

TANZANIA / JUDGMENT

PETRO GURUSYA MAGENDERO PROBATE AND ADMINISTRATION CAUSE

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PROBATE AND ADMINISTRATION CAUSE NO. 02 OF 2022 REFERENCE NUMBER
20220819000442423 In the matter of the estate of the late PETRO GURUSYA
MAGENDERO..... DECEASED AND In the matter of an application
for letters of administration by ROSE PETRO GURUSYA..... 1st
PETITIONER MAGENDERO PETRO GURUSYA.....2nd PETITIONER AND
In the matter of a Caveat by DOROTHEA BARONGO GURUSYA.....
CAVEATOR

RULING

20th November & 12th December, 2024 M, L, KO MBA, J.: Petro Gurusya Magendero died intestate on 05 June 1982. Rose Petro Gurusya and Magendero Petro Gurusya, the Petitioners herein filed a Petition seeking to be appointed as administrators of his estate. Their endeavor hit a snag when their mother, Dorothea Barongo Gurusya, the Caveator herein showed up to challenge the Petition via Caveat as per 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). Page 1 of 15 Since the matter turned contentious, it became as nearly as possible a civil suit as per section 52 of the PAEA and decision in Monica Nyamakere Jigamba vs Mugeta Bwire Bhakome and Another, (Civil Application No. 199 of 2019) [2020] TZCA 1820. When the special pleadings were complete the matter was scheduled for hearing. At the hearing of this matter, petitioners had the services of Mr. Lenard Magwayega learned advocate and had Four witnesses; that is Rose Petro Gurusya (PW1), Salome Zacharia (PW2), Cleophas Makara Mihigo (PW3) and Thoma Evarist Magendero (PW4) they did not tender any exhibit and all of them testified in support of the Petition. The Caveator had the services of Mr. Baraka Makowe and called four witnesses Salvatory Nabukondo Gurusya (CW1), Stella Peter Gurusya (CW2), Laurent Daudi Kashaigiri (CW3) and Dorothea Barongo Gurusya (CW4) all of them testified to oppose the Petition. I find prudence to first provide a summary of what was the testimony of witnesses before starting analysis of issues framed. CW1 Salvatory testified as among caveator witnesses, he is the elder son of the late Mzee Petro Gurusya who apart from confessing that his father Page 2 of 15 died intestate, by the time his father died, Salvatory testified that he was 34 years. He recognized petitioners as his young sister and young brother who were born when he was employed in different district and

therefore, he doesn't remember exactly years of their birth. He remembers some of wives of his father and managed to mention Kabula, Salome and Dorothea who take care of him since he was young and cemented that Dorothea was married to his father when he decided to be a Christian. He went on testified that there was administrator of the estate of his later father, he mentioned some properties and explained that houses were rented and the income were used to pay school fees to his young brothers and sisters and later when all complete studying rents were used to up keep Dorothea, his mother. He insisted that all properties were administered by the administrator Wiliam with instruction from his father that no house shall be distributed but only female children were given house by the late Mzee Petro Gurusya. CW2 Stella Peter Gurusya, informed this court that Dorothea is her mother and was married in 1964 by that time she was young but she was 18 years when her father died. She further testified that there was probate case at Nansimo Primary Court and it was closed as properties of the deceased Page 3 of 15 were distributed as per court order and per directives of her father where, some properties were banned from distribution while others were sold and proceed were distributed to beneficiaries. She managed to mention few items which were distributed to include cows, woods, weapon and money from bank accounts. Landed properties were not for distribution according to the said directives and she is not benefiting from those houses but one of her young brothers is keeping one house which is lodge. When cross examined, she clarified that there was order of deceased before his death that houses should not be distributed as probate and he instructed who should dwell in those houses and other should be kept for his wife. She confidently said she was aware of those directives of their father during family meeting and that directives were given before witness, mother, sister, Mzee Mrubi and Mzee Mapagala. Laurenti Daudi Kashaigiri testified as CW3 and informed this court that he was employed at Nansimo Primary court between 1975 up to 2012 in all those years he was working at that Primary Court. He testified further that he knew Mzee Gurusya during his life time and when he died, the probate cause was filed at Nansimo Primary Court, it was William Mtana who applied and was granted with a letter of administration of the estate of the Page 4 of 15 late Mzee Gurusya. About the duties of Administrator, he said Administrator performed duties as per family meeting agreement and when completed distribution of the properties the probate was closed. Caveator Dorothea Gurusya testified as CW4 who apart from acknowledging that he finds his late husband with children, she recognized Salome and Kabula as co wives. Letter she testified that Mzee Gurusya was baptized and the two cerebrated Christian marriage and the caveator became a legal wife, she further testified that the two (caveator and Mzee Gurusya) started to build houses after the marriage while her co wives were married to other men after Mzee Gurusya decided to become a Christian. Before death she informed this court that Mzee Gurusya gave directives on how his properties have to be handled and those directives were given before Caveator, Mtundu, Bahenga, Mabagala and another whom she forgets his name. She went on testified that after the death, William was appointed as administrator who administered all properties as per directives of the Deceased. Children participated in selling the weapon and the plot in Musoma. There was also money from one of the banks in Dar es salaam which she doesn't know but what she remembered is that the said money was distributed to children of deceased. About the petition Page 5 of 15 and the list of the children of deceased, she informed this court that petitioners recognized her as wife but he

