kennedy Joseph Chua.**

Finally, it was argued that the respondent monopolized the deceased's properties the conduct that bred misunderstandings. But the main reason behind it was to continue misusing the deceased's properties.

When Mr. Nogogo took the floor to respond, he first prayed to adopt the respondent's counter affidavit and the affidavit of Hana Chuffwo and the joint affidavit of Aneth Stanley Mangula (Aneth) and Monica Tusekele Kamwela (Monica) to form part of his submission.

Submitting on allegations of misappropriation and misuse of the deceased's estate, Mr. Ngogo contended that being serious allegations, the applicant was to prove them instead of giving mere words. He submitted

that the applicant is the only beneficiary opposing the applicant but by their affidavits, other beneficiaries are supporting the respondent.

On the allegations of selling cows, Mr. Ngogo submitted citing paragraph 8 of the respondent's counter affidavit and 10 of Hana Chuffwo's affidavit that cows were not sold.

Responding to the allegation of misusing rent, Mr. Ngogo's contention was that all beneficiaries agreed to sell them but meanwhile rent be given to their mother. On this, he relied on paragraphs 5 and 6 of the respondent's counter affidavit, paragraphs 8 and 9 of Hanna Chuffo's affidavit and paragraphs 8 and 9 of the joint affidavit of Aneth and Monica. He brushed off the challenge mounted on annexure CA1 and contended that Hana Chufwo was better placed to raise the challenge not the applicant.

Replying on the allegations of misappropriating Tshs. 74,000,000/=, Mr. Ngogo vehemently contended that the respondent was transparent and involved all beneficiaries on the deceased's money in the account. He said that the distribution was a result of beneficiaries' unanimous decision. The learned counsel invited this court to visit paragraphs 9, 10, 11 and 12 of the counter affidavit, paragraphs 5, 6 and 7 of Hana Chufwo's affidavit and paragraphs 4, 5, 6 and 7 of the joint affidavit of Aneth and Monica.

With respect to the respondent getting large share, Mr. Ngogo's submission was that backed by annexure CA2 whose contents reveal that the extra money that remained after the distribution was allocated to the respondent to cater for the lawyer's fees and costs for administering the estate. He argued further that the allegation was an afterthought because the applicant was part of the meeting and never contravened the fact the meeting was convened or that minutes were fabricated.

The respondent's side was convinced that sections 66 and section 107 (5) of PAEA were complied with. Substantiating on the latter, Mr. Ngogo stated that the respondent had not filed an inventory and the whole process was not yet closed. In his view, the instant application was preferred prematurely.

Commenting on the cited case of **Mrs. Fransisca Joseph Chua** (supra), Mr. Ngongo admitted that it emphasizes transparency and faithfulness. He, however, saw no relevance of it in the circumstances of this case having the position that the respondent has demonstrated high level of truthfulness and transparency.

Mr. Athuman's rejoinder is by and large a reiteration of the submission in chief. He however, underscored that the fact that other beneficiaries not opposing the respondent does not mean that he

discharged his duties. He insisted that the respondent was to comply with the law in discharging his duties as administrator.

I have considered the arguments from both sides and, I think, the issue for determination is whether this application has merits.

This court is moved to grant prayers sought in the chamber summons under section 49(1) (c), (d), (e) and (2) of the PAEA. I think it will be useful to quote here in full this provision. It provides that:

"49-(1) The grant of probate and letters of administration may be revoked or annulled for any of the following reasons—

- (a) N/A*
- (b) N/A*
- (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 wilfully 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.*

(2) Where it is satisfied that the due and proper administration of the estate and the interests of the persons

beneficially entitled thereto so require, the High Court may suspend or remove an executor or administrator (other than the Administrator-General or the Public Trustee) and provide for the succession of another person to the office of such executor or administrator who may cease to hold office, and for the vesting in such person of any property belonging to the estate.

The plain message assembled from the above provision is that it permits courts to revoke letters of administration when the following factors manifest themselves. **Firstly**, 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. **Secondly**, the grant has become useless and inoperative. **Thirdly**, the person to whom the grant was made has wilfully 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.

Undeniably, the paramount duty of the administrator of the estate is to abide to the powers entrusted to him by the law. The law requires good faith on the part of the administrator in dealing with the estate of the deceased. Breach of trust or conflict of interest and duty, warrant the beneficiaries to apply to the court for revocation of letters of

administration. However, a mere conflict of interest will generally not result in the revocation of a grant. Evidence must be produced that proves significant neglect, such as an administrator monopolizing and misusing the estate and failure to file the inventory.

Although courts have powers to revoke a grant of Probate or a grant of Letters of Administration where certain circumstances arise which give grounds for a revocation, as a general rule, the court will not revoke a grant lightly. Where an application for the revocation of a grant is made, the applicant must show good cause for the grant to be revoked. The court will not revoke a grant simply because it is desirable to the parties or because someone else wants to take over the role. This is because the object of the power endowed to courts to revoke a grant is to ensure the due and proper administration of an estate and protection of the interests of those beneficially interested.

Basically, in applications of this nature the burden is on the applicant to prove on the balance of probabilities that there was misappropriation and misuse of the deceased's estate by the administrator. On this position I subscribe to the position settled by the law, that is, section 112 of the Evidence Act, Cap. 6 R.E. 2022 which provides that:

"The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by law that the proof of that fact shall lie on any other person."

See also the case of **Onolina J. Maketa v. Methew Christopher Sanga**, PC Probate Appeal No. 01 of 2021 (HC-Iringa found at Tanzlii)

In the present case, the applicant alleges that the respondent collected rent from the deceased's houses located in Dar es Salaam and at Iwambi- Mbeya and used it for his personal needs. It is with regret that the applicant didn't say how much was collected and in which period. However, it is gleaned from his chamber summons that the respondent should be ordered to return Tshs. 5,500,000/= an amount realised from selling cows and rent. It is difficult to know how much rent was collected and used by the respondent. Therefore, this allegation was not proved.

