

IN THE HIGH COURT OF TANZANIA

TEMEKE SUB – REGISTRY

(ONE STOP JUDICIAL CENTRE)

AT TEMEKE

PROBATE AND ADMINISTRATION CAUSE NO. 30 OF 2023

In the matter of the estate of the late

COL. ESIL SIMON MWAKYAMBIKI DECEASED

AND

In the matter of an application for
revocation of the grant of Probate
issued to ANNA MBOKA ESIL MWAKYAMBIKI AND
LAWRENCE GWAKISA ESIL MWAKYAMBIKI by

EMELIA SIMON MWAIPOPO @

EMELIA SIMON MWAKYAMBIKIAPPLICANT

VERSUS

LAWRENCE GWAKISA ESIL MWAKYAMBIKI.....1stRESPONDENT

ANNA MBOKA ESIL MWAKYAMBIKI2nd RESPONDENT

RULING

Date of last order: 26/02/2024

Date of Ruling: 25/03/2024

OMARI, J.

Through a Chamber Summons Emelia Simon Mwaipopo *alias* Emelia Simon Mwakyambiki is seeking orders that this court *inter alia* be pleased to investigate the *status quo* of Farm ID1044265 at Katumba Village, Rungwe



District if apparently on the face of the evidence adduced belongs to the estate of the late Esil Simon Mwakyambiki. If the same will not be in the Affirmative this court is beseeched to nullify/revoke the grant of letters granted to the Respondents through Probate and Administration Cause No. 30 of 2023 for the reason of not being faithful to this court.

The Application is brought under section 49 (1) (e) of the Probate and Administration of Estates Act, Cap RE 2002 (the PAEA) and Rule 29 (1) of the Probate Rules GN. No. of 1963 (the Rules). It is also supported by an Affidavit sworn by the Applicant.

In the said Affidavit, the Applicant among other things states that she is the last born and only surviving child of one Simon Mpakele Mwakyambiki who grew up in her home village on what is now known as Farm ID1044265. She also stated that she witnessed a portion of the land given by her father to her two elder brothers in 1968 and 1988 respectively. The two brothers constructed houses on the said land and the same are standing up to date. The Applicant stated further that the land including the portions given to her brothers is 8 acres and also includes the clan burial grounds.

She narrated further that the late Esil Simon Mwakyambiki who was the first born of the late Simon Mpakele Mwakyambiki was given the task of brining



masons to build a bigger house as the existing mud house was unsuitable for use. He was also tasked with surveying the land. In turn the house was built and the late Simon Mpakele Mwakyambiki lived therein with his wife until 1990 when he passed away and 2000 when she died. There was no report of the survey the late Esil Simon Mwakyambiki conducted.

The Applicant further stated that the Respondents caused confusion among the Mwakiyambiki's clan when they claimed the land to be his, thus a part of his estate. She further said that on 14 February, 2023 a clan meeting was called and led to the discovery that the land is now Farm ID1044265 and there is an offer letter on the same. The Farm ID1044265 and letter of offer include land that has the house of Simon Mpekele Mwakyambiki and the houses belonging to the Applicant's two brothers. She went on to state that the clan knew nothing of this and all clan ceremonies have been done every year for 20 years on the said land. She listed the graves of the clan members buried in the said land, emphasizing that the Respondents knew this. The Applicant went on to state that the first Respondent suggested holding a clan meeting in December of 2023 after the February 2023 meeting where the said Farm ID1044265 was to be discussed he knowingly went ahead to name Farm ID1044265 as the deceased Esil Simon Mwakyambiki's property



which caused a rift in the clan. She averred further that the Respondents have been unfaithful to this court because they hid the fact that there are 4 houses on Farm ID1044265. And, knowing that there was a conflict as regards the said land they included it in the estate of their father the late Esil Simon Mwakyambiki while knowing it is the property of the late Simon Mpakele Mwakyambiki. She finished off by stating that, having been proposed as the Administrator of the late Simon Mpakele Mwakyambiki she has taken legal measures including filing a caveat over the said land.

The 1st Respondent filed a Counter Affidavit vehemently contesting the Application and the Applicants averments.

When the matter came for hearing I ordered the same to be heard by way of written submission to wit the parties did not object. A scheduling order was entered and the parties complied. The Applicant's submission was drawn and filed on her behalf by Mr. Katala John Kalimba while those of the 1st Respondent were drawn and filed on his behalf by John Kisyungu both being learned advocates.

