

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

TEMEKE SUB-REGISTRY

(ONE STOP CENTRE)

AT TEMEKE

MISC. CIVIL APPLICATION NO. 63 OF 2023

(Originating from Probate and Administration cause No. 268 of 2022 at Temeke High Court)

MARIAN JOHN MALLYA APPLICANT

VERSUS

1. MIRIAM JOHN MALLYA

2. BRIGHTON JOHN MALLYA

3. CHARLES KASUMBAI MALLYA

..... RESPONDENTS

RULING

12.4.2024 & 10.5.2024

BARTHY, J.:

Upon the passing of John Kacheli Mallya, the applicant in this matter instituted Probate Cause No. 3 of 2021, seeking appointment as the executrix of the deceased's will, a prayer that was granted by the court. Subsequently, the respondents, along with Grace Mallya, sought the revocation of this grant through Misc. Application No. 7 of 2021, which was successful, leading to the court ordering the filing of a fresh petition. Consequently, the applicant filed Probate Cause No. 268 of



2022. Meleckzedek John Mallya, a beneficiary, then pursued Civil Revision No. 67/01 of 2023, seeking the Court of Appeal's review of the High Court's decision in Misc. Application No. 7 of 2021 for revocation of grant.

This prompted the applicant to file this application, praying, inter alia, for an order of stay of proceedings of Probate and Administration Cause No. 268 of 2022 pending the determination of Civil Revision No. 67/01 of 2023, pending in the Court of Appeal.

The background of this matter traces back to a prolonged legal battle spanning several years, marked by an inability to reach a resolution. Stemming from the administration of the estate of the deceased, John Kachel Mallya, the disputes have pitted various parties against each other over the estate.

The beneficiaries have been shuffling from one court to another for many years. The reasons behind the prolonged legal battle varied. Despite the passage of time, the parties have been unable or unwilling to find common ground or reach a mutually acceptable resolution. Consequently, the probate matter remains unresolved, mired in a seemingly endless cycle of litigation and legal wrangling.

Now in this matter, the parties were heard by way of written submission, Mr. Emmanuel Mbuga submitted for Applicant while Dr. Ngemera submitted for the Respondents.

Mr. Mbuga in his submission he stated that the application is found under section 8, 68(e) and 95 of Civil Procedure Code, Cap 33 R.E. 2019 (the CPC). His submission hinges in four points that were stated in the case of **Wengert Windrose Safaris (Tanzania) Ltd v. The Minister of Natural Resource and Tourism & another**, Misc. Comm. Cause No. 89 of 2016, High Court Commercial Division (unreported), where the court outlined criteria for staying the proceedings of the case to have the following elements: The suits must be directly and substantially the same, secondly, the parties are the same or litigating under the same title, thirdly, the court is competent to grant order sought thereto, and lastly, the other suit must be pending before the proper court.

Mr. Mbunga elaborated on the mentioned criteria, particularly emphasizing the first one. He argued that the court should focus on the general subject matter rather than the relief sought. He convincingly demonstrated that both Probate Cause No. 268 of 2023 and Civil Revision No. 67/01 of 2023 concern the estates of the late Kacheli John Mallya. Additionally, he noted that a successful revision application would

impact the executorship appointed in Probate No. 3 of 2021, affecting the current matter before the court.

He further argued that an additional party does not invalidate the criterion of having the same parties and litigating under the same title. He emphasized that what matters is that the subject matter is the same and the parties are substantially similar. Making reference to the case of **Wengert Windrose Safaris (Tanzania) Ltd** (supra).

Examining the notice of motion, he observed that both parties in the matters are the same except for the applicant in the application for revision matter. Though it was deposed in the affidavit he was one of the beneficiaries of the estates of the late Kacheli John Mallya. Therefore, the matters involving same parties.

