

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**TEMEKE SUB-REGISTRY**

**(ONE STOP JUDICIAL CENTRE)**

**AT TEMEKE**

**CIVIL REVISION NO. 3 OF 2022**

(Arising from Civil Revision No. 11 of 2021 of District Court of Temeke, at Temeke)

**ASHA HUSSEIN.....APPLICANT**

**VERSUS**

**ATHUMAN HAMIS.....1<sup>ST</sup> RESPONDENT**

**WAMOJA MOSHI MUSTAFA.....2<sup>ND</sup> RESPONDENT**

**RULING**

30<sup>th</sup> April & 31<sup>st</sup> May, 2024

**BARTHY, J.**

The applicant filed for a revision before this court, seeking the following orders;

- 1. This honourable court be pleased to call for, and examine and revise the decision of the honourable Magistrate court of Temeke District Court made on the 27<sup>th</sup> August 2021 in Civil Revision No. 11 of 2021.*
- 2. This honourable court be pleased to exercise its supervisory powers over the District Court and call for and inspect the records of the Civil Revision No. 11 of 2021 which decided*



*(sic) the 1<sup>st</sup> respondent is rightful heir to inherit the deceased's properties and one to be granted the letter of administration of the deceased estate by the Primary Court.*

- 3. This honourable court be pleased to exercise its powers vested to it by the law and revise the decision of the District Court in Civil Revision No. 11 of 2021 and quash the decree and order therein, nullifying the proceedings and appointment of the 1<sup>st</sup> respondent as administrator of the estates of Tatu Athuman in a Probate Cause No. 399 of 2020 granted by Temeke Primary Court and declare the 2<sup>nd</sup> respondent as administratrix of the estate of Tatu Athuman as appointed by Temeke Primary Court in Probate Cause No. 313 of 2020.*
- 4. This honourable court be pleased to make an order for the 1<sup>st</sup> respondent to vacate from the house No. TMK/MG/264 located at Temeke Maganga, in Temeke Municipality, to hand over the rent accumulated from the same from 2006 up to (sic) determination of this application and hand over the same house to the 2<sup>nd</sup> respondent as administratrix of the deceased estates on order to proceed with her duty to distribute the estates to the heirs.*



*5. Any other relief(s) which this honourable court may deem fit and appropriate to grant.*

The applicant moved this court by way of a chamber summons filed under section 79(3) of the Civil Procedure Code, Cap 33 R.E 2019(the CPC), and section 31 of the Magistrates' Courts Act, Cap 11, R.E 2019 (the Magistrates' Court Act). The application is supported by the affidavit of Asha Hussein, the applicant, but it was heavily contested by the first respondent.

The hearing of this matter was conducted orally, with the applicant represented by Ms. Loveness Ngowi, learned counsel, and the first respondent represented by Ms. Sophia, learned advocate. The second respondent appeared in person.

Before the hearing commenced, the second respondent made it clear that he supports the application. Thus, the hearing proceeded between the applicant and the first respondent.

At the hearing, Ms. Ngowi prayed to adopt the affidavit and combined the first and second grounds in her submission. She argued that the applicant was not a party to the original proceedings; hence, she has the remedy to file for revision. To reinforce her argument, she cited the case of **Monica Jigamba v. Mugeta Bwire and another**, Civil



Application No. 199/01 of 2020, as well as section 68 of the CPC, and section 31 of the Magistrates' Court Act.

She further stated that the first respondent was named as an heir of the estate of the late Tatu Omary and appointed sole administratrix as the sole heir. She argued that the court cannot determine who is the lawful heir of the deceased's estate, citing the case of Monica Jigamba (supra) and section 108(1) of the Probate Administration of Estate Act, Cap 353 R.E. 2019 (Probate and Administration of Estate Act).

The applicant was not identified as a beneficiary, she argued that Tatu Athuman never had a child, but her sister had a child, who is the applicant.

Turning to the third ground, Ms. Ngowi argued that the first respondent lied to the court about being a grandchild of the deceased and being a blood relative. She refuted the claim that the deceased and the father of the first respondent were half-brothers who shared a mother. Ms. Ngowi stated this assertion contradicts Civil Revision No. 11/2021.

It was her firm argument that the first respondent has no interest in the property of the deceased and should not inherit, and the second respondent should be appointed to administer the deceased's estate.



