

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(DAR ES SALAAM SUB REGISTRY )**

**AT DAR ES SALAAM**

**CIVIL CASE NO.23 OF 2023**

**(Arising from Probate and Administration Cause No.27 of 1979)**

**MURTAZA FIDAHUSSEIN FAZAL RAWJI .....PLAINTIFF**

**VERSUS**

**LATIFA MEHBOOB FAZAL ..... 1<sup>ST</sup> DEFENDANT**

**HASNANI FIDAHUSSEIN FAZAL ..... 2<sup>ND</sup> DEFENDANT**

Date of Last Order: 08.05.2024

Date of Judgement: 21.05.2024

**JUDGEMENT**

**MAGOIGA, J.**

The plaintiff, **MURTAZA FIDAHUSSEIN FAZAL RAWJI** petitioned to this court praying to be appointed as administrator of the un-administered estate of the late **FIDAHUSSEIN FAZAL RAWJI** who died interstate in Dar es Salaam on 2<sup>nd</sup> day of April, 1979. Subsequent to the filing of the petition and citation issued, the defendants (caveators) herein, **LATIFA MEHBOOB FAZAL** and **HASNANI FIDAHUSSEIN FAZAL RAWJI**, lodged a caveat in terms of the provisions of section 58 (1) and (5) of the Probate and Administration of Estate Act, [Cap 352 R.E.2019] and Rule 82 (4) of the Probate Rules of the same Act, G.N.369 of 1963 (hereinafter to be referred as the '**Act**' and '**Rules**' respectively) opposing the plaintiff's prayers.



Thereafter, on the basis of the caveat lodged to the petition and in terms of the provisions of section 59(2) of the Act, the petitioners did apply for issuance of citation to the caveators, requiring them to enter appearance. Upon the caveators entering appearance to the petition, by virtue of the provisions of section 59 (3) of the Act, the court had to bring into play the provisions of section 52 of the Act, which for easy of reference, provides as follows: -

***"Section 52 -Except as hereinafter provided and subject to any Probate Rules in that behalf-***

***(a) the proceedings of the court relating to the grant of the probate and letters of administration shall be regulated, so far as the circumstances of the case admit, by the Civil Procedure Code, or any enactment replacing the same; and***

***(b) in any case in which there is contention, the proceedings shall take, as nearly as may be the form of a suit on which the petitioner for the grant shall be plaintiff and any person who appears to oppose the proceedings shall be the defendant."***

Guided by the foregoing provision, therefore, the petitioner became the plaintiff, whereas the caveators turned into defendants, hence, this civil suit.



Facts pertaining to this suit are not complicated. It is common ground by both parties that the late Fidahussein Fazal Rawji died on 2<sup>nd</sup> day of April, 1979 at Dar es Salaam leaving behind 8 and a widow. Sequel to his death, his elder son, Mehboob Fidahussein Fazal Rawji (now deceased) successfully petitioned in this court for grant of the letters of administration of his estate, which he administered and filed an inventory and statement of accounts of the estate of the decease as exhibited in **exhibits PE1.**

However, in 2010, the plaintiff realized that, there are still un-administered estate of late Fidahussein Fazal Rawji which he pleaded, namely: 50% shares in **Fidahussein and Company Limited** and 50% shares in **Dispharma Retail Limited** worthy Tshs.37,000,000,000/- not disclosed and administered by Mehboob and have not been administered to date. The process was not easy and was welcomed with hurdles, but daunted and determined, eventually the plaintiff (petitioner) initiated this probate and administration cause, the subject matter of this suit.

The caveators objection was that, the petitioner is interested and that no un-administered of the late Fidahussein Fazal Rawji as alleged by the petitioner because all what was in the name of late Fidahussein Fazal Rawji was administered in Probate and Administration Cause No. 27 of 1979 as exhibited in the inventory and statement of accounts.

This is the judgement of the Court after hearing both sides of the suit.

My predecessor judge, Mkwizu, J. heard the plaintiff's case, but following the special sessions which were ongoing in Dar es Salaam zone, this matter was re-assigned to me where I heard the defence case.

