JUDICIARY
IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
PROBATE CAUSE NUMBER 779 OF 2018

IN THE MATTER OF SECTION 43(2) OF THE DECEASED ESTATES (WILLS, INHERITANCE AND PROTECTION) ACT

AND

IN THE MATTER OF THE ESTATE OF MICHAEL M. PANYANJA (DECEASED)

CORAM: **THE HONOURABLE JUSTICE KENYATTA NYIRENDA**
Mr. Chisama, Deputy Administrator General, for the Applicants
Mr. D. K. Itai, Court Clerk

ORDER

Kenyatta Nyirenda, J.

On 18th December 2018, the Administrator General filed with the Court an ex-parte summons for letters of administration with limited grant in respect of Government death gratuity. The summons, which is in connection with the estate of Michael M. Panyanja (Deceased Person), is said to be brought under *"SECTION 25 PROBATE NON-CONTENTIOUS RULES as read with SECTION 17 AND 89 OF THE DECEASED ESTATES (WILLS, INHERITANCE AND PROTECTION) ACT 14 OF 2011".*

An important question to pose at this juncture is which of the stated provisions provides for the grant of letters of administration with limited grant. It might help if the stated provisions were to be quoted in full. I believe, being Rules, "section 25" is meant to refer to "rule 25". Rule 25 of the Probate Non-Contentious Rules (Rules) reads:

> *"An application for an order for a grant limited to part of an estate shall be made by summons and shall be supported by an affidavit stating-*
>
> *(a) whether the application is made in respect of the real estate only or any part thereof, or real estate together with personal estate, or in respect of a trust estate only;*

(b) *whether the estate of the deceased is known to be insolvent;*

(c) *that the person entitled to grant in respect of the whole estate in priority to the applicant have renounced either explicitly or by failing to appear to a citation or have consented to the present application."*- Emphasis by underlining supplied

Section 17 of the Deceased Estates (Wills, Inheritance and Protection) Act [Hereinafter referred to as the "Act"] sets out principles of distribution of intestate property to immediate family and dependants and it is couched in the following terms:

"(1) Upon intestacy, the persons entitled to inherit the intestate property shall be the members of the immediate family and dependants of the intestate, and their shares shall be ascertained upon the following principles of fair distribution–

(a) protection shall be provided for members of the immediate family and dependants from hardship so far as the property available for distribution can provide such protection;

(b) every spouse of the intestate shall be entitled to retain all the household belongings which belong to his or her household;

(c) if any property shall remain after paragraphs (a) and (b) have been complied with, the remaining property shall be divided between the surviving spouse or spouses, the children, and the parents of the intestate;

(d) as between the surviving spouse or spouses and the children of the intestate, their shares shall be determined in accordance with all the special circumstances including–

(i) any wishes expressed by the intestate in the presence of reliable witnesses;

(ii) such assistance by way of education or other basic necessities any of the spouses or children may have received from the intestate during his or her lifetime; and

(iii) any contribution made by the spouse or child of the intestate to the value of any business or other property forming part of the estate of the intestate, and in this regard the surviving spouse shall be considered to have contributed to the business unless proof to the contrary is shown by or on behalf of the child,

but in the absence of special circumstances the spouses and children shall, subject to subsection (3) be entitled to equal shares;

(e) as among the children of the intestate, the age of each child shall be taken into account with the younger child being entitled to a greater share of the

property than the older child unless the interests of the children require otherwise; and

(f) in the absence of any spouse or child of the intestate the property described in paragraph (c) shall be distributed between the dependants of the intestate, if more than one, in equal shares.

(2) If the intestate left more than one female spouse surviving him each living in a different locality, each spouse and her children by the intestate shall be entitled to a share of the property of the intestate in their locality in accordance with this section; but such spouse and children shall have no claim to any share of the property of the intestate in the locality where another spouse lives:

Provided that this subsection shall not apply to the property of the intestate of a value exceeding a small estate or institutional money or private land.

