

IN THE HIGH COURT OF TANZANIA

MUSOMA SUB-REGISTRY

AT MUSOMA

PROBATE APPLICATION NO. 42 OF 2023

REFERENCE NO. 20231010000532150

(Arising from Probate Case No. 47 of 2016 at Tarime Urban Primary Court)

NATHANIEL WALUSE NYABANGE (Administrator of the
Estate of late Johnson Nyabange Waluse) **APPLICANT**

VERSUS

YUSUFU NYABANGE WALUSE **RESPONDENT**

RULING

26th & 27th June 2024

M. L. KOMBA, J;

Applicant has moved this court with Chamber Application under Rule 14 (1), (2) and (3) and section 3 of the Probate and Administration of Estate, Cap 352 and section 19 (1) of the Magistrate Court Act, Cap 11 R.E 2002 accompanied with affidavit deponed by the applicant.

The application has twelve (12) prayers which can be summarize as follows, **one;** this court to pronounce that it is the applicant who was legally appointed as administrator of the Estate of the late Mzee Johnson Nyabange Waluse in Probate Cause No. 47 of 2016 under Cap 253 R.E

2002, **two**; to pronounce that applicant being administrator was obliged to administer the house found in Plot No. 4 Block E Nyerere Road in Tarime Urban, **three**; his appointment as administrator has never been nullified not disqualified, **four**; this court to nullify Probate Cause No 54 of 2017 which appointed respondent as administrator as probate cause was illegally conducted, respondent was not blessed with clan meeting and has cause chaos in their family as applicant was appointed by clan meeting conducted on 01/07/2023, **five**; this court to nullify all activities by respondent as administrator with regard to House situated in Plot No. 4 Block E Nyerere Road in Tarime Urban and last which is **six** to pronounce that Tarime Urban Primary Court erred to entertain Probate cause No. 54 of 2017 without first nullify the probate cause No. 47 of 2016.

Upon being served with chamber summons, respondent file counter affidavit and Preliminary Objection (PO) on Point of law. As custom a Preliminary Objection has to be entertained first. This court schedule date for hearing PO where the applicant had self-representation while respondent had legal service of Mr. Werema, an advocate. Parties made submission on points as filed.

However, in due course of composing the ruling I came across with the legal issue which I needed parties to address on. It was the correctness of counter affidavit with PO as filed by respondent. It was confirmed that respondent cited different case in his counter affidavit and I ruled that is as good as there was no counter affidavit and he was supposed to argue point of law only in main application.

In supporting his application, the applicant prayed his chamber summons to be adopted and issues as filed be considered as his submission and prayed this court to allow the application.

Resisting application, Mr. Werema submitted that this court was not well moved to attend the application, starting with Regulation 14 of Probate Act, Cap 352 as cited by applicant he submitted that it is not about this kind of application and even the Probate rule as he cited Rule 14 it provides mode of filing probate application that there must be chamber summons and affidavit. Applicant in here is praying to be announced as administrator which is not applicable. Counsel further attacks the referred section 19 of Magistrate Courts Act, Cap 11 as cited stating that, although it was wrongly cited, the section refers 5th schedule which does not confer High Court power to appoint administrator but the Primary court and the

section is about powers and procedures and not about appointment of administrator. It was his submission that the cited law is not proper and the applicant has failed to move this court as it lacks original jurisdiction to entertain the matter while referred me to **Lugano Alfred Mwakasungula vs Stephania Roeleme Rami & 2 others** Civil Revision No. 44 of 2019 HC DSM and he prayed the application to be struck out with costs.

Furthermore, counsel submitted that the applicant affidavit has arguments and prayers while it was long established that affidavit must have facts and not legal argument as provided by Order XIX rule 3 of the Civil Procedure Code. He said in **Phantom Moden Transport (1985) limited vs DT Dobie (Tanzania) Limited**, Civil Reference No. 15 of 2001 the Court insisted that an affidavit should contain statement of facts and not legal arguments or conclusion. Analysing the affidavit which accompanied this application, he mentioned paragraph 11, 12 and 13 to have arguments and prayer and to him, the application is not proper and suggested the remedy for improper affidavit is to expunge the defective paragraphs. If that will be done, he submitted that the application will lack legs to stand on.

Mr. Werema went on attacking the application that the applicant is no longer the administrator of the estate of deceased Johnson Nyabange

Waluse and he is praying to be announced so. However he submitted that in this application, the applicant indicates that he is administrator the fact which is not correct. To put his point clear, Mr. Werema submitted that there is no dispute that applicant was appointed as administrator in Probate No. 47 of 2016 by Tarime Primary Court and was nullified by High Court, Mwanza Sub- Registry via PC Probate Appeal No. 15 of 2016 where the decision was delivered 20 January 2017. He further submitted that applicant did not exercise his duties as his status was suspended on 20/12/2016 by the same Primary Court before confirmed by High Court. After nullification it was respondent who was appointed as administrator in Probate Cause no 54 of 2017 to administer the Estate of the late Mzee Johnson Nyabange Waluse after complying with High Court directives. Respondent performed his duties and closed probate on 26/05/2020. From that submission the applicant has no locus to file this application. He prayed this application be dismissed with costs.

