IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF DODOMA

AT DODOMA

DC. CIVIL APPEAL NO. 08 OF 2023

(Arising from the decision of the District court of Dodoma in Probate and Administration Cause No. 48/2022)

GABRIELA CHAGULA NKYA ....APPELLANT

VERSUS

SOPHIA ROGASIAN TAIRO..... RESPONDENT

JUDGMENT

Date of last Order: 18th July 2023
Date of Judgment: 21st December 2023

MASABO, J:-

This is a first appeal. It is challenging the decision of the District Court of Dodoma, at Dodoma (the trial court) in Probate and Administration Cause No. 48 of 2022. To appreciate the kernel of the appeal, it is imperative to briefly narrate its background facts, as I hereby do.

The appellant is the biological sister of the deceased, one Lucas Baluhya Chagula, who died on 27th June 2019 and was survived by a wife who is the respondent herein, four children, and his mother. The respondent being the widow and one of the heirs, petitioned for the letters of administration before the District Court of Dodoma (trial court) on 23rd March 2022. On 25th May 2022, the appellant filed a caveat opposing the petition. In her affidavit for appearance deponed on 2nd June 2022, she stated the following reasons for objecting to the

petition: **one**, the respondent did not notify her and other members of the deceased's family on the petition she filed and **two**, she wrongly included a house with the certificate of Title No. 186252/29 LD No. 7414, LO NO. 506225, Plot No. 361 Block 46 located at Kijitonyama-Kinondoni Dar es Salaam in the list of properties falling under the deceased's estate whereas the said house belongs to the deceased's mother a fact that, perpetuated a misunderstanding between the deceased's family and the respondent. It was deponed further that, on 28th May 2022 the deceased's relatives conducted a family meeting and through that meeting, the appellant was nominated to be the co-administrator of the estate. The proposal that she became a co-administrator was to ensure transparency and to avoid future misunderstandings in taking care of the deceased's children.

After hearing this contentious probate, the trial court partially overruled the caveat. It allowed the petition but ordered that the house identified above be excluded from the list of assets falling under the estate as it belongs to the deceased's mother.

The appellant was aggrieved. She knocked on the doors of this court armed with the following seven (7) grounds of appeal:-

1. That, the learned trial Magistrate erred in law and facts by failure to consider the reason put forward by the appellant herein for praying to be joined as co-administrator to the estate of her late brother.
2. That the learned trial magistrate erred in law and in fact by failure to consider the fact that the respondent

herein failed to be transparent and open to the other beneficiary even before her appointment by the court.

3. That, the learned trial magistrate erred in law and in fact by failure to consider the reason of the appellant to be joined as a co-administrator only for the benefit of the mother of the deceased and other heirs.
4. That, the learned trial magistrate misdirected himself to say that the appellant herein is not an interested party in the estate of the deceased who was her brother.
5. That the learned trial magistrate erred in law and fact by failure to consider the communication between the appellant and the respondent herein from Tigo Mobile Company which shows that the respondent was informed of the emergency family meeting but she refused to attend.
6. That, the learned trial magistrate misdirected himself by saying that the appellant requested removal of the respondent to administer the estate of her late husband while the appellant wanted to be joined as a co-administrator.
7. That the learned trial magistrate erred in law and in fact by misdirecting himself and using false evidence not adduced by the appellant herein.

When the matter came for hearing, the parties materially differed on the mode of hearing. The appellant was insistent that, being lay, she

can only not satisfactorily exercise her right to be heard if the hearing proceeded orally. On her party, the respondent although lay, was insistent that she was not in a position to argue the appeal in writing hence, she prayed that the hearing proceed orally. In the interest of justice, this court found it prudent to have the appeal heard partially orally and partially in writing. The appellant was ordered to file her written submission by 23rd November 2023 and the same was filed on time. Thereafter, the parties appeared in court on 7th December 2023 whereby the respondent's reply submission was heard orally and the appellant had an opportunity to orally rejoin.

