IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MAIN REGISTRY)

AT DAR ES SALAAM

(CORAM: MOSHI, J., MZUNA,J., And MGETTA, J.)

MISCELLANEOUS CIVIL CAUSE NO. 18 OF 2021

IN THE MATTER OF THE CONSTITUTION OF THE UNITED REPUBLIC OF TANZANIA 1977 AS AMENDED FROM TIME TO TIME

AND

IN THE MATTER OF BASIC RIGHTS AND DUTIES ENFORCEMENT ACT [CAP 3 R.E. 2019]

AND

IN THE MATTER OF BASIC RIGHTS AND DUTIES ENFORCEMENT (PRACTICE AND PROCEDURE) RULES G.N NO 304 OF 2014

AND IN THE MATTER OF PETITION TO CHALLENGE THE PROVISIONS OF SECTION, 44,70,99,101 OF THE PROBATE AND ADMINISTRATION OF ESTATES ACT [CAP 352] FOR BEING UNCONSTITUTIONAL

BETWEEN

MARIAM DAWSON ASWILE.....PETITIONER

VERSUS

AMANI ASWILE MLIMBA.....1ST RESPONDENT

MOHAMED SALIM MOHAMED.....2ND SPONDENT

ABDALAHMWANGALILE.....3RD RESPONDENT

PERMANENT SECRETARY, MINISTRY OF CONSTITUTIONAL AND LEGAL AFFAIRS.....4TH RESPONDENT

THE ATTORNEY GENERAL.....5TH RESPONDENT

JUDGMENT

22nd Nov. 2022 & 20th Feb. 2023

S. C. MOSHI, J.:

The petition is preferred by way of originating summons under Articles 26 (2) and 30 (3) of the Constitution of the United Republic of Tanzania (The constitution), section 4 and 5 of the Basic Rights and Duties Enforcement Act, Cap. 3 [R.E 2019] and rule 4 of the Basic Rights and Duties Enforcement (Practice and Procedure) Rules, 2014. The petitioner prays for the court to declare that: -

a) *The provisions of sections 44, 70, 71, 99 and 101, of the Probate and Administration of Estate Act [Cap 352] are unconstitutional for offending the provisions of Article 24 (1) of the Constitution of the United Republic of Tanzania 1977 as amended.*
b) *The provisions of sections 44,70, 71, 99 and 101, of the Probate and Administration of Estates Act [Cap. 352] be amended in convenient speed by the Government time through the Attorney General (the Respondent).*
c) *The Government was reckless for letting such a provision exist in a statute book that led to petitioner's loss of her properties.*
d) *The Government breached its obligations of respect and protect the rights of the petitioner.*
e) *The court be pleased to award the petitioner a sum of Two Hundred Million shillings (TZS 200.000.000/=) as general damages for the suffering endured in losing her properties, she legally earned which also rendered her homeless to date.*
f) *Any other reliefs this Honourable court deems fit to grant.*

g) Each party to bear its own costs.

She stated that, sections 44, 70, 71, 99 and 101 of the Probate and Administration of Estates Act [Cap 352] (Herein also referred to as the Act) are unconstitutional, for the following reasons:

a) The provisions grant absolute power to the Administrator to act like body double on every right of the deceased against the heirs which is in violation to Article 24 (1) of the Constitution of the United Republic of Tanzania 1977 as amended.

b) The provisions usurp from the heirs any powers over the estate by designating the administrator as the only actor during the administration of the deceased estate which makes it open to abuse therefore affecting the rights enshrined in Article 24 (1) of the Constitution of the United Republic of Tanzania 1977 as amended.

c) The provisions while granting exclusive control of the deceased estate to the Administrator in lieu of any other person including the heir's involvement of any kind, contains no safeguards that will protect the heirs of the estates against any possible abuse by the Administrator therefore violates Article 24 (1) of the constitution of the United Republic of Tanzania 1977 as amended.

d) The provisions have failed to protect the heirs for granting unchecked powers to the administrator over movable and immovable properties without putting any safety measures and therefore leaving the law open to abuse which led to Article 24 (1) of the Constitution of the United Republic of Tanzania 1977 as amended be infringed.

The petitioner cited specific Articles which have been violated in part 111 of the Chapter one of the constitution of the United Republic of Tanzania 1977 as amended to be: -

a. *That, Sections 44,70, 99 and 101 of the Probate and Administration of Estate Act [Cap. 352], are unconstitutional for offending the provisions of Article 24 (1) of the Constitution, which enshrines the right of a person to own property and protection of the said property as the provisions of the law designates the administrator as exclusive actor against the heirs during the administration of deceased's estate.*
b. *That, Sections 44, 70, 71, 99 and 101, of the Probate and Administration of Estate Act [Cap. 352], offends Article 24 (1) of the constitution, for failure to provide for safeguard against abuse by the administrators who are vested with powers to assume rights and possibly vision of the deceased person on the estate, which more has caused the heirs to be side lined on the distribution of properties during the administration.*
c. *That, Section 44,70, 71, 99 and 101, of The Probate and Administration of Estate Act [Cap. 352], violates Article 24 (1) of the Constitution, for failure to recognize the existence of heirs in the case of death of a person and failure to provide for strong administration of their entitlements and protecting the heir against abuse or unwanted invasion on their entitlements.*

The particulars of facts as set in the petition are thus:

a. *That, the Probate and Administration of Estates Act [Cap. 352] provides for the grant of probates of wills and letters of administration to the estate of the deceased persons and powers of the administrators among other related matters.*

b. *That, the Probate and Administration of Estate Act [Cap 352] administers rights of ownership of movable and immovable properties from a deceased person to heirs under the concept of "inheritance".*

c. *That, the Probate and Administration of Estates Act [Cap. 352] provides for grant of letters of administration in the case the deceased dies intestate, and the letters of administration can be granted to a person who is entitled to the estate of the deceased or any other person in accordance with the circumstances provided by law.*

d. *That, the Probate and Administration of Estates Act [Cap 352] grants absolute power to the administrator to step in the shoes of the deceased and to act as representative and do whatever he thinks is fit for the estate.*

e. *That, the power is absolute, and it puts the Administrator in the position of being "body double" of the deceased as he is allowed to dispose of movable property, as he thinks fit, and powers of sale, mortgage, leasing of and otherwise in relation to immovable property.*

f. *That, the Probate and Administration of Eatates Act [Cap 352] does not recognize the presence of heirs and provide for their rights and participation explicitly while the law has been put into place to administer among other things inheritance matters which heirs are essential part of the exercise.*

