

(TEMEKE HIGH COURT SUB-REGISTRY)

(ONE STOP JUDICIAL CENTRE)

AT TEMEKE

PROBATE AND ADMINISTRATION CAUSE NO. 4 OF 2023

In the matter of the estate of the late

LUTENGANO HAMISI MPONELADECEASED
AND

In the matter of an application for letters of administration by

BLANGSON HAMIS MPONELAPETITIONER
AND

In the matter of a Caveat by

ISACK LUTENGANO MPONELACAVEATOR

JUDGMENT

Date of last order: 12/01/2024

Date of Judgment: 07/02/2024

OMARI, J.

On 13 April, 2010 one Lutengano Hamisi Mponela died intestate at Mwananyamala Hospital, Kinondoni- Dar es Salaam. According to the Petition the deceased left behind four relatives a widow and three adult children. Blangson Hamis Mponela one of the adult children of the deceased petitioned for grant of letters of administration of his late father's estate. An order for publication of the Petition by way of a General Citation was entered and complied with.



On 13 March, 2023 one Isack Lutengano Mponela lodged a Caveat under section 58 of the Probate and Administration of Estates Act, CAP 352, R.E 2002 (the PAEA) and Rule 82 of the Probate Rules, 1963 (the Rules). The matter having turned into a contentious one, it became as nearly as possible to a civil suit as per section 52 of the PAEA, see also the case of **Monica Nyamakere Jigamba v. Mugeta Bwire Bhakome and Another**, (Civil Application No. 199/1 of 2019, Court of Appeal of Tanzania) [2020] TZCA 1820.

As required by the law the Petitioner made an application for a Citation to the Caveator and the same was issued. The Caveator entered appearance on 08 May, 2023 and after the pleadings were complete the matter was scheduled for hearing. Prior to the hearing of this matter, three issues were framed:

1. Whether the Petitioner qualifies to be appointed the administrator of the estate of the late Lutengano Hamis Mponela;
2. Whether the assets listed in paragraph 3 of the Petition belong to the late Lutengano Hamis Mponela; and
3. To what reliefs are the parties entitled to.



At the hearing, the Petitioner chose to represent himself while the Caveator had the services of Messrs. Hassan Ruhwanywa and Peter Madaha both being learned advocates. However, it should be noted that the Petitioner subsequently enlisted the services of Litete Hajj a learned advocate towards the end of the hearing of this matter.

The Petitioner called three witnesses while the Caveator had two witnesses and five Exhibits to prove his case. I shall discuss the witnesses' testimonies, Exhibits and counsel's submission in the course of determining the issues.

For reasons I shall explain in a moment I commence to determine the second issue, which is whether the assets listed in paragraph 3 of the Petition belong to the late Lutengano Hamis Mponela.

I shall not let this issue detain me for the same is prematurely raised as there is no administrator duly appointed. It can be raised when an appointed administrator is exhibiting the inventory of the estate of the deceased as is required by section 107 of the PAEA. This is so since it is the duly appointed administrator who has the responsibility to collect the properties of the deceased and distribute them as provided for under section 108 (1) of the PAEA. This issue is therefore struck out for being prematurely raised.



I now move to determine the first and third issues collectively as they both revolve around who should be appointed to be the administrator of the estate of the late Lutengano Hamis Mponela. The first issue is whether the Petitioner qualifies to be appointed as the administrator of the estate of the estate of the late Lutengano Hamis Mponela; while the third is to what reliefs are the parties entitled to.

In defence of his Petition, the Petitioner testified as PW1. His testimony centred in the deceased's life. He informed this court that he Petitioned for letters of administration because in addition to being the oldest son of the deceased; he was appointed to petition for grant of letters of administration by the family meeting. PW1 stated further that the persons listed in the Petition, that is Blandina Lutengano Mponela, Prosper Lutengano Mponela, Isack Lutengano Mponela and himself; Balngson Hamis Mponela are all beneficiaries of the estate of the late Lutengano Hamis Mponela. During cross examination PW1 admitted to having annexed to the Petition only minutes of a family meeting held in Njombe and not the one that sat at Ubungo Msewe which was held immediately after the death of Lutengano Hamis Mponela. He stated that the minutes of the Ubungo Msewe meeting are not required as part of the documents. He further testified that it was his second time to Petition for letters of Administration the first being at the



Magomeni Primary Court in 2012. The grant was revoked because it was filed at Magomeni instead of Sinza as the deceased was domiciled at Ubungo Msewe. He denied having filed the same at Magomeni for the purpose of concealing the matter from the Caveator as he was involved and knew of the proceedings.

As regards the allegations of taking rent from tenants that the Caveator had made in a bid to establish he is not a fit person for the job; PW1 explained that the family meeting had directed that there be a joint account; which was to be run by the Caveator, the widow and PW1. He went on to state that the Caveator did not show up on the date they had agreed to go to the bank thus the reason the account was opened by the remaining two and all the same the said account was only active for six months. This, according to PW1 defeats the allegations that the tenants are paying rent to him and the money that was hitherto collected was given to the widow for the deceased's child and the grandchildren's upkeep. PW1 testified further that he is qualified as an administrator of the estate and denied the allegations of squandering any properties of the estate stating that he was only an administrator for six months, before being revoked.