On her written submission in support of her appeal, the appellant opted to submit on the first two grounds while she silents abandoned the remaining five grounds. In support of the first ground that the trial court erred in not considering the reasons adduced in the caveat by the appellant and in not adding the appellant as the co-administratrix of the deceased's estate. She cited the case of **Benson Benjamini Mengi and Three Others vs. Abdiel Reginald Mengi**, Probate Cause No. 39 of 2019 [2021] TZCH 3202 TanzLI and the case **Saleti Doto vs. Maganga Maige and Others,** Probate Appeal No. 6 of 2018 [2019] TZHC 2120 TanzLII in support. She argued that, in these cases it was held that the major factor considered by court in appointment of administrator is whether he is trustworthy and whether he is capable of executing his duties fairly and without favour. The respondent herein does not have these qualities as she is not a trustworthy person. It was the appellant's further submission that, at

first the deceased's relatives had trust in the respondent. That is why, at the family meeting conducted immediately after the funeral the family consented and nominated her for appointment as administratrix of the estate of her deceased husband and the minutes were signed by all the relatives, including the appellant herein. However, later on, they realized that she was untrustworthy and incapable of distributing the estate fairly. She is not in good terms with the deceased's mother and when she instituted the administration cause in court, she did not notify the deceased's mother about it and she listed her house in the list of the deceased's estate while knowing that it did belonge to the deceased. Hence, she cannot do justice to her and the only way to resolve this is to appoint the appellant as co-administratrix. For this reason, the caveat ought to have been sustained.

On the second ground that the court erred in not holding that the respondent was not transparent to other heirs, the appellant spent her quality time submitting, that the respondent being the administrator she must earn the trust of other heirs and she must demonstrate that she is faithful to the estate and to all the heirs but she did not. She concealed the existence of the administration cause so as to purposely exonerate the deceased's mother who is also a lawful heir of the deceased.

In reply, the respondent submitted that the appeal is with no merit as nothing shows that she is not trustworthy. On the argument that she concealed the existence of the administration cause, she ardently refuted and submitted that, it all lies as she notified the family of the

existence of the Adminstration cause. She recalled that, in March 2022, she went to the deceased's mother and informed her of her intention to institute a probate matter. The deceased's mother consented and signed the papers lodged in court. Also, as per the law, a citation was issued for anyone interested in the deceased's estate to file caveat or enter appearance on the date the matter was set for hearing. Hence, she cannot be faulted. She added that, in addition, when she instituted the Adminstration Cause, she informed the deceased's brother one Francis Chagula who was designated a care taker of the deceased's family. The said Francis Chagula informed the appellant and her mother who thereafter filed a caveat.

On the issue that she listed the property of the deceased's mother among the deceased's assets, she admitted that indeed she listed it. However, she did so inadvertently, believing that it belonged to the deceased because much as it is in the plot owned by the deceased's mother, the deceased was the one who built it and during his life time, they used it as a source of income for the school fees for their children. Thus, she believed that it will continue to be a source of income for the upkeep and school fees for the children. However, after the dispute, the deceased's relatives took over the house and since 2019 they have been in occupation. She proceeded that, although she listed it, she was advised by the court to remove it from the list when she instituted the administration cause and acting on that advise she removed it.

The respondent submitted that, she was surprised that some months after the death of the deceased, his family convened a meeting attended by 5 relatives of the deceased and proposed that the appellant be a co- administratrix of the estate which is not proper. The respondent being the widow she has a right to administer the estate and even the family meeting convened after the funeral consented to that. It was argued that, the appellant has no interest whatsoever in the estate and apart from claiming that she be joined as a co-administratrix she has not been of any assistance to the widow and to the deceased's children. Also, it was argued that, appointing the appellant as a co-administratrix will paralyse the administration as the appellant and the respondent are not in good terms. Hence it will be difficult for them to jointly administer the estate. In conclusion she prayed that the appeal be dismissed and she be allowed to proceed with the administration which will relieve her from the burden of single handedly caring for the children.

