

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

**IN THE DISTRICT REGISTRY OF ARUSHA**

**AT ARUSHA**

**MISC. CIVIL APPLICATION NO. 22 OF 2019**

**(Original; Probate and Administration Cause No. 10 of 2016)**

Between

**PARAMJEET GURDEV SINGH SANDHU.....1<sup>ST</sup> APPLICANT**

**KALWANT GURDEV SINGH SANDHU** (by his  
Mother SELINA MARCO DUDIYE 'Next Friend').....2<sup>ND</sup> APPLICANT

**HARDEEP GURDEV SINGH SANDHU** (by his  
Mother SELINA MARCO DUDIYE 'Next Friend').....3<sup>RD</sup> APPLICANT

And

**HARVINDER KAUR** (As the Administratrix of the  
Estate of the late GURDEV SINGH SANDHU).....RESPONDENT

**RULING**

**29/04/2021 & 10/08/2021**

**GWAE, J**

This application has been preferred under the provisions of Rule 105 of the Probate Rules, G.N 369 of 1963 where the applicants through their learned counsel, **Mr. Moses Mahuna** are moving this court to issue directions to the administratrix **Harvinder Kaur** of the estate of the late **Gurdev Singh Sandhu**

(herein "deceased") to accept, recognize and include the applicants as lawful beneficiaries of the estate of the deceased.

The application is supported by the sworn affidavit of the applicants' counsel and is to the effect that, the applicants herein being the children of the deceased claim that the respondent herein who is the administratrix of the estate of their late father has patently refused to accept, recognize and include them as beneficiaries of the deceased. The applicants are further claiming to be the biological children of the deceased person and in proof of that they have attached their birth certificates which they claim to bear the name of the deceased, Gurdev Singh Sandhu as their biological father.

On the other hand, the respondent who was represented by Mr. **Bharat B. Chadha**, the learned advocate strongly opposed the application through his affirmed counter affidavit. In his counter affidavit Mr. Chadha stated that the respondent seriously disputes that the applicants are the biological children of the deceased person on the reasons that; **firstly**, that, the applicant's next friend once opened a suit against the respondent seeking for revocation of the letters of administration granted to her however the suit was dismissed for want of proof therefore the applicants cannot in law bring this application again seeking for the same relief. **Secondly**, that, the deceased person, during his lifetime, had never acknowledged to be the father of the applicants. And **thirdly**, that, none of the

surviving family members of the deceased have ever known the applicants as part of the deceased person's family. The counsel has also challenged the attached birth certificates annexed to the application alleging that the deceased's name was registered as the father of the applicants without the deceased's acknowledging paternity of the applicants and also the said birth certificates are invalid for being issued after the expiration of ten years after their birth.

In line with the respondent's counter affidavit, the counsel also filed a notice of preliminary objection which was however overruled and the application proceeded for hearing.

Nevertheless, the proceedings reveal that before hearing of the application commenced the applicants' counsel sought for leave to file a supplementary affidavit following the failure to procure the applicant's aunt for purposes of conducting DNA test. Leave was granted and the supplementary affidavit was filed. The respondent also filed his reply to the counter affidavit and the same was accompanied by a notice of the preliminary objections. With the leave of the court, both the Preliminary objection and the application were disposed of by way of written submissions. As a usual practice, in the course of determining this application, I shall start with the preliminary objection raised by the respondent's counsel.

The respondent in his notice of preliminary objection to the supplementary affidavit has raised six points of law as hereunder;

1. (a). The annex marked as Exhibit G2 is incurably defective for bearing a defective verification clause which reads;  
.....are true and correct to the best of my knowledge and belief without specifying which part is true according to the knowledge and which part is true according to belief contents of my affidavit.  
(b) It contravenes the provisions of section 10 of the Oaths and Statutory Declarations Act, Cap 34.  
(c). The said affidavit marked as Annex Exhibit G2 does not indicate the name of the court and title of the case and as such, it cannot be linked to the present application.  
(d). Paragraphs 4 and 5 of the said affidavit marked as Annex Exhibit G2 are wrongly verified as the same are not sourced from the personal knowledge of the deponent.
2. The said annexures marked as Exhibit G1 and Exhibit G2 are not admissible in evidence by virtue of section 34 C (3) of the Evidence Act, R.E 2019 and thus, merit to be expunged from the record. And further, the affidavit marked as Annex Exhibit G2 is not the original copy.

3. The mother of the 2<sup>nd</sup> applicant has lost her locus to represent him, as he is no longer a minor and, in consequence, his name merits to be struck.

