

TANZANIA / JUDGMENT

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IN THE HIGH COURT OF TANZANIA TEMEKE HIGH COURT SUB - REGISTRY (ONE STOP JUDICIAL CENTRE) AT TEMEKE MISC. CIVIL APPLICATION NO. 11635 OF 2024 (Arising from Probate and Administration Cause No. 79 of 2023 at High Court of Tanzania Temeke High Court Sub - Registry (One Stop Judicial Centre) at Temeke) In the matter of an Application for revocation of the Probate granted to Mwanahamisi Marshal Smalling by LIBERTY NELSON MOSHA..... APPLICANT VERSUS MWANAHAMISI MARSHAL SMALLING..... RESPONDENT

RULING

Date of last order: 28/11/2024 Date of Ruling: 19/12/2024 OMARI, J. The Applicant herein, one Liberty Nelson Mosha filed an Application under section 49 (1) (a) (c) and (2) of the Probate and Administration of Estates Act, Cap 352 R.E 2002 (the PAEA) seeking for among other things, the annulment and revocation of the Respondent, Mwanahamis Marshall Smalling as the executor of the probate of the late James Michael Shang'a. He also prayed for orders that this court give effect to its order for the maintenance of status quo of the estate of the deceased dated 23 October, 2023 and consider the same as a Caveat against the estate of the deceased. The Applicant supported the Application with his Affidavit stating among other things he has vested interest in the estate of the late James Michael Shang'a as the same was put under his administration up to 07 May, 2024 when he was revoked. He deposed that he was appointed in accordance with Chagga tradition to be the elder and over searer of the family of Michael Shang'a and how he is related to the deceased. He further contested that the validity of the deceased's Will for among other things bequeathing properties not belonging to the deceased, disregarding Chagga customs for bequeathing property in the village that belong to the forefathers. Additionally, he contested the Will as it names persons that are not legal heirs to the deceased leaving out his sister Patricia Michael Shang'a. Mr. Mosha further deposed that the Will is undated and witnessed by strangers. The Applicant also stated that the executor named lied to have been the wife of the deceased while she is not. And, that it lacks the standard of an ordinary Will. According to the Applicant the Will was made out of undue influence. Furthermore, the Applicant deposed that the proceedings to obtain the grant were defective in substance because it was made during the pendency of a letter of administration granted to the Applicant thus, subject to revocation. The Respondent filed a Counter Affidavit contesting the Application and the averments made by the Applicant. During the hearing of the Application the Applicant was represented by G.S. Ukwong'a

and the Respondent by Oscar Kiziguto both are learned advocates. Hearing was conducted by way of written submission which were duly filed by both parties. Mr. Ukwong'a commenced his submission with a prayer that the Applicant's Affidavit be adopted to form part of the submission. He then went on to state that he would submit on the first, third and fourth prayers as the second prayer had already been dealt with during the hearing of the preliminary objections raised by the Respondent. Mr. Ukwong'a then registered his concern that the respondent was not attending the proceedings stating that there must be consequences as she has not attached interest to the Application in that she finds it not necessary to attend and there are no reports that explain her absence. Moving on to the first prayer counsel submitted that the law requires an Applicant to prove that the grant was made in a proceeding that was defective. He submitted that having been made on 20 October, 2023 the grant to the Respondent was made during the pendency of the grant to the Applicant by the District Court on 06 October, 2023. A grant which was subsequently revoked by the District Court on 07 May, 2024. Mr. Ukwong'a argued that in terms of section 49(1) (a) of the PAEA the probate granted to the Respondent was done without the knowledge of this court of the existence of the proceedings in the District Court in Probate and Administration Cause No. 686 of 2023, this was known on 23 October, 2023. This, according to counsel makes the proceedings defective due to duplicity, thus the same "can be" annulled/revoked without any preconditions. Mr. Ukwong'a further submitted that in terms of section 49(2) of the PAEA the Respondent needs to be removed as the executor of the estate of the late James Michael Shang'a he gave reasons that; the Respondent did not annex any Will yet the Applicant did. Counsel submitted that the Respondent's Counter Affidavit did not carry the Will which prompted this court to grant probate, in other words the Respondent has not brought the Will to court. He then went on to question the annexures of the Respondent's Counter Affidavit including the copy of the Affidavit in lieu of the Certificate of Death in the Petition stating that there was no reason given for the Respondent's failure to obtain the Certificate of Death which also makes the proceedings defective. Counsel then berated the Respondent for including a purported adopted child while he was not adopted and the contention that he was adopted at age zero (0) to mean that he was adopted before birth so the Respondent's Affidavit contains lies. Mr. Ukwong'a then concluded that the facts given disqualify the Respondent (from being the executor of the probate) as according to him she neither has the capacity to administer the estate nor the interests in the persons who are beneficiaries in her contemplation. He therefore prayed for this court to annul or revoke the grant of probate and all the consequential matters arising out of annulment to follow. When it was his turn, Mr. Kiziguto also commenced with a prayer to adopt the Respondent's Counter Affidavit to form part of his submission. He then went on to point out that this being an Application for revocation then this court should confine itself to the enabling provision, that is section 49 (1)