In rejoinder, the appellant by and large reiterated her submission in chief and added that the respondent is not a potential administratrix because of her misconduct. She has been a source of conflict within the family. Thus, it is in the interest of justice that she be appointed a joint administratrix so that she can protect the rights of the deceased's children as some of them are still of tender age and although the respondent is their biological mother, they need the appellant's protection as a representative of the deceased's extended family.

Lastly she argued that the joint administration of the deceased's estate will bring peace and harmony in the deceased's family.

After considering the submissions above and the lower record which I have thoroughly scrutinized, I will now proceed to determine the appeal. Since the parties' submissions are in respect of the two grounds of appeal, I consider the 5 grounds to have been abandoned and for those reasons, I will not determine them. The two grounds that await my determination revolve around the following issues, namely whether the trial court erred in overruling the caveat and in appointing the respondent as the sole administrator of the deceased's estate.

The appeal having arisen from a contentious petition for letters of administration, I find it apposite to start with the provision of section 33 of the Probate and Administration of Estates Act, Cap 352 RE 2002 which deals with the eligibility for appointment of an administrator of the estate of the deceased where, like in the instant case, the deceased died interstate. It states as follows:

> 33.-(1) Where the deceased has died intestate, letters of administration of his estate may be granted to any person who, according to the rules 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.

Therefore, a petitioner seeking appointment as administrator must prove to the satisfaction of the court that he has an interest

(immediate or remote) in the deceased's estate. As held in **Sekunda Mbwambo v. Rose Ramadhani** [2004] TLR 439:

> "The administrator might come from amongst the beneficiaries of the estate..... Furthermore, it must by now be very obvious to all, that such an administrator must be a person who is very close to the deceased and can therefore, easily identify the properties of the deceased. .....Such a person may be the widow or the widows, the parent or child of the deceased or any other close relatives of the deceased. If such people are not available or if they are found to be unfit in one way or another, then the Court has the powers to appoint any other fit person or authority to discharge this duty.

In the present appeal, the respondent been the deceased's widow is one of the heirs of the deceased. On the other hand, and as correctly held by the trial court, the appellant being the sister of the deceased, is not among the heirs and as she has argued in support of her appeal, her prayer to be joined as co-administrator is not to protect her own interest but the interest of the deceased's mother and the interest of the deceased's children. Basically, she does not contend that the respondent being the widow has the right to petition for letters of administration and is eligible for grant of letters but she has passionately argued that she is unsuitable as she has no consent from the deceased's extended family and she is unfaithful as she included, in the list of properties, a property not owned by the deceased. Also, she concealed the existence of the probate matter.

Starting with the consent, Rule 39 of the Probate Rules sets the procedural requirements for petition of letters of administration and requires that, the petitioner for letters of administration must have a consent of the heirs (see rule 39 (f)). The requirement for consent is reinforced by rule 71 which states thus;

> 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 [emphasis is added]
> (2) n/a
> (3) n/a
> (4) Consent shall be in the form prescribed in Form 56 set out in the First Schedule and shall be signed by the person or persons giving the same and attested by any person before whom an affidavit may be sworn.

A petition brought without such content is procedurally fatally defective for non-compliant with a mandatory requirement of the law. In the present appeal, the record clearly demonstrates that the following, six persons were listed as heirs of the deceased; who are

i. Sophia Rogasian Tairo – Wife
ii. Gilbert Lucas Chagula – Son
iii. Victoria Lucas Chagula –Daughter
iv. Vivian Lucas Chagula –Daughter
v. Flavian Lucas Chagula – Daughter

vi. Victoria Gabriel Chagula - Mother

As per the above mandatory rule, the petition had to be accompanied by a consent of these six heirs or in absence, an affidavit in lieu thereof. From the record, the petition was accompanied by a consent form jointly deponed by all the heirs on 22/3/2022 which was only six (6) days before the petition was filed in court on 28/3/2022. The deceased's mother was among the heirs who signed the consent form.