g. *That, the Probate and Administration of Estates Act [Cap. 352] does not protect in the rights of the heir the powers granted are absolute and exclusive against any other person and does not require any consent of the heirs in exercising the said powers.*

h. *That, the Probate and Administration of Estates Act [Cap. 352] does not have explicit safeguards and only generally provides for prudence to be exercised into whom should be granted those powers of administration and care to be given to the welfare of the estate which carries subjective interpretation and therefore dangerous to the heirs once these properties are disposed it is usually final.*

i. *That, the lack of safeguard in the Probate and Administration of Estate Act [Cap 352], has left a loophole that has been used for years by greedy relatives to rob grieving widows and heirs during the time of confusion of burial of the deceased.*

j. *That, after the burial and follow up and recovery period most relative lobby to become Administrator in the shadow of helping the family and by the time the family comes to find out it is too late that most properties have been disposed of and the buyers are protected since the disposition was performed while administrator was exercising his legal power and did not need any consent from the heirs and / the widow.*

k. *That, the fact that the powers of Administrator in the Probate and Administration of Estates Act [Cap. 352], can be exercised without consent from the people who are legally entitled to the estate, the people who if anything have more awareness of how the deceased intended to distribute his estate, is nothing more than legally sanctioned robbery and it is quite contrary to what is provided for in the constitution.*

l. *That, prudence that is provided in the impugned provisions of the Probate and Administration of Estate Act [Cap 352] as safeguards in tiny drops is insufficient and unserious in matters that decides on what happens to things that a person sacrificed*

his whole life to attain and puts in mockery the sweat and tears of the deceased.

m. *That, according to provisions of Article 26 (1) of the constitution, every person must bear a duty of adhering to constitution by observing and abiding to each single provision within the constitution.*

n. *In addition, in case the constitution is contravened then every person has the right to take legal action to ensure the protection of the constitution under Article 26 (2) of the constitution.*

o. *That, as according to provisions of Article 64 (5) of the constitution, all laws that conflicts with the constitution shall be void to the extent of such inconsistencies.*

During hearing of this petition, the petitioner Mariam Dawson Aswile was represented by Mr. Mpale Mpoki, advocate, Aman Joakim, advocate and Melchzedeck Joachim, advocate whereas the first, second and third respondents were represented by Ms Suzan Jacob Barnabas, advocate and the fourth and fifth respondents were represented by Ms Jacqueline Kinyasi, State Attorney.

The back ground of this matter according to the petitioner's testimony on examination in chief which was adduced before this court and petitioner's affidavit, is briefly that, the 1st Respondent is a brother-in-law of the Petitioner who was married to a deceased one Harrison Aswile. The deceased Harrison Aswile died intestate in Dodoma in 2013 and was buried in Mbeya in family burial. During the grieving time as testified by

the petitioner, she was involved in a family meeting that was not meant to be used as part of a probate matter, but the meeting was fraudulently used to institute an administration matter by 1st respondent, while the petitioner was still grieving in Mbeya as a widow, the 1st Petitioner travelled to Tukuyu Mbeya , and managed to obtain a death certificate and travelled to Dar es salaam and managed to obtain residential licences on the two properties in the name of the deceased which previously were purchased by the widow. After obtaining the residential licence, along with access to bank accounts and cars owned collectively by the petitioner and the deceased, the 1st Respondent "quickly" instituted probate matter without the knowledge of the petitioner. The 1st respondent after obtaining the letters of administration once again proceeded to dispose the two properties by way of sale to the 2nd and 3rd Respondent without the knowledge and consent of the petitioner.

The petitioner came back and found that there were developments done on the two properties. In the year 2016 the petitioner filed two Applications at the District Land Tribunal for Temeke. Land Application No. 65 of 2016 and Land Application No. 143 of 2016 against the first and 2nd respondent and the first and 3rd Respondent, where judgment

objection on point of law. The point was raised by the 4th and 5th respondents in their reply to the petition which was filed in this very court on 22nd July 2021. The parties were afforded an opportunity to present their arguments and this court delivered its decision on 5th of January, 2022. Indeed, despite of having parties' rival submissions, this issue need not detain us, we have decided that we will not deliberate on it as it is obvious that we are *functus officio*.

Next is the 3rd issue of onus of proof and standard of proof; submitting on the issue of standard of proof in constitutional case, Mr. Melchzedeck Joachim said that this being a constitutional case the onus of proof is upon those who challenge the constitutionality of the legislation; they have to establish a primafacie case to rebut the presumption whereas the state or any other authority the onus is on them to justify the restrictions. He argued that, the petitioner is not required to prove the case beyond a reasonable doubt. He cemented his argument by citing several case laws, they include the following cases; **Julius Ishengoma Francis Ishengoma Ndyanabo vs. Attorney General and Another** [2004] TLR 14, **The Attorney General vs Dickson Paulo Sanga,** Civil Appeal No. 175/2020, Court of Appeal of Tanzania sitting at Dar es salaam, **Charles Onyango Obbo and Another vs AG**

and decree in both cases were entered in favour of the 2nd and 3rd Respondent. Both matters received same decision that, for the reason the 1st Respondent was appointed an administrator and because the said properties were disposed while the first respondent was still the administrator of the deceased estate, and because the statute did not require the 1st Respondent to procure prior consent of the beneficiaries, the sale agreement to 2nd and 3rd Respondents were lawful and non-reversible.

Upon consideration of the pleadings as a whole, petitioner's testimony, parties' rival submissions and the relevant laws, we have gathered three issues for determination; they are: -

1. *Whether the provisions of section 44, 70, 99 and 101 of the Probate and Administration of Estate Act, Cap. 352 violate Articles 24 (1) of the Constitution of the United Republic of Tanzania.*
2. *Whether the petitioner has exhausted available adequate means of redress.*
3. *What is the onus and standard of proof in constitutional cases.*

We have decided to start deliberating on the second issue; whether the petitioner has exhausted other available adequate means of redress. We would like to point out at the outset that, this issue has been decided by this court in the present case, it was presented as a preliminary

(Constitution petition No. 15 of 1997 [200] UG and **AG|vs, Momodou Jobe** (1984) AC 689.

It was his submission that the respondents have failed to show that there is protection provided by the law as per the requirement of the Constitution.