(3) If the intestate left more than one female spouse surviving him all living in the same locality, each spouse and her children by the intestate shall be entitled to a share of the property of the intestate proportionate to their contribution.

(4) Re-marriage shall not deprive a surviving spouse of property inherited under intestacy except in the case of property on customary land where title in that property shall devolve to the children of the spouse by the intestate upon re-marriage of the surviving spouse."

Section 89 of the Act repeals the Wills and Inheritance Act (repealed Act) but saves any subsidiary legislation made under the repealed Act except that which is in conflict with the Act.

A perusal of sections 17 and 89 of the Act shows that neither of them makes provision for the grant of letters of administration with limited grant. In the premises, the conclusion to be reached is that the Application is grounded on rule 25 of the Rules.

The summons is supported by a statement sworn by Mr. Peter Chisama which provides as follows:

*"2. **THAT MICHAEL PANYANJA** (deceased) died on 6th October, 2017 at Mchinji District Hospital in the Republic of Malawi. See Death Certificate marked exhibit "**1DAG1**".*

*3. **THAT** following the death of the deceased the Accountant General remitted to the Administrator General death gratuity to his estate amounting to **MK 26,596,822.00** to distribute to due beneficiaries marked exhibit **"1DAG2"**.*

*4. **THAT** the deceased is survived by, **Anasitanzia Panyanja, Mercy Panyanja, Fransisco Panyanja, Virgilio Panyanja, Martin Panyanja, Leonisa Panyanja.** Attached is the list of beneficiaries marked exhibit "**1DAG 3.**"*

5. ***THAT*** *the beneficiaries have requested this office to obtain letters of administration in respect of the death gratuity and distribute the same.*

6. ***THAT*** *the Administrator General applied for the listing the deceased's name into a gazette in compliance with the provisions of the Administrator General Act. Attached is a copy of the gazette marked exhibit* ***"IDAG4"****.*

7. ***THAT*** *the death gratuity for public officers or civil servants does not attract estate duty or certificate of estate duty.*

8. *THAT according to the law the Administrator General Department will act according to the law in so far as the funds are concerned as a Public Trustee.*

WHEREFORE *from the foregoing premises I pray to the Honourable Court to grant LETTERS OF ADMINISTRATION to the Administrator General LIMITED to the death gratuity received unto its custody."* – Emphasis by underlining supplied

I momentarily pause to observe that the Application pertains to death gratuity. An estate of a deceased does not include death gratuity by reason of section 5(2) of the Estate Duty Act which provides as follows:

"(2) The estate of the deceased shall not be deemed to include-

(a) property held by the deceased as trustee for another under a disposition not made by the deceased or under a disposition made by the deceased more than three years before his death;

(b) any gratuity paid by the Government to the personal representatives, heirs or dependents of a deceased public officer after his death under-

(i) section 16 of the European Officers' Pension Ordinance; or

(ii) the Malawi Public Service Regulations." – Emphasis by underlining supplied

It seems to me, in my not-so-fanciful thinking, that the office of the Administrator General takes the view that gratuity has to be given separate treatment from the other items of intestate property. We will revert to this issue shortly.

The summons is accompanied by, among other documents, Oath of Administration (Intestacy), a copy of a General Notice and Letters of Administration (draft). The relevant parts of each of these documents will be quoted in full:

*"**OATH FOR ADMINISTRATOR (INTESTACY)***

.....

that I am the Deputy Administrator and entitled to protect the estate of the deceased and I am not aware of any person who has a greater or more immediate interest in such estate

*except **Anasitanzia Panyanja, Mercy Panyanja, Fransisco Panyanja, Virgilio Panyanja, Martin Panyanja, Leonisa Panyanja** that I will administer according to law all the estate which by law devolves to and vests in the personal representative of the said deceased, and will exhibit a true and perfect inventory of the said estate, and render a just and true account thereof whenever required by law so to do; and that the said estate amounts in value of **MK 26, 596, 822.00** to the best to be of our knowledge and belief."* – Emphasis by underlining supplied

