IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MUGASHA, J.A., KWARIKO, J.A., And KENTE, J.A.)

CIVIL APPEAL NO. 160 OF 2020

THEOFRIDA MHAGAMA.....APPELLANT

VERSUS

NJENGAFIBILI MPONJOLI MWAIKUGILE
As the legal representative of Jackson Reuben Mwaikinda.....RESPONDENT

[Appeal from the decision of the High Court of Tanzania, Dar es Salaam District Registry at Dar es Salaam]

(Magoiga, J.)

dated the 31st day of May, 2019
in

Miscellaneous Civil Application No. 638 of 2018

.....

JUDGMENT OF THE COURT

29th October, & 5th November, 2021

KWARIKO, J.A.:

This appeal is against the decision of the High Court of Tanzania (Magoiga, J.) Dar es Salaam District Registry at Dar es Salaam (the trial court) dated 31st May, 2019 in Misc. Civil Application No. 638 of 2018 which was decided in the appellant's disfavour.

The background of this matter which led to this appeal is as follows. The appellant is the widow of one Jackson Reuben Mwaikinda (the deceased) who died on 9th February, 2015. The couple did not have children together, but the deceased had three children of his own namely, Reuben Jackson Mwaikinda, Lynette Gwantwa Mwaikinda and

Sekela Rita Mwaikinda. After his death, it transpired that the deceased had prepared a Will bequeathing his properties to the above-mentioned heirs in the manner to be shown later in the course of the judgment. He had also appointed the respondent herein as executor of the Will.

In honour of the Will, the respondent filed Probate and Administration Cause No. 7 of 2016 in the trial court seeking to be granted probate to execute the Will in terms of section 24 (1) of the Administration of Estates Act [CAP 352 R.E. 2002] (the Act). After no one appeared to put a caveat, the respondent was accordingly appointed on 9th August, 2016.

In the course of execution of the Will, on 27th May, 2017 the respondent visited the appellant who was still staying in the family house at Plots No. 625 and 626 Block 'L' Mbezi Beach Area in Dar es Salaam (the disputed house) with intention to hand it over to Reuben Jackson Mwaikinda who was bequeathed the same by the deceased. It was that visit which prompted the appellant to lodge at the trial court Misc. Civil Application No. 638 of 2018 praying for the Court to; **One**; interpret the Will of the deceased; **two,** order the respondent to file inventory as per the order of the court; and **three,** order the respondent to execute the Will as per its contents.

At the hearing of the application before the trial court, the appellant maintained that according to the contents of the Will, the deceased intended her to be the caretaker of the entire estate and that the disputed house was a matrimonial property which was not intended to be bequeathed to any other and she ought to have been left to stay therein.

The trial court found that the Will was clear that the disputed house was bequeathed to Reuben, and the appellant was to be a caretaker of the deceased's properties within two years after his burial following which the heirs were to take charge of whatever was bequeathed to them. Further that, the two years expired in February, 2017 hence the respondent was entitled to ask the appellant to vacate the disputed house so that he could hand it over to Reuben the one to whom it was bequeathed by the deceased. The court also found that the disputed house was not a matrimonial property as claimed by the appellant.

The appellant was aggrieved by that decision hence she preferred this appeal upon the following seven grounds:

1. *That the Honourable Court erred in law and in fact by failing to interpret the will of the deceased Jackson Reuben*

Mwaikinda to mean that the deceased, Jackson Reuben Mwaikinda intended for the [Appellant] to reside in [the] House located on Plot No. 625 and 626 Block L Mbezi Beach despite having bequeathed the same to one Reuben Jackson Mwaikinda.

