

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

TEMEKE SUB-REGISTRY

(ONE STOP JUDICIAL CENTRE)

AT TEMEKE

PROBATE AND ADMINISTRATION CAUSE NO.68 OF 2023

IN THE MATTER OF THE ESTATE OF THE LATE

MICHAEL NYARI YONA

AND

IN THE MATTER OF THE APPLICATION FOR GRANT OF LETTERS OF

ADMINISTRATION DURING MINORITY BY

LILIAN GODFREY KAMUKALA

AND

IN THE MATTER OF THE CAVEAT FILED BY

THERESIA PETER PAKATA

RULING

20/05/2024 & 10/6/2024.

SARWATT, J.;

Upon the demise of Michael Nyari Yona on 28th January 2023, the petitioner herein, Lilian Godfrey Kamukala, petitioned before this Court for the grant of

letters of administration during minority under section 36 of the Probate and Administration of Estate Act, Cap 352 of R.E 2019 (the Act) and Rule 44 of the Probate and Administration of Estate Rules (the Rules). The petitioner, a mother to Ester Michael Nyari and Joel Michael Nyari, who are minors and the deceased heirs, petitioned on their behalf.

Upon the issuance of the citation, Theresia Peter Pakata, who is the wife of the deceased, filed her caveat on 22nd September 2023. As per her affidavit, upon the death of her husband, she applied before Kimara Primary Court and was granted a certificate of appointment as administratrix of the estate of the late Michael Nyari Yona through Probate Cause no 24/2023. She objects to the appointment of the petitioner on the following grounds;

- i. The petitioner is not supported by written consent of all those persons who would be entitled to the whole or part of the estate of the deceased, and this honourable Court has not made any order dispensing with such consent as required by law.*
- ii. The petition for the grant of letters of administration made by the petitioner is overtaken by events as the caveator has already been appointed as such as demonstrated in this affidavit.*

- iii. The petitioner is not qualified for the appointment as administratrix of the estate of the late Michael Nyari Yona on the ground that she was never married to the deceased.*
- iv. The petition is not supported by a death certificate of the deceased, and the affidavit in lieu thereof is incompetent as a qualified person did not make it according to law.*
- v. The list of assets left behind by the deceased, as submitted by the petitioner, is incomplete and incorrect and contains some assets that are unknown to the caveator.*
- vi. The petitioner has filed the petition as the mother of Ester Michael Nyari and Joel Michael Nyari(minors), who are, as admitted by the petitioner, children born out of wedlock and, therefore, illegitimate.*

Upon the matter turning contentious, it was conducted under the standard procedures of civil suits pursuant to section 52(b) of the Act. Therefore, the parties led by their advocates, Victor Kikwasi for the petitioner and Ibrahim Mbuga for the caveator, advanced three main issues for the determination by the Court.

- i. Whether the petitioner is a fit person to administer the deceased estate*
- ii. Whether the petitioner's children, Ester Michael Nyari and Joel Michael Nyari, are entitled to inherit the deceased estate*
- iii. Any other relief the parties are entitled to*

To prove her case, the petitioner, cast with the duty to commence, brought two witnesses, namely Lilian Kamukala (Pw1) and Stella Yona, a deceased mother (Pw2). On the other side, one witness, Theresia Peter Pakata (Dw1) came to prove the caveat. After a full hearing, closing submissions were filed as scheduled.

In her evidence, Pw1 told the Court that she decided to petition to be appointed as administratrix because she has two children with the deceased who have been taken care of by the deceased until his death. This fact was supported by Pw2, who told the Court that the deceased had introduced the said children to her when they were young. According to Pw1, she knows all the properties of the deceased as well as all the beneficiaries. Therefore, she is a fit person to be granted the letters of administration. Further, Pw1 stated that the caveator had 2023 opened a probate case no 24/2023 without adhering to the law, and in the said case, she did not recognize her children.

Therefore, pray for the children, Ester Michael Nyari and Joel Michael Nyari, to be recognized as among the beneficiaries.

On the other side, Dw1 testified that the deceased was her husband whom they contracted a Christian marriage on 28th August 1999. According to Dw1. In all the time of her marriage with her late husband, he had never introduced to her any child out of wedlock. She further testified, she does not know them and even the petitioner she knew her through the present case.

Dw1 testified further that, after the burial, the family meeting was held, and she was proposed to be the administratrix of her late husband's estate. In the said meeting, she added, three beneficiaries were identified, which are herself and her daughters Stela, and Lise. The petitioner's children were never mentioned in the said meeting by anyone, even by Pw2, who also attended the meeting.