*"**GENERAL NOTICE NO. 54***

ADMINISTRATOR GENERAL ACT

(Cap.10:01 Laws of Malawi)

Under the provisions of section 9 of the Administrator General Act, the Administrator General hereby gives notice of her intention to apply to the High Court of Malawi, for letters of administration in respect of the Estates of the Deceased persons whose particulars are given hereunder. All persons who are indebted to the below mentioned deceased persons or those who have anything in their possession which forms part of the said deceased persons estates, should submit the particulars thereof in writing to the Administrator General, Private Bag 218, Lilongwe, within fourteen (14) days of the date of the notice after which the deceased estates will be distributed by the Administrator having regard only to those claims of which she shall have received written particulars.

Peter Chisama
for Administrator General"

"LETTERS OF ADMINISTRATION

This is to certify that the Administrator General has been duly appointed the administrator of the estate of Michael M. Panyanja who died on 6th October, 2017 at Mchinji District Hospital, domiciled in the Republic of Malawi and intestate and is hereby authorized to administer the said estate according to law"

The Application came before me on 19th December 2018. Having perused the Application, I was intrigued by, among other matters, the contentions in the Applicants' Skeleton Arguments that:

- *Sections 5(2)(b), 33(4) and (5) of the Estate Duty Act exempt death gratuity in respect of civil servants and public officers from paying estate duty and the necessity of a certificate thereto, as an exception to the requirement under sections 5 and 33 of the Estate Duty Act and 34 of the Deceased Estates (Wills, Inheritance and Protection) Act*

- *It is, therefore, submitted that applications of letters of administration limited to the death gratuity of civil servants and public officers requires no certificate of the estate duty commissioner as per section 33 of the Estate Duty Act*

- *It is also submitted that to require a certificate of estate duty and assessment of estate duty on estates which are exempt from paying estate duty is an affront to the right to access to justice of the beneficiaries there under."*

To better appreciate the contentions, I requested the Applicant to supplement the skeleton arguments by way of oral submissions. Counsel Chisama, on behalf of the Applicant, obliged. He orally argued the Applicant's case and responded to questions raised by the Court. The Court is very much indebted to Counsel for his guidance and, more importantly, his candour on the difficulties being faced by the office of the Administrator General in processing probate matters.

The first point made by Counsel Chisama is that it takes too long to have pension and gratuity (particularly for civil servants) processed such that by the time the same is ready, there is a lot of pressure on the Administrator General by the beneficiaries to have it paid at once, without having to wait for compliance with other legal requirements as provided in various other written laws such as the Estate Duty Act and the Act.

The second point being that, as a result of the said pressure, (a) the applications for letters of administration are exclusively limited to pensions or gratuity, as the case may be and (b) some beneficiaries opt to take their files away from the office of Administrator General to lawyers in private practice and other agencies in the hope of quicker processing of their respective applications for letters of administration.

Unfortunately, charlatans (*Madobadoba*) and outright fraudsters have taken advantage of the situation and joined the groovy train. This is evidenced in the sloppy preparation of the applications. In other cases, perhaps in an attempt to evade payment of applicable taxes, these charlatans and outright fraudsters do not own up to having prepared the application: the applications invariably bear the words *"Filed by the Applicants whose address is ...."*. I came across such applications recently. There was no question of them having been prepared by legal practitioners. Upon inquiry, the Registry confirmed that it is legal practitioners who had filed the applications and that the legal practitioners kept following up on the same.

Regarding fraudsters, the situation is akin to that which has beset the insurance industry with regard to personal injury claims. There have been occasions where letters of administration for limited grant have been issued and pension or gratuity has been paid out to "wrong people": the actual persons entitled to inherit the intestate estates are not aware of the application having been made in their names and end up not getting what is due to them. Perhaps, it is time all applications should be accompanied by the National Identity Cards of the applicants.