doubted the names, Christina, Mwabia, Victoria and Edward to be children of the deceased inhere. Petitioner witness (PW) 1 Rose Petro Gurusya who is the first petitioner herein. She informed this court that their father Petro Gurusya Magendero was died in 05/06/1982 left fourteen surviving children out of twenty-three and three surviving wives out of nine but petitioners and other children are not benefiting from the properties of their father. She went on testifying that after the death, William Mtana was appointed as administrator but he did not distribute properties because some children were still attending school so properties were used to collect money for school fees while under the custodian of Dorothea Barongo. While mentioning the said properties, she insisted all properties were left to Dorothea so that all children may go to school. However, she said upon reaching the age pf majority properties were not distributed as Caveator, Dorothea is holding them and only children from one womb benefit. When cross examined this witness mentioned some houses which have tenants and those occupied by some children while acknowledges that she doesn't know whereabouts of cattle. Page 6 of 15 PW2 was Salome Zacharia, one among the wives of the late Mzee Petro Gurusya. She testified that no properties were distributed because children were going to school who needed to be taken care and they agree to hold and make sure all children are educated. She recognizes William Mtana who was supervising properties but later he died. Witness complained that even when children attained the age of majority her co wife Dorothea resisted distribution of the properties of their late husband without good cause and prayed this court to allow distribution. When cross examined, she confirmed she did not benefit from any property. PW3 Cleophas Kamara Mihigo whose grandfather and the grandfather of Mzee gurusya were relative. He testified that when Mzee Gurusya died he was 21 years old. He remembered family had a meeting and they appoint William Mtana to be administrator of the estate of Mzee Petro Gurusya. He confirmed that court issued letter of administration. However, he said because there were young children the properties were not distributed. When children became adult there was no distribution and the administrator died. Since his death there is no one appointed as administrator. Page 7 of 15 Thoma Evarist Magendero appeared as PW4, his relation with the deceased is his uncle (his father's older brother). He testified that deceased Petro Gurusya left three wives and fourteen children. He mentioned some children and properties which he said were not distributed because there were minor children. He informed this court that William Mtana was appointed administrator who was advised not to distribute properties till children become adult, but he died. That means properties were not distributed. That marks the end of the testimonies by parties in this matter. To facilitate the determination of the matter, the following three issues were framed:

1. Whether there was administrator of the estate of late Mzee Petro Gurusya,
2. Whether administrator performed his duties and dosed the probate.
3. Whether there is unadministered properties. On the first issue, both side witnesses agree that there was person called William Mtana who was appointed as administrator of the estate of the late Mzee Petro Gurusya. The same was picked from caveat and testimony of the first petitioner. I find the first issue was answered in affirmative as there was no

controversial testimony. Page 8 of 15 The second issue was on performance of duties by administrator. 1st petitioner testified that no properties were distributed because some of the children were minor who were going to school and were in need of tuition fees. When administrator died, the properties were said to remain in hands of Caveator, Dorothea who had to make sure some children are attending to school. Caveator witness no. 3 and Caveator witness no. 4 informed this court that probate was closed that means administrator performed his duty and trial court was satisfied. From testimony it was directed and agreed that landed property should not be distributed as it meant to assist the whole family. Caveator witness no. 1 testified that only one house was distributed during the life time of their father to female children who were divorced and the rest were left under supervision of their mother, Dorothea, the caveator for up keeping children and herself. However, when petition was filed, caveator in her affidavit which resist the petition she deponed that all properties were administered and houses were distributed while provide the distribution list showing all children with exception of two co-wives (Salome and Kabula) who left from matrimonial home during the lifetime of deceased on year 1965 when deceased became Christian. I find the list on how children will benefit from houses Page 9 of 15 from caveator is exhaustive. The 1st petitioner claimed that children of deceased Petro Gurusya are not benefiting from the properties as a whole because all properties were taken care by their mother, Caveator; and currently only children from one womb are benefiting. From testimony, I find probate was closed as properties were used to up keep minor children of the deceased. It is deceased wife and mother of petitioners who provide in court the distribution list on who child benefit from which property, that means each child as per list supplied by petitioners has to benefit from landed property as deponed by caveator. Basing on affidavit of caveator, what is needed is for children who were listed by petitioners to be shown their properties in which they have to benefit in either way but not for sale. The second issue is answered in affirmative. Caveator affidavit is silent about 25 acres of land which is called farm while petitioners list it as among the properties to be administered when appointed inline with weapon and cows. This will answer the third issue. In his testimony Caveator witness no. 1 testified that there was a weapon but was sold by administrator and even 50 cows were distributed to female Page 10 of 15 children and the rest were stolen. Caveator who testified as caveator witness no. 4 she informed this court that cows were stolen and she know nothing about weapon. It is more than 40 years since death of Mzee Petro Gurusya, I understand it is not possible to remember movable properties which were dealt in those days. This court accepts the testimony as each witness deserve credence. See Goodluck Kyando vs Republic, [2006] T.L.R 369. However, the farm is immovable and so far as the caveator deponed nothing about distribution of the farm and who is benefiting from it, I find this is a property which was not administered. I am aware that the probate once closed no court can entertain it over the same deceased, however if there is unadministered property, it is possible to file probate for unadministered property. Petitioners herein are applying for letter of administration of the estate of their beloved father, Mzee Petro Gurusya Magendero. Let now consult relevant provision of law to know who is entitled to be appointed as administrator. Page 11 of 15 Section 2 (1) of Probate and