At all material time, the plaintiff (petitioner) was enjoying the joint legal services of Mr. Odhiambo Kobas, Dar es Salaam based learned advocate from Kobas O.J Attorney and Mr. Daimu Halfani, learned advocate from Misnak Law Chambers; whereas the defendants had the legal services of Mr. Shehzada Walli, learned advocate from Stallion Attorneys.

And, before commencement of hearing of this petition in compliance of the procedure stipulated in the aforementioned provision, from the pleadings it was agreed between learned advocates for parties that, this petition give rise to two main issues and one consequential (relief sought), which were recorded for its determination as follows:

1. Whether there are un-administered estate/properties in the estate of late Fidahusseini Fazal Rawji?
2. If the 1<sup>st</sup> issue is answered in the affirmative, whether the letters of administration should be issued to the plaintiff?
3. What reliefs are parties entitled?

The plaintiff through his witness statement testified as PW1 and tendered three exhibits. Plaintiff called one witnesses in support of his case who



testified through witness statement as PW2. On the part of the defendants, 1<sup>st</sup> defendant testified through her witness statement as DW1 and tendered one exhibit. DW2 testified through his witness statement, prayed exhibit PE1 and PE2 to form part and parcel of the defence exhibits and tendered three exhibits. Next witness for defence was DW3 who testified through his witness statement, prayed that exhibit PE2 and PE3 to form part of the defence exhibits and tendered exhibits DE5. Next was DW4 (who is the 2<sup>nd</sup> defendant) testified through his witness statement, prayed exhibit PE1, PE2, PE3, DE5 to form part of the defence case and tendered exhibit DE6. And the last witness for defence was DW5 who testified through his witness statement, prayed exhibits PE2, PE2, DE3 and DE6 to form part of the defence exhibits.

As regard the 1<sup>st</sup> issue, the ground upon which the plaintiff seeks to be granted letters of administration was that despite the letters of administration granted to his late elder brother Mehboob Fidahussein Fazal Rawji in 1979, there are still un-administered estate of his late father estate as contained in paragraphs 3, 4, and 7 of the petition. PW1 testified that, the late Fidahussein Fazal Rawji during his lifetime was shareholder of 50% shares in Fidahussein and Company Limited and 50% in Dispharma Retail Limited in the UK which was formerly known as



Dispharma UK Limited which properties, according to PW1, have never been administered and distributed to the lawful heirs.

In his testimony, PW1 stated that the un-administered estate was not disclosed nor distributed equally to lawful heirs. And PW1 being now, elder son and for his and other interests being lawful heirs of the late Fidahussein Fazal Rawji, after perusing the old probate file discovered that the late Mehboob did not list the shares of the two companies.

According to PW1, the two companies were formed and incorporated by Fidahussein Fazal Rawji and Gullamabbas Fazal Rawji who were brothers with equal shares. PW1 told the court that Fidahussein and Company Limited was incorporated in Tanzania and Dispharma Limited before its change of the name to Dispharma Retail Limited was incorporated in the UK. PW1 further testimony was that the names of the owners were held in the names of their two sons: Mehboob Fidahussein Fazal and Mohamed Gulamabbas Fazal respectively as **exhibited in exhibit PE2**.

Further, it was the plaintiff's testimony that, according to the annual returns, accounts and directors' reports Dispharma Retail Limited showed that the shareholders structure has changed and new structure of Fidahussein family and Gulamabbas family put in place. In this, PW1 relied on Directors Report of 1977 to 1985 but which were not tendered in evidence as exhibits.

According to PW1, in 1986, one Amirali Fidahussein Siwji purported to have power of attorney from Fidahussein family and Gulamabbas family entered into four contracts (**exhibit P3**) which were in respect of the estate in dispute. PW1 denied to have given his consent to Siwji and when he queried that powers Siwji threw the ball to Mehboob. PW1 asserted that he and other beneficiaries have not been given any share of their late father as rightful heirs as consented to this petition. PW1 in the circumstances, prayed that this court finds and hold that there are still un-administered estate and proceed to appoint him as administrator of estate of his late father and that costs be borne by the defendants.

In support of the case for the plaintiff was sister to PW1, one **SHAMIM FIDAHUSSEIN FAZAL RAWJI** (to be referred herein as ("PW2").


Under affirmation and through her witness statement whose testimony is more or less the same as that of PW1 and tendered no exhibit to substantiate her testimony and supported PW1 case by all means.

