IN THE UNITED REPUBLIC OF TANZANIA

THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

PROBATE AND ADMINISTRATION CAUSE NO. 20 OF 2021

IN THE MATTER OF THE ESTATE OF THE LATE AL- HASSAN ALLY BWANGA

AND

IN THE MATTER OF APPLICATION FOR THE LETTERS OF ADMINISTRATION BY MWANAARABU MOHAMED TALLE AND ASHURA ALLY BWANGA.....JOINT PETITIONERS

AND

IN THE MATTER OF CAVEAT AGAINST THE GRANT OF LETTERS OF ADMINISTRATION BY SALOME FRANCIS DASSA..... CAVEATOR

JUDGMENT

Date of last order: - 06/06/2022
Date of judgment: - 08/07/2022

OPIYO, J.

The petitioners herein Mwanaarabu Mohamed Talle and Ashura Ally Bwanga petitioned for a grant of letters of administration of the estate

of the late Al Hassan Ally Bwanga, who died at Bochi Hospital, Ubungo, Dar es Salaam on 24th August 2020.

Salome Francis Dassa filed a caveat against the grant of letters of administration on 4th June 2021. It is stated in her affidavit in support of her appearance as caveator paragraph 4 (I) to (VI) that she is the wife of the late Al Hassan Ally Bwanga, but she has been excluded from benefiting from his estate. She also avers that she is a mother of deceased's two minor issues hence she is responsible for guiding and protecting their interest. That, as a wife they have jointly accumulated matrimonial properties with the deceased. She also denied recalling any family meeting appointing the two joint petitioners for that task.

The above averment was strongly disputed by the first petitioner in her counter affidavit in reply to the caveator's affidavit. She stated that the caveator's alleged certificate of marriage attached to the affidavit is fabricated since the caveator and the deceased had long divorced and never remarried again. That, the caveator after divorcing with deceased was married by another person until 2018 when she divorced that other person and never remarried deceased. She continued to state that, the fact of deceased being married to a another person is found in her own admission in messages (sms) found in the deceased phone where she declared not being blessed with a talent of being a wife as she has failed to keep her second marriage too, in the same way her marriage with the deceased failed. Thus, caveator is not to be included in the list of deceased heirs as she failed to prove her subsequent remarriage with deceased after she divorced the other man in 2018.

Her further averment is that the caveator has not included any property she jointly acquired with the deceased contrary to what she deponed in her affidavit in support of her appearance. She is only driven by greedy to have hand on what was jointly acquired by the deceased and the first petitioner at the time the two were divorced. Therefore, as each wife of the deceased at different times acquired separate properties with the deceased, the caveator has no hand in what was acquired by the 1st petitioner separately with the deceased in her absence. As a sole wife, the 1st petitioner stands for her share in the jointly acquired property before the residue is divided to all heirs.

On the issue of not being proposed by any meeting to administer these estates, she stated that the duo were dully proposed by resolution in a clan meeting that was attended by the caveator as well, contrary to what caveator has pleaded in her affidavit.

Since the matter became contentious, it was treated as any other civil suit in accordance with Section 52 (b) of Probate and Administration of Estate Act, Cap 352, R.E 2002. **Also see the case of Monica Nyamakere Jigamba v. Mugeta Bwire Bhakome & Another, Civil Application No. 199/1 of 2019, Court of Appeal of Tanzania, (Dar es Salaam Registry) [2020] TZCA 1820 (16 October 2020)(Tanzlii),** where the Court of Appeal had the following in observation:-

"Where a Caveator appears and opposes the petition for probate or letters of administration then sub-Section 3 of Section 59 of the Probate and Administration requires the Court to proceed with the petition in accordance with paragraph (b) of Section 52 of the Probate and Administration which provides;

in any case, in which there is contention, the proceedings shall take, as nearly as may be the form of a suit in which the Petitioner for the grant shall be a plaintiff and any person who appears to oppose the proceedings shall be the defendant."

On 30th March 2022, in consensus with the parties counsel's the following issues were framed for purpose of effectively determining the matter:-

1. Whether the caveator was the wife of the deceased Al Hassan Bwanga.
2. Whether the first petitioner, Mwanaarabu Tale, as a wife has 50% share (before distribution to all heirs) in the disclosed estate of the deceased by virtue of contribution towards the acquisitions?
3. Who are the lawful heirs of the deceased Al Hassan Bwanga?
4. Whether all the deceased properties have been disclosed?
5. To what reliefs are the parties entitled to?