- (a) and (c) of the PAEA. He further stated that by virtue of Mr. Ukwong'a's submission canvassing only section 49(1) (a) then paragraph (c) has been abandoned. Mr. Kiziguto then explained that the core of Mr. Ukwong'a's submission, which is in his view unmeritorious is that this court should revoke the grant to the Respondent because it was made while there was a subsisting grant to the Applicant. Moreover, this court should revoke the grant because

the Respondent did not append the impugned Will to her Counter Affidavit and the reasons advanced for not annexing the Certificate of Death to the Petition lack justification. Arguing on the first reason, counsel stated that the proceedings to obtain the grant were not defective as per section 49 (1)(a) of the PAEA. In the circumstances, there being two grants over the same deceased and estate, one had to fade. He argued that because the Applicant's grant was obtained illegally as it offended section 57(3) of the PAEA because the Applicant admitted to know of the Will but scorned it, then it had to be his grant that is revoked since the Respondent had complied with the legal requirements before obtaining the grant. Counsel added that the Respondent had no knowledge of the proceedings in the District Court thus her appointment cannot be deemed defective only on the basis that she was appointed after the Applicant had already been appointed. And, since he made an admission that he knows there is a Will but thinks the same is invalid then his argument is flawed. On the second reason counsel contended that the argument that no Will was annexed to the Counter Affidavit thus there is not Will is a strange one since the argument questions the court's records. However, the Applicant annexed the Will to his Affidavit and the Respondent has not disputed the same making the argument that there is no Will flawed. Moving on to the Affidavit in lieu of the Certificate of Death Mr. Kizuguto argued that the Respondent had resorted to Rule 63(3) of the Rules and annexed to the to the Petition an Affidavit of Khadija Khalid Baliwena who was present at the funeral and saw the remains being interred. Thus, according to counsel Mr. Ukwong'a's argument is misconceived. With that, Mr. Kizuguto went on to canvass the remaining arguments starting with the Respondent not appearing in person stating that having engaged an advocate then she had no obligation to do so. As regards the Will bequeathing properties to an alleged adopted son, he arguec that since the deceased executed a Will, then he had the right to bequeath properties to whomever he desired. Counsel concluded his submission with a prayer that this court dismisses the Application as it is wanting in merit. By way of rejoinder, Mr. Ukwong'a reiterated what was in his submission in chief that the Respondent's grant was obtained in contravention of section 49(1) emphasizing that the Respondent did not annex neither the Will nor the Certificate of Death. He further stated that his client's letters were not obtained illegally but were revoked because of the concealment of information about a Will and since the Respondent did not produce; any Will then both grants should suffer the same consequences. Counsel then went on to question the alleged adoption and the fact that the child is a stranger to the family of the deceased and the Respondent arguing that the Respondent has not stated what is going to happen to the said child; is he going to be adopted by the deceased's family? How is he going to fit in? On the assertion that the Respondent is not obligated to appear in court in person, Mr. Ukwong'a made remarks that he is nating that these days executors are empowered to delegate their obligations to counsel stating that Mr. Kizuguto cited no law to this effect. He addec that if this was the case then the Respondent has disqualified herself as the executor. Counsel concluded stating that his submission was not challenged instead the Respondent has just sought the sympathy of the court. Having gone through the Affidavits and counsels' submissions for and against the Application I am satisfied that there is only one issue for the determination of this court,