In reply thereof, Ms. Jacqueline Kinyasi argued that, the standard of proof in constitutional petitions is proof beyond reasonable doubt. She supported her stand with the case **of Rev. Christopher Mtikila (Supra) at p. 35,** where the High Court held that:-

"Breach of the Constitution is such a grave and serious matter that cannot be established by mere inference but by proof beyond a reasonable doubt."

She argued further that, the petitioner has not provided any evidence to prove his allegations of likelihood of the violation of Article 24 (1) of the Constitution of the United Republic of Tanzania of 1977 [As amended from time to time]. It was her view that, the petitioner's allegations are mere speculations/assumptions and has no any legal basis.

She finally prayed that the petition be dismissed in its entirety.

We have given a keen consideration to the submissions relating to this issue. We subscribe to the stand that in Tanzania the court has

been given a role to interpret the laws and to protect the constitution of the land, see the cases of **Ally Linus and 11 others vs. Tanzania Habours Authority and Another** (1998) TLR where it was stated that: -

> *"It is clear that the basic structure of the constitution of the court vests the power of states in the judicature that is the judicial arm of the Government. The function of interpreting the law of the state is a judicial function and for that reason the judicial arm of the government has final word about the meaning of laws of this country."*

In this regard also see the case of ***Hamis Masis and Others versus The R*** *(1985) TLR 5 where it was stated that:*

"One of the duties of this court is to protect the constitution of the land"

Likewise in **Augustino Mrema Vs. Speaker of the National Assembly** (1999) TLR 206, it was held that: -

> *"Our Constitution is written, with stress on human rights and which must be given a proper dynamic. In my view it is in that light and duty that our judges here have regard to the broad objective of any statutory obligation and also more importantly, have regard to the constitution we are operating under to upload the fundamental rights of any party aggrieved, if transgressed by any organ of state...".*

It is common ground that, a constitutional case which is made under Article 12 to 29 of the constitution involves basic rights and duties. It is settled principle of law that the petitioner who alleges that there is violation of the provisions of the constitution is duty bound to establish a primafacie case. The petitioner has to rebut the presumption of

constitutionality of the impugned provision of law. On the other hand, the respondents have a duty to justify the restrictions. Therefore, the burden shifts, the petitioner does not have a duty to prove his claim beyond a reasonable doubt as suggested by the 4th and 5th respondents' counsel. In this respect see the cases of **Julius Ishengoma Francis Ishengoma Ndyanabo vs. Attorney General and Another** [2004] TLR 14 which was quoted in the case of **The Attorney General vs Dickson Paulo Sanga,** Civil Appeal No. 175/2020, in this case, the Court of Appeal had this to say: -

> *"In the light of the cited case, we agree with the respondent that, while the respondent had a duty to establish a prima facie case which he discharged, the burden shifted to the appellant who was duty bound to prove that the impugned provision is not violative of the constitution. We need not to say more. In the premises, we do not agree with the appellant that in the constitutional petitions it is incumbent on the petitioner to prove his case beyond reasonable doubt."*

Again, in **Ndyanabo vs. AG** the court held that: -

> *"Until the contrary is proved, legislation is presumed to be constitutional. It is a sound principle of construction that, if possible, legislation should receive such a construction as will make it operative and not inoperative. Fourthly; since, as a short while ago, there is a presumption of constitutionality of legislation, save where a claw back or exclusion clause is relied upon as a basis for constitutionality of the legislation, the onus is upon those who*

challenge the constitutionality of the legislation; they have to rebut the presumption."

Also, at page 29 the court stated that: -

"There is a presumption of constitutionality of the legislation, save where claw back or exclusion clause is relied upon as a basis for constitutionality of the legislation the onus is upon those who challenge the constitutionality of the legislation, they have rebutted the presumption".

The court stated further that: -

"Where those supporting a restriction on a fundamental right merely on a claw back or exclusion clause in doing so, the onus is on them; they have to justify the restrictions".

All in all, guided by the Court of Appeal decisions which under the doctrine of *stare decisis* we are bound to follow; we differ from the stand which was taken in **Mtikila's case** (Supra). We find that the petitioner's advocate stand is at the upper hand. We are of the view that the petitioner' duty is just to make up *a primafacie* case and not to prove the case beyond a reasonable doubt as suggested by the 4th and 5th respondent.

We now turn to the *first issue* which is the crux of the matter. In connection to this issue, Mr. Melchzedeck Joachim, contended among other things that, under Article 24 (1) of the Constitution of the United

Republic of Tanzania every citizen is entitled to protection of his property which is in accordance with the law.

He gave a definition of the word property as it was explained in the case of **R. C Cooper V. Union of India, AIR** 1970 SC 564: 1970 1 SCC 248: (1970) 3 SCR 530, it was defined thus: -

> *"as the highest right a man can have to anything, being that right which one has to lands or tenements, goods or chattels which does not depend on another's courtesy: it includes ownership, estates and interests in corporeal things, and also rights in personam capable of transfer or transmission, such as debts; and signified a beneficial right or a thing considered as having a money value, especially with reference to transfer or succession and to their capacity of being injured."*

Mr. Melchizedek submitted that, the impugned provisions read together are a series of powers vested onto the Administrators of the estate of the deceased. From the law, the administrator is given unfettered powers through the grant of letters of administration to dispose of movable and immovable properties of the deceased 'as he thinks fit' without any requirement on the law to seek consent or consultation of the heirs on the modality of the movement of the estate.

He said that, the cumulative effect of section 44, 70, 99 and 101 of the Probate and Administrative Act show without any shadow of doubt that the administrator has huge power to deal with the Estate of the

deceased, by virtue of stepping into the shoes of the deceased. He suggested that, acting as legal representative of the deceased it is expected that the law should not afford such wide and absolute power on the administrator but the law should put safeguards which protect the rights of the beneficiary to the Estate of the deceased. He said that, these are rights such as those found in the Land Act and the Law of Marriage Act. He gave an example of the Land Act [Cap 113], when it comes to the issues of Lease, Mortgage and Disposition of Matrimonial property the law is clear that in each element there must be a spousal consent.

He contended that, in several decisions concerning probate properties it has been decided that an administrator steps in the shoes of the deceased, but the administrator is not required to conduct consultation and pronounce consent from the heir who was previously a co-owner but deceased would be required while alive, to produce consent from a co-owner. He proposed that, it can be concluded that an administrator does step into the deceased shoes but has more powers than that of the deceased. He argued that, it is these wide powers conferred by the law to the Administrator of the Estate that they find there is a constitutional violation, and this can be seen in the testimony of the petitioner during the hearing.