Dw1 went on to testify that, after the meeting, she went before Kimara Mobile court to open a probate case no 24/2023, where she was appointed the administratrix. Following her appointment, she started to distribute some of the deceased properties, but later on, her appointment was revoked.

In their final submission, Mr. Kikwasi, an advocate for the petitioner, submitted on the first issue that the petitioner had been in a long-term relationship with the deceased. She is the mother of his two children, Ester Michael Nyari and Joel Michael Nyari. According to Mr. Kikwasi, the petitioner has demonstrated comprehensive knowledge of the deceased assets, and she has acted in a manner that reflects integrity and responsibility. Thus, she is a fit person to be appointed, unlike the caveator, who does not recognize the petitioner's two children.

On the second issue, Mr. Kikwasi submitted that the paternity of the deceased to Ester Nyari and Joel Nyari is well documented and exhibited by birth certificates, health insurance cards, and baptism certificates for both children, which confirms the deceased as their father as well as the statement of the mother of the deceased who testified that the deceased introduced the children to her as his children.

He further submitted section 5 of the Law of the Child Act, 2009 prohibits child discrimination, and section 10 of the said Act prohibits any person from depriving a child of a reasonable enjoyment of the estate of his parents. It was the learned counsel's contention that children born out of wedlock are entitled to inherit from their biological father if paternity is established. To

support his assertion, he cited the case of **Kristantus Msigwa v Marry Andrew Masuba**, Probate and Administration Appeal no. 6 OF 2019.

On the third issue, it was the counsel's submission that the petitioner is a fit and suitable person to be granted letters of administration. Alternatively, if the Court should find that she is not a fit person to administer, then an independent person should be appointed to administer the estate. He also submitted that the caveator is not a fit person due to the reasons and circumstances as demonstrated in the ruling in respect of Civil Revision No. 5507 of 2024 between **Rose Levina Tungaraza (*as the administrator of the estate of the late Theresia Masale Tungaraza*) v Theresia Peter Pakata (*as administrator of the estate of the late Michael Nyari Yona*)**.

The caveator counsel, on his final submission regarding the first issue, advanced that the petitioner in her petition did not include herself on the list of beneficiaries as she was never married to the deceased. Citing the decision in Probate and Administration cause no 50 of 2021, **in the matter of the estate of the late Dr. Servacious Beda Likwelile**, the caveator's counsel advanced that since the marriage between the deceased and the caveator was a Christian one and monogamous, it goes without saying that the

petitioner was a concubine and not a legal wife. In appointing administrators of the deceased estate, the counsel added, the Court is guided by the relationship between the deceased and that person. Due to those reasons, Mr. Mbugha advocate concluded that the petitioner is not a fit person to be appointed as administratrix of the estate of the late Michael Nyari Yona.

On the second issue, the counsel submitted that the petitioner and the deceased mother admitted before the Court that the petitioner's children were born out of wedlock. He drew the attention of the Court to the decision of the Court in the case of **Violet Ishengoma Kahangwa v The administrator General and Mrs. Eudokia Kahangwa** (1990) TLR 72, where the Court held that a putative father's obligation under bastardy or affiliation order ends with his death. Thus, it was the counsel's contention that the petitioners' children have no right to inherit the deceased.

After having recapped the evidence and the submissions from both sides, the ball is now in my hands to determine whether the caveat has merit. On the first issue, this Court is tasked to determine if the petitioner is a fit person to administer the estate of the deceased. In the present case, the petitioner applied to be granted letters during minority under section 36 of the Act. According to the said section, letters of administration may be granted to

the guardian of the minor, who is entitled to be granted letters until the minor reaches the age where he can obtain a grant himself. The provision states that;

"Where a minor would, but for his minority, be entitled to probate or letters of administration, letters of administration with or without the will annexed may, subject to the provisions of subsection (1) of section 22, be granted to the guardian of the person and property of the minor, or to such person as the Court thinks fits, limited until the minor comes of age and obtains a grant to himself."

What is evident from the cited provision of the law is that, for a guardian to be granted letters of administration, it must be shown that the beneficiary would be entitled to be granted probate or letters of administration, but he cannot be granted the same due to the minority. However, it must be proved that the minor has the criteria or sufficient interest before the letters can be granted to the guardian on their behalf.

For a person to be entitled to be granted probate or letters of administration, it must be shown that he is entitled to be distributed the whole or part of the estate. Section 33 of the Act, the said section provides;

"Where the deceased has died intestate, letters of administration of his estate may be granted to any person who, according to the rules for distribution of the estate of an intestate application in the case of such deceased, would be entitled to the whole or any part of such deceased estate."