2. *That the Honourable Court erred in law and in fact by failing to hold that the house located on Plot No. 625 and 626 Block L Mbezi Beach was a matrimonial property, acquired during the subsistence of the marriage with the [Appellant] and jointly owned as per the Certificate of Practical Completion submitted as evidence.*

3. *That the Honourable Court erred in law and in fact by failing to observe that the deceased exceeded his powers by bequeathing of a property (and not just the portion owned by him) that was a matrimonial property acquired during the subsistence of his marriage with the [Appellant], to his son.*

4. *That the Honourable Court erred in law and in fact by holding that the [Appellant] is not the joint owner of the impugned house located on Plot No. 625 and 626 Block L Mbezi Beach.*

5. *That the Honourable Court erred in law and in fact in holding that the impugned house located on Plot No.625 and 626 Block L Mbezi Beach is not a matrimonial home anymore.*

6. *That the Honourable Court erred in law and in fact in holding that the [Appellant's] period of staying in the impugned house located on Plot No. 625 and 626 Block L Mbezi Beach expired in February, 2017.*

7. *That the Honourable Court erred in law and in fact in holding that the [Appellant] is staying in the impugned house as a tenant at will of the beneficiary the said Reuben Jackson Mwaikinda.*

In compliance with Rule 106 (1) of the Tanzania Court of Appeal Rules, 2009, the learned counsel for the parties filed written submissions for and against the appeal.

At the hearing of the appeal, Ms. Ernestilla Bahati, learned advocate appeared for the appellant, whilst the respondent had the services of Mr. James Bwana, also learned advocate. Both counsel adopted their written submissions to form part of their oral submissions.

As regards the first and sixth grounds of appeal, it was submitted for the appellant that according to paragraph 3 of the Will, the deceased intended to bequeath the disputed house to the appellant but other beneficiaries have the right to use it under the guidance of the appellant. It was argued further that since the disputed house is a matrimonial

house the appellant is entitled to own and reside in it following the death of her husband.

Responding, the respondent's counsel argued that according to the contents of the Will at paragraphs 3 and 9, the appellant was given permission to reside in the disputed house for two years only after the burial of the deceased. As such, the trial court properly held that the said period expired in February, 2017.

It was further argued that, in compliance with the wishes of the deceased at paragraphs 3 and 9 of the Will, the appellant was given and she acknowledged receipt of USD 34,400.00 being two years rent from the tenant residing in the Ada Estate House. It was thus contended that the respondent being executor, executed the Will correctly when he instructed the tenant to pay the appellant the said rent and permitted her to reside in the disputed house uninterrupted for the said period of two years following the burial of the deceased. Further that, after the expiry of the said period, the disputed house and the one at Ada Estate were to be handed over to the beneficiaries as per paragraph 3 of the Will and that the appellant is not mentioned as beneficiary of the two houses and another one in the Republic of Ivory Coast. Therefore,

according to Mr. Bwana, the respondent did not err when he executed the Will as it is.

It was also argued that paragraph 3 of the Will stated that the mentioned properties were bequeathed to the three children under the guidance of the appellant; but that 'under the guidance of the appellant' did not amount to deceased reversing his desire to bequeath the two houses to his three children. The learned counsel for the respondent went on arguing that the appellant has not pointed out which paragraph of the Will states categorically that the disputed house was bequeathed to her. That, knowing that the appellant was not going to reside in the disputed house, the deceased bequeathed all the furniture to her (paragraph 5 of the Will) to be taken to Makongo house where she desired to reside after the expiry of two years. Moreover, she was bequeathed all moneys in the deceased's bank accounts in Dar es Salaam.

We have considered the submissions of the parties in respect of the first and sixth grounds of appeal. The appellant's main contention is that the deceased had intended her to reside in the disputed house despite being bequeathed to his son. Our starting point in the determination of this issue will be paragraphs 3, 4 and 5 of the Will

which gave a roadmap on how the deceased bequeathed his landed properties to his heirs. They are as follows:

> *"3. NINAUSIA mali yangu yote iliyothabiti na isiyothabiti kuwa itakuwa mali ya mke wangu na watoto wangu walioorodheshwa hapa chini ambao watakuwa na haki ya kutumia mali hiyo kwa mujibu wa wasia huu wakiongozwa na Theofrida Mhagama ambaye ni mke wangu:*
>
> *1. Reuben Jackson Mwaikinda ambaye atarithi nyumba yangu iliyopo Mbezi Beach viwanja namba 625 na 626 Block 'L', Dar es Salaam.*
>
> *2. Lynette Gwantwa Mwaikinda na Sekela Rita Mwaikinda ambao kwa pamoja watarithi nyumba yangu iliyopo Ada Estate namba 37A, Dar es Salaam.*
>
> *4. Bila kuathiri matakwa ya aya ya tatu (3) hapo juu, ninatamka kwamba Amina Mtemvu-Mwaikinda atarithi "flat" namba 79 lililoko katika jengo la "Bubale" lililopo Deux Plateaux, Abidjan, Ivory Coast.*
>
> *5. Nyumba yangu iliyopo Makongo, Dar es Salaam, magari yangu yote, "furniture" na vifaa vilivyomo katika nyumba ya Mbezi Beach, Dar es Salaam,*

pamoja na "generator", vitakuwa mali ya mke wangu".