He said that, the petitioner during the hearing of two cases in the tribunal Proved that she was a wife and therefore a widow of the deceased therefore entitled to the whole estate of the deceased. Furthermore' in her testimony at the time of hearing, she stated that she is the only surviving heir as they did not have any child. The petitioner also stated that she is a Pogoro by tribe while her husband was a Nyakyusa by tribe. In which case administration of the Estate could not have been based on customary law. In this regard he referred to the case of **Innocent Mbilinyi, Deceased** [1969] HCD 283. He submitted that, in the cited case, the deceased died intestate and accordingly the question to succession to his property was whether to be determined by customary law of the Wangoni. The widow of the deceased was a Mchagga by tribe and also a Roman Catholic. She said that she had learned from her husband that he had left Songea when he was about seven years old and had been educated entirely outside the region. On the strength of those facts the court held that: -

> *"On these facts which are not controverted I am satisfied that it can be said that the deceased had abandoned the customary way of life in favour of what may be called a Christian and non-traditional way."*

He said that, in this situation therefore customary law will not be applicable since the widow and the deceased were not living in any shape

or color of customary life. In that case the petitioner remains unquestionably the sole heir of the deceased estate.

On the other hand, the counsel for 4th and 5th respondents argued that, the impugned provisions do not in any how contravene Article 24 of the constitution rather it is in compliance with the said Article and it provides for protection of the beneficiary property against abuse both before and after one is granted letters of administration as the law has set safeguards in place.

As to whether there are safeguards in the provisions of the law to oversee that the provisions of section 44,70,99 and 101 of the probate and administration of estates [cap 352] are not arbitrarily applied as to have an effect of giving absolute powers to the administrator, was strongly challenged by petitioner's advocate.

In this respect Mr. Merchizedeck Joachim contended that, it has been stated that a law which limits the enjoyment of individual's right has to meet the test as set in the case of **Kukutia Ole Pumbuni and Another vs, AG and Another** (1993) TLR 159 at page 161 where it was stated that: -

> *"A law which seeks to limit or derogate from the basic right of the individual on grounds of public interest will have special requirements;*

first, such laws must be lawful in the sense that it is not arbitrary. It should make adequate safeguards against arbitrary decisions and provide effective controls against abuse by those in authority when using the law. Lastly the limitation imposed by such law must not be more than is reasonably necessary to achieve the legitimate object. That is what is also known as proportionality text."

He said that, the reasons for adopting such a test are well articulated in the case of **DPP vs. Daud Pete (**1993) TLR 22 at p. 35 that: -

"The second important principle or characteristic to be borne in mind when interpreting our Constitution is corollary of the reality of co-existence of rights and duties of the individual on the one hand and the collective or communitarian rights and duties of the society upon the other. In effect this co- existence means that the right and duties of the individual are limited by the rights and duties of the society and vice versa."

Submitting further on proportionality test, he again referred to the case of **Ole Kokutia** (Supra) at p. 166 where it was stated that: -

"Because of the coexistence between the basic right of the individual and the collective rights of the society, it is common now days to find in practically every society limitation to the basic rights of the individual. So the real concern today is how the legal system is.. harmonious. The two sets of the rights in trying to achieve this harmony, the view has been that in considering any act which restrict fundamental rights of the individual... the court has to take into account and strike a balance between the interest of the individual and those of society which the individual is a competent.."

He argued that, despite the fact that we have the law, yet it does not fall within the parameters set forth by the supreme court of India in the case of **Maneka Gandhi vs. Union of India** (1978) 2 SCR 621 where it was stated that: -

> *"Is the prescription of some sort of procedure enough or must the procedure comply with any particular requirement? Obviously, procedure cannot* be arbitrary, unfair and unreasonable".

He proposed that the issue is whether looking at sections 44,70,99 and 101 of the Probate and Administration of estates Act does it fall short of the above test set in the three cases above. He said that, reading through the counter affidavit of 4th and 5th Respondent, they state that the petitioner has several remedies such as to challenge the appointment of the said administrator, filing a caveat, filing inventories, suing the administrators from misusing the estate of the deceased and filing for revocation. However, safeguard has been defined as **"to protect something/somebody safe"**. He said that, the misconception of the safeguards suggested by the Respondent is a protection you could afford at any point on the matter, before or after. He cited the relevant provisions of law which provide thus: -

S. 58 Caveats against grant of probate or administration

(1) Any person having or asserting an interest in the estate of the deceased may enter a caveat against the probate grant or letters of administration.

(2) A caveat may be entered with the High Court or, where the deceased at the time of his death had his fixed place of abode within an area for which a District Delegate has been appointed or application for probate or letters of administration has been made to a District Delegate, with that District Delegate.

(3) Immediately on a caveat being entered with a District Delegate he shall send a copy thereof to the High Court.

(4) Where a caveat lodged with the High Court discloses that the deceased at the time of his death, has his fixed place of abode within an area for which a District Delegate is appointed, the Registrar shall send a copy thereof to that District Delegate.

(5) A caveat shall remain in force for four months after the date upon which it was lodged (unless sooner withdrawn) but, subject to the provisions of section 59, may be renewed.

49. Revocation of grants and removal of executors

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

(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 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.

107. Inventory and accounts

(1) An executor or administrator shall, within six months from the grant of probate or letters of administration, or within such further time as the court which granted the probate or letters may from time to time appoint or require, exhibit in that court an inventory containing a full and true estimate of all the property in possession, and all the credits, and also all the debts owing by any person to which the executor or administrator is entitled in that character, and shall in like manner, within one year from the grant or within such further time as the court may from time to time appoint, exhibit an account of the estate, showing the assets

which have come to his hands and in the manner in which they have been applied or disposed of.

(2) If the administration is not completed within one year from the grant of probate or letters of administration, the executor or administrator shall at intervals of not more than six months, or within such further time as the court which granted the probate or letters of administration may from time to time appoint or require, and on the completion of the administration, exhibit in the like manner an account showing the assets which have come into his hands and the manner in which they have been applied or disposed of since the last account was exhibited.

(3) If an executor or administrator, on being required by the court to exhibit an inventory or account under this section, omits to comply with the requisition within the time limited in the requisition for compliance therewith, he commits an offence and on conviction is liable to a fine not exceeding two thousand shillings or to imprisonment for a term not exceeding six months.

(4) If an executor or administrator exhibits an intentionally false inventory or account under this section, he commits an offence and on conviction is liable to imprisonment for a term not exceeding seven years.

