IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CIVIL CASE NO. 151 OF 2007

NAIMA IBRAHIM .....~~APPELLANT~~ Plaintiff

VERSUS

ISAYA TSAKIRIS .....~~RESPONDENT~~ Defendant

Date of last order: 2/7/2009

Date of Judgment: 13/7/2009

JUDGEMENT

MLAY, J.

ISAYA ISAKRISI made an application for the grant of letters of administration of the estate of the Late HALIMA MOHAMED. One NAIMA IBRAHIM represented by Dominic Kashumbugu advocate entered a caveat against the grant pursuant to section 58 (1) of the Probate and Admistration Act Cap 358 RE 2002. The Applicant duly applied for the issue of a citation to the caveator in accordance with section 59 (2) and the caveator having entered appearance, this court proceeded to hear evidence from the parties in accordance with the provisions of section 52 of the said Act.

The Applicant/ Plaintiff Isaya ISAKRISI gave evidence as PW1 and also called three witnesses. PW1 told this court that the late HALIMA MOHAMED was his aunt, being the younger sister of his mother SHAMSA MOHAMED, born of the same mother and the same father and that he was appointed by the clan to be the administrator of the estate of the late HALIMA MOHAMED. The minutes of the meeting of the Clan appointing the applicant were produced as EXH PI. PW1 stated that the caveator was called to the meeting but did not attend. PW1 further stated that the deceased was once married to one YAHYA SALEH but at the time of her death she was not married and she had no children. PW1 said he knew the caveator who is only a tenant in the house of the late HALIMA MOHAMED. He said in fact the tenant was the caveators husband ABDUL RASUL. PW1 said neither the caveator nor her husband had any relationship with HALIMA MOHAMED other than being tenants. Pw1 further stated that he had no information that the late HALIMA MOHAMED left a will and that he first saw the purported will as Annexture "A" to the cavetors Affidavit here in court and he did not agree with the will Pw1 said he did not see any reason why the deceased disinherited her relatives. He mentioned the names of the relatives as ASHA MOHAMES, SAIDI MOHAMED, NASSORO MOHAMED, SHAMSA MOHAMED and JOHA MOHAMED. Pw1 said these are her sisters and brothers born of the same mother and father. Pw1 said that relatives were not appointed to be the administrators because they are old. Pw1 reiterated that he did not agree with the will because in the will there is no reason expressed for not considering her brothers and sisters. Pw1 questioned where the purported grandchild came from when the deceased had no child . He said HABIBA SEIF MOHAMED was the child brought up by the deceased and that HABIBA SEIF MOHAMED and PW1 were at the death bed at Muhimbili Hospital from 9/2/2004 until 12/2/2004 when HALIMA MOHAMED died and was buried art Kibaha in the farm of her sister HAMSA MOHAMED on 13/2/2004.

Pw1 further stated that the caveator was working at Shoppers Plaza and Pw1 did not see her even on one day visiting the deceased when she was hospitalised and that only HABIBA MOHAMD was sleeping at the hospital with the deceased. PW1 said MOHAMED ABDULRASUL ISMAIL

(the beneficiary named in the will of the deceased) is the SON of the caveator . Pw1 told this court that he had doubts with the will and he had never set his eyes on the witness to the purported will one ABDU SAIDI CHAMBUSO . He said the said witness has no relationships with their clan and that the caveate has no merit. PW1 further said that the caveator her husband and children are still living in the deceased's house No 18 at Magomeni Kinyonga street. He produced the tenancy agreement as Exh. P2. He prayed that the petition for letters of administration be granted.

Upon cross examination by Mr. Kashumbugu the petitioner (PW1) stated that the property mentioned in the purported will is the property of the deceased's estate and exists. He said there are known procedures if the deceased wished to dispose of her property and that he would bring an expert on Islamic matters to give evidence on the said procedures. He said he saw one MAWAZO SALUM MLAWA at Kinondoni District Court when he went to give evidence in the proceedings which were subsequently nullified by the High Court in Civil Appeal No. 140/2005 and that he would oppose the will even if the said MAWAZO SALUM MLAWA came to give evidence that he saw the deceased making the will. PW1 reiterated that it was him and one HABIBA MOHAMED who took care of the deceased when she was sick. He said the deceased had another house at Kariakoo which he sold after he was appointed the Administrator by the Kinondoni District Court [Sale Agreement was produced for the defence as Exh DI]. PW1 said he knew SHAMSA MOHAMED the elder Sister of HALIMA MOHAMED and also knew LILY PHILIPS. PW1 further stated that he knew there was Civil Case No. 24/1984 in the Court of the Resident Magistrate at Kasutu which was between SHAMSA MOHAMES AND LILY PHILIPS Vs

HALIMA MOHAMED about a house situated on Plot 51 SWAHILI STREET DAR ES SALAAM which Halima Mohamed sold to Lily Philips and Shamsa Mohamed and Lily Philips won the case but Halima Mohamed won the case on appeal to the High Court in Civil Appeal No. 14/1987.