Regarding the fourth ground, it was argued that the first respondent should vacate the property of the deceased because he is misusing the estate, including taking rent and occupying the premises.

Resisting the application, Ms. Sophia prayed to adopt the counter-affidavit of the first respondent and argued that the court has the duty to identify the deceased's heirs. She contended that the applicant had failed to cite the law properly, and therefore the application should be dismissed.

Addressing the second ground, Ms. Sophia pointed out that in Islamic faith, inheritance goes to the male side, not the female side. She suggested that the court may seek clarity from the Sheikh to prove this. She further argued that the first respondent and the deceased were related because the deceased was her aunt.

She added that the father of the respondent and the deceased were brothers from the same father, whereas the relationship between the applicant and the deceased is too remote. This was properly determined by the Primary Court and upheld by the District Court.

To conclude, Ms. Sophia conceded that the house is not vacant, as the first respondent is living in it, but it is not rented nor has it been transferred to her name. She contended that the house will be shared with other heirs, so the application should be dismissed.

In the rejoinder submission, Ms. Ngowi reiterated her arguments made in her submission in chief, stating that the case law cited above shows that it is not the duty of the court to identify the heirs of the deceased. She also referred to section 108 of the Probate and Administration of Estate Act. She insisted that the first respondent had failed to show the authority on inheritance under Islamic law.

She further maintained her argument that there is no proof that the first respondent had any relationship with the deceased. Therefore, she prayed for the application to be granted.

Having heard the contending arguments with respect to this application, it is essential to outline the gist of this matter before embarking on deliberations. This case concerns the estate of the late Tatu Musa Athuman, who died intestate on 8<sup>th</sup> of October 2002, without leaving behind any child and the widower status was not clear. The deceased had a house at Temeke which is the subject of this matter.

A petition was lodged before the Primary Court of Temeke for letters of administration, and on September 26, 2006, the court appointed Hamisi Athumani to administer her estate via 'Mirathi' (Probate Cause) No. 117 of 2006. Subsequently, Asha Hussein also petitioned for letters of administration for the same estate and was appointed by the Primary





Court of Temeke on February 5, 2008, through 'Mirathi' (Probate Cause) No. 486 of 2008.

To address the resulting confusion, the Primary Court Magistrate in charge wrote a letter to the District Magistrate in charge of the Temeke District Court, which led to the initiation of a *suo motu* revision to rectify the anomalies. This resulted in Revision No. 18 of 2020, wherein both appointed administrators were invited to address the court on the existing matters. On September 29, 2020, the District Court ruled that all previous appointments were null and void. The court ordered the paternal side of the deceased to convene a family/clan meeting to appoint a person who would then petition for letters of administration.

Following this order, Wamoja Moshi filed an application for letters of administration to manage the estate of the late Tatu Musa Athuman via 'Mirathi' (Probate Cause) No. 313 of 2020. On December 11, 2020, the Primary Court of Temeke issued letters of administration to her. Despite this, Athumani Hamisi Mtengela filed a similar application with the same court through 'Mirathi' (Probate Cause) No. 399 of 2020, and on February 24, 2021, where he was appointed the administrator.

During the administration of the estate, the Temeke Municipal authorities faced a dilemma regarding the rightful and legal heir to the landed property in the deceased's estate, as there were two sets of

letters of administration. This confusion prompted the Primary Court to seek guidance from the District Court of Temeke, leading to the initiation of Civil Revision No. 11 of 2021.

After the hearing on August 27, 2021, Athumani Hamisi was named the rightful heir to inherit the property and was issued letters of administration.

Aggrieved by the decision in Civil Revision No. 11 of 2020, Asha Athumani filed this application for revision before this court. After the application was lodged, it was initially challenging to locate the records of the District Court of Temeke regarding Civil Revision No. 11 of 2020 for the determination of this matter. It was only in May 2024 that the records were made available to this court. Upon reviewing the records from the District Court, several issues were noted.

Firstly, the file contained a copy of the ruling, the drawn order, and the proceedings from June 24, 2021, July 8, 2021, and August 9, 2021, as well as a letter dated February 17, 2020, from Temeke Municipal. Additionally, there was a duplicate file that included a covering letter from the in-charge of Temeke District Court dated April 4, 2024, with Ref. No. Civil Case No. 11/2021, and a sworn affidavit of Jeremia





Stephen Mihayo. It was availed that the records of the said matter could not be located in the court registry.

