REPUBLIC OF MALAWI

JUDICIARY

IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY

PROBATE CAUSE NUMBER 614 of 2020

IN THE MATTER OF SECTION 43 OF THE DECEASED ESTATES (WILLS INHERITANCE AND PROTECTION) ACT CAP. 10:02

AND

IN THE ESTATE OF HARRY ANDREW MAIDA (DECEASED)

CORAM : **HON. JUSTICE F.A. MWALE.**
: Chinula, of counsel for the applicant
: Mpandaguta, Court Interpreter

Mwale, J.

ORDER

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1. This application for grant of representation was filed in December 2020 for letters of administration. From this filing, I noted a number of anomalies in the application that I sought counsel to address me on in my order dated 21st December 2020. I reasoned that in view of these anomalies, no grant of representation could be made. This ruling now follows a supplementary sworn statement by, the applicant, Mrs. Jacoba Maida and new skeletal arguments in support of grant of probate executed by her counsel. Much to my disappointment, the central issue that the application was wrongly commenced as an application for letters of administration when the deceased died testate has simply been noted but has not been addressed, making it impossible for me to grant the probate now sought. Since the application as originally filed remains an application for letters of administration, the Court cannot then grant probate when there has never been an application for probate before it. The application was therefore wrong from the start. There are in addition a number of other anomalies in the application that I shall detail below.

2. I raised a number of issues in the 21st December Order. The issues were broad and based on the fact that the application had been submitted as an application for the grant of letters of administration and if this was the case, there were a number of issues that should have been addressed in order for such an application was to succeed. It was for counsel to decide what grant he required from the Court and to ensure that the process he chose to file under, was consistent with the requirements at law.

3. When this application first came before me in December 2020, the matters of irregularity noted were grave and remain so to this date. Originally, as can be seen from the title of the proceedings at first filing, this matter came before me as an application under Rule 3 of the Probate (Non-Contentious) Rules made under section 24 of the Wills and Inheritance Act. This title is in itself defective for a number of reasons. To begin with, the Wills and Inheritance Act is a repealed law and cannot ground an application. Whilst the Probate (Non-Contentious) Rules have been saved from that repealed law, they are saved under section 89 of the Deceased Estates (Wills, Inheritance and Protection) Act, which if this was the correct provision to base the application, should have been the provision cited.

4. This application continues in a manner that leaves the Court to deduce that the application is for grant of probate as it states as follows:

> TAKE NOTICE that we are the Legal Practitioners of the Executor of the Will of DR. JAMES HARRY ANDREW MAIDA (Deceased). We now apply to Court for a Grant of Probate and attached hereto are –
>
> 1. Estate Duty Affidavit;
> 2. Certified Copy of Death Report;
> 3. Assessment by Commissioners;
> 4. Proof of payment of estate duty;
> 5. Oath for Executor made by **JACOBA MAIDA**;
> 6. Administration Bond;
> 7. Copy of the Will of **DR. JAMES HARRY ANDREW MAIDA (DECEASED)**; and
> 8. Probate.

Rule 3 of the Probate (Non-Contentious) Rules simply makes for provision for how an application may be made. Rule 3 of the Probate (Non-Contentious) Rules is not the authority on which an application for either grant of letters of administration or grant of probate can be made. The application as it stands on the basis of that title does not give this Court any indication as to whether it is exercising its powers in relation to a testate or intestate estate. The title in any proceedings is of vital importance as it sets

out the application that is before the court and the authority by which the court is to entertain that application.

5. Further, an application for the grant of probate must follow a particular format set out in the law, in this case, the Probate (Non-Contentious) Rules. The list provided above as supporting the application, is the standard list that usually accompanies applications for letters of administration. When an application for the grant of probate is made, for example, the oath filed must be in Form IA of the Probate (Non-Contentious) Rules (Oath accompanying application for grant of probate). Further, none of the issues under Rules 10 and 12 of the Probate (Non-Contentious) Rules with reference to processes required such as marking of the will and to provide evidence as to due execution of the will have been addressed. These are processes which at a minimum should accompany an application for the grant of probate. Lastly, I was also left wondering what the process referred to in 8., on the list provided above, as "Probate", means or relates to.