(5) Any beneficiary under a will, person entitled to a share under an intestacy or unsatisfied creditor shall be entitled to inspect the inventory and accounts of an executor or administrator.

He argued that, the three provisions of the Act have the effect after fact measures. The revocation of the probate letters does not in any way affect or reverse any act done by the Administrator such as the

disposition of the property of the estate by the Administrator. The act will be valid just for reasons that the administrator is properly in place, the law does not permit to look at the mala fide of the acts, as per the letters of administration.

He said that, caveat on the other hand is associated with knowledge of the heir/beneficiary. Relating caveat with the unfettered power of the Administrator, he said that Caveat on the other hand is associated with knowledge is lack of relevance of saving the heirs if the Administrator is not required to procure the consent of the heirs in obtaining and disposing of the estate if the heir is not aware of the probate at the end the Heir and caveator will not be able to save the damage after the disposition.

In respect of the requirement to file an inventory, he argued that, the inventory is at final stage and not in any way in preliminary stages. The consequences of noncompliance are penalties of imprisonment and fines of the administrators which impact nothing on the reversal of the conducts of Administrator on the estate while he was validated with the letters of administration.

He said that, the provisions quoted by the 4th and 5th Respondent do not fit within the parameters of the cases which was cited above.

He ended his submission by proposing that, the issue of lack of the safe guards to the heirs by the Probate and Administration of Estate Act [Cap 352], has been addressed and acknowledged by the Court of Appeal.

In response thereto, Ms. Jacqueline submitted that, the safeguards include, firstly, consent and citation where consent is not available. The Act and its rules provide for a need of consent from heirs/ interested people before one is appointed as administrator of the estate. Rule 39 (f) provides for the documents accompanying an application for appointment of administrator of the estate whereby among others, shall be accompanied by consent of heir. Furthermore, rule 71 provides that, application for letters of administration shall be supported with a written consent of those persons who according to the rules for distribution of the estate of an interstate applicable in the case of the deceased would be entitled to the whole or part of his estate. The said consent is provided in the prescribed form 56 set out in the first schedule. She argued that, therefore, for one to petition for letters of administration there shall be a consent of heirs, where a person refuses to give consent or where that consent cannot be obtained without undue delay or expenses then the petitioner shall file an affidavit giving full address and giving reasons why such consent has not been produced.

She said that, the law provides further that, upon filling that affidavit the court is at liberty to either dispense that requirement or require citation to be served upon the person whose consent is not available. The said citation is prescribed in Form 57 of the 1st schedule to the rules [see rule 72]. Therefore, it is with no doubt that the law has clearly provided for safe guard before one is granted with the letters of administration, the same has to be consented by heirs/ beneficiary and where no consent, citation will be issued to any interested person informing him/her of the filed petition and calling upon that person to attend the proceeding before the grant is made and lastly one is directed and if there is any objection to the grant then the same should be filed on or before specified date.

Secondly, General citation. She submitted that, rule 73 provides that upon receiving an application for the grant of probate of letters of administration the registrar shall publish a general citation in the form prescribed in Form 58 in the first schedule and shall be exhibited in some conspicuous part of the house and be published in the Gazette (see Rule 75). Upon publication, no probate or letters of administration shall be granted until after expiration of fourteen clear days from the date of last publication. The general citation is issued to any person claiming to have

an interest in the estate of the deceased to come and see the proceedings if they think fit before the grant or if not to file an objection to the said grant. Therefore, it is with no iota of doubt that, the court will never grant probate or letters of administration without issuing a general citation which is gazette hence all those who have an interest in the estate of the deceased will have knowledge of the filed petition.

She stated that the third safeguard is caveat. She said that, general citation will state time limit for any interested person to file an objection to the grant and this is known as caveat and the same is prescribed in Form no 62 of the schedule to the Rules. The Act, under section 58 and 59 provides for caveat against probate or letters of administration whereby upon an interested person filing a caveat no proceedings shall continue so long as there is a caveat. Therefore, a person can be heard on his objection as to why a petitioner of the letters of administration should not be granted letters of administration and this can be done for number of reasons.

Fourthly, administrator's oath; she contended that, the provisions of section 66 of the Act, makes it mandatory condition that, upon grant, the administrator has to take an oath that he will administer the estate faithfully. On the basis of this oath, administrator's actions are bound to

be for the benefit of the rightful heirs and are precluded from embezzling or in any way misapplying the deceased estate, In so doing, it creates fiduciary relationship as it was interpreted by the court in **civil** Appeal No. 385 of 2019 **between Abbas Ally Athuman Bantulaki v.** KCB **Bank Tanzania Limited and Kelvin victor Mahity (administrator of the estate of the late Peter Walcher)** at page 12 (unreported**).** By way of emphasis, we he reiterated that, such a fiduciary duty is inferred from the oath taken by the grantee of the probate or letters of administration.

Again, she submitted further on the safeguards after the grant which include, firstly, filing inventory and accounts. She said that, an inventory is described under section 107 (1) of the Act and rule 106of the rules whereupon executor or an administrator is required to file inventory containing full and true estimates of all the properties which came into his possession as a legal representative, all the debts owing by any person, and all the credits. Its format is provided in Form 80 set out in the first schedule to the rules. Whereas, section 107 (2) of the Act requires an executor/administrator to exhibit an account showing the assets which have come into his hands and in the manner in which they have been applied or disposed of since the last account was exhibited.

From the above, the administrator is required to exhibit the manner he had administered the deceased's estate by exhibiting in the accounts the assets of the deceased collected debts and the funeral expenses incurred and paid and expenses of the administration. Similarly, he has to indicate how he has distributed the residue of the estate to the person or persons entitled thereto.

She said that, therefore the inventory is filed in order to show the assets and liabilities of the deceased whereas the accounts is filed in order to show the administration of the deceased assets and its format is provided in Form 81 of the First schedule to the Rules. Accounts must be filed within a period of not more than one year or within such further time as specifically appointed by the court whereas the inventory is required to be filed within six months from the grant of probate or letters of administration, or within such further time as the court which granted the probate or letters may from time to time appoint or require. The rationale of exhibiting the inventory and accounts is to keep the beneficiaries informed and have transparency in the execution/administration of the deceased's estate.