It is therefore evident that the proceedings for Civil Revision No. 11 of 2020 were incomplete, raising concerns about the determination of the matter before this court.

Nonetheless, with regard to the matter at hand, I will begin my deliberation with the second ground of appeal, where the applicant challenges the powers of the district court to name the first respondent as the heir of the deceased estate and to appoint him as the administrator of the deceased estate. The first respondent contended that the decision of the district court was justified, as Islamic law requires heirs to come from the paternal side.

The records from the district court clearly indicate the existence of two matters, which led to the appointment of two administrators for the same estate of the deceased, prompted the Primary Court Magistrate in charge to seek direction from the district court. This occurred after both administrators sought to transfer the title of the deceased estate with the land office.



Neither the Primary Court nor the District Court was presented with the issue for determination as to who is the lawful and rightful heirs of the deceased estate. As stated in the ruling of the court on page 4 that;

*"This courts decides that **the applicant is the rightful heir to inherit the deceased property and therefore should be one to be granted the letters of administration of the deceased estate**". [The emphasis is supplied].*

Considering that the appointment of the administrators of the deceased's estate was made by the Primary Court, therefore these matters will be governed by the Fifth Schedule to the Magistrates' Courts Act. Under rule 5 of the said Fifth Schedule, it entrusts the appointed administrator/administratrix with the duty to collect the assets of the deceased, pay the debts and costs of administration, and thereafter distribute the estate to the heirs.

In a normal setting, the court is prohibited from interfering with this sacred duty of the administrator. The administrator is responsible for collecting the assets, identifying the heirs, and distributing the deceased's estate. This principle was emphasized by the court in the case of **Monica Nyamakare Jigamba v. Mugeta Bwire Bhakome & Another**, as cited by Ms. Ngowi, the learned advocate for the applicant.



Since no objection has been raised before the Primary Court regarding the identification of the lawful heirs of the deceased's estate, it was improper for the District Court, during the determination of the revision, to decide on this matter without inviting the parties to address the issue.

The proper distribution of the deceased's assets to the heirs is typically made after the inventory and account of the estate have been filed and presented before the court through Forms No. V and VI, as prescribed by Rule 10 of The Primary Courts (Administration of Estates) Rules, G.N. 49 of 1971, which states;

*10. - (1) Within four months of the grant of administration or within such further time as the liabilities court may allow, the administrator shall submit to the court a true and complete statement, in form V, all the assets and liabilities of the deceased persons' estate and at such intervals thereafter as the court may fix, he shall submit to the court a periodical account of the estate in form VI showing therein all the moneys received, payments made, and property or other assets sold or otherwise transferred by him.*

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*(2) The statements of accounts referred to in sub rule (1) may, on application to the court, be inspected by any creditor, executor, heir or beneficiary of the estate.*

It is upon the filing of these forms and inspected by any interested party, then the objections may arise regarding the claimed assets or the manner in which the estate is distributed to the heirs. When such objections are raised, the court may hold a hearing to address the issues. Following the hearing, the court may either order the family (including the administrator and beneficiaries) to resolve any disagreements and submit their agreement to the court or make its own findings and directives concerning the matter brought to its attention.

This procedure was also highlighted by Justice Mlacha (as he was then) in the case of **Beatrice Brighton Kamanga and Another vs. Ziada William Kamanga** (Civil Revision 13 of 2020) High Court at Dar es Salaam [2020] TZHC 1428, where the court held that;

*If they do so the court must allow them. In practice, in a good system of administration of justice, once they are filled, the court must cause the same to be known to heirs, debtors and creditors and ask them to file objections against them, if they so wish. If there is an objection, the court will be at liberty to return them to the administrator*

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*for rectification as was said by this court in Nuru Salum and Husna Ali Msudi Juma, PC Probate Appeal No.10 of 2019 (Rumanyika, J.) or proceed to hear the parties and make a ruling on the matter as was said by this court in Hadija Saidi Matika (supra). On good reasons being established and in the great interest of justice, the court can change what was done by the administrator and substitute thereof with what it considers to be the best division or make a directive accordingly. It is however important to hear the administrator and all interested parties fully before making the decision. Otherwise, the court has no power to question an act or omission of the administrator contained in the statement of accounts and inventories.*

Since the beneficiaries were not called before the court to inspect Forms No. V and VI and present their confirmation or objection regarding the same, the court was not justified in determining who the rightful and lawful heir of the deceased estate was. This was also stated in the case of **Monica Nyamakare Jigamba v. Mugeta Bwire Bhakome & Another**, Civil Application No. 199/01 of 2020, Court of Appeal of Tanzania, where it was held that the court grossly erred when it stepped

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into the shoes of the administrator. Therefore, I find merit in the second ground of this application.

