IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MUNUO, J.A., RUTAKANGWA, J.A., And MJASIRI, J.A.)

CIVIL APPEAL NO. 119 OF 2009

NAIMA IBRAHIM AS A
TRUSTEE OF MAHAMUD ABDURASUL ISMAIL.....APPELLANT

VERSUS

ISAYA TSAKIRIS.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Mlay, J.)

dated the 13th day of July, 2009
in
Civil Case No. 151 of 2007

JUDGMENT OF THE COURT

23 March & 27 May, 2011

MUNUO, J.A.:

This is an appeal against the decision of Mlay, J. in Civil Case No. 151/2007 in the High Court of Tanzania at Dar es Salaam.

The facts of the case are straight forward. The late Halima Mohamed was, until the time of her demise, the owner of a house situate on Plot. No. 65 Block 13, Kiyonga Street, Dar es Salaam City. It is the case of the appellant that the late Halima Mohamed bequeathed the material house to

her son, Mahamud Abdurasul Ismail by a will, Exhibit D1. The will, Exhibit (D1) reads in Kiswahili:

"**WOSIA**

Mimi HALIMA BINTI MOHAMED, Islam, umri miaka 71, wa Kiyonga Street/Jaribu H/No. 28 Magomeni Area, Dar es salaam,

Nikiwa na akili timamu, bila ya kulazimishwa na mtu yeyote, nikiwa sina mshirika. Natoa wosia huu leo tarehe 22 Novemba, 1999 kuwa endapo nitafariki dunia natamka kuwa:-

1. Nyumba moja Plot No. 65, Kitalu 13, nyumba Na. 28 iliyoko Kiyonga Street, Magomeni Area, Dar es salaam.
2. Shamba moja la heka mbili na nusu lililoko Kibaha kwa Mathias.
3. Kiwanja kiko Kidenge, Mwembe Tayari, kwa mjumbe **YAHAYA HAMISI**, eneo ambalo halikupimwa huko Kibaha kwa Mathias.

Natoa wosia huu kuwa endapo nitafariki, mali zote hizo nilizotaja hapo juu nimemrithisha mjukuu wangu ambaye ni **MAHAMUD ABDURASUL ISMAIL** mwenye umri wa miaka mitano na miezi mitatu.

Kutokana na hayo, nafuta wosia niliyoutoa hapo awali niliyomtolea **HABIB SEIF MOHAMED** nimefuta na usitambulike tena. Katika uhai wangu wote, mali zote niliyozitaja hapo juu zitakuwa katika mamlaka yangu hadi nitakapofariki. Na ikiwa nitafariki kabla **MAHAMUD ABDURASUL ISMAIL** hajafikisha umri wa miaka kumi na nane msimamizi awe ni mama yake mzazi ambaye ni **NAIMA IBRAHIM.**

Nathibitisha yote niliyotamka hapo juu ni kweli tupu.

SAHIHI YA MTOA WOSIA ....

(Right thumb print of Halima Mohamed)

(HALIMA MOHAMED)

SAHIHI YA SHAHIDI WA MTOA WOSIA

.....

(ABDU SAIDI CHAMBUSO)

Wosia huu umetolewa mbele yangu leo tarehe 22 November, 1999.

MBELE YA M. S. MLAWA

SAHIHI: .....

CHEO: HAKIMU

TAREHE: 22/11/1999

MAHAKAMA YA MWANZO

MAGOMENI

WILAYA YA KINONDONI"

By the above will, the late Halima Mohamed bequeathed to the son of the present appellant, all her properties listed in the **will** namely:

1. The house on Plot No. 65, Block 13, House No. 28 Kiyonga Street, Magomeni Area, Dar es Salaam.
2. 2 ½ acres farmland at Kwa Matias, Kibaha.
3. An unsurveyed Plot at Kitenge, Mwembe Tayari at Kwa Matias, Kibaha.

The three properties were vested in the appellant to hold on trust for the beneficiary Mahamud Abdurasul Ismail, then aged five years and three months. His mother, the appellant, would hold the said properties on trust until her son Mahmud Abdurasul Ismail attains the age of 18 years.

The will, Exhibit D1, was witnessed by Mr. Abdu Saidi Chambuso in the presence of Mr. M. S. Mlawa, a Primary Court Magistrate at Magomeni Primary Court in Kinondoni District within Dar es Salaam Region.

At the hearing of the suit, the appellant testified as D.W.1. She asserted that the deceased was her landlady, not a relative. She was single at the time of her death. DW1 stated also that Halima wrote the will, Exhibit D1, bequeathing her properties to D.W.1's little son, Mahamud Abdurasul Ismail to be held on trust by his mother until he attains the age of majority.

When Halima Mohamed passed away, her nephew, the present respondent was appointed by Halima's clan to administer the estate of the deceased. Upon the respondent applying for letters of administration in the High Court of Tanzania at Dar es Salaam, the appellant entered caveat under the provisions of sections 58 and 59 of the Probate and Administration Act, Cap. 358 R.E. 2002. The matter was then converted into Civil Case No. 151 of 2007 which was determined in favour of both parties to administer the estate of the deceased jointly. Dissatisfied with the decision of the High Court, the appellant instituted this appeal.