Regarding the last two criteria, Mr. Mbuga argued that since Meleckzedek John Mallya was not a party to the court's decision, seeking revision was the appropriate remedy. With the revision application pending and the respondent having filed a counter affidavit, the matter was proper before the court and the requirements were fulfilled. To bolster his argument, he referred to a case of **Yahya Khamis vs Hamida Haji Idd & Others** (Civil Appeal 225 of 2018), Court of Appeal

at Bukoba [2019] TZCA 549, which emphasized that an order of stay can be granted via inherent powers of the court in various circumstances.

He also highlighted that if the revision proceeding is successful, the applicant would regain her position as executrix of the deceased estate, and continuing with the petition may lead to confusion if the court would not appoint the petitioner. He cited cases of **Industrial Project and Technical Services Limited vs Barrel Petrol Energy Co. Ltd & 2 Others** (Land Case No. 56 of 2023), High Court Land Division [2023] TZHCLandD 17008, and **YARA Tanzania Limited vs DB Shapriya & Co. Limited** (Civil Appeal No. 360 of 2022) Court of Appeal at Dar es salaam [2023] TZCA 17763 to support his argument.

In his response, Dr. Ngemera prayed to incorporate a joint affidavit sworn by respondents into their submission. He addressed two main issues to oppose for this application: Firstly, whether the court can entertain an application for stay on the principle of *res-subjudice* when a lodged caveat is undetermined, and secondly, whether the application for stay meets the criteria for staying probate proceedings.

Regarding the first issue, Dr. Ngemera argued that once a caveat is lodged, nothing can be entertained until the caveat is determined or withdrawn, citing section 59(1) of the Probate and Administration Act



Cap 352 R.E. 2019 (PAEA) and the case of **Chantal Tito Mziray & Another vs Ritha John Makala & Another** (Civil Appeal 59 of 2018), Court of Appeal of Tanzania at Dar es salaam [2020] TZCA 1930.

He stressed that the caveat, lodged before the current application, should be resolved to determine the dispute over the validity of the will before considering the application for stay of proceeding, should the caveat remain unresolved it would create confusion and challenge the court's jurisdiction.

On the second issue, Dr. Ngomera discussed the doctrine of *res subjudice*, aimed at preventing concurrent courts from entertaining the same matter. This doctrine's conditions, outlined in **Ravji Construction Ltd vs Mohamed Enterprises (Tanzania) Ltd & Another** (Civil Case 59 of 2022), High Court at Dar es salaam [2022] TZHC 11684, require two suits with substantially similar issues involving the same parties and competent courts.

He added that the applicant in Civil Revision No. 268/01 of 2023, that is pending before the Court of Appeal, is not the party to the current proceedings. There's no pending suit for the appointment of an administrator/executor, thus no basis for staying the proceedings.

Regarding the third principle, he contended that applicant if has unprotected interests, lodging a caveat would be appropriate under Section 58(1) of PAEA, rather than through the present application.

As for the fourth limb, he claimed the uncertainty exists on whether the court can grant probate amidst a challenge to the probate itself through a lodged caveat. He insisted the pending application before the Court of Appeal application doesn't concern the appointment of an executor. He stated the competency of the court to grant relief is questionable without ensuring the validity of the will, citing the case of **Mark Alexander Gaetje and 2 others vs Brigitte Gaetje Defloor**, Civil Revision No. 3 of 2011, Court of Appeal of Tanzania Dar es salaam (unreported).

Lastly, on the fifth limb, he maintained that the parties are not the same, and the title sought doesn't intend to determine the beneficiaries. Overall, counsel argued against staying the proceedings based on the above reasons offered.

In rejoinder, Mr. Mbuga was firm that Dr. Ngemera had he wrongly interpreted section 59(1) of PAEA, which prohibits proceedings for the grant of probate or letters of administration in the

presence of a caveat. He went on to stating that what proceedings ought not to proceed are proceedings against grant.