In the present case, in order for the petitioner to be granted letters of administration in the minority criteria, it must be shown that her children, of which she applies on behalf, are entitled to the whole or part of the estate. Thus, it is imperative to answer issue number two, which seeks to see if her children are entitled to inherit the estate.

According to the evidence of the caveator, she told the Court that she was not aware that the deceased had other children outside of their marriage, as the deceased denied the same. Despite the caveator testimony, Pw2, who is the mother of the deceased, told the Court that she recognizes the children as the children of her deceased son as he introduced them to her. In addition to that, the petitioner has brought the birth certificates of the said children, which were admitted by the Court collectively as exhibit P1. In the said exhibits, the name of the father is shown as Michael Nyari Yona. Section 35 of the Law of the Child Act shows that one of the proofs of parentage is for

the name of the parent to be entered in the register of births kept by the Registrar-General. The provision reads,

"The following shall be considered by a court as evidence of parentage-

(a) any marriage performed in accordance with the Law of Marriage Act;

(b) the name of the parent entered in the Register of Births kept by the Registrar-General;

(c) performance of customary ceremony by the father of the child;

(d) public acknowledgment of parentage or

(e) DNA results."

From the above provision, and considering the evidence of Pw1 and Pw2, this Court is satisfied that Ester Nyari and Joel Nyari are the children of the deceased.

On another note, the caveator's counsel argued that, since the children were born out of wedlock, they are therefore illegitimate and, thus, are not entitled to inherit from the deceased estate, citing the decision in the case of **Violet Ishengoma Kahangwa(supra)**. Despite the learned counsel argument, with the coming into force of the Law of the Child Act 2009, there is

protection of the rights of children born out of wedlock. Section 5(2) of the Law of the Child Act prohibits any discrimination against a child in respect of gender, race, age, religion, language, etc. The wording of the section portrays that all children are required to be treated equally without any discrimination.

The Law of the Child Act did not end there, under section 10, it prohibits deprivation of a child from enjoyment of the estate of the parent. It reads;

"A person shall not deprive a child of reasonable enjoyment out of the estate of a parent."

Guided by the above provisions of the law, I see no reason the deprive the said children from inheriting the estate of their father. The same was the view of this Court in the case of **Beatrice Brighton Kamanga and Amanda Brighton Kamanga v Ziada William Kamanga**, Civil Revision no 13 of 2020, HCT at Dar es Salaam, and the case of **Kristantus Msigwa v Marry Andrew Masuba**, Probate and Administration Appeal no.6 of 2019 cited by the petitioner counsel.

Having seen that the petitioner's children have the right to inherit, It goes without saying that the petitioner's children have an interest in the estate of the deceased. Since they are minors, their mother can petition for the grant

of letters during minority. However, the caveator objected to the appointment because she was not the wife of the deceased but a mere concubine.

I think the caveator misconstrued the petitioner's application. This is because the petitioner applied to be granted the letters of administration during minority as her children, the minors are entitled to the part of the estate of the deceased, and not because she is a beneficiary. This is evidenced by the petition itself, whereby the petitioner did not list herself among the beneficiaries, but she listed her children, the caveator, and the children of the caveator as beneficiaries of the estate.

Therefore, this Court observed that the petitioner can be granted the letters of administration during minority as she prayed. However, according to section 36 of the Act, that grant must be made until the minor becomes of age to obtain the grant themselves. In the present case, the children of the petitioner are not the only beneficiaries of the estate, as it is evident that the caveator is the wife of the deceased, and together they had two children. Thus, granting the letters to the petitioner until her children become of the age of majority to obtain the grant themselves will not be appropriate under the circumstances whereby the petitioner did not live with the deceased,

therefore be hard for her to identify the properties of the deceased, and I don't think, if she is appointed, the caveator as the wife of the deceased will offer any cooperation to her.

However, with the nullification of the appointment of the caveator as administratrix of the estate of the deceased, through Civil Revision No. 5507 of 2024, it follows that there is no administrator to the deceased estate.

In the event, in answer to the third issue, as to what relief the parties are entitled to, since the caveator is the legal wife who can be easy to access the deceased estate, I hereby appoint her to administer the estate of her late husband, Michael Nyari Yona. This Court requires her to collect, and distribute the deceased properties to all heirs, including the two children of the petitioner, pay the debts of the deceased (if any), and file inventory before this Court within six months from the grant of letters of administration.

It is so ordered.

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



S. S. Sarwatt
S. S. SARWATT

JUDGE

Delivered in the presence of the petitioner, the caveator, Mr. Ibrahim Mbuya advocate for the caveator and Mr. Victor Kikwasi the advocate for the petitioner.

Right of appeal is fully explained.