She argued that, it is therefore with no doubt that, the beneficiary can always have a room to check the accounts and inventory so that they

are satisfied on how the administrator is administering the estate hence there is transparency. In this regard, she cited the case of **Abbas Ally Athuman Bantulaki V. KCB Bank Tanzania Limited and Kelvin Victor Mahity, (Administrator of the estate of the late Peter Walcher** at p. 12 (Supra)

Secondly, Revocation of letters of administration; she argued that, this is provided for under section 49 of the Act whereby upon application the court can revoke the grant and the administrator can be removed. Hence the grant is not necessary to be for the whole period as a party can be removed simply for failure to administer for the benefit of the heir of the estate or upon proof that his or her grant was defective in substance.

Thirdly, she said that the law provides that Administrator shall not benefit from his office. She said that, under section 103 of the Act an administrator is prohibited from benefiting from his office. It is on these lines that an executor of a will or administrator is barred from taking advantage from the deceased's estate by purchasing party of the deceased property. This provides on the need for the administrator to act on behalf and for the benefit of the heirs. That much it must be reflected in every aspect including disposition of the deceased asset and this is applicable even where the administrator sells the deceased

property to another person. She referred to the case of **Abbas Ally Athuman Bantulaki V. KCB Bank Tanzania Limited and Kelvin Victor Mahity (Administrator of the estate of the late Peter Walcher)** (Supra) where it was held that:-

> *"A mere indication that Erick Peter Walcher was an administrator of the late Peter Walcher's estate was not enough to show that he was selling the disputed land on behalf and for the benefit of the beneficiaries or rather the rightful heirs and others having interest on it. Not surprising that PW1 instituted the suit against 1st appellant which act is sufficient proof that, as a member of the family of Peter Walcher and hence a rightful heir, he was not aware of the disposition of the suit land to the 1st appellant by Erick Peter Walcher .. ..since an administrator did not exercise and act with ultimate good faith in the alleged sale of the disputed land hence no good title could pass to the first appellant. Accordingly, the purported sale was void ab initio. Ownership of the disputed land remains the property and party of the estate of the late Peter Walcher."*

Fourthly, Suing administrator for misapplication of the estate of the deceased, she argued that, section 138 clearly provides for the liability for misapplication of the estate of the deceased or where he subjects the estate to loss or damage, he is liable to make good the loss or damage so occasioned. Therefore, an administrator can be sued for

misapplication of the estate or for a loss or damage so occasioned and be held liable to make good the loss or damage.

She submitted that, the law is clear, not arbitrary and it has put quite a number of safeguards to ensure that the beneficiaries are protected from any abuse of power by administrators. She pointed out that even the petitioner herself testified that, she utilized one of the safeguards by filing an application for revoking the 1st respondent as an administrator and she herself is now an administrator of the estate of the deceased.

Submitting in respect of the case of **Kukutia Ole Pumbuni and Another v. A.G and Another** (Supra) which was cited by the petitioner, she said that, the principle enunciated in the above case, states that a law which seeks to limit or derogate from the basic right of individual on the ground of public interest, will be saved by Article 30 (2) of the Constitution if it satisfies two requirements. Firstly, such law must be lawful in the sense that it is not arbitrary. It should make adequate safeguards against arbitrary decisions and provide effective controls against abuse of those in authority when using the law. Secondly, the limitation imposed must not be more than necessary to achieve the legitimate object, in this regard she cited the case of **Julius Ndyanabo Vs. the AG [2004]** TLR 14 at Page 38 it is stated as follows; -

"Fundamental rights are subject to limitation. Those rights as being absolute is to invite anarchy in the society. Those rights can be limited, but the limitations must not be arbitrary, unreasonable and disproportionate to any claim of state interest."

She contended that, this principle is not applicable in our case since the impugned provisions do not limit or derogate from the basic rights of the individual on the ground of public interest. The impugned provisions do not in any how contravene Article 24 (1) or limit the Right to own and to protection to property and they provide safeguards as stated above at any point on matter before and after the grant.

She conceded that, the case of Joseph **Shumbusho v. Grace Tigerwa** (supra) it was stated that, an administrator does not need consent of heirs before disposing off properties of the deceased it is not a statutory requirement but rather a fiduciary obligation. She however submitted that, the petitioner can sue on the breach of fiduciary duty and a number of times the court has set aside sell of deceased properties on the ground that he did not act on outmost faith by selling land without consulting heirs For instance in the case of **Abbas Ally Athuman Bantulaki** (Supra) at p. 13 the court was of firm position that, an administrator of the estate did not exercise and act with ultimate good faith in the alleged sale of the disputed land hence no good title could pass to the buyer.

Accordingly, the purported sale was void ab initio. The ownership of the disputed land remains the property and part of the estate of the deceased.

She submitted that, going through the affidavit in support of the petition and affidavit of admissibility and testimony before court, the petitioner wants this court to rely on the outcome of the decisions, that is, of the primary Court and the High Court in determining the constitutionality of the impugned provisions. It was her argument that, Land Application No, 65/2016 filed before the DLHT, Temeke was filed by the petitioner in relation to ownership of suit land whereby she testified to be a lawful owner of the disputed land having purchased the land alone from one Salum Mkilanyama but unfortunately later on when the land officer visited the suit land the name mentioned was her husband and not hers. Upon hearing of the matter and evidence tendered, it was found that the property was among the properties owned by the deceased and the same was lawfully disposed by an administrator of his estate.

She contended further that, the petitioner lost the case, she appealed to the High Court which upheld the decision of the Tribunal. Still aggrieved, the petitioner testified that she filed a notice of appeal to the Court of Appeal but she is advised by her lawyer the outcome will be still the same. The fact that the petitioner has failed to pursue her case so that

the court could decide on her favour and utilize the safeguards provided under the Act does not mean that the impugned provisions are unconstitutional.

For the 1st, 2nd AND 3rd Ms Suzan submitted inter alia that, administrators are empowered to exercise their duties under the law as legal representative of the deceased on the estate and the same powers are restricted in one way or another. But, also in the course of exercise of the said powers and duties as matter of practice an administrator can make consultations with legal heirs and the aim is to avoid misunderstanding between them. But there is no provision of law that commands the administrator to seek consent or make consultation with the heirs.

However, the same law provides for room to deal with administrator of the estate where there is misuse of properties of the deceased or if the properties listed to be under ownership of the deceased while they are not. One of the remedies, is lodging for caveat challenging the actions of the administrator or applying for revocation before the court that appointed him as she did at Temeke Primary court where the 1st respondent's letters of administration was revoked on 26th November, 2022.