6. The Notice for the application is entitled as follows:

IN THE ESTATE OF DR. JAMES HARRY MAIDA DECEASED

AND

IN THE MATTER OF SECTION 43 OF THE DECEASED ESTATES (WILLS, INHERITANCE AND PROTECTION) ACT (CAP. 10:02))

EX-PARTE SUMMONS FOR APPLICATION FOR LETTERS OF ADMINISTRATION (Under the DECEASED ESTATES (Wills, Inheritance and Protection Act (Cap. 10:02)) and in compliance with Rule 7(2) of the Probate (Non-Contentious) Rules

As constantly alluded to earlier, there is a will in this matter and as such, the application should not be one made under 43 of The Deceased Estates (Wills, Inheritance and Protection) Act which specifically applies to letters of administration on intestacy. There has been no assertion that the will was not properly executed or is invalid and therefore reference to section 43 is erroneous. This anomaly is a thread running through the entire application.

7. To further compound matters, various documents filed in support of the application have different titles that suggest that the application is not one for grant of probate but for letters of administration. The Sworn Statement in Support of the Application is entitled as follows:

IN THE ESTATE OF DR. JAMES HARRY MAIDA DECEASED

AND

IN THE MATTER OF SECTION 43 OF THE DECEASED ESTATES (WILLS, INHERITANCE AND PROTECTION) ACT (CAP. 10:02))

AND

IN THE MATTER OF AN APPLICATION FOR LETTERS OF ADMINISTRATION OF ADMINISTRATION BY GENNARO MALFENSE-FIERRO

It is very clear that the application is intended to be for letters of administration and not the grant of probate. More concerning however is the fact that this is a sworn statement purported to be made by the applicant, **Jacoba Maida**, yet the title on her very sworn statement indicates that the application is made by **Genaro Malfense-Fierro**. This must be negligence of the highest order.

8. Within the body of the sworn statement referred to above, the applicant, Jacoba Maida avers as follows:

> 3. THAT my husband owned a house situated in Area 10 in the City of Lilongwe which house is registered at the Lilongwe Land Registry as Title Number Alimaunde 10/295.
>
> 4. THAT following the demise of my husband, I have been advised to have the property valued for purposes of paying Estate Duty and the house has been valued at K158,8000,000.00.
>
> 5. THAT I have been advised to obtain letters of administration in order to transact on the said house.
>
> 6. WHEREFORE I pray to this Honourable Court for an order that letters of Administration be granted so that I can transact on the house as by law allowed.

The sworn statement speaks for itself with regard to the nature of the application and the type of grant the applicant is seeking. This sworn statement has not been revoked and remains the sworn statement in support of the application, the only change being that there is now a sworn statement supplementing this one praying for a different grant.

9. Three other irregularities are noted in relation to this sworn statement. First is signed but it is not dated, the jurat is improper and it is therefore improperly executed. Secondly, The Courts (High Court Civil Procedure) Rules are very specific on the format sworn statements should take. I have

occasion to remind counsel of these requirements in the case of ***In the Estate of DZ Nyirenda Probate Cause No. 528 of 2020 (HC, LL Registry (unreported))*** as follows:

> 8. Secondly, if the supplementary sworn statement is to be used it must comply with procedural requirements for the same.
>
> 9. The Courts (High Court) (Civil Procedure) Rules, order 18 rule 7(4) provides the procedural requirements as follows:
>
> > (4) The full name of the deponent and the date on which the sworn statement was sworn shall appear on the first visible page of the sworn statement.
> >
> > (5) A sworn statement shall contain an authorizing part at the end of the body of the statement that –
> >
> > (a) states whether the sworn statement was sworn or affirmed;
> > (b) states the place the person made the sworn statement;
> > (c) states that the person making the sworn statement understands the sworn statement shall be used as proceeding;
> > (d) states that the person who made the statement acknowledges that if he made a false statement he may commit perjury and be liable to a substantial penalty;
> > (e) is signed by the person taking the sworn statement, above a statement of the person's full name, address and capacity to take the sworn statement. (Emphasis supplied)
>
> 10. Finally, Order 18 rule 19 of the Courts (High Court) (Civil Procedure) Rules provides that:
>
> > A sworn statement shall not be used in any proceedings without the permission of the Court if has not been filed or has been filed in a defective form. (underlining supplied)
>
> In view of the defects I have found in the sworn statement, it may not be used in these proceedings without first a justification as to why just a sworn statement has been filed (as opposed to a supplementary sworn statement) and if the justification is accepted, it may not be used without the leave of the Court.

These observations apply equally in the matter at hand.

10. Thirdly, the applicant has failed to mention in this very crucial sworn statement that the estate is testate and has gone on to pray for the grant of letters of administration and not the grant of probate when the initial process filed makes it clear that the estate is testate.