On the other hand, the 1<sup>st</sup> defendant (**LATIFA MEHBOOB FAZAL**)- the widow and administratrix of the late Mehboob Fidahussein Fazal through her witness statement testified as DW1 and tendered one exhibit DE1.

The 2<sup>nd</sup> defendant (**HASNAIN FIDAHUSSEIN FAZAL**) through witness statement testified as DW4, prayed exhibits PE1, PE2, PE3, DE5 to form part and parcel of his defence and tendered exhibit PE6 which was



valuation of shares sold in 14.04.1986. The defendants as well called **MOHAMED HUSSEIN MEHBOOB FAZAL** who testified as DW2, tendered exhibit DE2, DE3, and DE4, **MUSTAKALI GULAMABBAS FAZAL** who testified as DW3 and tendered exhibit PE5 and lastly but not least, **Mr.MEHDI GULAMABBAS FAZAL** all these witnesses gave evidence to the effect that Probate and Administration Cause No. 27 of 1997 administered all estate of the deceased, shares of **Fidahussein and Company Limited** inclusive. According to defence testimonies, the plaintiff aim in this proceeding is calculated and intended to harass the family of late Mehboob Fidahussien Fazal because ever since 1997 no such claims were ever raised and wanted to get money which he is not entitled at all. As to the ownership of 50% shares in Dispharma Limited, they were categorically that that company was formed and incorporated by Mehboob Fidahuseein Fazal Rawji and Mohamed Gulamabbas and it has never been shared by their late father. All defence witnesses maintained that, the inventory and account of estate filed by late Mehboob included the shares in Fidahussien and Company Limited, which proceeds were equally distributed to all, the plaintiff inclusive. All defence witnesses prayed that all exhibits tendered by them, and those tendered by the plaintiff to form and be part of the defence case, which prayer was granted without objection.





Before answering the first issue I wish to point out that in civil cases, the cardinal principle in civil cases is that **"he who alleges must prove"** and the standard in civil cases is on balance of probability. See the case of case of **Paulina Samson Ndawavya vs Theresia Thomasi Madaha (Civil Appeal 45 of 2017) [2019] TZCA 453 (11 December 2019)**, where the Court of Appeal of Tanzania at Mwanza at page 14 held categorically held that; -

***"It is trite law and indeed elementary that he who alleges has a burden of proof as per section 110 of the Evidence Act, Cap. 6 [R.E 2002]. It is equally elementary that since the dispute was in civil case, the standard of proof was on a balance of probabilities which simply means that the Court will sustain such evidence which is more credible than the other on a particular fact to be proved". [Emphasize added]***

It should further be emphasized that, the objective of appointing an administrator of the estate in any given situation is to have a faithful person who will, with reasonable diligence, collect all the properties of the deceased, collect debt due and debts owed to the deceased, distribute the same to the lawful heirs. (Emphasis mine). See the case of **Sekunda Mbwambo Vs. Rose Ramadhan [2004] TLR 439.**



Now back to the instant suit. I have had an opportunity to read between the lines and along the lines of the testimonies of PW1 and PW2 for the plaintiff and DW1, DW2,DW3,DW4 and DW5 for the defendants as well as the contents of exhibits PE1, PE2, PE3 and DW1, DE2, DE3, DE4,DE5 and DE6 which the defence prayed that all forms part and parcel of their defence, and I am satisfied that the first issue in this suit must be and is to be answered in the affirmative that some of the properties of the late Fidahussein Fazal Rawji are an un-administered to date. I will explain why I am taking the above stance. **One**, guided by the cardinal principles that parties are bound by their own pleadings, even without citing a case law, then, the plaintiff in his pleadings (petition) categorically mentioned that the un-administered properties were 50% shares in both Fidahussein & Company Limited and Dispharma Retail Ltd In UK. But in exhibit P1, one of the documents admitted is an affidavit made under the Estate Duty Act, 1963 which shows that the Fidahussein & Company Limited with 333 nominal shares valued at 408,352/= were mentioned as '**outstanding**' but in the inventory and statement of accounts were excluded with no explanation at all. No defence witness told this court why those shares as correctly indicated in that affidavit vanished when inventory and statement of accounts was filed. A general denial exhibited by the



defendants that shares were included sound good but fall short of evidence on record to answer this issue otherwise.

