

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

PROB. & ADMINISTRATION CAUSE NO.4 OF 2005

**IN THE MATTER OF THE ESTATE OF THE LATE PROF. HUBERT
CLEMENCE MWOMBEKI KAIRUKI OF DAR ES SALAAM**

AND

IN THE MATTER OF AN APPLICATION FOR PROBATE BY

- 1. MR. JOHN BALILONDA**
- 2. MR MICHAEL NJUMBA**

RULING

ORIYO, J:

The Petitioners, John Balilonda of Kanyigo, Bukoba and Michael Njumba of Dar es Salaam jointly applied for the Probate of the Will of the late Hubert Clemence Mwombeki Kairuki who died on the 6th of February 1999. A photocopy of the deceased Will was attached to the Petition. The said petition was lodged under the provisions of SECTION 55 of the PROBATE AND ADMINISTRATION ORDINANCE, CAP 352 R.E. 2002, (old Cap.445).

A perusal of the photocopy of the Will show that it contains five (5) typewritten pages. It was made on 29th November 1998 in the presence of Mr. G. Kilindu, learned advocate, who placed his rubber stamp and signature thereon. The Will is titled:-

"SUPPLEMENTARY WILL (CODICIL)"

The word "*codicil*" is handwritten and not typewritten like the rest of the Will. The Executors of the Will are named at page four (4) as Michael Njumba, John Balironda and the late Advocate Frederick Rutakyamirwa.

The Dispositive Clauses are contained on pages 1, 2 and 3 and are prefaced by the following preambular clauses:-

*"This is the last Will of me **HUBERT CLEMENCE MWOMBEKI KAIRUKI**, made this 29th day of December 1998.*

I hereby revoke all former wills and codicils made by me and declare that this is my last will made this 29th day of December 1998.

*I declare this to be the SUPPLEMENTARY WILL. This WILL is supplementary because, my wife, **Kokushubila Kairuki** and myself, **Hubert Clemence Mwombeki Kairuki** have a JOINT WILL. **It's that joint wili which matters more than anything else**". (emphasis supplied)*

The wording used in the preamble has exercised my mind for quite sometime because it raises a number of issues on the validity of the Will before the court. The Will states in part that it is **supplementary** to a **Joint Will** between the deceased and his wife, Kokushubila Kairuki, who survived him. In addition to that, paragraph 4(i) and (ii) state as follows:-

- (i) The joint Will, will remain confidential and will not be showed (sic) to any of the would be beneficiaries of our property. Only a few of the property shown or mentioned below could be dealt with according to my decision. And they will be shown in Kokushubila's Supplementary WILL as well.
- (ii) The properties that will be mentioned in the JOINT WILL, will be for the beneficiaries that will include only our children, that is, Clementina, Siima, Muganyizi, Nkemerwa and Mbelwa and in addition Ma Angelina and any other **named** person."

The definition of a WILL is given by PARRY and CLARK in their book titled The Law of Succession, 10th Edition at page 1 as follows:-

"A disposition or declaration by which the person making it (the testator) provides for the distribution or administration of property after his death. It is always revocable by him."

A valid Will must be in writing, signed by the testator in the presence of at least two witnesses, who must each sign in the presence of the testator. In terms of the definitions above, a Will is, by its very nature revocable by the maker at any time until his death. A revocation can be expressly done by another will or codicil; and that's why in most Wills the first clause is the revocation clause.

In law, Joint Wills are recognized as valid and are executable. So there is no problem on the existence of a Joint Will between the deceased and his wife. What is in issue here is whether the Will attached to the Petition can legally be admitted to probate as the last

will of the deceased in view of the existence of the Joint Will. Does this Will revoke all previous Wills including the Joint Will which contains the deceased wife's wishes? If so, what is the effect of the subsequent testaments that the Joint Will matters more than anything else.

On the foregoing analysis it is apparent that the testaments preceding the devulsion clauses are problematic and contradictory. It is also of note that the Will is not witnessed by the legal minimum of two witnesses. In this connection, SECTION 57 of the Probate and Administration Ordinance, provides:-

"(2) Where the application is for probate, ... the petition shall also be verified by at least one of the witnesses to the will." (emphasis supplied)

It is therefore a mandatory legal requirement that a will must be witnessed by at least two people and that a Petition for probate must be verified by at least one of the witnesses to the Will.

However, the Verification of the Petition in this matter was done by one SIIMA Kairuki Mujemula as one of the witnesses to the Will. As already stated above, the deceased signature was witnessed only by Advocate Kilindu who attested it by placing his signature and rubber stamp thereon. The name of Siima Kairuki Mujemula does not feature anywhere in the Will. Further, since Siima is a beneficiary, she is disqualified as a witness to Will. The absence of a

second witness to the Will renders the Will incurably defective. The Will is problematic and it will be unsafe to grant probate of the same. The Petition is also rendered defective in that it lacks a Verification by one of the witnesses to the Will which is contrary to the mandatory provisions of Section 57(2) above.

Under the circumstances the Will has not been proved; and the application for Probate is not granted as the photocopy of the annexed Will is defective. Even if the Will had been validly executed, it would still be bad in law for being problematic and contradictory.

Parties may wish to proceed to apply for Letters of Administration of the Estate of the deceased, intestate.

It is so ordered.

K. K. Oriyo

JUDGE

15/8/2006