Mr. Kalimba commenced his submission with the statement that the Respondents hid facts that there are four houses on Farm ID1044265 purposely misleading the decision of the court. This, according to counsel



means the Respondents are not fit to continue being the Administrators as appointed. Counsel went on to state that the Counter Affidavit confirms there are houses on Farm ID1044265 constructed by the two brothers, a fact that the Respondents hid. He went on to argue that the Respondents do not have evidence to prove that the said land was given to one family, that is the family of the late Esil Simon Mwakyambiki. The said Farm ID1044265 is clan land and according to counsel facts lead one to believe that there is a land dispute to be dealt with by the relevant authority thus, including it in the estate of the late Esil Simon Mwakyambiki will be preempting justice as the process for obtaining letters of administration for the estate of the late Simon Mpaleke Mwakyambiki are already underway.

Mr. Kalimba further submitted that it is a settled principle that once the administrator is willfully and without reasonable cause omitted to exhibit an inventory in accordance with the law or concealing from court something material to the case; this court has the mandate to revoke the appointment of the said administrator as was done in the case of **Joachim Robert Marandu v. Mrs. Susan Joachim Marandu**, Misc. Civil Application No. 152 of 2022. Counsel then went on to conclude his submission by beseeching this court to grant the Applicant's prayers.



When it was his turn Mr. Kisyungu began his submission by praying that the Counter Affidavit of the 1st Respondent who is one of the executors of the estate of the late Col. Esil Simon Mwakyambiki be adopted to form part of the submission. Counsel then went on to submit why the Application should be dismissed for it is lacking in merit. The first point of his submission is that in her first prayer in the Chamber Summons the Applicant is inviting this court to deal with a land dispute and not a probate matter. According to counsel, the Applicant has acknowledged that Farm ID1044265 is registered in the name of the late Esil Simon Mwakyambiki therefore she, the Applicant has no *locus standi* or right to represent her deceased father or brothers as she is not their administrator. He then went on to refer to Halsbury's Laws of England, 4th Edition and the case of **Lujuna Shubi Balonzi Senior v. The registered Trustees of Chama Cha Mapinduzi**, [1996] TLR 203 both of which define the concept of *locus standi*. Counsel explained that the Applicant not being a beneficiary she has no claim in this probate and her prayer for investigation over the ownership of Farm ID1044265 is not one arising out of a probate, therefore this court lacks the jurisdiction to entertain it as provided by section 3 of the PAEA.



Mr. Kisyungu went on to submit that the Executors of the estate of the late Esil Simon Mwakyambiki have executed their duties as set forth in Part XI of the PAEA and the Applicant has not shown that they have done otherwise. As regards section 49(1)(e) of the PAEA and Rule 29 (1) of the Rules counsel submitted that the Executors have in compliance with section 107 of the PAEA listed Farm ID1044265 owned by the late Esil Simon Mwakyambiki and not Farm ID1044266 that is the subject of this Application. This being the case, the Respondent's counsel argues that the Applicant has failed to demonstrate how they have exhibited inventory and accounts that are untrue. As for the houses; counsel argued that building houses does not mean they are lawful owners of the land and being that Farm ID1044265 is registered in the name of Col. Esil Simon Mwakyambiki therefore, the Executors represented to the court the entirety of Farm ID1044265.

Counsel concluded his submission by praying that this court finds no substance in the Application and dismiss the same with costs.

Having gone through the two rival submission I wish to now determine whether the Application before me has merit and if so what is the way forward. Before going into that, I would like to point out that the Chamber Summons the Applicant speaks of Farm ID1044265 at Katumba Village



within Rungwe District. The same is what she referred to in paragraphs 3,12,16,17,18 and 19 of the Applicant's Affidavit. However, it is Farm ID1044266 which appears in the Applicant's submission, this is also found in the Counter Affidavit filed by the Respondent. In the Inventory and ensuing Accounts of the estate the said land is depicted as Farm ID1044265. I reckon the reference to Farm ID1044266 was a slip of the pen; since it seemingly began in the 1st Respondent's averments in his Counter Affidavit, and I shall leave it at that.

The Applicant is alleging that by including the farm in dispute as part of the estate of the late Esil Simon Mwakyambiki the Executors have exhibited inventory that is untrue and therefore contravened the law thus liable to revocation. The Respondent is vehemently disputing this stating that the said Farm ID1044265 belongs to the late Esil Simon Mwakyambiki and even the Applicant has acknowledged this fact. This in my view is the core of this Application.