So, as rightly pleaded by the plaintiff and argued by the learned advocates for the plaintiff in their final submissions, and rightly so in my own opinion, that shares in **Fidahussein & Company Limited** though mentioned in the affidavit of Mehboob but were not administered are merited, in this suit because as rightly enumerated in the final submissions by learned advocate for the plaintiff that the estate was valued Tshs.731,475 but in the inventory and statement of accounts no explanation was offered of the 50% shares valued at Tshs.408,352/= of Fidahussein & Company Limited.

**Two,** the effect of the above state of affairs led the discontentment of the rightful heirs and which behoved the creation of exhibit PE3. This led this court to note that, out of 8 children, 5 are in support of this petition which is an indication as rightful heirs were not given such shares and same remained an un-administered.

**Three,** the second category of estate allegedly not administered but forming part of the deceased estate is a company by the name of Dispharma UK Limited. This property will not detain me much. The plaintiff who had legal duty to prove that, indeed, his late father owned 50% shares in this company utterly failed to do so. The evidence on the second

company at this stage is wanting. The plaintiff tendered exhibit PE2- certificate of incorporation of Dispharma Limited No. 1296476 dated 1<sup>st</sup> February, 1977 and Memarts of its incorporation but which shows the company was/is owned by two subscribers who are Mehboob Fidahussein Fazal and Mohamed Gulamabbas Fazal. Nowhere, the late Fidahussein Fazal Rawji is mentioned at all.

Therefore, the testimony by PW1 in paragraph 9 of his witness statement that Dispharma Limited was formed by the two brothers on behalf of Fidahussein family and Gulamabbas family are but without merits. No such arrangement was tendered to disprove the contents of exhibit PE2. That said and done, this second limb of the company, I find no evidence at this stage to connect it with the estate of the late Fidahussein Fazal Rawji.

**Four**, the arguments and reasons stated by defendants that the plaintiff is interested in this probate was argued out of context because section 33 (1) of the Probate and Administration Act, allows person interested to petition for grant. So, by defendant admitting that the plaintiff is interested, I seen no law offended. For easy of reference, the said section provides as follows:

***"Section 33 (1) where the deceased died intestate, letters of administration of his estate may be granted to any person***



***who, according to the rules for the distribution of the estate of the intestate applicable in the case of such deceased, would be entitled to the whole or any part of such deceased's estate.***

So, the plaintiff qualifies to the estate being a lawful heir along with others, hence, entitled to part of such estate of his late father.

From the foregoing, the first issue is hereby answered in the affirmative to extent explained above.

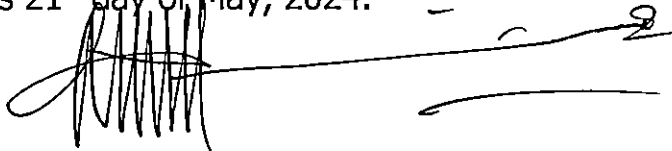
This takes me to the second issue which was couched that *"if issue number one is answered in the affirmative, whether the letters of administration should be issued to the plaintiff."* Given my findings above and given the fact that no other caveat is pending, I hereby find and hold that the plaintiff is entitled to letters of administration as prayed for an unadministered estate or any other estate that was not administered but form part and parcel of his late father estate that may come to his knowledge in the course of his administration.

Next is *"what reliefs are parties entitled"*. From my finding above this probate is hereby granted with costs to the plaintiff to be deducted from the estate.

That said and done, let letters of administration be granted to plaintiff to administer for the benefit of him and all lawful heirs of the unadministered estate of the late Fidahussein Fazal Rawji as prayed.




Dated at Dar es Salaam this 21<sup>st</sup> day of May, 2024.



**S.M. MAGOIGA**  
**JUDGE**  
**21/05/2024**

**Court:** Judgement delivered today in Dar es Salaam in chambers in the presence of *Mrs Lulu Mpinga* learned advocates for the plaintiff and *Mrs Fausser Mani* learned advocate for the defendants in Dar es Salaam



**S.M. MAGOIGA**  
**JUDGE**  
**21/05/2024**

**Court:** Right of Appeal fully explained



**S.M. MAGOIGA**  
**JUDGE**  
**21/05/2024**