11. The Skeletal Arguments in Support of the Grant of Letters of Administration also bear a different title to the other three titles referred to

above. In the skeletal arguments the matter is simple entitled in the Deceased Estates (Wills, Inheritance and Protection) Act. No provision in the Act under which the application is grounded, is mentioned. The arguments themselves refer to section 20 of the Act and Rule 5 of the Probate Non-Contentious Rules. The former gives the High Court jurisdiction over grant of representation and the latter gives jurisdiction to a single judge sitting in chamber. Arguendo specifically relates to section 3 and 17 of the Act with reference to the applicant as being a member of the immediate family and thereby entitled to inherit. The main crux of the matter, being an application for probate with a will and its validity is not addressed in the arguments. In conclusion it is argued in the skeletal arguments that the application has complied with the said Act and the Court is entreated to grant the letters of administration sought. I reiterate my finding that it is very clear that the application is wrong from the beginning and cannot be the basis of a grant of probate.

12. Counsel was referred to these issues in my order dated 21st December 2020 but has chosen in addressing the Court with new skeletal arguments to proceed on the same application despite conceding in the skeletal arguments that because there is a will, the application cannot be made under section 43 of the Deceased Estates (Wills, Inheritance and Protection) Act. As alluded to earlier, two new processes were therefore filed in response to the said order, the skeletal arguments being one. The other is a supplementary affidavit by the applicant. Before going into the substance of these two documents, which have been discussed before, it must be noted that neither of them is properly entitled as they both omit to state what section in the Act the application is made and whether it is an application for the grant of probate or letters of administration.

13. More to the issue, the Supplementary Sworn Statement as has been stated earlier is merely a supplement. You cannot correct an improperly filed application with a supporting document. It should be remembered that if her original sworn statement was not defective, the only grant she could have obtained in this matter is one for letters of administration. The only

cure under these circumstances was to withdraw the earlier application and file a correct application. Even if the supplementary sworn statement were capable of curing the current anomalies, it too is woefully defective. The jurat on the supplementary sworn statement is separated from the text it attests to thereby appearing on a separate page. This is a practice that opens up such documents to fraud.

14. To summarize, none of the documents that have been filed since the order of December 2020 have changed the status of the application. It remains an application for letters of administration, yet the estate was testate.

15. Finally, and equally concerning, one of the issues that caught the attention of the Court in the application was the Estate Duty Affidavit. An Estate Duty Affidavit covers the entire estate not just part of it. When I ordered that I be addressed as to whether the deceased had other properties it was because the principle at law is that grant of representation is sought for entire estates, not parts thereof. An Estate Duty Affidavit that gives the value of only part of the estate is, at the very least, questionable and wrong in law. Such applications eventually give rise to multiple applications for representation when beneficiaries need to lawfully transact on other parts of the estate. Multiplicitous applications for grant of representation over the same estate are wrong in law for reasons given in the case of ***In the Estate of DD Kamputa, Probate Cause Nos. 556, 557 and 558 of 2020(HC LL District Registry (unreported))***. The basis being:

> According to section 4 of the Estate Duty Act, valuation of property for the purposes of estate duty is determined by the principal value of all the property belonging to a deceased, not some of it or just parts of it as has been set out in these applications. The said section 4, provides as follows:
>
> > In the case of every person dying after the commencement of this Act, there shall, save as hereinafter mentioned, be levied and paid to the Government upon the principal value of all property belonging to the deceased at his death ... (emphasis supplied)
>
> Further, section 10 (1) of the Estate Duty also provides as follows:
>
> > For determining the rate of estate duty to be paid on the estate of the deceased, all property forming the estate shall be aggregated so as to form one estate, and the duty shall be levied at the proper graduated rate on the principal value thereof. (emphasis supplied)

It is now apparent from the supplementary sworn statements filed that there were indeed additional properties such as a vehicle and bank accounts which were never part of the calculation for the purposes of Estate Duty. The Estate Duty Certificate is based only on the value of the house. It would be tantamount to the Court facilitating and conducing tax fraud if knowing that the Estate Duty Certificate does not cover the entire estate, it went ahead to grant representation.

16. For all I have I have reasoned above, grant of letters of administration is denied because the estate is testate and consequently grant of probate is denied because no application, in the prescribed format, has been made to this Court for such a grant. The denial of grant is made without prejudice. However, should an appropriate application be made afresh, any attendant legal practitioner and own clients costs shall be borne by counsel for the negligent manner in which this application has been made.

I so order.

Pronounced in Chambers this **23rd** day of **February 2021.**

Fiona Atupele Mwale
JUDGE