that is whether the Applicant has provided sufficient grounds for this court to find that it can invoke the provisions of section 49(1) (a) of the PAEA and revoke the Respondent's grant. Has the Applicant substantiated claims that the proceedings to obtain the grant were defective in substance? Before I proceed to determine the identified issue, I would like to give a brief background so that firstly context is had. Secondly and more importantly provide clarity and possibly attempt to separate the grain from the chaff so that I only focus on the Application that is before me. On 14 August, 2023 the Respondent herein brought a Petition for Probate under section 24(1) of the PAEA seeking to be appointed as the executor of the Will of the late James Michael Shang'a who died testate on 02 February, 2023. To the Petition she annexed a burial permit and an Affidavit of one Khadija Khalid Baliwena in lieu of a Certificate of Death. Additionally, she annexed her own Affidavit which is meant to describe the circumstances of the death of James Michael Shang'a. The Respondent's Petition also had as an annexure the Will of the deceased which she stated was duly executed by him and registered with the Registrar of Tittles and deposited with the Registrar of Insolvency Trustees Agency (RITA). Together with the said Will, she has a Verification made by one Miranda Paschal Lutege, who is one of the witnesses of the Will of James Michael Shang'a as per section 57(2) of the PAEA and Rule 34 of the Rules. In the Verification the named witness declared that she was present and saw him signing the Will annexed to the Petition. And, with the Executor's Oath, the Respondent annexed the original Will. The Petition having been admitted, this court made the initial orders v/hich were to the effect that the Petition be published by way of a General Citation in the Government Gazette and a daily newspaper with a wide circulation. The record depicts that the Petition was published as GN. No. 5024 in the Government Gazette issue No. 36 published on 08 September, 2023 page 84. Likewise, the said Citation also appeared in the Mwananchi newspaper of 29 August, 2023 on page 25 and Habari Leo Afrika Mashariki of 29 August, 2023 to 04 September, 2023 on page 20. The hearing was conducted on 20 October, 2023. At the said hearing, among other things the question as to the requirements of Rule 33(1) (b) of the Rules which require a Certificate of Death was broached and since the Petitioner had sought refuge in the provisions of Rule 63(3) of the Rules she was found to be compliant to the provisions of Rule 33 and was appointed as the Executor of the Will of the late Michael Shang'a. What ensued after has been well articulated by Messrs. Ukwong'a and Kiziguto in their respective submission therefore save for emphasizing that the grant issued in Probate and Administration Cause No. 686 has, as of 07 May, 2024 been revoked under section 49(1)(b) of the PAEA. Thus, the Applicant herein is no longer an Administrator of the estate of the late James Michael Shang'a. Another matter that has caught my attention is the Applicant counsel's concern over the Respondent's court appearance and from Mr. Kizuguto's reply, he concluded that she has disqualified herself from being an Executor. With all due respect to Mr. Ukwong'a, I fail to understand the basis of the submission and conclusion. Once again with all the deserved respect to counsel, it would seem he is trying to question the Executor's performance through the current Application. In all earnest counsel must know that what is before this court is an Application to revoke the Respondent brought under section 49(1) (a) (c) thus, issues of who is coming to court and who is not and why are in my view superfluous

regardless of the fact that counsel has failed to explain how by not being physically in court the Respondent has delegated her powers as Executor to her advocate. He rebuked Mr. Kizuguto for not citing any law. I would also add that, although decorously, if he had been courteous to provide the provision(s) of law that guided him then his insistence for personal attendance of the of the Respondent could have been treated with the reverence he is giving it. Nonetheless, I would like to point out that since her appointment, at which the Respondent was present physically, this matter has not had any hearing due to the pendency of this Application and in any case the record depicts that counsel has been attending. Having discussed the above I now segue to the core of the Application. First and foremost, I find it necessary to reproduce the section on which the Applicant is relying on, that is section 49 (1) (a)(c): The grant of probate and letters of administration may be revoked or annulled for any of the following reasons-(a) that the proceedings to obtain the grant were defective in substance;(b) (c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant, though such allegation was made in ignorance or inadvertently" [Emphasissupplied] The Applicant counsel's arguments as to why the Respondent is to be removed from the office of the Executor pivot on the reason(s) that first there is duplicity as the grant was made when Probate and Administiation Cause No. 686 of 2023 was in the District Court. As already stated the grant that was issued in Probate and Administration Cause No. 636 of 2023 has since been revoked. The Ruling that revoked the Applicant's grant elucidated why the same had to be revoked. And, this is not the proper forum to challenge the same. I therefore find this reason baseless. The second reason is that the Respondent did not annex a Will to her Counter Affidavit and none was produced in court, therefore this court should not have granted probate as there is no Will. Regardfully, I wonder whether Mr. Ukwong'a was serious or submitted this in jest? The Applicant's Affidavit mentions the Will and lists a number of what he thought are deficiencies leading to his despising it as invalid and explaining that is why the grant to the Respondent needs to be annulled and revoked. He also annexed a copy of the said Will. The Respondent noted the Will and its contests in her Counter Affideivit, I therefore, agree with Mr. Kizuguto that there is nowhere in her Counter Affidavit that seems to suggest that the Respondent needed to annex the Will. As for Probate and Administration Cause No. 79 of 2023, I am not sure why Mr. Ukwong'a would with so much gusto claim no Wil was produced. There is a copy of the same annexed to the Petition and the original is also in the court's file which begs the question of how is counsel submitting on behalf of his client that there is no Will produced in court yet it is in the court's file. It is not clear why Mr. Ukwong'a needs the Will annexed to the Counter Affidavit as he is contending that because she failed to attach the Wi I and none was produced when probate was granted then the proceedings were defective in substance. Perhaps a simple perusal would have evaded all of this. I also find that line of argument that probate was granted without a Will as unfounded and baseless to warrant revocation of the grant as sought. As to what the Applicant's Affidavit identified as reasons that maka the Will invalid, I am of the view that the Respondent having propounded the Will at probate and subsequently has been appointed as already explained above makes the Applicant late in his endeavour to object the Will. The probate was