According to paragraph 3 as quoted above, the deceased declared that all his assets were properties of his wife and children under the guidance of the appellant and they had the right to use them according to the terms set forth in the Will, following which he bequeathed his landed properties as follow: the disputed house to Reuben Jackson Mwaikinda and a house at Ada Estate to Lynette Gwantwa Mwaikinda and Sekela Rita Mwaikinda. Further, a flat house in Abidjan, Ivory Coast was bequeathed to Amina Mtemvu- Mwaikinda, whilst the appellant got the house at Makongo, furniture from the disputed house, all motor vehicles and a generator.

Despite the foregoing, the Will stated under paragraph 9 that any authorities over the properties mentioned under paragraphs 3 (1) and 3 (2) would be transferred to the beneficiaries after the expiry of two years subsequent to his burial. Further, during that period, those properties would be under the authority and use of the appellant who would deal with them as she deemed fit. Paragraph 9 of the Will states thus:

9. Madaraka juu ya nyumba zilizoko Ada Estate na Mbezi Beach yatahamishiwa kwa warithi kama nilivyotamka katika aya ya 3 (1) na 3 (2) hapo

juu baada ya kupita muda wa miaka miwili baada ya mazishi yangu. Katika kipindi hicho cha miaka miwili nyumba hizo zitakuwa katika matumizi na madaraka ya mke wangu kama atakavyoamua yeye.

Therefore, according to the wording of the Will, there is nowhere where it is stated that the deceased had intended the appellant to stay in the disputed house indefinitely. She was given only two years to control and use the two houses following the burial of the deceased. That is why the rent of two years in respect of the house at Ada Estate of USD 34,000.00 was paid to her in May 2017. It follows therefore that, since the deceased was buried on 17th February, 2015, the period of two years expired in February 2017. Thereafter, Reuben was legally at liberty to take possession and charge of the said premises. Thus, when the respondent visited the appellant on 27th May, 2017, he was merely executing the wishes of the deceased to hand over the premises to his son.

There is no any ambiguity in the wording of the Will and it is our considered view that had the deceased wished the appellant to reside in that house for unspecified time, he would have clearly stated so. As correctly argued by Mr. Bwana, had the deceased intended for the appellant to stay in that house forever, he would not have singled out

and bequeathed its furniture to her. For what we have discussed herein, we are settled that, the trial court correctly interpreted the Will. Thus, the first and sixth ground of appeal fail.

The appellant's contention in respect of the second, third, fourth and fifth grounds is that the disputed house is a matrimonial property jointly acquired by the appellant and deceased from the National Housing Corporation (NHC) during the subsistence of their marriage and that they resided in it until the death of the deceased. That during the trial the appellant presented documents showing that the couple were the purchasers from the NHC. Further that, being a matrimonial property, the deceased's share is limited to 50% only as it did not belong to him 100% hence, he was not entitled to bequeath it to other heirs as he did. In support of this contention, the learned counsel referred us to section 2 (a) of the Law of Marriage Act [CAP 29 R.E. 2019] (the LMA) which defines a 'matrimonial home' and the case of **Bi. Hawa Mohamed v. Ally Seif** [1983] TLR 32 defining the term 'matrimonial asset'.

It was therefore argued that the deceased exceeded his powers by bequeathing all of the disputed house and not only the portion owned by him because it was acquired during the subsistence of the marriage,

hence co-owned. Reference to that effect was made to section 59 (1) of the LMA and the case of **Gabriel Nimrod Kurwiyila v. Theresia Hassan Malongo,** Civil Appeal No. 102 of 2018 (unreported).