She submitted that, it is a trite principle that a statute should be read in whole and interpretation of one section of a statute cannot be used to defeat the other as it was stated in the case of **The director of Public prosecution vs. Li Ling Ling,** criminal Appeal No. 508 of 2015, Court of Appeal of Tanzania at Dar es salaam (unreported).

She argued that, the petitioner states that the estate of her late husband was not based on customary law but it was filed in primary court and governed by the Magistrates' court's Act, Cap 11R.E 2019. She said that the petitioner is not the only legal heir, it was shown that there is deceased's mother who was given a share from the pension fund.

She submitted further that the law provides for safeguards in the provisions of sections 44,70, 99 and 101 of cap. 352 as any person who is not pleased with how those powers are exercised can knock the door of the appointing court to revoke letters of administration granted to that administrator. She said that, the 1st respondent's appointment as administrator of the estate of late Dawson Aswile was revoked in Nov 2015. It was the petitioner who initiated the revocation process. After revocation she had a room to claim the properties that she claims that the administrator sold them without her consultation. And she utilized that opportunity by instituting

Land case No. 65 of 2016 and 142 of 2016 against the 1st, 2nd, and 3rd respondents before the DLHT of Temeke. On these cases the petitioner claimed ownership of the landed properties which were sold by the 1st respondent when he was the administrator of the estate of her late husband Dawson Aswile. The court ruled on the side of the respondent and being aggrieved by these decisions, the petitioner appealed to the High Court Land Division through Land Appeal No. 234 of 2021 which is still pending before Hon. Msafiri, J. which is against 1st and 2nd Respondents and Extended Miscellaneous Land Appeal which was decided on merit in favour of the 1st and 3rd respondent. She `concluded by submitting that, the law gives the petitioner the redress to enforce her rights to the higher court but she resorted to this court.

We start by acknowledging that the constitution of the United Republic of Tanzania stipulates that every citizen has a right to own and protection of his property subject to the law of the land, see Article 24.

The Act was enacted with a view of providing for the grant of probates of will and letters of administration to the estates of deceased persons, to make certain provisions with regard to the powers and duties of

executors and administrators, administration of wakf property, benevolent payments in Islamic estates and related matters.

For easy of reference, it is crucial that we enumerate the provisions of sections 44, 70, 99 and 101 of the Probate and Administration of Estates Act hereunder, and they read thus: -

> *44. Effect of grant of letters of administration*
>
> *Subject to all such limitation and exceptions contained therein and, where the grant is made for a special purpose, for that purpose only, letters of administration entitle the administrator to all rights belonging to the deceased as if the administration had been granted at the moment after his death:*
>
> *Provided that letters of administration shall not render valid any intermediate acts of the administrator tending to the diminution or damage of an intestate's estate.*
>
> *70. Conclusiveness of probate and letters of administration*
>
> *Probate and letters of administration shall–*
>
> *(a) have effect over all the property, movable and immovable, of the deceased throughout Tanzania; and*
>
> *(b) be conclusive as to the representative title against all debtors of the deceased, and all persons holding property which belongs to him; and*
>
> *(c) afford full indemnity to all debtors paying their debts, and all persons delivering up such property to the person*

to whom such probate or letters of administration shall have been granted

99. Character and property of executor or administrator as such

The executor or administrator, as the case may be, of a deceased person is his legal representative for all purposes, and all the property of the deceased person vests in him as such:

Provided that nothing in this section contained shall operate so as to vest in an executor or administrator–

(a) any property of a deceased person which would otherwise pass by survivorship to some other person; or

(b) any property vested in a corporation sole as such.

101. Power to dispose of property, etc.

An executor or administrator has, in respect of the property vested in him under section 99, power to dispose of movable property, as he thinks fit, and the powers of sale, mortgage, leasing of and otherwise in relation to immovable property conferred by written law upon trustees of a trust for sale.

Reading through the cited provisions, the administrator once he is given letters of administration, they entitle the administrator to all rights belonging to the deceased. The rights include :-

(a) have effect over all the property, movable and immovable, of the deceased throughout Tanzania; and

(b) be conclusive as to the representative title against all debtors of the deceased, and all persons holding property which belongs to him; and

(c) afford full indemnity to all debtors paying their debts, and all persons delivering up such property to the person to whom such probate or letters of administration shall have been granted

99. Character and property of executor or administrator as such

The executor or administrator, as the case may be, of a deceased person is his legal representative for all purposes, and all the property of the deceased person vests in him as such:

Provided that nothing in this section contained shall operate so as to vest in an executor or administrator–

(a) any property of a deceased person which would otherwise pass by survivorship to some other person; or

(b) any property vested in a corporation sole as such.

101. Power to dispose of property, etc.

An executor or administrator has, in respect of the property vested in him under section 99, power to dispose of movable property, as he thinks fit, and the powers of sale, mortgage, leasing of and otherwise in relation to immovable property conferred by written law upon trustees of a trust for sale.

However, on the other hand as stated in the submissions, the law has set several safeguards which regulate smooth handling of the administration of the deceased's estate, they include: -

I. Consent, r. 39 (f), r.71
II. General citation, r. 73
III. Administrator's oath, s.66
IV. Filing of inventory; s. 106 and r. 107
V. Exhibiting Accounts, s. 107 and r.107
VI. Section 103; the administrator is forbidden to benefit from the office
VII. Administrators is not forbidden to damage or diminish an estate, a proviso to s. 44
VIII. Revocation and removal of the administrator, s. 49
IX. Suing the administrator, s. 138

For convenience we hereunder reproduce the specific provisions, and they read as follows: -

Caveats against grant of probate or administration

(1) Any person having or asserting an interest in the estate of the deceased may enter a caveat against the probate grant or letters of administration.

(2) A caveat may be entered with the High Court or, where the deceased at the time of his death had his fixed place of abode within an area for which a District Delegate has been appointed or application for probate or letters of administration has been made to a District Delegate, with that District Delegate.

(3) Immediately on a caveat being entered with a District Delegate he shall send a copy thereof to the High Court.

(4) Where a caveat lodged with the High Court discloses that the deceased at the time of his death, has his fixed place of abode within an area for which a District Delegate is appointed, the Registrar shall send a copy thereof to that District Delegate.

(5) A caveat shall remain in force for four months after the date upon which it was lodged (unless sooner withdrawn) but, subject to the provisions of section 59, may be renewed.

49. Revocation of grants and removal of executors

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

(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 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.