published and the hearing was conducted as per the law. The Executor having been appointed what was to follow is the exhibition of the inventory and the accounts of the estate. The third question is as regards the Affidavit in lieu of the Certificate of Death. As already explained the Respondent stated in her Petition that she had no Certificate of Death, to this end she filed an Affidavit as to the circumstances of the death of James Michael Shang'a explaining how she knows him, took him to hospital, and took care of him in his last days after he fell ill. In this Affidavit, she also explained what ensued after James Michael Shang'a's death, his burial and, her efforts to get the Certificate of Death. Additionally, she annexed an Affidavit sworn by one Khadija Khalid Baliwena as per Rule 63(3) of the Rules. The Applicant's counsel is not satisfied with the justification given, yet, he has not controverted what has been deposed in the said Affidavits other than questioning who is the said one Khadija Khalid Baliwena why and how would she see the remains being a Muslim woman. Although for the purposes of this Application it is going off tangent and being respectful to the counsel's line of argument, what is at issue is not whether the deceased James Michael Shang'a is dead. No one is disputing his death, his client included. I have already explained that the Petition had no Certificate of Death and the reasons for that are as stated in the Affidavits. The "impediments" that Mr. Ukwong'a does not agree to can only at this time be controverted by evidence showing that what is stated in the Affidavits is untrue. Since the Respondent has complied with Rules 33(1) and 63(3) of the Rules then the lack of a Certificate of Death cannot make the proceedings defective. Furthermore, from the record of the District Court in Probate and Administration Cause No. 686 and of this court in Probate and Administration Cause No. 79 and the Applicant's Affidavits in support of the Application it can be seen that the Applicant is not amused by the act of the deceased executing a Will that in his view does not conform to the values and moral principles he subscribes to including appointing the Respondent as Executor and introducing strangers to the estate of the deceased. It is easy to appreciate why he might think those are enough reasons to make the Will invalid. I shall refrain from commenting on whether they would as in the circumstances of this case as already stated the Will was brought to court not challenged and probate was granted. However, I feel the need to refer to the definition of a Will as per section 2 of the PAEA. The section provides: "'will' means the legal declaration of the intentions of a testator with respect to his property, which he desires to be carried into effect after his death." [Emphasis Supplied] This, unfortunately, connotes that so long as a Will is propounded at probate and the propounded has satisfied the court it was duly executed by the testator and validly attested then in the absence of proof otherwise a court will take in as a declaration of the intentions of the testator in respect of his property (or interest in some property) to be carried out after his death, whether or not those he left behind like or not. In light of the discussion above, I hold that the Applicant has failed to satisfy the court that the proceedings in Probate and Administration Cause No. 79 that led to the grant of probate to the Respondent were defective in substance as required by section 49(1) (a) of the PAEA. Consequently, this court finds this Application without substance. It is hereby dismissed. Owing that the Application emanates from a probate matter, I order that each party should bear its own costs. It is so ordered. A. OMARI JUDGE 19/12/2024 Ruling

dated and delivered 19th December 2024 in the presence of Oscar Kizuguto advocate for the Respondent and Liberty Nelson Mosha the Applicant appearing in person. 19/12/2024

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