In rebuttal to the foregoing, Mr. Bwana argued that, first, the issue of the disputed house being a matrimonial property jointly acquired by the appellant and deceased during their marriage was not raised before the trial court. And, that the court did not hold that the disputed house was not a matrimonial property because it has never been. Secondly, during the appointment of the respondent as executor, the appellant did not even raise any complaint relating to the deceased's exceeding his powers when he bequeathed the disputed house to his son.

It was submitted that the appellant had the opportunity to object the Will when it was read by the respondent to the family members, the appellant inclusive and challenge it when the probate case was filed in Court. It was argued therefore that the appellant has raised this issue now as an afterthought and only she is geared to benefit from the deceased's properties more than what was bequeathed to her.

Mr. Bwana argued that the certificate of practical completion and handing over of the disputed house are neither proof of ownership nor that the property was a matrimonial asset jointly acquired by the

appellant and the deceased. After all, Mr. Bwana argued, in the certificate of completion the purchaser is shown as the deceased, and no title deed was tendered to prove that the appellant was a joint owner of the disputed house.

The learned counsel distinguished the **Bi. Hawa Mohamed** case (supra) and section in 59 (1) of the LMA from the case at hand, as that case did not relate to bequeathing of properties through a Will but it related to the distribution of matrimonial property between the spouses upon divorce or separation. He argued further that the deceased never alienated any of his properties through the Will during the subsistence of his marriage but he rather bequeathed his properties which would be distributed upon his death and the Will is ineffectual until its maker is deceased. To fortify this contention, the learned counsel cited to us a High Court case of **Costantin Hamanya v. Elias Kayoza** [1968] H.C.D 67.

Having considered the contending submissions in respect of these grounds, two issues arise, namely; whether the disputed house is a matrimonial property jointly acquired during the subsistence of the marriage of the deceased and the appellant; and secondly, whether the deceased exceeded his powers when he bequeathed the whole of that

house to his son. These issues will not detain us for long. This is so because the appellant's application before the trial court was about interpretation of the Will; and she requested for the respondent to be ordered to file inventory in relation to execution of the deceased's estate; and execute the Will in accordance with its contents. There is nowhere where the appellant challenged the Will. Similarly, the issue of the disputed property being declared a matrimonial property was not among the reliefs sought by the appellant. However, even if that relief was sought, it would have been in a wrong forum because such a matter is ordinarily dealt with upon divorce or separation of spouses.

It is our opinion that the appellant had the opportunity to complain about the Will, **first,** when it was read out by the respondent to the family members, herself inclusive after the burial of the deceased. There is no evidence to show that she seized that opportunity to air her grievances regarding the Will. **Secondly,** when the respondent instituted Probate and Administration Case No. 7 of 2016, the appellant could have filed objection in a form of a caveat if she found that the deceased had bequeathed to other heirs some properties in which she had interest. Section 58 (1) of the Act provides thus:

> *"Any person having or asserting an interest in the estate of the deceased may enter a caveat*

against the probate grant or letters of administration."

The Court also had an opportunity to interpret this provision in the case of **Revenanth Eliawory Meena v. Albert Eliawory Meena and Another,** Civil Revision No. 1 of 2017 (unreported), where it stated that:

> *"A person with an interest in the estates of a deceased in which, a petition for grant of probate or letters of administration has been lodged, is required to enter a caveat in terms of section 58 (1) of the Probate and Administration of Estates Act, Cap 352 RE 2002."*

As rightly argued by Mr. Bwana, the court can only consider a relief that has been sought. In support of this argument, the learned counsel cited our decisions in the cases of **Georgia Celestine Mtikila v. Registered Trustees of Dar es Salaam Nursery School and Another** [1998] TLR 512 and **Dr. Abraham Israel Shuma Muro v. National Institute for Medical Research and Another,** Civil Appeal No. 68 of 2020 (unreported). For instance, in the first case, it was held *inter alia* that:

"The Court cannot consider relief that ought to have been sought in the trial court below but was not."