107. Inventory and accounts

(1) An executor or administrator shall, within six months from the grant of probate or letters of administration, or within such further time as the court which granted the probate or letters may from time to time appoint or require, exhibit in that court an inventory containing a full and true estimate of all the property in possession, and all the credits, and also all the debts owing by any person to which the executor or administrator is entitled in that character, and shall in like manner, within one year from the grant or within such further time as the court may from time to time appoint, exhibit an account of the estate, showing the assets which have come to his hands and in the manner in which they have been applied or disposed of.

(2) If the administration is not completed within one year from the grant of probate or letters of administration, the executor or administrator shall at intervals of not more than six months, or within such further time as the court which granted the probate or letters of administration may from time to time appoint or require, and on the completion of the administration, exhibit in the like manner an account showing the assets which have come

into his hands and the manner in which they have been applied or disposed of since the last account was exhibited.

(3) If an executor or administrator, on being required by the court to exhibit an inventory or account under this section, omits to comply with the requisition within the time limited in the requisition for compliance therewith, he commits an offence and on conviction is liable to a fine not exceeding two thousand shillings or to imprisonment for a term not exceeding six months.

(4) If an executor or administrator exhibits an intentionally false inventory or account under this section he commits an offence and on conviction is liable to imprisonment for a term not exceeding seven years.

(5) Any beneficiary under a will, person entitled to a share under an intestacy or unsatisfied creditor shall be entitled to inspect the inventory and accounts of an executor or administrator.

It is apparent that, literally, the impugned provisions tend to give all rights to the administrator in various undertakings over the deceased's estate including disposition of the properties of the estate. The petitioner submitted that these provisions give unfettered absolute powers over the deceased's estate, and the heirs of the estate have been left out. However, the respondents argued that there are safeguards which are provided by the same law, which protect the estate from being mishandled.

We are of the view that, the listed measures are included in the law to invite participation of both parties, that is, the administrator and the beneficiaries. We wish to refer to the case of Joseph **Shumbusho Vs. Mary Grace Tigerwa and two others**, Civil Appeal No. 183 of 2016, Court of Appeal of Tanzania (unreported) where the court held inter alia that: -

> *"In the performance of his duty as a legal representative, the law requires him to act in accordance with his oath . And what this mean? Section 66 of the Probate and Administration Act requires the guarantee of the probate or letters of administration to take an oath that he/she will faithful administer the estate of the deceased and will account for the same... it is therefore implicit in the probate and administration Act that a legal representative owes a fiduciary duty to the heirs and beneficiaries. By way of emphasis, we wish to reiterate here that such a fiduciary duty is inferred from the oath taken by the grantee of the probate or letters of administration."*

The CAT went on to hold that the term 'fiduciary duty' *has been defined in the Black's Law Dictionary,* 9th Edition, Wes Publishing Co. 2009 at page 581 to mean: -

> *" a duty of utmost good faith, trust, confidence, and candour owed by a fiduciary (Such as a lawyer or corporate shareholder); a duty to act with the high degree of honesty and loyalty towards and another person and in the best interest of the other person (Such as the duty that one partner owes to another)."*

The court stated further that: -

"Indeed, it is true that the Probate and Administration Act does not expressly vest an administrator with an obligation to seek consultation with the heirs and beneficiaries on the matters of the estate." However, we are of the view that the fiduciary duty owed by the administrator and all other safeguards which have been put in place, which we have pointed herein above, do give obligation on the administrator to consult the heirs. It is pertinent to note that the safeguards which have been discussed herein above, are available at every stage of the pendency of the estate because the administrator once appointed has an obligation to exhibit the inventory and accounts of the estate, in this respect see the case of between **Abbas Ally Athuman Bantulaki V. KCB Bank Tanzania Limited and Kelvin Victor Mahity, (Administrator of the estate of the late Peter Walcher** at p. 12 (Supra).

In the case of **Abbas Ally** (Supra) at p.12 the Court of Appeal, discussing section 66 of the Act expounded further that: -

> *"On the basis of this provision, administrator's actions are bound to be foe the benefit of the rightful heirs and are precluded from embezzling or in any way misapplying the deceased's estate. In so doing, the court interpreted it as creating a fiduciary relationship".*

The safeguards are there even where the administrator breaches his fiduciary duty to administer the estate faithfully in accordance with the

oath. In case that happens, any hair who is not satisfied may challenge the administrator's decisions including applying for his removal. The law has put in place these measures to proportionately guarantee safeguards against administrator's abuse of his function. We are of the view that the main aspect here is the proportionality test. Are the provisions sufficient to oversee that the deceased estate is run smoothly according to the law? Are the safeguards sufficient to protect the deceased estate and the beneficiaries. Our answer to these pertinent questions is in the affirmative.

We agree with the respondent's counsel that the constitutionality of a provision or statute is not found in what could happen in its operation, where a provision is reasonable and valid because the mere possibility of it being abused in its operation does not make it invalid, see the case of **Rev. Christopher Mtikila v. AG** [1995] TLR 31 where the court held that: -

> *"It must be realized that the constitutionality of a provision or statute is not found in what could happen in its operation but in what it actually provides for. Where a provision is reasonable and valid,* ***the mere possibility of its being abused in actual operation will not make it invalid."*** *(Underscoring ours).*

In the case of **Silvester Hillu Dawi And Another vs The DPP,** Criminal Appeal No. 250 of 2006 it was emphasized that, courts must operate within the parameters of the constitution and not breaking the constitution for the sake of breaking new grounds. Yet again, it is also a settled principle of law that a statute should be read as a whole, see the case of **The Director of Public prosecution vs. Li Ling Ling** (Supra).

Before we pen off, we would like to comment on the submission by the 1st, 2nd and 3rd respondent's counsel that the petitioner ought to have challenged the law which dealt with the Administration of the deceased estate in the Primary Court, i.e. the Magistrate's court Act. We fully subscribe to this view. We doubt if the petitioner knew what point he was advancing when she said that the probate and administration case ought not to have been dealt with under customary law whilst she challenged the Probate and Administration Act, Cap. 352. Worse still, the petitioner's counsel did not make a reply on it which presupposes a concession.

In fine, basing on the aforesaid, we find that the provisions of sections 44,70,71 and 101 of the Probate and Administration Act [Cap. 352] do not offend Article 24 of the constitution of the United Republic of Tanzania of 1977 as amended. Consequently, the petition is dismissed accordingly.

Each Party to bear its own costs.

It is hereby so ordered.

S.C. MOSHI,

JUDGE

20/02/2023

M.G. MZUNA,

JUDGE

20/02/2023

J. S MGETTA,

JUDGE

20/02/2023