Counsel for the appellant filed two grounds of appeal namely that:

1. That the learned trial judge erroneously held that the late Halima Mohamed could not vest

the whole estate to a stranger, Mahamud Abdurasul Ismail.

2. That the learned trial judge failed to consider that the house in dispute has already been sold to a third party.

In his written submission, counsel for the appellant contended that the late Halima Mohamed was entitled to bequeath the whole of her estate as she did in her will, Exhibit D1. He further contended that the will was made in the primary court so it is not an Islamic will subject to Islamic Law. On this, counsel for the appellant found support in the evidence of DW3 Sheikh Zuberi Yahya Musa. That being the position, counsel for the appellant maintained that the testatrix, Halima Mohamed, lawfully bequeathed her properties to the beneficiary Mahamud Abdurasul Ismail and duly appointed the child's mother, the present appellant, to hold the said properties on trust for the beneficiary until he attains the age of 18 years. Counsel for the appellant cited the case of **Julius Petro** versus **Cosmas Raphael (1983) TLR 346** wherein it was held that a testator's desires expressed in a will should be complied with.

Furthermore, counsel for the appellant submitted that Article 24 of the Constitution of the United Republic of Tanzania, allows a person to own lawfully acquired properties just as the late Halima Mohamed did so it would be unlawful to deprive her of her properties against the wishes she expressed in her **will**, Exhibit D1. Even if Halima Mohamed was married, counsel for the appellant observed, her properties would still be protected by the provisions of section 59 of the Law of Marriage Act, 1971, Cap 29 R.E 2002. He further urged us to make a finding on the status of the house which the respondent sold to a third party.

The respondent submitted that the authenticity of the purported **will** is doubtful because he only saw it in Court. The appellant did not inform the relatives of the deceased anything about the **will** during the lifetime of the deceased or even when the relatives went to collect the body for burial, the respondent stated.

The issue before us is the validity of the **will** of the deceased, Halima Mohamed.

A scrutiny of the record does not suggest that the deceased had renounced Islam during her lifetime. Since the deceased professed Islam

and died a Moslem, we are of the considered opinion that her estate should be administered according to Islamic Law principles. If the deceased had decided to depart from Islamic principles in the administration of her estate, she would have stated so in her will. Had she done so, she would in effect have disinherited her natural heirs. As it was, the deceased did not take that course. We are therefore of the settled view that the learned judge correctly applied Islamic Law to the administration of the estate of the late Halima Mohamed.

The learned judge considered the validity of the **will** of the deceased and held that:

> "There is no dispute therefore that under Islamic or Mohamedan law, a testator cannot bequeath more than 1/3 of the estate unless the heirs ... have consented to the surplus bequeath..... no evidence has been adduced to show that the heirs of Halima Mohamed subsequent to her death, consented to the bequeath of all her property to Mahamud Abdurasul Ismail."

The learned judge further observed that –

> "... the bequeath of more than 1/3 of the estate does not invalidate the will. Islamic law states: "Bequeath in excess of the legal one cannot take effect."

The learned judge further cited Mullas Principles of Mohamedan Law at page 104 in which the author cited Hidaya 6.7P stated:

> "If the heirs do not consent, the remaining two thirds must go to the heirs in the shares prescribed by law. The testator cannot reduce or enlarge their shares, nor can he restrict the enjoyment of their shares."

On the format of a valid Islamic **will**, the learned judge quoted Mulla's Principles of Mohamedan Law cited supra, at page 101 wherein it is stated that: -

> "Under a Mohamedan Law no writing is required to make a valid will and **no particular form is necessary**. Even a verbal declaration is a will. The intention of the testator to make a will must be clear and explicit and form is immaterial...
>
> A Mohamedan will, though in writing, does not require to be signed, nor even if signed does it require attestation. The reason is that a

Mohamedan **will** does not require to be in writing at all."

The High Court held that the **will** of Halima Mohamed was valid because it was witnessed by one Chambuso who has since died and the magistrate who attested it. Furthermore, the High Court held that the **will** in dispute is unambiguous and clear, that the testatrix Halima Mohamed was of sound mind, and that she voluntarily bequeathed her property to a minor, Mahamud Abdurasul Ismail on the 22/11/1999.

Under the circumstances, we agree with the learned judge that under Islamic Law, the appellant is only entitled to 1/3 of the deceased's estate to hold the same on trust for her son, Mahamud Abdurasul Ismail, as bequeathed by the testatrix, Halima Mohamed. On how the beneficiary would get his 1/3 share of the estate of the deceased, the learned judge properly directed that the properties listed under the **will** be valued. The beneficiary, Mahamud Abdurasul should get 1/3 of the value of the estate of the deceased as ordered by the High Court. The remaining 2/3 of Halima's estate should be distributed among the heirs, the learned judge, further held. Hence, the High Court ordered that the letters of

administration be issued jointly to the parties. If one of the houses has been sold, the price of the house would be its value. We find no justification to interfere with decision of the High Court.

In view of the above, the appeal is devoid of merit.

We accordingly dismiss the appeal. Either party to bear their costs.

DATED at DAR ES SALAAM this 12th day of May, 2011.

E. N. MUNUO
JUSTICE OF APPEAL

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

J. S. MGETTA
(DEPUTY REGISTRAR)
COURT OF APPEAL