I will now turn to the first and third grounds calling for the revision of the proceedings, ruling, and orders of the district court that appointed the first respondent as the administrator of the deceased estate. From the contending arguments and records of the lower courts, it is evident that there were two petitions for letters of administration of the same deceased estate: Probate Cause No. 313 of 2020, which appointed Tatu Musa Athuman on December 11, 2020, and Probate Cause No. 399 of 2020, which appointed Athumani Hamisi Mtengela on February 24, 2021.

The fact that Probate and Administration Cause No. 313 of 2020 was instituted first, leading to the appointment of Tatu Musa Athuman as the administratrix, means that the later petition (Probate Cause No. 399 of 2020) and subsequent appointment of Athumani Hamisi Mtengela should not have proceeded. These two interconnected matters, involving the same estate and seeking similar relief, have created chaos and constitute an abuse of the court's process.

The proper procedure requires anyone objecting to the appointment of a petitioner to file a caveat or objection before the court

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for determination. If the court upheld the caveat or objection entered, the court may dismiss the petition.

Conversely, if the court dismisses the objection, it may appoint the petitioner or another person to administer the estate. In a later stage when the inventory and account of the estate are submitted to the court any interested person on the estate may present their objections, rather than filing a fresh petition for administration of the same estate. Alternatively, interested parties could seek intervention from a higher court through appeal or revision.

The proceedings of the district court in Civil Revision No. 11 of 2021 are flawed, particularly in declaring Athumani Hamisi Mtengela the administrator of the deceased estate. Faced with a similar situation, the court in **Waheeda Yakub Selemani vs. Mary Atupele Mungai and Another** (Civil Revision 34 of 2020) High Court at Dar es Salaam [2020] TZHC 3306, held that the subsequent probate and administration matter was null and void.

Thus, I find that the proceedings, ruling, order, and any other relief granted by the district court in Civil Revision No. 11 of 2021 are vitiated and unlawful. The district court improperly decided the issue of heirs without the matter being presented before it, and it left intact the



null and void proceedings and decision of the primary court of Temeke in Shauri la Mirathi No. 399 of 2020. This failure to observe probate and administration procedures in the primary courts and the district court's failure to make necessary orders in the revision application led to a miscarriage of justice.

I proceed to invoke the revision powers vested in this court under section 44(1) (a) of the Magistrate's Courts Act, quash, and set aside the proceedings and decision of the primary court of Temeke in Probate and Administration Cause (Mirathi) No. 399 of 2020 for being improperly before the court. The appointment of Athumani Hamisi was illegal, as there was an ongoing proceeding regarding the estate of the deceased in Probate and Administration Cause (Mirathi No. 313 of 2020).

There has been no common understanding between the two sides of the family regarding the administration of the deceased estate for many years, resulting in no distribution of the estate. To resolve this familial discord, I find that applying the Probate and Administration of Estates Act to the matter will be in the best interest of the heirs, beneficiaries, and all interested parties.

By virtue of Rule 3 of the Fifth Schedule to the Magistrates' Courts Act, read together with Section 93(1) and (2) of the Probate and



Administration of Estate Act, Cap 352 R.E. 2019, I direct the primary court of Temeke to apply the Probate and Administration of Estates Act, in the proceedings of Mirathi No. 313 of 2020 pending before the said court. This is necessary for the interest of justice and the protection of the estate and all beneficiaries. This court also directs the primary court to revoke the appointment of Tatu Musa Athuman made on December 11, 2020, through Mirathi No. 313 of 2020, and, in the interest of justice, appoint another neutral person to administer the deceased estate.

It is so ordered.

**Dated at Dar es Salaam this 31<sup>st</sup> day of May, 2024.**



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**G. N. BARTHY**

**JUDGE**

Delivered in the presence of the applicant in person, both respondents in person and Ms. Loveness Ngowi learned advocate for the applicant.