

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

MISC CIVIL APPLICATION NO. 361 OF 2019

(Arising from Probate and Administration Cause No. 25 of 2015)

**IN THE MATTER OF THE ESTATE OF THE LATE MASHAURI
AMANIEL MALLEO SAIYE**

BETWEEN

GODWIN AMANIEL MALLEO.....1ST APPLICANT

DORAH AMANIEL MALLEO.....2ND APPLICANT

AND

DANFORD MASHAURI AMANIEL MALLEORESPONDENT

RULING

Date of last Order: *16/12/2020*

Date of Ruling: *22/12/2020*

MLYAMBINA, J.

This is an application seeking to annual *Probate and Administration Cause No. 25 of 2015* granted to the Respondent Danford Mashauri Amaniel Malleo on 26th August, 2016. The application is by way of Chamber Summons made under *Section 49 (1) (b) of the Probate and Administration Act Cap 445 of the laws (R.E.2002) and Rule 28 (1) of the Probate and Administration Rules*. The application is supported with the joint

affidavit of the Applicants Godwin Amanuel Malleo and Dorah Amanuel Malleo. Due to the seriousness of the evidences adduced therein, I will reproduce in part paragraphs 1 up to 11 of the supporting affidavits hereunder:

1. That, we are joint administrators of the estate of late Amanuel Mashauri Malleo having been appointed by this Court under *Probate and Administration Cause No. 23 of 2014*.
2. That, prior to the appointment, the petition in respect of the deceased was filed at the Morogoro District Court by the Respondent as *Probate and Administration Cause No. 8 of 2006* which went on appeal before this Court as *Civil Appeal No. 201 of 2006* where the proceedings of the District Court were on 11th September, 2007 quashed with a direction that the parties file proper proceedings before a proper Court.
3. That, following the above mentioned order, a fresh *Probate and Administration Cause No. 77 of 2007* was filed before this Court whereby Respondent filed a caveat to that proceedings, being represented by Advocate Dominic Kashumbugu alleging, among others, the existence of the will of late Amanuel Mashauri Maleo.

4. That, the said will was doubted and we decided to refer the same to the office of the Criminal Investigation, Forensic Bureau and on 15th February, 2013 the purported will was confirmed to have been forged.
5. That, on 25th March, 2013 the Forensic Report was filed in Court and a copy served to the Respondent through his Advocate.
6. That, after a protracted mention and attempts to have an amicable understanding, on 5th November, 2013 *Probate and Administration Cause No. 77 of 2007* was marked withdrawn to pave way for the family to file a proper probate and administration cause.
7. That, Respondent Danford Maleo who had undertaken to file a fresh petition did not do so and he refused to attend a family meeting that was convened on 27th April, 2014, whereby those in attendance decided to petition the Court hence the filing of *Probate and Administration Cause No. 23 of 2014* whereby on 25th February, 2015 we were appointed joint administrators.
8. That, following the appointment and filing of an inventory, on 14th July, 2015 we filed a final account of the estate of Amanuel Mashauri Malleo.

9. That, without the involvement and knowledge of the rest of the beneficiaries and without seeking consent and being aware that there was already in place *Probate and Administration Cause No. 23 of 2014*, Respondent petitioned the Court under *Probate and Administration cause No. 25 of 2015* for grant of probate relying on a forged will as stated under paragraph 4 above.
10. That, at the time of filling and being granted letters of probate annexure AF-9 Respondent had concealed to the Court the existence of an earlier *Probate and Administration Cause No. 23 of 2014* and also concealed and presented a forged will.
11. That, the actions of the Respondent are a clear abuse of the Court process and he has all along been submitting his letter of probate to the land authorities in Morogoro thereby interfering with the proper administration already undertaken by ourselves.

In the light of the afore affidavit, it correctly appears that the major reasons advanced by the Applicant for the grant of this application is paragraph 9 and 10.

In his counter affidavit, the Respondent partly noted to the extent that the Respondent is the executor of the will of the late Mashauri. The rest of facts were strongly disputed.

The Respondent went further to state that the will was proved to be genuine and original by the living witness named in the will as well as by the Honourable Court which granted probate to the Respondent.