Administration of Estates Act, CAP 352, R.E 2002 (the PAEA) defines an administrator to mean: 'a person appointed by the court to administer the estate of a deceased person when there is no executor or no executor is able and willing to act, and includes, when Part VIII applies and subject to the provisions thereof, a person appointed an administrator under that Part.' In a simple language, administrator is a person appointed by the court to collect and distribute a deceased person's estate when the deceased has died intestate or where there is a Will but it did not appoint an executor or the executor refuses to act. Furthermore, section 33(1) of the PAEA states; 'Where the deceased has died intestate, tatters of administration of his estate may be granted to any person who, according to the ru/es for the distribution of the estate of an intestate applicable in the case of such deceased, would be entitled to the whole or any part of such deceased's estate.' The section allows any person who has an interest in the deceased's estate to petition for the letters of administration and the court may entitle the whole or part of it depending on the circumstances. On who should be an administrator, this court in Benson Benjamini Mengi and Others vs Page 12 of 15 Abdiel Reginald Mengi and Another, (Probate and Administration Cause No. 39 of 2019) TZHC 3202 when referring to the case of Saleli Doto vs Maganga Maige and Others, PC Probate Appeal No. 6 of 2018 had the following to say: 'In appointing the administrator of the deceased's estate, the main consideration is the reputation and capability of such person to act faithfully diligently and impartially in administering the estate to the rightful owners. Therefore, Court can appoint any reputable person who is not even a member of the family or officer of the Court for that matter to be an administrator of the estate of the deceased.' The main qualification for an administrator is therefore tested through a reputation and capability to act faithfully, diligently and impartially in administering the estate to the rightful owners. The question is whether the present Petitioners have those qualifications. As already stated, the two have asserted their interest in the estate as well as why they qualify and can administer the same. This, in my view coupled with the fact that an administrator is not left to their own avails as was held in Sekunda Mbwambo vs Rose Ramadhan (2004) TLR 439 wherein this court observed: Page 13 of 15 "Her objection was predicated more on her fears and feelings than proved facts. If after appointment the respondent proceeds to administer the state unfaithfully or in a discriminatory manner or in any way unsatisfactory to the appellant or any other beneficiary the law gives the aggrieved party to go to the opportunity court to apply for the revocation of the appointment... " Petitioners herein having asserted their interest in the deceased's estate are eligible and qualified to petition for letters of administration by virtue of section 33 (1) of the PAEA. So far as this court is satisfied that there is land which is not administered, the petitioners have qualification to be appointed as administrators to administer the rest of the estate. In the final analysis, I find that the Caveat partly fail for reasons explained and analysed above. Consequently, I make the following orders: I. All petitioners as listed in caveator affidavit to be shown relevant houses which were allocated to them and start benefiting from those houses the moment this order is issued. The caveator must supervise and complete this task within 14 days. Page 14 of 15 II. The Petitioners, Rose Petro Gurusya and Magendero Petro Gurusya, appointed to administer unadministered estate of the late

Petro Gurusya Magendero; III. Letters of administration to issue; IV. Rule 111 of the Probate Rules to be complied with; V. Inventory of the estate to be filed on or before date 17 April, 2025; VI. Hearing on 30 April, 2025 at 10:00HRS beneficiaries to be present, those outside of Musoma to join via Virtual Court; and VII. This being a probate matter I make no orders as to costs. It is so ordered. DATED at MUSOMA this 12 Day of December, 2024. Page 15 of 15

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