Submitting in support of his preliminary points of objection, Mr. Chadha basically challenged the legality of annexures G1 and G2 which were annexed to the supplementary affidavit. Annexure G1 was a decision from the court of SMT KULWINDER KAUR, PCS CIVIL JUDGE (JUNIOR DIVISION) BARNALA in which the applicant claims that the court thereat pointed out the applicants as beneficiaries over the estate of the deceased. Mr. Chadha's contest in this annexure is that, the same cannot be admitted in evidence by virtue of section 34C (3) of the Evidence Act, Cap 6 Revised Edition, 2019 neither does the annexure G2 as the said section prohibits the production of evidence procured during the pendency of proceedings, more so, the counsel challenged annexure G2 that the same does not indicate the name and location of the court, number of the application and names of parties, therefore he was of the view that in the absence of the above said particulars it cannot be linked with the present application.

Similarly, the counsel went on submitting with regard to the third point of his preliminary objection that since the 2<sup>nd</sup> applicant is no longer a minor, his mother therefore has lost locus to represent him as a next friend and therefore his name is to be struck out.

I have also noted some new issues being raised and argued by the respondent's counsel while the same were not covered in his notice of preliminary objection, I shall not therefore waste the precious time of this court to discuss them as they are merely an afterthought.

Mr. Mahuna, on his part, basically challenged the preliminary points of objection raised by the respondent's counsel stating that the preliminary objections raised by the respondent's counsel are not pure points of law as referred in the case of **Mukisa Biscuit Manufacturing Co. Ltd vs. West end Distributaries Ltd** [1969] E.A 696 as in this matter the preliminary objection has been leveled against an exhibit annexed to the supplementary affidavit and not the supplementary affidavit itself. Mr. Mahuna was of the view that the preliminary objection raised by Mr. Chadha seeks to invite the court to examine the evidence annexed in the affidavit as exhibit G2. He thus urged this court to overrule the preliminary objection.

Having considered the submissions by both parties, I am of the considered view that before going to the merit of the preliminary points of objection raised by the respondent's counsel, I find it to be pertinent to ascertain first as to whether the said preliminary points of objection are purely points of law as challenged by Mr. Mahuna.

Needless to say, the question on what is a preliminary objection as been well settled in an old and land mark case of **Mukisa Biscuit Manufacturing Company Ltd. v. West End Distributors Ltd** (supra) at page 700 wherein Law,J.A. had this to say;

"So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arise by clear implication out of the pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."

And at page 701 Sir Charles Newbold, P. stated;

"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or what is sought is the exercise of judicial discretion."

In the light of the above observations, the question that follows is whether in the instant case all the points of objection raised by the respondent's counsel are, preliminary objections in law? With due respect to the learned counsel who raised the same, I think the points raised as preliminary objections are not worth

of constituting points of law for the following reasons; a carefully scrutiny of the preliminary points of objection raised by the respondent's counsel are centered on the annexures which were appended to the applicants' supplementary affidavit where the counsel challenged their legality and their admissibility as evidence. As correctly submitted by Mr. Mahuna this is a misconception by the respondent's counsel of the real meaning of what amounts to a preliminary objection in purview of the case of **Mukisa Biscuit Manufacturing Company Ltd** cited above since what has been raised by Mr. Chadha ought to have been challenged in supplementary affidavit and not annexures which basically attract the issue of facts and evidence which will have to be ascertained by this court. In that respect this court is of the considered view that, the preliminary objections raised by the respondent are not founded on pure points of law, consequently, I hereby overrule the raised points of objection.

Coming to the merit of this application, this court is basically moved by the applicants who claim to be the biological children of the late Gurdev Singh Sandhu to give directions to the administratrix of the estate of the deceased to accept, **recognize and include the applicants as lawful beneficiaries** of the estate of the deceased.

In convincing this court to grant the application, Mr. Mahuna submitted that the applicants are the biological children of the late Gurdev Singh Sandhu by virtue

of their birth certificates which were attached to the application as exhibits L5, L6 and L4. According to Mr. Mahuna the name of the father appearing in the birth certificates of the applicants correspond to the name of the deceased, and according to the dates of their birth as appearing in their certificates of birth, the deceased was still alive at the time of their birth and even at the issuance of the said certificates. Furthermore, Mr. Mahuna argued that there is also an affidavit of the deceased's sister one Malkit Kaur (annexture G2 to the supplementary affidavit) which acknowledges the applicants as biological children of the deceased, therefore, stands as a proof of the paternity of the applicants.

Augment his argument, Mr. Mahuna urged this court to make a reference to a decision of this court sitting at DSM's in **Judith Patrick Kyamba vs. Tunsume Mwimbe and 3 others**, Probate and Administration Cause No. 50 of 2016 (Unreported). He thus urged this court to grant the application so that the applicants may have rights over the estate of their late father.