Lastly, he argued on the subject matter, it was his submission that the application was taken by event as the subject matter which was in dispute is the house which was sold and longer the property of deceased but is owned by Colnerius Investment 2020 (T) Ltd, the deposits were distributed

to hers including applicant as can be witnessed when the Probate Court close the Probate, the respondent informed the Magistrate that the property was sold. So far as there is no more properties of the deceased, it was his assertion that if the applicant will be appointed there will be no property to administer. He refers this court to **Felix Emmanuel Mkongwa vs Andrew Kimwaga**, Civil Application No. 249 of 2016 where it was said when the application cannot serve the purpose, they are considered to be taken by event. He prayed the application to be dismissed with costs.

During rejoinder applicant confirmed that it is true High Court ordered family meeting before appointment of administrator and blamed the respondent on forgery of the minutes of meeting in 2013 and submitted that Hon. Dibogo Wenje did not nullify anything. Referring High Court directives in Land Case No. 26 of 2022, he submitted that they were directed to conduct clan meeting. It was his position that the meeting which was conducted in 2017 was nullity because elders did not attend but in current application, he attached minutes of the meeting in which family appointed him. He prayed this court to note and uphold his appointment done in Probate Case No. 47 of 2016.

My duty is to determine if the application has merit. As read from pleading, applicant is praying to be recognized as administrator following nomination done in clan meeting which was conducted on 01/07/2023 Utegi Rorya. As submitted by applicant, the meeting was called following order of the court in Land Case No. 26 of 2022 as a preparation for appointment of administrator.

I had enough time to read records and hear contest of parties concerning administration of estate of the late Mzee Johnson Nyabange Waluse. I have read the ruling in Land Case No. 26 of 2022 and find this court (Mtulya J.) at page 13 pointed those orders issued on 20/01/2017 was not adhered after noting no family meeting was reported to be conducted. The story is very short, the record show and so was the submission by Mr. Werema that Probate Cause No. 54 of 2017 was filed after the directive of this court (Mwanza Sub-Registry) in Probate Appeal No. 15 of 2016, directives which were given via judgment which was delivered on 20/01/2017. Following that directive, as picked from Probate Cause No. 54 of 2017 clan meeting was conducted and decision to file new probate was reached and on 26/01/2018 respondent was appointed as an administrator of the Estate of the late Mzee Johnson Nyabange Waluse. Whereas after completion of

duties respondent submitted inventory and probate was closed on 26/05/2020. Applicant informed this court that he did not recognize what was done by respondent on the ground that elders did not attend the meeting. That alone is not a ground of filing another probate. By this ruling applicant is notified that Probate Cause No. 47 of 2016 was nullified by this court (Mwanza Sub-Registry) on 20/01/2017 when it ordered the family meeting to be convened. A new administrator was appointed who completed his responsibilities on 26/05/2020 and on the same date the Probate Cause No. 54 of 2017 was closed.

Literary, probate comes to an end on filling of Forms No. V and VI (Inventory and final Accounts) and after the order of the court closing the matter. The emphasis here is that, the administrator must present his reports to the court in time which will proceed to put the matter to an end. Respondent after he was appointed, he performed his duties and report to court which after was satisfied that administrator completed his duties, probate court discharge him from responsibilities as it closed the probate. As was said in the Case of **Beatrice Brighton Kamanga and Amanda Brighton Kamanga vs. Ziada William Kamanga**, Civil Revision No. 13 of 2020 HC At Dar es Salaam that "there was no life time administrator",

the order of the trial Court in Probate Cause No 54 of 2017 which was given on 26/05/2020 closed the matter with the result that the respondent ceased to be administrator. Having vacated office as an administrator, he has no capacity to sue or being sued in that capacity.

So far as the Probate Cause No. 54 of 2017 was closed and the only property of the deceased was administered, no appointment can be made or confirmed as there is no property left unadministered.

Basing on the cited precedents, the current application was improper as administrator was already appointed and discharged his duties and the probate was closed. Unless there is new property which was not administered then, any person may apply to be appointed as administrator to administer that discovered property.

The applicant mentioned property of deceased which is the house situated at Plot No. 4 Block "E" Nyerere Road in Tarime Urban, this house was administered by respondent herein as it was reported the house was sold and prayed to close probate. That is to say, this application is not valid as the property was already administered. In other words, the application was

taken by event. See to **Felix Emmanuel Mkongwa vs Andrew Kimwaga** (supra).

Court of Appeal in the case of **Hadija Masudi (as the Legal Representative of the late Halima Masudi) vs. Rashid Makusudi**, Civil Appeal No. 26 of 1992 (unreported) once said;

*'We have found it necessary to give a chronological background to this case since the outcome of the appeal is to say the least, a startling demonstration of the truth that **this Court like all courts can do justice only in accordance with the law and not otherwise...**' (Emphasis is added).*

Justice which is expected from this court can only be done in line with prevailing laws. I proceed to dismiss the application for want of merit. I dismiss it with costs as the applicant is aware of the Probate Case No. 54 of 2017 and therefore his application is frivolous.

It is so ordered.

DATED at **MUSOMA** this 27th day of June, 2024.



NK
M. L. KOMBA
Judge