Apart from that there is proof from the respondent side the rent collected, i.e. Tshs. 1,200,000/= was disbursed to their mother Hana Chufwo on 2/3/2023 as per annexure CA1. Hana Chufwo certified this event in her affidavit at paragraph 9. She averred that:

"9. That it was further resolved that while waiting for the completion of sale process of the said houses, rents from the said houses should be collected by son John Tusekele

Kamwela, and submit the same to me and on 02.03/2023 I received a sum of Tshs. 1,200,000/= from my son John Tusekele Kamwela as rent collected from tenants of Iwambi-Mbeya house."

This statement is in consonance to paragraph 9 of the joint affidavit of Aneth and Monica. I am, therefore, not persuaded by the applicant's contention.

The applicant contends that the respondent sold the deceased's cows and used the money for his personal needs at the detriment of other beneficiaries. The respondent enthusiastically disputed this allegation through paragraph 8 of the counter affidavit whereby he stated that two cows left by the deceased were not sold. Hana Chufwo's affidavit adds weight to this defence. She averred under paragraph 10 that the two cows left by the deceased were still under her custody to the date of deposing her affidavit. The joint affidavit of Aneth and Monica have similar message under paragraph 10. If the applicant's allegations were true, he had at least to state when and to whom the cows were sold. His allegations are too general and are, in my considered view, not backed up by any proof.

The other allegation is directed to unequal distribution of Tshs. 74,000,000/= left in the bank by the deceased. This claim is also unfounded. My view is predicated on annexure CA2, minutes of the family

meeting held on 30/12/2022. This document is categorical that the applicant attended the meeting and appended his signature. Agenda number three of the meeting concerned giving report on the administration of the deceased's estate says it all. The report which was given and wholeheartedly accepted revolved about Tshs. 71,941,700.61 which was in the deceased's NMB accounts. Annexure CA2 intimates how the distribution was made. I think it will be useful to quote here in full what the division accepted by the family members. It is that:

"Baada ya wanafamilia kupata taarifa ya fedha alizoacha marehemu, walijadiliana kwa pamoja na kukubaliana kuwa fedha hizo zigawanywe baada ya kutoa gharama za kesi ikiwa ni gharama za mawakili na msimamizi wa mirathi. Wanafamilia walikubaliana kwa pamoja kuwa mgawanyo wa fedha hizo uwe ifuatavyo:

- 1. Hana Chufwo Mwanjisi mke wa marehemu apate Tshs. 20,000,000/=*
- 2. Aneth Stanley Manguli apate Tshs. 11,000,000/= + 3,000,000/= (gharama za wakili). Jumla Tshs. 14,000,000/=*
- 3. John Tusekele Kamwela apate Tshs. 11,000,000/= + 4,941,700.61 (gharama za mchakato wa usimamizi na gharama za wakili). Jumla Tshs. 15,941,700.61.*
- 4. Samwel Tusekele Kamwela apate Tshs. 11,000,000/=.*
- 5. Monica Tusekele Kamwela apate Tshs. 11,000,000/=*

It is patently clear that all the deceased's children got a flat rate of the distribution. Except Aneth and John who got Tshs. 3,000,000/= and Tshs. 4,941,700.61 extra respectively on the reasons of catering advocates' instruction fees and follow up of the process of administrating the deceased's estate.

As hinted above, the applicant acknowledged the distribution and signed on the minutes authenticating the unanimous family decision. He did not express negative perception or raise a complaint in his affidavit. With all these being apparent, it puts me on inquiry on the intention of the applicant. But all in one, I repeat myself to hold that his allegation is unfounded.

Lack of transparency in leasing the deceased's houses located in Dar es Salaam and Iwambi-Mbeya, is another applicant's ground of revocation. Ms. Jalia contended that the respondent had a duty to distribute them to the beneficiaries not to lease them. Again, answers are extracted from Annexure CA2. It states that:

"Baada ya makubaliano ya kugawana fedha msimamizi wa mirathi aliwaeleza wanafamilia kuwa mchakato wa ufuatiliaji wa mali za marehemu unaendelea. Taarifa itatolewa kwenye kikao kingine kijacho."

The quoted excerpt carries the message that there would be another meeting which would show a report on the progress of administering the remaining deceased's estate. I agree with Mr. Ngogo that the complaint is pre-mature because there is no complaint that the family requested for the meeting but the respondent refused or acted negligently. There is no proof that the meeting was held but the respondent failed to give the report. I also share Mr. Ngogo's views that had the process of administering the estate been closed, the applicant's allegation would be justified. Indeed, no lack of transparency and truthfulness. In the circumstances, the case of **Mrs. Fransisca Joseph Chuwa** (supra) is a good authority. Marrying the principle enunciated in that case and the facts of this case there can't be a debate that the respondent has complied with law.

In a nut shell, complaints revolving around monopolization and misuse of the deceased's estate, respondent being a source of the family misunderstandings with an intention of continuing misusing the deceased's estate, are vexatious and flimsy. I say so because he has failed miserably to prove to the balance of probabilities the aired allegations. There are no good reasons advanced to trigger this court exercise its powers under section 49 of the PAEA to revoke the respondents grant.

All said and done, I hereby dismiss the application and order the respondent to proceed with his duties granted to him by this court. On considering the fact that parties to this case are brothers and given the nature of this case, I order each party to bear his costs.

It is so ordered.



Dated at **MBEYA** this 28th April, 2023

A handwritten signature in black ink, appearing to be "J. M. Karayemaha", is written over a horizontal line.

J. M. Karayemaha
JUDGE