Not only that, the respondent's petition for letters was accompanied by minutes of the family meeting dated 2/7/2019 through which she secured the family endorsement allowing her to petition for the letters of administration. As it has been held in numerous cases, much as the minutes of the family meeting are, strictly speaking, not among the requirements of the law, they are a good accompaniment to the petition. They have so far become an acceptable and encouraged practices as stated in **Elias Madata Lameck vs. Joseph Makoye Lameck,** Probate and Administration Appeal No. 1 of 2019 [2020] TanzLII. From the consent form duly executed by the deceased's mother and minutes of the family meeting held on 2nd July, 2019 authorizing the respondent to institute the petition for letters of administration, I entertain no doubt that the petitioner had the consent of all the heirs, including that of the deceased's mother. The appellant's argument that the deceased's mother was sidelined is found to have no any merit.

As for the family meeting held on 28/5/2022, I find it with no effect to as it was held while the petition was pending in court. Also, as stated above, the family meetings and their respective minutes while acceptable and encouraged are not a legal requirement. Hence, they cannot override the consent forms which are a mandatory legal requirement of the law.

For the foregoing reasons, I reject both, the argument that the petitioner had no consent from the deceased's family. I also reject the argument that she instituted the probate matter secretly because, the petition was instituted only 6 days after the deceased's mother signed the consent form authorizing the respondent to apply for letters of admnistration. I may also add that the petitioner for letters of the administration is not mandatorily required by law to personally/physically notify each of the deceased's extended family members. Such a requirement would have unreasonably imposed an unbearable burden on the petitioner. The notification is thus done through the General citation directed to any person interested in the estate. In this case the record show that the General Citation was issued and published in Mwananchi Newspaper dated 06th April 2022. Under these circumstances the respondent can not any how be condemned for being unfaithful.

On the issue that the respondent is untrustworthy because she included in the list of the deceased's estate a house owned by the deceased's mother which is located at Kijitonyama in Dar es es Salaam,

the respondent has conceded that she indeed included it but she did so inadvertently and after being advised she rectified her papers and removed the same from the list. My perusal of the trial court record has revealed that the same was not included in the list appearing at paragraph 4 of the petition. In this paragraph, the respondent who was the petitioner, stated that;

> 4. I believe that the gross (sic) which are likely to come to my hand will be
>
> (i) A family house located at Kisasa Dodoma
>
> (ii) Bank Account Number 01j2040691700 CRDB
>
> (iii) Unsurveyed plot of land located at Zuzu Dodoma
>
> (iv) Pension from PSPF.

Thus, it is possible as she has submitted that that she inadvertently listed it but later on after being advised and following a misunderstanding between her and the appellant's side, she dropped it from the list. I have asked myself whether she can be adjudged unfaithful as a result of such inclusion and whether she can in view of that, be disqualified from administering the state. I will answer both questions negatively because, the property complained of being wrongly listed was dropped hence not listed in the paragraph above. Second and even if it was listed, that alone would not render the respondent ineligible as the list of assets and liabilities shown in the petition are often provisional. The role of the administrator once appointed is to identify the actual assets and liabilities falling within the estate. The law expects him to complete this task within 6 months and exhibit an inventory thereof. Depending on the complexity of

identifying the assets and liabilities, the time may be extended. In the exercise of this function the administrator may omit from the list such assets which were inadvertently added to the list and add those that were inadvertently omitted. Thus, it is not uncommon to have an inventory that is substantially different from the list appearing in the petition for letters. Therefore, it will be materially wrong for this court hold that the respondent is unfaithful simply because she added a house to a list which is for all intents and purpose provisional.

On the basis of what I have stated, the appeal fails in entirety and it is dismissed.

DATED at **DODOMA** this 21st day of December, 2023

J. L.MASABO

JUDGE