The plaintiffs paraded two witnesses in vouch to prove their case and defendant had only one witness. The parties also had a chance of filing their final submissions at the conclusion of hearing. I am not going

reproduce the testimonies and parties submission as a whole, instead I will go straight in disposing the issues framed drawing from parties testimonies and submissions when become relevant. The first issue is whether the caveator was the wife of the deceased Al Hassan Bwanga? In the testimony of PW2, Mwanaharabu Tale claimed to be the sole wife of the deceased and tendered a marriage certificate which was marked as exhibit P2 as evidenced at page 17 of typed proceedings. Same stand was taken by caveator who also claimed to be the first wife of the deceased and also produced a marriage certificate marked as exhibit D1 (page 201 of the typed proceedings. Examining the two exhibits it is observed that, exhibit D1 which is the marriage certificate issued by BAKWATA shows the date of contracting the marriage was on 16/07/2000, C/No. 055060 and exhibit P2 also a marriage certificate No. 0259767 the the of contract a marriage indicated is 23/09/2005. Both were contracted in accordance with Islamic rites as indicated in the certificates.

According to the Law of Marriage Act, Cap 29, R.E 2019 section 10(2)(a) states that,

> 2) *"A marriage contracted in Tanzania whether contracted before or after the commencement of this Act, shall-*
> *(a) if contracted in* ***Islamic form or according to rites recognised by customary*** *law in Tanzania, be presumed, unless the contrary is proved, to* ***be polygamous*** *or potentially polygamous..." (****emphasis is mine****)*

The first marriage contracted between the deceased and the caveator, as shown above, was in Islamic rites and BAKWATA certificate was issued. This acts as evidence of marriage by virtue of section 55(f) of the Law of Marriage Act, (*supra*). Being in Islamic form which is inherently potentially polygamous, deceased was not bound by one wife he contracted a second marriage by PW2 as evidenced by exhibit P2. PW2 was aware of this fact when she admitted at page 21 of the typed proceedings that deceased had deceived her that he was not married until when she came to find out, yet after finding out she did not do anything because as a Muslim polygamous is acceptable. She used the following words to deliver the message "... *I did not do anything after knowing he deceived me because I am a Muslim and the Law allows 4 wives.*"

The claim by PW2 is that the marriage evidenced by exhibit D1 was dissolved at the time of deceased death. The evidence she has for that is the messages (sms) she claims to have been found in her husband's phone after his death indicating that the caveator was married to another man at some point which to her amounts to automatic dissolution of her marriage to the deceased, until 2018 when she had to leave that other marriage too. According to PW2 the messages were from phone number 0656765327 which was saved as Mama Badra in the deceased phone. Caveator denied possession of the above phone number. What can quickly be glanced from the above scenario is that there was no formal dissolution of marriage between caveator and deceased that was made known to anyone including PW2. Therefore, until the time of deceased death caveator was believed to be a deceased

wife as envisaged by testimony of PW1 that she was assigned a task of investigating the rumors that both caveator as well as PW2 were married to other men at the time of deceased death to disentitle them from the deceased estate, but she proved that those were mere rumors. Therefore, both were listed as deceased wives in the clan meeting that proposed her and PW2 as administrators of deceased estate (exhibit P1). She was surprised to learn that PW2 had left caveator out in the petition being the one who took active role in preparation the same. Also see exhibit P1 (minutes of clan meeting dated 3/10/2020 attended by both caveator and first petitioner as co-wives of the late Al Hassan Bwanga) showing caveator as a first wife of deceased and 1st petitioner as second wife.

PW1 added that deceased would sometime say in anger that he was going to leave the caveator, but after sometime one would find them getting together as husband and wife to the extent of producing a second child. So, it was never clear whether he really divorced her or not. That means, the only insinuation of the two being divorced comes from the alleged 2018 messages retrieved from the deceased phone (exhibit P4) by PW2 after his death. In my considered view, such testimony is not reliable in proving divorce between the two. This issue involved two adults who consciously legally formalized their marriage, it is expected that when it comes to the desire of ending it, they should also consciously and legally do so. It is on record that Caveator denied being owner of the phone number in question and as it is not in her name as of now (it is in the name of one Juhudi Longo), I feel hesitant to force it on her for lack of basis. It is only service provider who would

have proved if the phone number was really hers by then, in 2018 when the alleged messages were sent. Thus, in the instant case as there is no any proof of formal divorce that was adduced apart from alleged messages, utmost if any, worth is to be attached to those messages could only suggest the caveator having extramarital affairs not legal dissolution of marriage. They do not amount as proof of divorce as the only organ vested with the power to grant divorce is the court (see section 107 (3) of the Law of Marriage Act (supra). The first issue is therefore answered in affirmative that the caveator was a deceased wife at the time of his death.