Alexander Elisali Mushi testified as PW2. He stated that he and the deceased were neighbours and long-time close confidants. His testimony was largely



on the life of the deceased Lutengano Hamisi Mponela. He stated that at the family meeting that was held immediately after Lutengano Hamisi Mponela's death there was a conflict between the Petitioner and his younger brother, the Caveator. According to the PW2, the said meeting nominated the deceased's first-born son to be the administrator. The Caveator opposed this proposal stating that the first-born son who is the Petitioner cannot be the administrator because there are two houses that were built by their late mother and not their father, so he (the Caveator) insisted that it was he who was to be the administrator. PW2 continued to state that attempts to pacify the situation between the siblings were futile.

Furthermore, PW2 also testified that the deceased had at some point in his life executed a Will that explained the distribution of his properties to his surviving family. The purported Will was among the properties that were lost when the Ubungu Lutheran Church, where it was stored was broken into. During cross examination he insisted that there was a Will and a copy of the same is with PW1 and his wife. He confirmed that he was present when the same was executed and even tried to recount some of the bequests. When he was further questioned as to why the purported Will or copy thereof was not brought to court he admitted not to know why. The Petitioner did not



challenge the witness's testimony that there is a Will or copy thereof during re-examination.

Lutengano Donald Mponela testified as PW3 and delved right into asserting that the Petitioner is the one entitled to Petition because he was the one proposed by the family meeting which he, PW3 attended with the rest of the family. And, according to PW3 the Petitioner was the deceased's oldest son thus, knows the family history and the history of the place (that is the properties). PW3 explained that the Petitioner has also been fair in the administration as he has all along been doing things as per the Will and family meeting. Once again, the Petitioner did not seek to contradict the reference to there being a Will by this witness during re-examination.

The Caveator, Isack Lutengano Mponela testified as DW1. He commenced his testimony by seeking to establish he is the son of the deceased to wit he tendered a baptism certificate from Ubungo Lutheran Church coupled with a Confirmation Certificate from C.C.P University Chaplaincy. Both were collectively admitted as Exhibit D1.

DW1 stated that the deceased had been appointed as the administrator of the estate of the late Anualile Kilala who was his wife by the Sinza Primary Court. To evidence this he sought to tender a copy of the grant and



proceedings of the primary court which were both admitted as Exhibit DII and Exhibit DIII respectively.

He went on to state that Probate Cause No. 122 of 2001 was never closed yet when their father passed away the Petitioner neither consulted him before going to court to Petition for grant of letters to administer their father's estate vide Probate Cause No. 347 of 2012 nor was he involved in the opening of the alleged family bank account. This, according to DW1 is why he filed Revision No. 9 of 2013 at the District Court of Kinondoni which revoked the grant. To evidence this, he tendered the District Court's Ruling which was admitted as Exhibit DIV. DW1 further testified that the Probate Cause No. 347 of 2012 was intentionally taken to the Magomeni Primary Court so as to conceal the same from him which he interprets as the Petitioner seeking to disinherit him.

He testified that he contested the grant because he was side-lined by the Petitioner who had monopolized all the properties and was taking the rental money and using the same for his gain which. In DW1 's view the current Petition is a repetition of what has happened in the past. Lamenting that the Petitioner did not possess any qualification to be appointed as an administrator, DW1 stated that he would not be fair and act justly as an administrator as he has even denied that he, DW1 is the deceased's son. He



prayed that he be appointed as the administrator of the deceased Lutengano Hamisi Mponela instead of the Petitioner.

Stella Francis Shirima testified as DW2. She informed this court that the late Lutengano Hamisi Mponela and his late wife were her Godparents. Her testimony centred around the deceased's family and family life. She informed this court that the Petitioner was away in school for a long time therefore it is DW1 who knows the deceased's home and properties thus he is the one who should be appointed as administrator. In her opinion, the Petitioner, if appointed will not be just and fair as he does not get along with his younger brother and has once before gone to court without informing him. When in cross examination she was asked whether she was sure of what she was testifying she confirmed that she was.

Having discussed the witnesses' testimonies as well as the evidence adduced by the Caveator as regards the first issue I am of the view that since it is the Petitioner's witnesses in the form of PW2 and PW3 who mentioned there being a Will or copy thereof then this Petition offends the provisions of section 56 (1) of the PAEA which for ease of reference I reproduce in part as hereunder:

'(1) Application for letters of administration shall be made by petition, stating— ... (e) that diligent search



has been made, and no valid will has been discovered;

Paragraph 5 of the Petition states:

'The said deceased died intestate and due and diligent search has been made for a Will but none has been found.

The testimony of PW2 and that of PW3 which the Petitioner did not seek to challenge or contradict suggest that there might be a Will or at least a copy thereof which the law allows to be brought to court and proved. In addition, PW2 alleged to be aware of the contents of the purported Will stating he was present when it was executed. If this is the case then the contents of the said Will could have been brought to court and established by evidence as provided for under section 25(1) of the PAEA.

When all is said and done as per the provisions of section 33(1) of the PAEA letters of administration can only be granted where the deceased died intestate. And, in accordance with section 56(1) (e) when making the application for the said letters the Petition has to state that a diligent search has been made, and no valid Will has been discovered. Despite the Petitioner's statement in paragraph 5 of the Petition, the testimony of his witnesses contradicts this. This seems to suggest that the Petitioner either did not make a diligent search to establish the existence or none of any Will.



It is for this reason that I find the Petition incompetent thus, reject it. As a result, the Caveat also becomes ineffectual.

After a due diligent search is made to ascertain whether or not the deceased had a Will the parties or anyone else who is so qualified are free to institute a fresh Petition. In the circumstances I make no order as to costs.




A.A. OMARI

JUDGE

07/02/2024

Judgment delivered and dated 07th day of February, 2024 in the presence of Isack Lutengano Mponela appearing in person.


A.A. OMARI

JUDGE

07/02/2024