He added that in the present matter it is not stay for grant, but rather a stay of proceedings awaiting the decision of the Court of Appeal regarding the subject matter at hand. He went on stating the Court of Appeal is not barred by the cited provision.

Regarding the submission that an application for revision is not a suit, he was firm the legal term 'suits' includes revision and appeal, as stated in the case of **Oldean Coffee Estate Limited v. The Registrar of Titles** (Land Application 56 of 2022), High Court at Arusha [2023] TZHC 16779.

He emphasized that section 59(1) of PAEA, only bars proceedings subsequent to, after filing of a caveat, employing the wording of the provision which read "*no proceedings shall be taken on a petition for probate or letters of administration*" of which the scope of application of the provision is limited to the particular proceedings and it should not be blindly applied.

With the question of the application of the doctrine of *res subjudice* he considered the application is found under on section 8 of the CPC in line with the conditions stated in the case of **Wengert**



Windrose Safaris (Tanzania) Ltd (supra) which state there must be pending suits that are directly and substantially the same; involving same parties litigating under the same title, before the competent court to grant order sought thereto.

Starting with the first criterion, where Mr. Mbuga rejoined that this application falls into the category of suits as per section 2 of the Limitation Act, Cap 89 R.E. 20219 (the Law of Limitation Act) which excludes applications from the definition of a suit, therefore claiming it was not covered by section 8 of the CPC. He contended that the court made much effort in defining what a suit means. To demonstrate this, he cited the case of **Exim Bank Tanzania Limited vs National Furnishers Ltd** (Civil Application No. 53/17 of 2022) Court of Appeal at Dar es salaam [2023] TZCA 17890, adopting the definition of a suit as stated in Black's Law Dictionary, 8th Edition stating;

Any proceeding by a party or parties against another in a court of law.

Also, citing the case of **Honourable Attorney General vs Reverend Christopher Mtikila** (Civil Appeal 20 of 2007), Court of Appeal at Dar es salaam where the term suit was defined and the case of **Oldean Cooffee Estate** (supra). Concluding his submission, Mr. Mbuga emphasized that it

is for interest of justice the proceeding of this case has to be stayed in order to avoid confusing decision of the court. That concluded the submissions of both sides.

After thoroughly examining the submissions presented by counsel for both parties, this court must address the whether application has the merit.

To commence my deliberation, the application before this court aims to stay the proceedings of Probate and Administration of Estate Cause No. 268 of 2022 pending determination of Civil Revision No. 67/01 of 2023 before the Court of Appeal.

As the provision of section 8 of the CPC requires stay of proceeding with a trial if the subject matter is directly and significantly in dispute in a previously filed suit involving the same parties or parties claiming under the same title. This applies regardless of whether the pending suit is in the same court or any other court in Tanzania with the authority to provide the relief sought.

Dr. Ngemera argued that the term "suit" as defined under section 2 of the Law of Limitation Act, does not include applications or appeals. He contended that since the matter before the Court of Appeal is an



application, the same is not covered by the said provision. Therefore, he maintain his position that this court cannot halt its proceedings.

In contrast, Mr. Mbuga argued that the term "suit" encompasses any proceedings between parties before the court. He referred to the court's interpretation regarding the term to also include applications and appeals.

In this point I agree with the arguments of Mr. Mbuga that through case law it has been established that suit is any proceedings of civil nature involving party on a dispute or claim that need to determine the rights of the party, as so held in the case of **Honourable Attorney General v. Reverend Christopher Mtikila** (Civil Appeal 20 of 2007), Court of Appeal of Tanzania at Dar es salaam [2008] TZCA 57.

Therefore, Probate and Administration of Estate Cause No. 268 of 2022 pending before this court and Civil Revision No. 67/01 of 2023 before the Court of Appeal are considered to be suits in the eyes of law.

That being said, there are other considerations for the court to ponder upon when evaluating the application for a stay of proceedings. It is imperative to establish whether there exists a subsequent matter closely and significantly connected to the former, involving the same

parties before a competent court as provided under section 8 of the CPC.