The Respondent's counsel is arguing that the Applicant is asserting ownership of the land in dispute attributing the same to her late father and her two brothers, therefore, raising the question of who is the lawful owner of Farm ID1044265 and in counsel's opinion that firstly the Applicant has no



locus standi in this probate for she is not a beneficiary of the estate of the late Esil Simon Mwakyambiki. And, according to the Respondent's counsel, this court has no jurisdiction to determine this question.

The Respondent's counsel questioned the Applicant's *locus standi* stating that she is neither the owner nor the administrator of the estate of the alleged owners of the land he cited the case of **Lujuna Shubi Balonzi Senior v. The registered Trustees of Chama Cha Mapinduzi** (*supra*).

In the case of Ally **Ahmed Bauda (Administrator of the Estate of the late Amina Hussein Senyange) v. Raza Hussein Ladha Damji and Others**, Civil Application No 525/17 of 2016, the Court of Appeal construed the term *locus standi* as a common law principle which requires that, a person bringing a matter into court should be able to show that their rights or interest have been interfered with.

It is therefore my view, and with due respect to the Applicant's counsel, the Applicant is attempting to assert ownership without having undergone the process of being an administrator of the estate(s) she is seeking to speak for. In that regard, I am persuaded by the decision of this court in the case



OF 2020 wherein it 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.'

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. 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 Applicant in her Affidavit deposed that Farm ID1044265 in question belonged to her father who later gave the same to her two brothers who all built houses therein. All this happened before the death of the late Col. Esil Simon Mwakyambiki. As a person who alleges to



have an interest in the estate of the late Col. Esil Simon Mwakyambiki she had the opportunity to assert her interests by way of entering a Caveat against the grant of the probate or letters of administration to the Respondent's herein as per section 58 of the PAEA. Having failed to do so, the Applicant has two recourses, the first, albeit not legal is to approach the Executors and settle her issues and grievances with them as was observed in **Mgeni Seif v. Mohamed Yahya Khalfani** (*supra*) wherein the court stated:

"...where a person claiming any interest in the estate of the deceased must trace the root of title back to a letters of administration, where the deceased died intestate or probate, where the deceased passed away testate."

This was reiterated in the case of **Monica Nyamakare Jigamba vs Mugeta Bwire Bhakome (as Administrator of the Estate of Musiba Reni Jigabha) and Another** (Civil Application 199 of 2019) [2020] TZCA 1820.

The above, makes the matter at hand not a land matter as can be determined by the probate court as the Applicant's claim neither stems from a right of inheritance nor does it emanate from purchase from an



administrator. The second recourse would be to take the requisite legal steps against the Executors of the said estate.

Having said the above, I now return to the question of the Executors having exhibited inventory that is untrue and therefore contravened the law, thus, liable to revocation. The Applicant is alleging the Respondents as Executors have not divulged that the said land has four houses and that there is a conflict over the same. I shall not let this detain me for two reasons, the first is that as already explained above the Applicant has no *locus standi* in this matter for she is not a beneficiary of the estate of the late Col. Esil Simon Mwakyambiki and although she claims to have been proposed as the administrator of the estate of the late Simon Mpakele Mwakyambiki she has not been legally appointed as such.

The second reason is that it is trite law that a party seeking a court to revoke a grant of probate or letters of administration has to not only make averments that can fit in the scope of section 49(1) and (2) but they are duty bound to substantiate the same. The Applicant has only successfully shown that there is a land dispute which the 1st Respondent has vehemently denied as has maintained the land belongs to the estate of Col. Esil Simon Mwakyambiki and not otherwise. The 1st Respondent's counsel has also



intimated that if there were to be a dispute then it is of a nature that is outside the jurisdiction of this court. I am in agreement with the 1st Respondent's counsel.

On account of the above, I am not convinced that the Executors of the estate of the late Col. Esil Simon Mwakyambiki and Respondents herein have intentionally exhibited an inventory of the estate which is untrue in a material respect, thus, has not failed to discharge his legal obligation in respect of the deceased's estate. Consequently, this court finds this Application without substance. It is hereby dismissed. Owing to the circumstances and this being a probate matter, I order that each party should bear its costs.

It is so ordered.



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

A.A. OMARI

JUDGE

25/03/2024

Ruling delivered and dated 25th day of March, 2024 at Dar es Salaam.



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

A.A. OMARI

JUDGE

25/03/2024