Opposing the submission by the applicants' counsel, Mr. Chadha strongly refuted the fact that the applicants are the biological children of the deceased. The counsel even contested the attached birth certificates of the applicants stating that they were illegally procured as the deceased during his life time has never consented for his name to be registered as the father of the applicants nor did he acknowledge the applicants as his children. The counsel went on submitting that

even the affidavit of the said Malkit Kaur (deceased's sister) which acknowledged the applicants is not sufficient to prove the paternity of the applicants on the reasons stated in the respondent's counter affidavit to the supplementary affidavit where the respondent attached an affidavit of one Kastuli Banja Ama who stated to have known the said Malkit Kaur on the ground that, the said Malkit left Tanzania in the year 1960, therefore her statements in her affidavit are false as at the time the deceased is alleged to have married the applicants' mother she was not in Tanzania.

After cautious consideration of the rival submissions by the parties and being guided by the decision of the Court of Appeal of Tanzania in **Monica Nyamakare Jigamba vs. Mugeta Bwire Bhakome as administrator of the estate of Musiba Reni Jigabha & another**, Civil Application No. 199/01 of 2019 (Unreported) at the outset this court cannot grant the order sought in the applicants' application for the reasons that follow;

It is glaringly clear from the records that in Probate and Administration Cause No. 10 of 2016, the respondent petitioned for letters of administration in this court where letters of administration were granted to her as the petition had not been objected by anyone including the applicants nor their mother who appears as a next friend to the 2<sup>nd</sup> and 3<sup>rd</sup> applicant and the one who happened to unsuccessfully file Miscellaneous Civil Application No. 95 of 2017 in this court

for revocation of the grant of letters of administration in favour of the respondent, administratrix.

In the above cited case of **Monica Nyamakare Jigamba vs. Mugeta Bwire Bhakome (1<sup>st</sup> respondent) as administrator of the estate of Musiba Reni Jigabha & Hawa Salum Mengele (2<sup>nd</sup> respondent)** (supra), this court at Dar es Salaam faced with the similar situation where the 2<sup>nd</sup> respondent filed an application for two directions one being to direct the administrator to include her in the list of beneficiaries of the estate of the deceased as she claimed to be the legal wife of the deceased. The 1<sup>st</sup> respondent who was the administrator did not object to the prayer and consequently the High Court granted the prayers sought by the 2<sup>nd</sup> respondent. However, on appeal, the highest court of the land was so clear that as the 2<sup>nd</sup> respondent did not enter caveat against the 1<sup>st</sup> respondent so as to secure her interest over the deceased person's estate and as the administratrix is still in her office, the 2<sup>nd</sup> respondent was expected to approach the administrator (1<sup>st</sup> respondent) and raise her concern to him as she missed 1<sup>st</sup> recourse of filing a caveat. It was rightly observed by the Court of Appeal that, in the probate or letters of administration, our courts have no power to determine beneficiaries or heirs of the deceased's estate neither to distribute the estate as such duty is solely bestowed to the appointed an administrator or administratrix or executor. I wish to quote part of the holding in **Monica's case** for clarity;

"it follows then that it is the duty of the administrator to collect the properties of the deceased and the debts, pay the debts, identify the rightful heirs of the deceased, to whom the amount of residue of the proceeds of the deceased's estate should be distributed and at what percentage each heir will be entitled to get depending on the law applicable in the administration of such estate....it is our considered view that the High Court went beyond its jurisdiction by directing the administrator of the deceased estate to join the 2<sup>nd</sup> respondent as beneficiary.....".

The same position was equally stressed by the Court of Appeal of Tanzania in the case of **Mariam Juma vs. Tabea Robert Makange**, Civil Appeal No. 38 of 2009 (Unreported) where it was correctly held;

"The High Court Judge did not have any mandate to determine who should be a beneficiary from the deceased's estate. This is role was to be played by the Administrator of the deceased's estate appointed by the court."

In our present application, in my considered view and in adherence with the precedent in Monica's case (supra), the applicants were therefore expected to approach the administratrix and raise their concern in order to trace the root of their right to the appointed administratrix (respondent)

Guided by the above authorities from the Court of Appeal of Tanzania to which this court is bound to adhere to, I have no hesitation in holding that, this

court has no powers to give the sought directions to the administratrix, the respondent, to accept and include the applicants as beneficiaries of the deceased person's estate as this is purely the duty of the administratrix to determine as to whether the applicants are the beneficiaries of the deceased or not.

For the reasons stated above, the application is hereby dismissed for lack of merit. Given the circumstances of the case, I feel constrained to refrain from making orders as to costs.

It is so ordered.



**M. R. GWAE**  
**JUDGE**  
**10/08/2021**

**Court:** Right of appeal fully explained



**M. R. GWAE**  
**JUDGE**  
**10/08/2021**