It was the counter testimony of the Respondent that he said will was read over to the family and clan members after the funerals of the late Mashauri. Amanuel Malleo Saiye, at Marangu, Samanga Moshi, Kilimanjaro on 26th March, 2006 and all Applicants herein were present and the will was never challenged. Hence, all Applicants knew and ought to know the contents of the will, heirs and beneficiaries named in the will. Thus, the Respondent was named executor of the will of the late Mashauri Amanuel Malleo Saiye who died on 22nd March, 2006, testacy at Marangu Samanga and was buried on 25th March, 2006.

When the application came for hearing, Senior Counsel Mr. Joseph Rutabingwa for the Applicants told the Court *inter alia* that the contention of the Applicants is that the Respondent Danford Amanuel Malleo filed *Probate Cause No. 25 of 2015* while aware of

Probate Cause No. 23 of 2014 in which the Applicants have already obtained letters of administration and filed final inventory in respect of the estate of the deceased.

In view of Counsel Rutabingwa, what the Respondent would have done, could be to seek nullification of the *Probate Cause No. 23 of 2014* or seek revocation of the grant of letters to the Applicant under *Section 49 of Cap 445*.

It was the Applicant's contention that the Respondent concealed such material facts. Under *Section 49 (2)* of the Probate and Administration of Estates Act this Court is mandated to nullify the probate filed in concealment of the probate already granted in respect of the same estate. Counsel Rutabingwa referred this Court to the case of **Fatima Fatehali Nazarali Jinah v. Alibhai Kassam**, Civil Appeal No. 85 of 2014 at page 12 in which Mmila J.A (as he then was) while faced with similar scenario found that the two grants cannot co-exist.

Counsel Rutabingwa therefore prayed for this Court to invoke its powers under *Section 49 (2) (supra)* and nullify *Probate Cause No. 25 of 2015* and cancel the Probate granted to the Respondent on strength of *Section 49 (1) (b) (supra)* under the stated facts.

In response, Counsel Victor Rugemalila for the Respondent started by distinguishing **the case of Fatima** with the case of **Mark Alexander Gaetje and 2 Others v. Brigitte Gatje Defloor**, Civil Revision No. 3 of 2011. The distinction made was that, this case is about grant of probate and not grant of letters as it was in the case of Fatima. Thus, to distinguish the two, this Court will have to decide whether the procedure to grant probate are the same with the procedure to grant letters of administration or not.

Counsel Victor went on to submit that *Part V (c) of Cap 352* stipulates the procedure of granting letters of administration of which, was not followed in this case. The letters of administration was not annexed with the will. Counsel Victor, therefore, was of view that the proper remedy is stated under Part V (c) of Cap 352 (*supra*).

It was further submitted by Counsel Victor that the Respondent never concealed material facts. He became aware on 2017 when receiving letter from Morogoro Land Office. It was during grant of probate. That being the reason of filing a case to nullify the letters of administration to the Applicants registered as *Misc. Civil Application No. 360 of 2019* filed on 17th July, 2019.

Counsel Victor, however, admitted that there is a grant of letters of administration and grant of probate.

In the light of the above evidences and submissions of both parties, I join hand with the Applicant's Counsel Mr. Rutabingwa in that the two probate, be it, one probate or grant of letters of administration in respect of the same estate cannot co-exist. The first probate properly filed and concluded takes precedent. I must add that, even if the first probate was not properly filed, once granted, it remains a lawful order of the Court till when set aside by the competent Court upon proper application.

Besides, one cannot die intestate and testate at the same time. A person can either die intestate or testate. The fact that the Respondent admitted there is grant of letters of administration and grant of probate, the proper procedure was not to file *the later application for probate. The wisdom of the provisions of Section. 49 of Cap 352 (supra)* was to seek for revocation of the grant of letters to the Applicants.

Though the procedure to grant probate is different from that of granting letters of administration, one estate cannot have both. One must be legal and another illegal. As such, *Civil Revision No. 3 of 2011* is distinguishable as it dealt with existence of the will

only while **the case of Fatima** dealt with existence of two matters on the same estate and not legality of the will.

In the end, therefore, the application is granted with costs as prayed.



Y. J. MLYAMBINA

JUDGE

22/12/2020

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Ruling delivered and dated 22th December, 2020 in the absence of the Applicant and in the presence of Counsel Joseph Rutabingwa for the 1st Respondent and 2nd Respondent. Right of Appeal explained.



Y. J. MLYAMBINA

JUDGE

22/12/2020

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