Then there are also those cases where the applicants and/or their legal practitioners seek to cut corners. On one hand, you have legal practitioners or third parties signing the applications as though they are the applicants. On the other hand, you have applications that are filed with the Court without having been signed by one or more of the applicants: see **In the Estate of Ali Mahommed Aidi Phiri, HC/Lilongwe District Registry Probate Cause Number 270 of 2015, unreported)**. It might not be out of place to quote at lengthy from the judgement in the said case. The relevant passage is to be found on pages 2 and 3 where Mwale J states:

> *"When the matter came before me on 22nd September, I noted that the application had been made by two applicants and yet only one had signed it. I therefore sent back the application with a direction that both should swear the affidavit.*
>
> *The matter came before again after the direction had been purportedly compiled with. This time there were two signatures, purported to have been signed by each of the applicants. Upon scrutiny of the affidavit I issued the following direction*
>
> > *I am a little concerned with this application. As a Judicial Officer I must be confident that I have examined the documents before me to the best of my ability before making a decision which has implications – in this case on the property rights and even livelihoods the person involved, especially the beneficiaries. When the application first came before me on 22nd September, 2015, I noted that this was an "Ex parte Application for a Limited Grant Order" and that the applicants were Agnes Phiri and Austin Phiri. However the affidavit in support of the application had only been sworn by Agnes. I therefore raised a query why this was so, requiring that if the application was being presented jointly, both applicants were to sign.*
> >
> > *I anticipated two possible actions in response to my direction. Either an amendment of the application so that it was in the name of the applicant deponing or that both applicants would sign. Today, 25th September, 2015, one copy only of the application was filed and one copy of the affidavit purporting to have been signed by both applicants. I am not a handwriting expert but it does not take a hand writing expert to notice that the signatures were signed by one person and not two different people. I cannot grant the application without a further inquiry into the issue. I am therefore directing the Commissioner for oaths to swear an affidavit that two people presented themselves before him, whose signatures he witnessed. The Commissioner for Oaths is reminded that he is an Officer of the court and therefore must depone to this matter in all truthfulness.*
> >
> > *Secondly, I am also directing the legal practitioner who prepared the documents to also swear an affidavit to the effect that two people presented themselves to the Commissioner for oaths. I will then entertain the application after this assurance.*
> >
> > *I so order*
>
> *In disregard of my directions, Counsel for the applicants appeared before me on 16th November, 2015 with an apology. It was his narration and I quote,*
>
> > *..... at the time of the preparation of the Affidavit, Austin Phiri was not available and the other deponent undertook to get the affidavit signed and so we gave her the copies. To be very honest, she brought back the copies purportedly signed by the other two deponents. It was not signed in our*

> *presence. To be fair to Commissioner for Oaths, we took both documents to him for commissioning and he commissioned in the absence of the deponents. We admit that we should have done better. The law is clear on how affidavits should be sworn and how commissioning should be done. We admit, we did not comply with the law, we are sincerely sorry.*
>
> *In light of this revelation it became apparent that one applicant had falsely executed the document with the negligence or nonchalance of both the Commissioner for Oaths and their counsel, both of whom owe an absolute duty to this court and are bound by the law and the ethics of their trade."*

My word of counsel to parties and legal practitioners is that the taking of "short cuts" in legal matters is not advisable because, more often than not, such approaches are visited upon by dire consequences such as unwarranted legal expenses, waste of court's resources and delayed conclusion of otherwise straight forward cases.

I have carefully examined the Application and it is my considered view that it has to fail. Firstly, the requirements of section 34 of the Act have not been fully met in that the documents in support of the Application do not include a certificate of the Secretary to the Estate Duty Commissioners. There is no mistaking the peremptory language used in section 34 of the Act: *"Every application for a grant of probate or letters of administration shall be accompanied by a copy of the estate duty affidavit and by a certificate of the Secretary to the Estate Duty Commissioners under section 33 of the Estate Duty Act*".