The second issue is whether the first petitioner Mwanaarabu Tale as a wife has 50% share (before distribution to all heirs) in the disclosed estate of the deceased by virtue of contribution towards their acquisitions. In this aspect, PW2 pleaded that, the deceased properties were acquired as the result of joint ownership and she financially contributed in their acquisition. She produced exhibit P3 which is loan repayment schedule, the money she alleged to have contributed in acquiring the house at Mbezi Makabe. This issue should not detain me much as it is a common understanding that it is hard to assess individual contributions at this stage as the party has already died, and there is no room for him to counter the assessment. I am alive to the fact after the death of one it is inconceivable how one would approach court seeking division of matrimonial properties in a matrimonial cause and that the same the same shall be channeled through Probate and administration cause as all those properties form part of the estate of the deceased following his or her death provided they were not disposed of by the

deceased inter vivos. The claim is indeed governed by the laws of probate and administration of deceased estates (see **Leticia Mtani Ihonde v Adventina Vaventina Masonyi (*Administratrix of the estate of the late Buhacha Bartazari Kichinda*), Civil Appeal No. 521 of 2021, Court of Appeal of Tanzania, at Musoma (unreported)** citing with approval the case **of Mr. Anjum Vical Saleem Abdi Vs Mrs. Naseem Akhtar Saleem Zangie, Civil Appeal No. 73 of 2003 (unreported)**

The relevancy of the above assertion is that, if the properties were not disposed of inter vivos, their inheritance is governed by the law of probate and administration. However, the question that remains is how and at what stage could one claim for that interest. Let us not confuse that this is not a matrimonial cause, but a probate cause which entitles all the beneficiaries to benefit a portion of the deceased estate especially wives and the children of the deceased as they are both recognized as evidenced by exhibit P1. It is also noted that in this case the deceased estate is not only comprised of the alleged house only for which 1st petitioner seeks to prove her contribution. There are other properties like motor vehicles, salary arrears, money in the bank. Each beneficiary's entitlement is therefore to be determined during the time of filing the accounts of the estate. This is after the administrator has been appointed and asked to exhibit full and correct inventory of the deceased estate. Determination of entitlement is the obligation of the administrator, not duty of the court. The administrator is the one entrusted with the power to distribute deceased estate to the heirs after all rationalisation of each one's contribution, if any, in exclusion of

others. The court may only get in upon determination of fairness of distribution in case one is not contented. Thus, in my view, the issue of first plaintiff's contribution in acquisition of the said house for the purpose of her entitlement in respect of the estate in question was prematurely brought at the stage when the other party, the deceased, is yet to be represented by the would be appointed legal representative. By saying so, in a polygamous marriage like the one at hand, I am not trying to act blind on the fact that there is a possibility of contribution by only one spouse in acquisition of certain matrimonial property, but the message I intend to put forward here is that the notion of how much goes to who, including the alleged contributing party, is to be dealt with in probate and administration of the estate which falls in the domain of the administrator or executer to be appointed in terms of section 108 (1) of Probate and Administration of Estates Act. The same will therefore be determined by the appointed administrator for the court to approve or not. The section provides:-

> *'The executor or administrator shall, with reasonable diligence,* ***collect the property of the deceased*** *and the debts that were due to him, pay the debts of the deceased and the debts and costs of administration, and* ***distribute the estate to the persons or for the purposes entitled to the same*** *or to trustees for such persons or for the purposes entitled to the same or to trustees for such persons or purposes or in accordance with the provisions of this Act, as the case may be.'*

According to the above section it is the executor or administrator who is empowered to diligently distribute deceased estate in accordance to heirs' entitlements not the court. Therefore, asking the court to determine entitlement of one beneficiary at this stage is indeed premature. The second issue is therefore, struck out for being prematurely raised.

The third issue is who are the lawful heirs of the deceased Al Hassan Bwanga? There is no dispute that deceased was survived three different classes of heirs, namely spouse/s, children and a biological mother as reflected in paragraph 2 of the petition. All the three sets fall in the category of lawful heirs of the deceased. Now that issue number one have been answered in the affirmative that the caveator was a deceased wife at the time of deceased death, the first category now has two wives not one originally listed under paragraph of the petition. At Page 14 of the proceedings, PW1 named the following 6 deceased children Shamsi, Ramzi Ndai, Mwamvua, Ilhan and Jamil. This is also similar to the list provided by PW2 at page 20 of the typed proceedings. Section 10 of the law of the Child Act prohibits any one from prohibiting any a child from inheriting from his parent's estate, so all children of the deceased are his lawful heir, though their entitlement depends on the law that will be applied in the distribution. Obviously, deceased mother as the only surviving parent also has share of inheritance from his child's estate. In respect of this issue the court can only describe general inheritance rights of different classes of heirs. It cannot go to the extent of confining the distribution to specific heirs or naming persons as the only heirs of the deceased in a binding form. This is

because it is well settled that court has no powers to determine the beneficiaries and heirs of the deceased. In the case of **Monica Nyamakere Jigamba v. Mugeta Bwire Bhakome & Another** *(supra)* it was held that:-

