

TANZANIA / JUDGMENT

Ruling Miscellaneous Civil Application No

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IN THE UNITED REPUBLIC OF TANZANIA JUDICIARY IN THE HIGH COURT OF TANZANIA
MOSHI SUB- REGISTRY AT MOSHI MISCELLANEOUS CIVIL APPLICATION NO. 06 OF 2023
(Originating from Probate and Administration Cause No. 10 of 2021 in the High Court of Moshi at Moshi) IN THE MATTER OF THE ESTATE OF THE LATE JOROBOAMU ABRAHAMU MINJA AND
IN THE MATTER OF AN APPLICATION FOR REVOCATION OF GRANT OF LETTERS OF
ADMINISTRATION GIVEN TO ERICK TUMANIEL MINJA, ELISANTE HEAVENLIGHT JOROBOAMU
MINJA AND JEREMIA JOROBOAMU MINJA ON 26TH MAY, 2022 THROUGH PROBATE CAUSE NO.
10/2021. SHEDRACK JOROBOAMU MINJA.....APPLICANT VERSUS ERICK
TUMAINIEL MINJA.....1ST RESPONDENT ELISANTE HEAVENLIGHT
JOROBOAMU MINJA..... 2ND RESPONDENT JEREMIA JOROBOAMU
MINJA.....3RD RESPONDENT

RULING

Date of Last Order : 03.07.2024 Date of Judgement: 17.07.2024 MONGELLA, J. Page 1 of 19 The application at hand has been preferred under Section 49 (1), (d), (e) and (2) of the Probate and Administration of Estates Act [Cap 352 R.E 2002] and Rule 29 (1) of the Probate and Administration of Estates Rules. In the application, the applicant is seeking for the following reliefs: one, revocation of the respondents as administrators of the estate of the Late Joroboamu Abrahamu Minja; Two, costs of the application and; Three, any other relief this Court deems fit. The application is supported by the applicant's own sworn affidavit and vehemently opposed by the respondents as reflected in their sworn counter affidavits. The applicant also filed her affidavit in reply to the respondents' counters affidavits. The brief facts of the application are to the effect that: the respondents were proposed by the clan of the late Joroboamu Abrahamu Minja to administer his estate. They petitioned before this Court and on 26.05.2022 were appointed as administrators of the deceased's estate. The applicant claims that the respondents are yet to account for inventory and distribution of the deceased's estate to the beneficiaries. He also claims that the administration is useless and inoperative because the administrators have personal misunderstanding, hence cannot undertake administrative duties. The applicant further alleged that the respondents are misusing some of the properties of the deceased and even transferring some of said properties to themselves. Further that, there are deceased's children failing to get support for their studies. Service was duly effected to the respondents. The 1st and 2nd respondents filed a joint counter affidavit. The 3rd respondent did Page 2 of 19 not

file his counter affidavit, thus left with the option to file his reply submissions on matters of law alone. He however, did not file the same. The application thus proceeded ex parte against the 3rd respondent. The application was argued by written submissions whereby the applicant was represented by Mr. Idris Muhidin Msemo while the 1st and 2nd respondents were represented by Mr. Joseph Peter, both learned advocates. Mr. Msemo, advanced four grounds on which revocation is sought. One, that the respondents have failed to file inventory and distribute the estate of the deceased; two, that the grant has become useless and inoperative as the respondents have failed to distribute the deceased's properties within the prescribed time; three, the respondents have failed to pay school fees for one Ester and Melkizedeck, children of the deceased and; four, the respondents have been misusing the deceased's properties and leasing the houses located at Plot No. 84 Marangu, Moshi and Plot No. 7 Himo, Moshi, which are part of deceased's estate without accounting for the rent. The 1st and 2nd grounds were argued together whereby Mr. Msemo alleged that the respondents have failed to account for inventory of the deceased's estate and to distribute the residue to the beneficiaries as ordered by this Court upon their appointment on 26.05.2022. He averred that the omission was contrary to the requirement of Section 107(1) and 108(1) of the Probate and Administration of Estates Act. He added that they have also failed to seek any extension or give reasons for their failure to implement their duties. In the circumstances, his stance was that the respondents have acted contrary to the law and are therefore jointly liable for disobeying Court Orders. In his view, this disqualifies them from continuing to administer the estate of the deceased. He cemented his arguments with the case of *May Mgaya vs. Salimu Saidi (Administrator of the Estate of the Late Saidi Salehe) & Another* (Civil Appeal No. 264 of 2017) [2019] TZCA 12 (27 February 2019) and *Joseph Mniko and Others* (Probate & Administration 48 of 1996)

[2006] TZHC 37 (13 November 2006) TANZLII. On the 3rd ground, Mr. Msemo averred that the respondents have failed to pay school fees and other school necessities for the deceased's children one, Ester and Melkizedeck. He said that the two children are in form five and third year at Sokoine University of Agriculture (SUA), respectively. He alleged that the respondents have the capacity to pay the said funds as they collect rent from Plot No. 84, Marangu and Plot No. 7 Himo, Moshi. The learned counsel contended that the failure by the respondents to pay the said school fees has caused the applicant to step in and pay the said fees for both children. However, the same has been a heavy responsibility on him. He alleged that the respondents were enjoying the rent from the said properties. In the premises, he held the view that the respondent's appointment ought to be revoked as was the case in *Joseph Mniko* (supra) whereby this Court faced similar circumstances. Page 4 of 19 Addressing the final ground, Mr. Msemo alleged that the respondents were misapplying and misappropriating the deceased's properties by collecting rent from houses located at Plot No. 84, Marangu and Plot No. 7 Himo, Moshi. Explaining the rents collected, he contended that the former Plot has 25 tenants paying TZS 100,000/=per month which is equivalent to TZS. 2,500,000/= per month. In the later house, the tenant pays TZS. 150,000/- per month. He added that all collected rent is spent by the respondents alone in exclusion of other beneficiaries. Citing the case of *Sekunda Mbwambo vs. Rose*

Ramadhani [2004] TLR 439 and Mwajina Abdul Maguno vs. Mwanahawa Maguno (Civil Appeal 74 of 2004) [2005] TZHC 235 (16 February 2005) TANZLII, the learned counsel prayed for the respondents' appointment to be revoked for acting unfaithfully, misapplying and misappropriating the deceased's properties. Mr. Peter, on behalf of the 1st and 2nd respondents, opposed the application. He commenced his submission averring that all respondents are children of the late Joroboamu, but they do not share a mother. He said that the applicant, on the other hand, shares a mother with the 3rd respondent who did not oppose this application. Replying to the 1st ground, the learned counsel argued that when the two respondents were appointed as administrators of the deceased's estate, they held a meeting with all beneficiaries who are children of the deceased. He alleged that this was done in good faith and in a transparent manner. However, he said, a Page 5 of 19 dispute arose as to what were the properties of the late Joroboamu Minja, which are subject for collection and distribution. He further alleged that the respondents shared their concerns with this Court presided by the Registrar something which rendered their failure to file the inventory within 6 months. Mr. Peter further argued that while the respondents were in final stages to finalize and distribute the estate to the beneficiaries, this application was filed causing the probate cause to stay. He contended that the respondents complied with Section 107(1) and

- (2) of the Probate and Administration of Estates Act, whereby the 1st and 2nd respondents have already collected the deceased's properties and distributed the same. He alleged that what was pending was filing of the inventory before this Court. On that account, he prayed the 1st and 2nd respondent be left to proceed with finalizing the filing of the inventory. With regard to the 3rd ground, Mr. Peter denied the accusation levelled against his clients and further called for proof. He termed the evidence as hearsay, thus inadmissible. In his view, there ought to have been affidavits sworn by the said Ester and Melkizedeck to prove the allegation. He thus called for this court to expunge paragraph 7 of the applicant's affidavit as it was hearsay evidence. He averred that the applicant had failed to prove his allegations as required under Section 110 and 111 of the Evidence Act [Cap 6 R.E 2022]. Page 6 of 19 As to the last ground, the learned counsel saw the issue needing proof. He contended that the applicant ought to have proved his allegations. Finding his clients in good order, he alleged that the 1st and 2nd respondents acted faithfully in administering the estate of the late Joroboamu and even informed the beneficiaries on every stage they reached in performing their duties as required under Section 66 of the Probate and Administration of Estate Act. In conclusion, he prayed for the application to be dismissed for failure by the applicant to prove his allegations. In the alternative he called for revocation of the 3rd respondent and in substitution the applicant be appointed in his place. He as well prayed for costs of the application to be borne by the applicant. Rejoining, Mr. Msemo challenged the respondents for failure to reply on the concerns he raised. He contended that while Mr. Peter had rightfully cited Section 107 of the Probate and Administration of Estate Act, he failed to note that the inventory and distribution of residue of the estate to the beneficiaries were two different things. He explained that the former is done within six months of appointment of

administrators and where the administrators fail to account the inventory within six months, they ought to seek for extension of time. He further noted the respondents' admission of failure to account for the inventory of the deceased's estate since their appointment on 26.05.2022 to date. The learned counsel insisted that this was a total disobedience of the Order of this Court and Section 107 (1) of the Probate and Administration of Estates Act. He maintained that Page 7 of 19 the consequence was revocation of the respondents' appointment as envisaged under Section 49(1)(d) and (e) of the Probate and Administration of Estate Act. He reiterated the assertion that the omission to account the inventory of deceased's property has rendered the grant useless and inoperative. As to the estate of the deceased being distributed, Mr. Msemo alleged that the respondents were deceiving the court. He maintained his stance that the respondents have neither collected nor distributed the deceased's estate to the beneficiaries including the applicant. He insisted that the respondents' appointment was invalid as they had not filed the inventory on time and never sought for extension of time thereof. He cemented this argument with the holding in *Beatrice Brighton Kamanga and Another vs. Ziada William Kamanga* (Civil Revision 13 of 2020) [2020] TZHC 1428 (10 July 2020) TANZLII. He further denied there being any dispute among beneficiaries. Rather, he said that the disputes and misunderstandings were between administrators which resulted in their failure to fulfil their duties as provided under Section 108(1) of the Probate and Administration of Estate Act. He proceeded to list the duties of administrators as stated in *Hadija Said Matika vs. Awesa Saidi Matika, PC*. Civil Appeal No. 2 of 2016, High Court of Tanzania, at Mtwara (unreported). In addition, he reiterated his arguments on the respondents misusing the deceased's properties for their own benefits. Mr. Msemo concluded by maintaining his prayers for the Page 8 of 19 application to be granted. He further prayed for the applicant to be appointed as administrator of the estate in lieu thereof. I have keenly considered the rival submissions by the parties' counsels and gone through the record of this Court in Probate Cause No. 10 of 2021. The core issues under which the applicant has sought this application are that: the respondents have failed to file inventory and statement of accounts; the grant has become useless or inoperative; and that, the respondents are misusing, misapplying or misappropriating the deceased's properties. Prior to addressing the 1st and 2nd issues, I find it imperative to note that the facts advanced in the two issues were presented under separate paragraphs, that is, paragraph 5 and 6, in the applicant's affidavit and presented two distinct claims. In his submission, the applicant's counsel merged the facts on the two issues and purportedly argued them jointly. Under paragraph 5 the applicant pleaded that the respondents had failed to file inventory, a matter falling under the 1st issue in his submission. The paragraph states:

5. That since their appointment to date they have failed to account for the inventory and distribution of the deceased's Estate to the beneficiaries within six months as required by Section 107 of the Probate and Administration of Estates Act, Cap 352 R.E 2019. Under paragraph 6, the applicant pleaded the 2nd issue averring that the grant had become useless or inoperative due to Page 9 of 19 misunderstandings between the respondents. The

paragraph states: “6. That the administration is useless and inoperative because the appointed administrators are unable to fulfil their duties since their appointment as administrators of the estate as required because they have their personal misunderstanding between themselves and hence, they cannot undertake administration duties.” However, in his submissions, Mr. Msemo, while jointly submitting on the 1st and 2nd issues addressed the failure by the respondents to file inventory and accounts. I find that he kind of abandoned the second issue and introduced a new issue regarding accounts. The law is clear that parties are bound by their pleadings and introduction of new facts is prohibited. See, *Salim Said Mtomekela vs. Mohamed Abdallah Mohamed* (Civil Appeal No. 149 of 2019)

[2023] TZCA 15 (15 February 2023); *Maria Amandus Kavishe vs. Norah Waziri Mzeru & Another* (Civil Appeal No. 365 of 2019) [2023] TZCA 31 (20 February 2023); *Masaka Mussa vs. Rogers Andrew Lumenyela & Others* (Civil Appeal No.497 of 2021) [2023] TZCA 17339 (14 June 2023); *Ramadhani Bakari & Others vs. Aga Khan Hospital* (Civil Application No.5/01 of 2022) [2023] TZCA 17552 (29 August 2023) and ; *Mway Arego Jombo vs. NMB Bank PLC* (Civil Application No. 627/08 of 2021) [2023] TZCA 17825 (13 November 2023). Being an application, the parties’ pleadings were the chamber summons and affidavits sworn by them. The submissions are not Page 10 of 19 evidence and cannot be used to introduce new evidence. It was facts pleaded in the applicant’s affidavit that ought to have been addressed in his submissions. Emphasizing on the fact that affidavits are oral evidence and submissions only elaborate on facts pleaded in affidavits, the Court of Appeal in *Mway Arego Jombo vs NMB Bank PLC* (supra) quoted with approval the case of *Registered Trustees of the Archdiocese of Dar es Salaam vs. The Chairman of Bunju Village Government and 11 Others*, Civil Appeal No. 147 of 2006 (unreported) where it held: “... submissions are not evidence. Submissions are generally meant to reflect the general features of a party’s case. They are elaborations or explanations on evidence already tendered. They are expected to contain arguments on the applicable law. They are not intended to be a substitute for evidence.” Mr. Msemo’s act of raising new arguments was a departure from pleadings and contrary to requirement of the law. As I stated earlier, he in fact addressed the 1st issue and abandoned the 2nd issue. Now back to the issues in this application. With respect to the 1st ground, I have found that the parties seem to confuse between inventory and statement of accounts. It must be noted that the two are diverse documents filed by the administrators at diverse stages in performing their duties. The former precedes the latter. The former provides for assets and liabilities of the deceased while the latter is a depiction on how the administration is finalized including Page 11 of 19 distribution of what is left of the deceased’s estate. In *Joseph Shumbusho vs. Mary Grace Tigerwa & Others* (Civil Appeal No. 183 of 2016) [2020] TZCA 1803 (6 October 2020) TANZLII, the Court of Appeal, facing a similar situation whereby the two were muddled gave a detailed description whereby it stated: “Here, we wish to pose and revert back to the difference between the inventory and accounts. An inventory is described under section 107 of the Probate and Administration and rule 106 of the Rules whereupon an heir or an administrator is required to file inventory containing full and true estimates of

all the properties which came into his possession as a legal representative, all the debts owing by any person, and all the credits. The format of it is provided in Form 80 set out in the First Schedule to the Rules. Therefore, the inventory is filed in order to show the assets and liabilities of the deceased whereas the accounts is filed in order to show the administration of the deceased's assets and its format is provided in Form 81 of the First schedule to the Rules. Such accounts must be filed within a period of not more than one year or within such further time as specifically appointed by the Court whereas the inventory is required to be filed within six months from the grant of probate or letters of administration, or within such further time as the Court which granted the probate or letters may from time to time appoint or require. In that regard, the inventory is not synonymous to the accounts as the parties would like this Court to take." Moving on to whether the respondents filed inventory and statement of accounts; the record in Probate Cause No. 10 of 2021, reveals that the respondents were appointed by this Court as Page 12 of 19 administrators on 26.05.2022. They were required to file inventory within six months and appear before this Court on 28.11.2022. On 28.11.2022, the respondents appeared before this Court and their advocate, Mr. Peter Joseph requested for another date for them to file inventory. The Court fixed the matter for mention on 21.02.2023, which was three months later. On 21.02.2023 neither the respondents nor their advocate appeared in Court. They as well never appeared in the subsequent mentions that were fixed by the court on 22.03.2023 and 18.04.2023. The application at hand was filed before this Court on 21.03.2023; a month after the respondents were required to enter appearance before this Court on 21.02.2023. There is clearly no any part of the proceedings showing that the respondents had addressed this Court on challenges in filing the inventory. There is also nowhere indicated that they had completed collection or distribution of the estate and were somehow filing the inventory. It is thus evident that there has been no filing of the inventory nor statement of accounts. In addition, there are also no extensions sought in that regard. In the premises, I find the respondent to have acted in clear violation of Section 107(1) of the Probate and Administration of Estates Act and the orders issued by this Court on 26.05.2022 and other subsequent orders thereto. The respondents' act of failing to file the inventory and statement of accounts was a dereliction of their duties as enshrined under Section 108 (1) of the Probate and Administration of Estates Act. Page 13 of 19 These duties were also discussed in detail in the case of Sekunda Mbwambo (supra) whereby the Court stated: "The objective of appointing an administrator of the estate is the need to have a faithful person who will, with reasonable diligence, collect all the properties of the deceased. He will do so with the sole aim of distributing the same to all those who were dependants of the deceased during his life- time. The administrator, in addition, has the duty of collecting all the debts due to the deceased and pay all the debts owed by the deceased. If the deceased left children behind, it is the responsibility of the administrator to ensure that they are properly taken care of and well brought up using the properties left behind by their deceased parent. After the administrator has so faithfully administered and distributed the properties forming the estate he has a legal duty to file an inventory in the Court which made the appointment giving a proper account of the

administration of the estate.” The failure to file inventory and statement of accounts is a ground for revocation as provided under Section 49(1) (d) of the Probate and Administration of Estates Act. In the premises, I find the 1st ground justified. As to the 3rd ground, the applicant raised two issues concerning misappropriation of the deceased’s estate. Both issues concerned houses located at Plot No. 84 Marangu, Moshi and Plot No. 7 Himo, Moshi. The first issue was that, the respondents leased the said properties and collected rent for themselves alone. The second was that, they were not paying school fees and other necessities for one Page 14 of 19 Ester and Melkizedeck, young children of the deceased rendering the applicant to pay their school fees. I however, find both arguments unproved as the applicant has rendered mere statements with no backup evidence. It is trite law that he who alleges must prove. This principle is enshrined under Section 110 and 111 of the Evidence Act. The burden of proof in civil cases is on balance of probabilities requiring one party’s evidence to be heavier than the other. However, this burden does not shift until the party that has alleged respective fact discharges it. See, Crescent Impex (T) Limited vs. Mtibwa Sugar Estates Limited (Civil Appeal No.455 of 2020) [2023] TZCA 17501 (16 August 2023) TANZLII, whereby the Court stated: "It is also elementary that the standard of proof, in civil cases, is on a balance of probabilities which means that the court will sustain such evidence which is more credible than the other on a particular fact to be proved. Likewise, it is the law that the burden of proof never shifts to the adverse party until the party on whom the onus lies discharges his/her burden to prove and the said burden is not discharged or diluted on account of the weakness of the opposite party's case.” As noted earlier, the applicant failed to advance any proof in relation to the alleged misuse or misappropriation of the deceased’s assets. There was no evidence on the listed properties belonging to the deceased, or either of them being leased and managed by the respondents. In fact, the applicant did not plead any fact in connection to the mentioned properties. He only stated Page 15 of 19 that the respondents were misusing some of the deceased properties by changing the titles into their personal names. This is reflected under Paragraph 8 of the applicant’s sworn affidavit which states: “8. That, among the appointed administrators have started misusing of some of the properties of the deceased by changing the some of the properties in to his personal name.” (sic) Evidently, the allegations with respect to the properties were never pleaded. As observed earlier, submissions are not evidence thus new facts cannot emerge during submissions. See, Registered Trustees of the Archdiocese of Dar es Salaam vs. The Chairman of Bunju Village Government and 11 Others (supra). Addressing a similar subject in Luhumbo Investment Limited vs. National Bank of Commerce Limited & Others (Civil Appeal 503 of 2020) [2022] TZCA 738 (23 November 2022) TANZLII, the Court of Appeal emphasized this point by stating: “As correctly argued by the learned counsel for the respondents, it is trite law that, parties are bound by their own pleadings. At any standard, written submissions and its annexures do not form part of pleadings and the same are not intended to submit new facts or evidence but only to elaborate on the facts and/or evidence already indicated in the pleadings such arguments will not be entertained.” As to the applicant’s allegations that the deceased’s children, one Ester and