To my mind, it is clear beyond all possibility of controversy that the legislative intention was that every (repeat "every") application for a grant of probate or letters of administration has to be accompanied by a copy of the estate duty affidavit and by a certificate of the Secretary to the Estate Duty Commissioners under section 33 of the Estate Duty Act. I am fortified in my view by the legislative history behind section 34 of the Act. The requirements set out in section 34 of the Act were not in the 1967 Act but in the subsidiary legislation made thereunder, namely, rule 8 of the Rules.

In considering rule 8 of the Rules, the Special Law Commission on the Review of the Wills and Inheritance Act took the view that the requirement for attaching a copy of the estate duty affidavit and a certificate of the Estate Duty Commissioners issued under section 33 of the Estate Duty Act to every application for a grant of probate and letters of administration was substantive in nature and should, more appropriately, be dealt with in the Act itself rather than in subsidiary legislation: see the Report of the Law Commission at page 53.

Section 33 of the Estate Duty Act is couched in the following terms:

> *"(1) No grant of representation to the deceased shall be made unless a certificate of the Commissioners is produced to the effect that a proper estate duty affidavit as to the estate*

of the deceased has been made and delivered to the Commissioners, or , where the executor or other person accountable for duty does not know the value of any property and undertakes to the satisfaction of the Commissioners to pay all estate duty in any manner arising in respect thereof, or for any other reason, the Commissioners permit the grant to be made.

(2) And the Commissioners may, if they think fit, refuse to give such a certificate until the estate duty has been paid or security for the payment thereof has been given to the satisfaction of the Commissioners.

(3) Every grant of representation after the commencement of this Act shall state that the certificate required by this section has been produced and shall give its date and such other particulars as to the certificate or the estate of the deceased as may be prescribed.

(4) The foregoing provisions of this section shall not apply where a fixed duty is paid and accepted in lieu of estate duty, or where the estate appears to the Court or the authority granting representation to be exempt from estate duty.

(5) Particulars of any fixed duty accepted in lieu of estate duty or that the estate appears to be exempt from estate duty shall be stated in the grant of representation." – Emphasis by underlining supplied

It is clear from section 33 of the Estate Duty Act that a certificate of the Commissioners has to be produced in all cases except where a matter falls within subsection (4) of the said section, namely, for purposes of these proceedings, *"where the estate appears to the Court to be exempt from estate duty*". It is noteworthy that what has to appear to be exempt from estate duty is the estate of the deceased. It is not enough that a part of the estate of the deceased (death gratuity, as an example) appears to be exempt.

In the present case, it is not in dispute that the estate of the Deceased Person does not just consist of death gratuity in the sum of K26,596,822.00. The Deceased Person left other properties which fall within his estate, per the provisions of section 5(1) of the Estate Duty Act which reads:

"(1) The estate of the deceased shall include:

(a) property which vests in the executor of the deceased;

(b) property of which the deceased was at his death competent to dispose;

(c) property which the deceased or any other person had an interest ceasing on the death of the deceased....

(d) money payable to the deceased's estate under any policy of insurance;

(e) property taken as a donatio mortis causa made by the deceased;

> *(f) property which belonged to the deceased or of which the deceased was competent to dispose at any time within three years before his death, and of which the deceased had disposed in any manner other than for full consideration in money or money's worth:*
>
> *Provided that this provision shall not apply to gifts which are made in consideration of marriage, or which are proved to the satisfaction of the Commissioners to have been part of the normal expenditure of the deceased, and to have been reasonable, having regard to the amount of his income or to the circumstances, or which, in the case of any done, do not exceed in the aggregate £100 in value or amount;*
>
> *(g) personal property not within the limits of Malawi ...*
>
> *(h) any annuity or other interest purchased or provided by the deceased, either by himself alone or in concert or by arrangement with any other person, to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased."*

In terms of the Schedule to the Estate Duty Act, the rates per centum of estate duty payable are as follows:

