IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[MOROGORO SUB-REGISTRY]

AT MOROGORO

CIVIL APPEAL NO. 31 OF 2023

(*Originating from the ruling in Probate and Administration Cause No. 36 of 2023, at the District Court of Morogoro at Morogoro, Hon. R.R. Kasele, PRM*)

JOAKIM TUMAINI MANGALE ..... APPELLANT

VERSUS

MARYGLORY TUMAINI MANGALE (As the Administratix of the Estate of the late TUMAINI AUGUSTINO MANGALE) .....RESPONDENT

JUDGEMENT

02/05/2024 & 06/05/2024

KINYAKA, J.:

Before the District of Court of Morogoro, the respondent petitioned for the grant of letters of administration of the estate of her late father, Tumaini Augustino Mangale, who died intestate on 19th December 2022 in Probate and Administration Cause No. 36 of 2023.

On 22nd May 2023, the appellant lodged a caveat objecting to the grant of letters of administration to the respondent based on the grounds that; the minutes of the family meeting attached to the petition was forged and hence invalid, the petitioner did not list other beneficiaries and legal heirs of the

late Tumaini Augustino Mangale, and that the petitioner squandered the estate of the deceased before she was appointed the administratix of the deceased's estate.

The trial court determined the caveat by hearing evidence from the petitioner who turned to be the plaintiff and the appellant who was then the defendant. Upon conclusion of the hearing, the trial court found the caveat unmerited and proceeded to appoint the respondent the administratix of the estate of the late Tumaini Augustino Mangale.

Dissatisfied, the appellant preferred the present appeal containing four grounds as below:

1. That the trial Magistrate erred in law and in fact when proceeded to appoint the respondent the administratix of the estate by not determining the caveat and ignoring the procedural requirement on the caveator's objection;
2. That the trial Magistrate erred in law and fact when proceeded to appoint the respondent as the administratix of the estate who excluded the legal heirs of the deceased estate;

3. That the trial Magistrate erred in law and fact when proceeded to appoint the administratix of estate while there was no any family meeting proposing the administratix; and
4. That the trial Magistrate erred in law and fact by appointing the respondent the administratix of the estate while before the appointment the respondent misused the deceased estate.

At the hearing of the appeal, the appellant appeared by himself and unrepresented. The respondent was represented by Mr. Gabriel Kitungutu, learned Counsel.

The appellant submitted that the meeting that recommended the respondent was a clan meeting not a family meeting as those who signed were not family members. He denied to have signed the minutes. He contended that the meeting was attended by neighbours and friends who were not family members and other attendants were unknown such as the one who signed as FM.

He further blamed the respondent for misuse of the deceased's estate after the burial of the deceased and after payment of medical expenses. He submitted that the monies were taken from the deceased's bank accounts without involving all the deceased's children including him and Loveness. He

argued that the respondent was not qualified to be the administratix of the estate of the deceased. He similarly lamented that his prayer to the trial court to appoint him the administrator together with any other beneficiary for co-administration of the estate was not attended. He contended that he qualifies to be appointed the administrator of the estate of his late father as he didn't have bad faith and has not been excluded by the law to be appointed the administrator.

He stated further that being one of the heirs of the deceased, he did not consent to the appointment of the respondent to be the administratix of the estate of the deceased and he was not involved prior to the respondent's petition for the letters of administration. He found the respondent's petition when he received summons to appear before the trial court.

On his part, Mr. Kitungutu began his reply submission with responding to the fourth ground on the alleged misuse of the deceased's estate by the respondent. He submitted that the respondent informed the trial court that the money that was taken from CRDB Bank account was withdrawn in order to pay for medical expenses and the deceased's debt of TZS 6,000,000 which were paid for the return of the certificate for plot of land held by one, Mary John Kalolo. He contended further that the evidence was corroborated by

PW2, the deceased's young brother who testified to have known the debts and was duly informed of the transactions made by the respondent. He similarly contended that the appellant admitted before the trial court that he did not know the source of the monies used to pay the deceased medical expenses. He argued that there was no misuse of the deceased's estate and that the information on the withdrawals and use of the monies were given to the family members including the appellant.

Opposing the third ground, Mr. Kitungutu submitted that the family meeting was held and the respondent was recommended to be the administratix of the deceased's estate. He stated that Loveness did not object to the appointment of the respondent to be the administratix of the estate during the family meeting and before the trial court as she did not testify at the trial court. He contended that there was no any member of the family who contested the recommendation except for Joyce Tumaini Mangale who was a minor. He argued that the law does not impose a precondition of obtaining consent from the family meeting prior to lodging petition for letters of administration.

Regarding the appellant's argument on lack of consent of heirs, Mr. Kitungutu submitted that Rule 39 (f) of the Probate Rules require the

petitioner for letters of administration to attach consent of heirs or beneficiaries of the estate of deceased, which in this case, are the children of the deceased. According to Rule 71 of the Probate Rules, the Counsel proceeded, the consent must be in writing. He admitted that the written consent of the heirs of the deceased had never been attached to the respondent's petition for letters of administration which was contrary to law. He relied on the decision of the Court of Appeal in the case of **Hassan Salum Ahmed v. Ally Salum Ahmed, Civil Appeal No. 118 of 2015** [2016 TZCA 643 20 June 2016], which found that the requirement to furnish consent of the family members under Rule 39 was fragrantly violated. He argued that as the respondent's petition for letter of administration lacked written consent of heirs, the proceedings and the resultant letters of administration granted to the respondent were invalid. He prayed for nullification of the proceedings and resultant orders of the trial court in Probate and Administration Cause No. 36 of 2023.