Now, since the appellant failed to challenge the Will in accordance with the law when she had the opportunity to do so, she cannot be heard to complain now because neither the trial court nor this Court is the rightful forum to raise that issue. Without prejudice to the foregoing, it is on record that, the issue of the disputed house being a matrimonial property was canvassed by the trial court following the appellant raising it in her affidavit in support of the application. It is our considered view that the trial court had no mandate to decide that issue because it ought to have been raised in the application for grant of the probate by the respondent. As such, these grounds are equally devoid of merit.

The appellant's argument in respect of the seventh ground is that the trial court erred to hold that the appellant is a tenant at will of the beneficiary Reuben Jackson Mwaikinda. Reference was made to paragraphs 3 and 6 of the Will which according to the appellant, the deceased declared that all his properties belonged to her and his children and that the disputed house should remain a family house in Dar es Salaam. For this reason, it was argued that the appellant should not be treated as a tenant in that house but a member of the family having the

right to reside therein. Upon the foregoing submission, Ms. Bahati urged us to allow the appeal.

For his part, Mr. Bwana submitted that according to paragraphs 3 and 6 of the Will, the disputed house was bequeathed to the deceased's son Reuben. Apart from that, the deceased permitted his male children or any of them and male grandchildren to be at liberty to reside in that house short of disposing it by sale. By that declaration, it was argued, the appellant is not among the heirs permitted to reside in the disputed house. Otherwise, the appellant was permitted to remain in that house for two years subsequent to the burial of the deceased which had already expired. The learned counsel argued that in the circumstances, the appellant could be referred to as a tenant at will or any other name to that effect. With the foregoing submission, Mr. Bwana implored us to dismiss the appeal with costs.

Having considered the learned counsel's arguments, we are in agreement with Mr. Bwana. This is because, according to paragraph 3 of the Will, the disputed house was bequeathed to the deceased's son Reuben. Further, under paragraph 9 of the Will, the appellant was only permitted to control the disputed house and the one at Ada Estate for two years after the burial of the deceased after which the authority over

them would cease and automatically vest in the rightful heirs namely, Reuben Jackson Mwaikinda and his two sisters, respectively. Further, the appellant is not even one of the family members who are entitled to reside in the disputed house, should the need arise, as expressly stated by the deceased vide paragraph 9 of the Will which reads as follows:

> 6. *"Nyumba yangu iliyoko Mbezi Beach ni nyumba ya familia yangu na nataka ibaki hivyo kama nyumba ya familia ya Mwaikinda hapa Dar es Salaam. Kwa mantiki hiyo, iwapo mrithi wake kufuatana na aya ya 3 hapo juu hataishi hapo, au mwanake (sic) wa kiume au mwanangu yeyote au mjukuu wangu wa kiume hataishi hapo, itaruhusiwa kuipangisha kwa vipindi mbalimbali lakini siyo iuzwe au ipewe vinginevyo."*

Simply translated, though bequeathed to Reuben, the disputed house is only subject to be rented out but not disposed of by way of sale. And that, should Reuben decide not to live in that house, any of the deceased's male or any other children or male grandchildren may reside in it. There is no mention of the appellant and understandably because she had been given the Makongo house. In the circumstances, since the appellant forced to remain in the suit premises after the expiry of two years, the trial court did not err when it referred to her as a tenant at

will, since as earlier stated, she is not one of the heirs permitted to reside in the disputed house.

In fine, we entertain no flicker of doubt that the trial court rightly interpreted the Will. We therefore find the appeal devoid of merit and it is accordingly dismissed. Since the matter relates to the deceased's estate, we give no order as to costs.

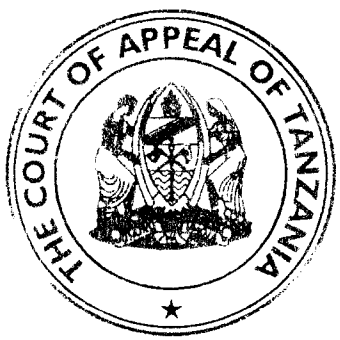
DATED at **DAR ES SALAAM** this 5th day of November, 2021.

S. E. A. MUGASHA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

This Judgment delivered on 5th day of November, 2021 in the presence of Mr. Emmanuel Ally learned counsel for the respondent who is also holding brief for Ms. Ernestilla Bahati, learned counsel for the appellant, is hereby certified as a true copy of original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL