IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

TEMEKE HIGH COURT – SUB REGISTRY

(ONE STOP JUDICIAL CENTRE)

AT TEMEKE

CIVIL APPEAL NO. 898 OF 2024

(Originating from the ruling of District Court of Temeke at One Stop Judicial Centre in Probate and Administration Cause No. 472 of 2023 before Hon Sanga – SRM)

AFRA UPENDO HAULE (Magdalena Alois Haule) .....**1st APPELLANT**

MICHAEL ALOIS HAULE.....**2nd APPELLANT**

VERSUS

BEATUS ALOIS HAULE (The Administrator of the Estate of the late Alois Lewis Haule) ..... **RESPONDENT**

JUDGMENT

07/02/2024 & 06/03/2024.

M.MNYUKWA, J.

Aggrieved by the Ruling of the District Court which appointed respondent as an administrator of the estate of the late Alois Lewis Haule, who was their father, appellants knocked doors of this court armed with six grounds of appeal which are;

1. *The trial magistrate erred in law and in fact by ruling that the alleged forgery was not proved while there was enough evidence supported by exhibit proving the same.*
2. *The learned trial magistrate erred in law and in fact by deciding that respondent was right to petition without consent of heirs the fact of which is a total misconceived and contrary to the Law.*

3. *The learned trial magistrate erred in law and in fact by ruling that the appellants refused to participate in the probate that's why their consent was not obtained, while in the trial court record during petition and grant for letters, respondent did not adduce any reasons as to why he did not obtain consent of the appellants herein.*
4. *The learned trial magistrate erred in law and in fact by failure to observe that the respondent herein had an evil intention with the estate of the deceased and that is the reason from precluding the appellants herein from participating in the clan meeting and even in entire proceeding petitioning and granting of letters of administration while the parties herein are blood relatives.*
5. *The learned trial magistrate erred in law and in fact for failure to observe that respondent did with bad intents precluded some of the deceased's properties from the list of the deceased's properties in the petition which were about to come on his administration.*
6. *The learned trial magistrate erred in law and in fact for not considering appellants' submissions and annexures annexed to the application therein hence reached erroneous decision.*

It was thus appellant's prayer that, this appeal be allowed, Costs of the same to be borne by the respondent and any other relief(s) this court deem fit and just to grant.

For better understanding of this appeal, narration of background facts is inevitable. Facts gathered from the records are that: Parties to this appeal are siblings born to the same father and mother. Their father, the

late Alois Lewis Haule died intestate on 2/6/2014 leaving behind his wife and six children, parties to this case being among those six children.

Litigation journey in this case started way back in 2014 when the deceased's widow was granted letters of administration by the Primary court of Manzese at Sinza in Probate and Administration Cause No. 199/2014. It is in record that, in 2022 this probate case was never closed, hence caused appellants herein to pray before the trial court for revocation of the administrator, a prayer was denied.

That decision did not amuse the parties who appealed at the district court of Temeke at one stop judicial centre in Probate Appeal No. 27/2022. At the district court, it was ruled that the trial court had no jurisdiction to entertain a probate matter since deceased was a Christian. It followed therefore that all proceedings, ruling, orders and appointment granted by the trial court were declared nullity and were set aside. The parties therefore were urged to appoint another person to petition for letters of administration in a proper court.

It took one month until when respondent filed a petition in the district court of Temeke at this centre to be granted letters of administration. The petition was granted, letters of administration was granted to the respondent on 31/7/2023. However, this appointment did not gratify the

appellants who once again filed an application for revocation of letters of administration granted to respondent. But the application was not granted, which is the reason for this appeal.

At the hearing both parties were represented, for the appellant it was Mr. Ambrose Nkwera learned counsel, whereas Mr. Elipafrah Ally appeared for the respondent. Appeal was argued by way of written submissions.

Supporting the appeal, it was Mr. Nkwera, the appellants' learned counsel who argued on ground 1 and 6 conjointly by insisting that respondent used a forged death certificate when petitioned for letters of administration. According to the learned counsel, this fact was not disclosed at the trial court which is against the law under section 49(1) (a) and (b) of Probate and Administration of Estate Act, **[Cap 352 R.E 2002]** (*PAEA*). Further, he claimed that respondent was unable to give justified reasons as to why he had to use another certificate apart from the one which was granted in 2014. Therefore, he alleged that trial court was wrong to rely on the forged certificate. To buttress his argument, he cited the case of **Nathachana Modhiwadia vs Jashu Jetha and Radhika Jetha Modhiwadia**, Probate Cause No. 31 of 2021 HCT.

On ground 2 and 3 which are also consolidated, learned counsel argued that a reason given by the trial court on the absence of appellants' consent is misconception of the law. He contended that, rule 39(f) and 71 of Probate Rules, GN No. 10/1963 (*the Rules*) give a mandatory requirement of a petition to be accompanied by consent of heirs. Learned advocate went on contending that petition which granted letters to the respondent was defective in substance by not being accompanied by the consent of appellants or affidavit to that effect. To support his argument, he cited the cases of **Jonester Traseas Rwabigendela @ Jonester Johes vs Elizabeth Nelson Ngaiza**, Misc Civil Application No. 01/2023 HCT at Shinyanga and **Tabu Ramadhani Mattaka vs Fauziya Haruni Saidi Mgaya**, Probate and Administration Cause No.15/2017 HCT.

Lastly on ground 4 and 5, learned counsel submitted that despite the fact that clan meeting is not a requirement of law as ruled by the trial court, but exclusion of the appellants at the meeting was unjustified. It was the learned advocate's submission that it indicated an evil motive of respondent towards deceased's estate. He then prayed for the appeal to be allowed with costs.

Disputing the appeal, on her part learned advocate for the respondent argued the grounds of appeal in the same manner as Mr. Nkwera. Starting

with ground 1 and 6 learned advocate argued that forgery alleged by appellants was never proved rather there were just mere words. According to him, death certificate accompanied the petition was genuine since it was issued by Registration Insolvency and Trusteeship Agency (RITA). Learned advocate went on to submit that, respondent had to apply for another certificate after the first one which was issued in 2014 was nowhere to be found. It was therefore the learned advocate's view that the trial court was right to rule against this claim. To support his argument, he cited section 110 of the Law of Evidence, **[Cap 6 R.E 2019]** and the case of **Registered Trustee of Joy in the Harvest vs Hamza K. Sungura,** Civil Appeal No. 149/2017.

As for the issue of consent of appellants raised in grounds 2 and 3, learned advocate argued that the same was not procured by the respondent due to their refusal to give.

On grounds 4 and 5 learned counsel argued that the trial court was right to rule out that non participation of the appellants at the family meeting cannot vitiate the proceeding. He stated further that, appellants were informed about the meeting but they refused to participate due to their ill motive and selfishness since they want properties which belonged solely to the deceased's widow (their mother). It was learned advocate's

prayer that this appeal is devoid of merits, so it has to be dismissed with costs.

When rejoining, Mr Nkwera learned advocate reiterates what he submitted in his submission in chief.

Having considered submissions of the parties and examined lower court records, the only issue for consideration and determination is whether this appeal has merit. To answer this issue, I shall start with ground two of the appeal which I think when determined, it will give me the mirror on the remaining grounds of appeal.

Before I embark on determination of the appeal, I must say this is the first appeal of which, as a matter of law, I am allowed to analyse the evidence gathered in the lower court and to interfere with the findings of the lower court and come up with my own findings depending on the facts and evidence found in record, but of course guided by principles of law. (See the case of **Tom Morio v Athumani Hassan (suing as the administrator of the Estate of the late Hassan Mohamed Siara & 2 others,** Civil Appeal No 179 of 2019, CAT).

Now, going to ground two of the appeal which is premised on the issue of consent of heir if the same is mandatorily required to accompany

petition for letters of administration, and whether failure to attach renders the petition defective.

It is settled that, application for letters of administration should be made by a petition as provided for under section 56(1) of the PAEA. This petition is prescribed in form 26 or 27 depending on the circumstances of the case, these forms are set out in the first schedule to the Rules.

The law is clear under rule 39 that petition for letters of administration shall be accompanied by several documents of which, consent of heir is among of them. For better and ease of reference, this provision is hereunder reproduced;

> *"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".

Guided by the foregoing provision, we can see the use of a word '*shall*' which indicates a mandatory requirement of the mentioned documents to be attached. As far as the interpretation of a word shall under section 53(2) of the Interpretation of Laws Act, [Cap 1 R.E 2019] is concerned, the act of attaching the mentioned documents must be adhered to. The law states that;

"53.-(1).....

(2) Where in a written law the word "shall" is used in conferring a function, such word shall be interpreted to mean that the function so conferred must be performed".

Considering the above provision and conditional requirement under rule 39, an inference is drawn that a petition which lacks any of the mentioned documents is incomplete, hence defective.

Without much ado, let's now go to the issue at hand where learned advocate Nkwera argued that, appellants' consent was not procured and

attached to the petition filed by respondent in the trial court. According to him, the petition which granted letters of administration to the respondent was defective.

On my part I agree with the learned advocate for the appellants that, the law under rule 39 as hereinabove stated provides for documents to accompany the petition, and consent of heirs is among the said documents. And, attachment of consent as provided by rule 39 is subject to the provisions of rule 71 and 72 of the Rules.

Now the question is, was appellants' consent necessary when respondent petitioned for letters of administration. Before answering this question, let see what rule 71 of the Rules provides. For ease of reference, it is herein reproduced;

> *"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".*

The above provision gives a mandatory condition that a petition for letters of administration has to be supported by a written consent of all heirs. Considering the appellants' claim that their consent was not

procured, I had time to peruse records of the trial court and I confirm that written consents of appellants were not attached.

Now, answering the question above, it was indeed necessary for the respondent to procure consent from appellants and attached the same to the petition since by doing that respondent could have adhered to a conditional requirement provided by the law. However, the law is very clear that, this condition may cease if the court orders otherwise, which was not a case in this matter at hand.

On the other hand, when learned advocate for the respondent argued on this ground, she claimed that appellants refused to give their consent despite respondent's efforts to procure it. With all due respect to the respondent's learned counsel, her argument is unfounded because the law is expressive under rule 72 of Rules which states that if heirs refuse to give consent, petitioner has to file an affidavit which will contain their full names and addresses and a reason why their consent cannot be obtained. The provision states that;

> *"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".

Therefore, guided by the foregoing provision, it is with no doubt that respondent ought to have filed together with his petition, an affidavit explaining reason why appellants' consent was not obtained. Thus, respondent's allegation that appellants refused to give consent lacks corroborative evidence since no affidavit to that effect was filed in the trial court. It is important to note that, the law is settled under section 110 of the Tanzania Evidence Act, [**Cap 6 R.E 2019**] that whoever alleges must prove. It is the duty of the respondent to prove through affidavit in the trial court that appellants withheld their consent.

Henceforth, all that have been said above, I hold that failure by the respondent to attach a written consent of appellants or filing affidavit in support thereto was fatal which goes to the substance of the case. So, I agree with Mr. Nkwera that the trial court erred in law by granting a petition which was defective. Consequently, the trial court's proceedings, ruling and orders thereto are quashed and set aside.

Now, considering the fact that the second ground of appeal dispose of the instant appeal, determining other grounds of appeal serves no useful purpose.

In the event, this appeal has merit, it is therefore allowed. By the power given under section 49 (2) of PAEA, I hereby revoke letters of administration grated to the respondent and order that any interested party should petition afresh in a proper court.

No orders as to costs since this is a probate matters and parties are relative.

Right of appeal fully explained to parties.

M.MNYUKWA

JUDGE

06/03/2024

Court: Judgment delivered on 6th March 2024 in the presence of the appellants in person and in the absence of the respondent.

M.MNYUKWA

JUDGE

06/03/2024