> *"...The probate or letters of administration court has no powers to determine the beneficiaries and heirs of the deceased. Similarly, it has no power to distribute the estate of the deceased. The law has vested that power to the grantee of probate or letters of administration. This is clearly provided under section 108 of the Probate and Administration Act..."*

As there was no dispute over children and deceased mother's entitlement, the only conflict remained on whether caveator was also deceased heir. This issue has been dissolved in the first issue that she was a legal wife, therefore an heir. she has to be listed as wife in accordance with **section 56(b) of the of the Probate and Administration Act** *(supra).* However, I am not going to state extent of her inheritance based on her contribution or whatever basis. This is a particular duty of the one to be appointed as administrator who is expected to wisely consider realities of the matter before him in distribution as he is the one on the playground, not the court.

The fourth issue to be determined is whether all deceased properties have been disclosed. The argument is that, there is a house at Kigoma and a company dealing with stationaries going under the name of "BabG" which is the deceased son nickname. I also find this issue to be

pre-maturely raised as it falls under the functions of the administrators who will be appointed and required to collect the deceased properties and file the inventory and this is when this issue will be answered. The tentative list in the petition is not exhaustive and it is not expected to as the petitioner may not have comprehensive list of deceased properties at the time of filing petition. And even if this court would have wished to, the evidence available before this court in this matter could not have helped in determining whether the alleged properties are in deceased name or not since even their proper description was not given to this court's satisfaction.

The last issue is as to what reliefs are the parties entitled to? As stated in **Monica Nyamakare Jigamba case***(supra),* in determining the caveat, when the suit changes to civil suit the main purpose of that such procedural requirement is to facilitate the investigation of a caveator's objection and its effect is to enable the entire proceedings not just part thereof to be dealt with in totality and to be concluded as one whole **(See the case of Nuru Hussein v. Abdul Ghani Ismail Hussein [2000] TLR 217).** In the instant case Mwanaarabu Mohamed Talle and Ashura Ally Bwanga petitioned to be appoint as joint administratrix but Salome Francis Daffa filed a caveat to oppose the same. From the submission of the parties it is clearly shown that the deceased resided at Makabe Mbezi -Dar es Salaam with Mwanaarabu and occasionally visiting Kigoma where Salome resided and both have children whose interest have to be safe guarded. Mwanaharabu lives in Dodoma, Ashura in Tabora and Salome in Kigoma. Caveator prays to be appointed as co-administratrix in order to protect interest of her children. However she

claims there is no deceased properties in Kigoma where she lives, meaning that she did not have any jointly acquired property with the deceased at that end. Most properties are in the hand of Mwanaarabu who knows them better. Appointing Salome means she will have to administer properties in the hands of Mawnaarabu as ther is nothing in her hands. Another reality is that there are other children who are not born by Mwanaarabu or Salome. They have different mothers. If the question is protecting ones children's interests, who is going to protect interest of the two? This requires a neutral person whose impartiality will not be easily challenged. In this case, that person is Ashura, the aunt of all deceased children, irrespective of their biological mothers. And because most properties are better known by Mwanaarabu, the joint administratorship of the two would do for these estates. Coupled with the desire to minimize administration costs as all the aspirants live in different places, caveator's prayer to be appointed co- administrator is declined. Therefore, to facilitate good administration of these estates, I hereby appoint **Mwanaarabu Mohamed Talle** and **Ashura Ally Bwanga** as **joint administrators** of the estate of the **late Al Hassan Ally Bwanga**. They are fully informed of their duties including filing with the court within a prescribe time an inventory of the properties of the deceased and accounts of the estate. Regarding the nature of the parties, each party shall bear her own costs.

Suit partly allowed to the extent explained.

HIGH COURT OF TANZANIA

M. P. OPIYO,

JUDGE

08/07/2022

Judgment delivered on 08/07/2022 in the presence of Lilian Apolinaly for the petitioners/plaintiffs and also holding brief for Rutakolezibwa for the caveator/defendant

The right of appeal is explained.



M. P. OPIYO,

JUDGE

08/07/2022