In relation to the second ground of appeal, he submitted that there were no beneficiaries who were not included in the respondent's petition for letters of administration. He added that all the six children of the deceased including

the appellant and Loveness Tumaini Mangale being the deceased's beneficiaries were included.

He opposed the first ground of appeal and submitted that the procedure for determination of caveat was followed by the trial court where both parties were heard.

In rejoinder, the appellant conceded with the submissions of the learned Counsel for the respondent that there was no written consent of the heirs. He disagreed that the deceased's withdrawn money was to carter for medical expenses as by then the deceased was already dead. He added that the respondent did not inform family members, including him, on how the money was used. He argued that even Loveness, his young sister did not receive such information. He reiterated that there was no family meeting as there was no proof of the minutes showing the names and signatures of the family members.

I now turn to determine the present appeal. Being a point of law, I will start to determine the third ground of appeal on the lack of consent of heirs. If need be, I will then determine the first, second and fourth grounds of appeal.

The appellant argued that he did not consent to the appointment of the respondent as the administratix of the estate of the deceased and was never involved prior to being summoned to appear before the trial court in the probate proceedings. On the other hand, the respondent admits that the petition was not attached with written consent of heirs as required by the law.

I have read the file of the trial court in Probate and Administration Cause No. 36 of 2023 and found that in her petition for letters of administration, the respondent did not attach written consent of the six heirs enumerated in paragraph 2 of the petition contrary to Rules 39 (f) and 72(1) of the Probate Rules which provide:-

> *39. A petition for letters of administration shall be in the form prescribed in Forms 26 or 27 set out in the First Schedule, whichever is appropriate,* ***and shall be accompanied by the following documents****:*
>
> *(a) subject to the provisions of rule 63 a certificate of death of the deceased signed by a competent authority;*
>
> *(b) an affidavit as to the deceased's domicile;*
>
> *(c) an administrator's oath;*

(d) subject to the provisions of rule 66, an administration bond;

(e) a certificate as to the financial position of the sureties;

(f) ***subject to the provisions of rules 71 and 72, consent of the heirs****; and*

(g) in the case of an application for a grant to a sole administrator, an affidavit as required by rule 32.

Rule 71(1) of the Probate Rules provides:-

71(1) Where an application for the grant of letters of administration is made on an intestacy the petition shall, except where the court otherwise orders, be supported by written consent of all those persons who, according to the rules for the distribution of the estate of an intestate applicable in the case of the deceased, would be entitled to the whole or part of his estate.

It is clear from the above provisions, and in accordance with section 53(2) of the Interpretation of Laws Act, Cap. 1 R.E. 2019, it is mandatory for the consent to support, and be attached to the petition for letters of administration.

I am aware that there may arise circumstances where procurement of the consent of heirs become impossible or difficult, including but not limited to, when there are disagreement or dispute between family members or

beneficiaries. In such circumstance one or more beneficiaries may refuse to consent to the petition for letters of administration. But the law has duly covered such circumstances and the procedure is enumerated under Rule 72 of the Probate Rules that:

> *72. (1) Where a person whose consent is required under these Rules refuses to give such consent, or if such consent cannot be obtained without undue delay or expense, the petitioner shall, together with his petition for grant, file an affidavit giving the full name and address of the person whose consent is not available (where such name and address are known) and giving the reasons why such consent has not been produced.*
>
> *(2) Where an affidavit under paragraph (1) is filed, the court may make an order either dispensing with such consent or requiring a citation in the form prescribed in Form 57 set out in the First Schedule to be served upon the person whose consent is not available.*

Despite the fact that there was no written consent of heirs attached to the respondent's petition, the respondent petition attached an affidavit as to the lack of consent of one of the heirs, Tumaini Mangale, who was the by then, a minor. The affidavit titled 'affidavit of non available consent' did not state anything concerning the withholding or lack of consent of the remaining five heirs. Instead, the affidavit stated in paragraphs 2 and 3 that five out of six

beneficiaries of the estate of the deceased who were residents of Morogoro, granted consent for petition before the court with competent jurisdiction, and recommended giving such consent unreasonably. However, there was no consent of the five beneficiaries attached to the petition. I therefore agree with both parties in the present appeal that there was no consent of the beneficiaries to the respondent's petition for the letters of administration.

As the requirement of consent is mandatory in petitions for letter of administration, the respondent's petition before the trial court was incomplete and incompetent. It means that the order granting letters of administration in in Probate and Administration Cause No. 36 of 2023 was invalid as the petition abrogated the mandatory requirement of the law to obtain consent of heirs for the purpose of petitioning for the letters of administration. It means that even the order of the trial court granting the letters of administration was invalid.

I am fortified by the decision in the case of **Hassan Salum Ahmed** (supra) where, upon being faced with similar situation, the Court of Appeal held on page 8 of the decision that:

> *"The certificates contemplated in there Rules were not filed. Ipso jure, this is evidence that the requirement to furnish the consent*

of the family members under rule 39 was fragrantly violated. In our view therefore, the second ground of appeal has merit and we allow it. In consequence, we quash the order granting the letters of administration and also annul the letters of administration thereof."

Guided by the above decision, I proceed to quash the order of the trial court granting letters of administration dated 26th September 2023. I also annul the letters of administration granted to the respondent emanating from the proceedings in Probate and Administration Cause No. 36 of 2023.

Based on the findings, there is no essence of determining the remaining grounds of appeal and matters canvassed to support the grounds as doing so will not serve any factual or legal purpose. In the final analysis, the present appeal is allowed to the extent demonstrated above. As the present matter involve family members, I make no order as to costs.

It is so ordered.

Right of appeal fully explained.

DATED at **MOROGORO** this 6th day of May 2024.

H. A. KINYAKA

JUDGE

06/05/2024