"Where the principal value of the estate	*Rates per cent*
does not exceed K20,000,000	*Nil*
exceeds K20,000,000 but does not exceed K25,000,000	*4*
exceeds K25,000,000 but does not exceed K35,000,000	*5*
exceeds K35,000,000 but does not exceed K50,000,000	*6*
exceeds K50,000,000 but does not exceed K70,000,000	*7*
exceeds K70,000,000 but does not exceed K90,000,000	*8*
exceeds K90,000 but does not exceed K100,000,000	*9*
exceeds K100,000,000	*10"*

I have read and re-read the Application, including the supporting documents, and I have found nothing therein to show that, excluding the gratuity, the principal value of the estate of the Deceased Person does not exceed K20,000,000.00. In the premises, I am not satisfied that duty is not payable in respect of the estate of the Deceased Person.

Secondly, in terms of paragraph (a) of rule 25 of the Rules (the rule under which the Application is said to have been brought), an application for limited grant can only

be made in respect of three classes of property, namely, (a) real estate only, (b) real estate together with personal estate and (c) trust estate only.

Section 47 of the Act deals with trust property and it provides as follows:

> *"Where a person dies, leaving property of which he or she was the sole surviving trustee, or in which he or she had no beneficial interest on his own or her own account, and leaves no general representatives, or one who is unable or unwilling to act as such, letters of administration, limited to such property, may be granted to the beneficiary, or to some other person on his or her behalf."*

One thing is crystal clear: the sworn statement by Mr. Chisama falls very much short of the requirements of rule 25 of the Rules. The subject matter of the Application, that is, the gratuity, does not fall within any one of the three classes of property in paragraph (a) of rule 25 of the Rules. Further, the sworn statement of Mr. Chisama does not allude to the solvency or insolvency of the estate of the Deceased Person. Furthermore, the sworn statement is silent on the issue of renouncement or the giving of consent to the Application.

Thirdly, it appears to me that the Application is an ingenious attempt by the Applicant to administer all of the estate of the Deceased Person through the back door. Much as the Applicant seeks to give the impression that it is only interested in administering the death gratuity (See the prayer in the sworn statement, to wit, "*...to grant LETTERS OF ADMINISTRATION to the Administrator General LIMITED to the death gratuity received unto its custody")* and not all of the estate, the documents paint a totally different story as evidenced by "*administer according to law all the estate which by law devolves to and vests in the personal representative of the said deceased*" (OATH OF ADMINISTRATION (INTESTACY)), and "*and is hereby authorized to administer the said estate according to law*" (LETTERS OF ADMINISTRATION).

The Court will not allow the Applicant to blow hot and cold in the same breath (application). It has to choose between limiting itself to administering the death gratuity only or to administering all the estate. Whatever choice the Applicant makes, either going for letters of administration with limited grant or full letters of administration, it has to ensure that the application and all the supporting documents relate to the chosen option. They cannot have it both ways.

Fourthly, the inescapable conclusion from the foregoing is that letters of administration with limited grant are meant to be issued in very exceptional circumstances. A good example would be where shortly after a person passes away, there is urgent need for funds for the upkeep of his or her immediate family, payment of school fees, etc. In accordance with rule 25 of the Rules, the funds must be

proceeds from "*the real estate only or any part thereof, or real estate together with personal estate, or in respect of a trust estate only*".

In this regard, unless compelling reasons can be given, applications for limited grant being sought well after more than a year has elapsed since the death of the deceased are likely to be frowned upon by the Court. In short, the norm should be applications for full letters of administration.

Sadly, the records paint a different picture: almost 90% of probate applications are in respect of letters of administration with limited grant. It is also the case that in a majority of cases, once letters of administration with limited grant have been issued, no further applications for full letters of administration in respect of the estates are ever made. This is not what the framers of the Act had in mind. Letters of administration with limited grant were not intended to be the end game.

All in all, the application is dismissed for reasons discussed hereinbefore. The Applicant may wish to consider applying for full letters of administration.

Pronounced in Chambers this 29th day of January 2018 at Lilongwe in the Republic of Malawi.

Kenyatta Nyirenda
JUDGE