Dr. Ngemera argued that the parties involved in these matters were not the same. Specifically, in the application for revision, it was initiated by a beneficiary who is not a party to the proceedings sought to be stayed. Conversely, Mr. Mbuga maintained that as the beneficiary of the same estate in dispute, and considering the similarity in relief sought, the matters are subsequent and significantly connected.

It becomes evident that the application for revision No. 67/01 of 2023 before the Court of Appeal revolves around the estate of late John Mallya, which challenges the revocation of the applicant in this matter to administer his estate. This issue is substantially related to Probate and Administration of Estate Cause No. 268 of 2022, where once again, the applicant seeks to administer the estate of the deceased.

The interconnected nature of these legal proceedings, involving the same estate and seeking similar relief, underscores the relevance of considering the application for a stay of proceedings. Therefore, despite the fact that the applicant in the application for revision is different, he is the beneficiary who has an interest in the estate of the deceased in both matters. Therefore, I am persuaded by the exceptional circumstances



stated in the case of Wendert Windrose Safaris (T) Limited (supra) to also apply in this case.

It is my considered finding that both courts where the matters are pending are clothed with jurisdiction to try the case. Allowing the matter before this court to be determined may lead to chaos and be detrimental to the best interests of all involved, should the Court of Appeal restores the grant to the applicant.

I will further consider whether this court can proceed with the determination of the application for a stay while a probate matter is pending before it. It is the common ground that after the applicant has applied for executrix of the estate of the late John Kacheli Mallya before this court vide Probate and Administration of Estate Cause No. 268 of 2022, then the caveat was filed by the respondents.

It is crucial to note the provision of section 59(1) of PAEA which bars proceedings subsequent to the filing of a caveat. The provision reads as follows;

*(1) Save as provided in this section, **no proceedings shall be taken on a petition for probate or letters of administration after a caveat against the grant or a copy thereof has been entered with a court to whom***

application has been made so long as the caveat remains in force. [Emphasis is supplied].

In the presence of the caveat the provision indeed imposes limitations on the ongoing proceedings. However, a crucial question arises: does the provision encompass matters of revision pending before the Court of Appeal? Examining the wording of the provision, it clearly states that no proceedings shall be taken with the court to which the application has been made. This prompts an analysis of whether revisional matters, being distinct from initial proceedings, fall within the purview of this provision.

Also, taking note that the application of the PAEA is for High Court and District Delegate, but its application does not include a district court, primary court or the Court of Appeal of Tanzania in terms of section 2(1) of PAEA. Therefore, the cited case of **Chantel Tito Mziray and another v. Ritha John Makala and another** (supra) it is distinguishable to this case, as the stay was on the proceedings for grant of letter to allow determination of the caveat entered before the same court.



I am mindful that the aim of staying the proceeding pending before the court is not to undermine the caveat's status but to ensure clarity and proper adjudication in light of concurrent legal proceedings.

In view of the arguments I have endeavored to demonstrate above, and in the interest of justice, I find it appropriate to grant the application. Therefore, the proceedings in Probate and Administration of Estate Cause No. 268 of 2022 shall be stayed pending the determination of Civil Revision No. 67/01 of 2023 before the Court of Appeal. Given the nature of this matter and the relationship of the parties, it is equitable not to grant costs of the suit.

It is so ordered.



Dated at Dar es Salaam this 10th day of May, 2024.

Handwritten signature of G. N. Barthly in blue ink.

G. N. BARTHY

JUDGE

Delivered in the presence of Ms. Lilian Kweka learned advocate for the respondents, also holding brief of Mr. Emmanuel Mbuga learned advocate for the applicant and Ms. Bernadina RMA, but in the absence of both parties.



Handwritten signature of G. N. Barthly in blue ink.

Sgd: G. N. BARTHY

JUDGE

10/5/2024