Melkizedeck were not given any financial assistance for Page 16 of 19 their studies; foremost, as stated by Mr. Peter, the two children ought to have sworn affidavits to plead arguments in being denied financial assistance. It is after all settled that where an affidavit mentions some other person, such person ought to swear his or her own affidavit in that regard otherwise, the same would-be hearsay. There is plethora of cases on this issue including the case of Frady Tajiri Chawe vs. TANESCO (Civil Application No. 505 of 2019) [2023] TZCA 88 (6 March 2023) TANZLII, whereby the Court stated: “As rightly argued by Mr. Kamihanda the law is settled that where an affidavit mentions another person, that other person must swear an affidavit otherwise the averment in which he is mentioned will become nothing but hearsay.” See also, Power & Network Backup Ltd vs. Olafsson Sequeira (Civil Application No. 307 of 2021) [2023] TZCA 80 (1 March 2023) TANZLII. Thus, there ought to have been presented affidavits sworn by the beneficiaries who were complaining on not getting any financial support for their education. The mentioning of the two without attaching their own affidavits renders the averment hearsay thus, cannot be relied on. To this point, the 3rd issue is found without merit. Concerning relief sought, the applicant has requested for revocation of the respondents as administrators. I am of view that indeed as I have observed in the 1st ground, the respondents failed to file inventory nor statement of accounts in due time and without any reasons communicated to the court, which warrants their revocation. Page 17 of 19 There was however another relief suggested by the 1st and 2nd respondents in their submission to the effect that the 3rd respondent be removed from office and the applicant be appointed in his place. This prayer cannot be granted because co-administrators are jointly and severally liable. If indeed the 3rd respondent stood in the way of administration, the 1st and 2nd respondents ought to have sought measures to be taken against him including filing an application to have him revoked. In May Mgaya vs. Salimu Saidi (Administrator of The Estate of The Late Saidi Salehe) & Another (Civil Appeal No. 264 of 2017) [2019] TZCA 12 (27 February 2019) TANZLII, addressing a circumstance where a co-administrator was revoked and the other left in office, the Court of Appeal stated: “As co-administrators the respondents were jointly and together responsible for everything in respect of the administration of the estate including exhibiting in court an inventory containing a full and true estimate of all the properties, debts and credits (section 107(1) of the Act) as well as distributing to the rightful heirs the residue after paying all the debts and liabilities (section 108(1) of the Act). Any default, including the delay in exhibiting the inventory and statement of account, is taken to have been committed by them all.” In the foregoing, I hereby revoke the letters of administration granted to all respondents in relation to the estate of the late Joroboamu Abrahamu Minja. The applicant also sought to be appointed as administrator upon the respondents’ revocation. His appointment, I can say, was also supported by the respondents in their submission when they Page 18 of 19 proposed him to take the place of the 3rd respondent. In that respect, the applicant, Shedrack Joroboamu Minja is hereby appointed to administer the estate of the late Joroboamu Abrahamu Minja. The respondents should hand over to the applicant everything in relation to the administration of the deceased’s estate and the applicant shall take up from

where the respondents stopped. The application is thus allowed to such extent. Considering the nature of the matter, to preserve the relationship between the parties, I make no orders as to costs. Dated and delivered at Moshi on this 17th day of July, 2024. X
L. M. MONGELLA JUDGE Signed by: L. M. MONGELLA Page 19 of 19

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