He said Shamsa Mohamed is a beneficiary of the estate of Halima Mohamed but Lily Philips was not.

Pw2 JOHA MOHAMED told this court, that HALIMA MOHAMED was her elder sister born of the same father and mother. She said before HALIMA MOHAMED died they were living together in the same house at Kibaha Kwa Mathias. She said HALIMA MOHAMED made a will about her house at Magomeni and told all of them including Shamsa Mohamed. PW2 said Halima Mohamed said if she died she left the house to them to live in and that they could sell it if they wished. PW2 said Halima Mohamed did not tell them that she had made a written will and left her property to an outsider (mtu baki). PW2 said HALIMA MOHAMED did not have bad relations with Shamsa Mohamed and that when she died she was buried at Kibaha in Shamsa Mohamed's Shamba.

PW3 YAHYA HAMIS JUMA told this court that he knew HALIMA MOHAMED as he was her Ten Cell Leader. He also said he knew Shamsa Mohamed when she used to visit HALIMA MOHAMED. He said the two used to taken care of each other.

Pw4 USTAADH ABDALLAH OMAR told this court that he was the Imam of Takader Mosque at Magomeni Mapipa. He said in order to be an Imam he had to be knowledgeable in Islamic law. He said he had been an Imam for 10 years . He said a will in Islamic law to do justice to oneself

which justice will be done after the maker of the will is dead. He said the maker of the will must be an adult, mentally sound and must be of his own free will. PW4 said the one to whom the will is made must be known to members of the family of the testator and to those who live in the area and must in law have the capacity to own property. He further stated that the testator must make a special declaration that " I have willed to a certain person certain property" (Nimemhusia mtu Fulani kitu Fulani). Pw4 said any different statement would negate the will. He further stated that , in Islamic Law, all the property cannot be willed to one person or to many persons. He said the property is willed from 1/3 and below but not more than 1/3. He said if a person wills all his property , the property will be distributed 1/3 to the person to whom it was willed and the rest to the relatives of the deceased. He further stated that the will must be witnessed by two witness. He said the witness must be men adults who are mentally sound and must be respectable persons. He said if men cannot be found two women can stand for one male witness and they must not be deaf or blind.

Upon cross - examination by Mr. Kashumbugu PW4 stated that in Islamic law the distribution of the deceased's estate is done by God. It is not left to the human being. He said even if the are bad feelings between the deceased and relatives God had already decreed that the relatives will benefit from the estate. He further stated that in Islamic law the property can be willed to a trustee of a minor. He said in Islamic law a will is witnessed by two witnesses and if there is in addition a magistrate, for as long as the maker of the will is present this is no problem. He reiterated that if a person wills all his property to a beneficiary in Islamic law the beneficiary will get only 1/3 of the property. Upon being shown the purported will Annexture3, PW4 stated that it is defective because the statement used is, " Nimemrithisha Mjukuu wangu", instead of, " nimemuusia mjuu wangu." He further stated that as the will is of property there should have been two witnesses. He said Annexture 3 has only one

witness and therefore is a defective will. He further said in the testator has willed all her property listed. If the two defects were not there, the defect would have been cured by giving the beneficiary 1/3 of the property according to Islamic law.

That was the end of the applicant's case.

The Caveator NAIMA IBRAHIM led by Mr. Kashumbugu told this court that she is a house wife. She said she used to work in 2004 as a cashier at Shoppers. She said she knew HALIMA MOHAMED who used to be her landlady and that they had no other relationships. She further said she knew MOHAMED ABDULRASUL who is her son. She said there was something between MOHAMED ABDULRASUL and HALIMA MOHAMED which was a will which the late HALIMA MOHAMED made in favour of her son MOHAMED ABDULRASUL. The caveator said she knew about the will because the late HALIMA MOHAMED brought the will to her. She said HALIMA MOHAMED who was with her witness asked the caveator to escort her to Magomeni Primary Court where she remained outside while HALIMA MOHAMED and her witness entered the court.

The caveator said the witness was the late SAIDI CHAMBUSO. She said HALIMA MOHAMED had not told the caveator what she was going to do there. She said after coming out HALIMA MOHAMED gave her the will and also showed her a photocopy of it which HALIMA MOHAMED retained one copy and another she gave to the witness. She said she was given the original will which she produced as Exh DW2. She said because the proceedings started in Kinondoni District Court, the Magistrate Mr. Mlaki marked the will. (Probate and Administration Cause No 18/2004). The caveator stated that the will states HALIMA MOHAMED granted all her property to her son who was four (4) years old and she was made the

trustee of MOHAMED ABDULRASUL until he attained the age of 18. The caveator told the court that HALIMA MOHAMED told her that she was leaving her property to the caveators son because she did not have good relations with her relatives for a long time. The caveator said she never saw any of the relatives coming to the house of HALIMA MOHAMED at Magomeni and that she suffered a stroke at her house and the caveator called one SAFIA who used to be the Applicant's wife but divorced. She said SAFIA told the caveator not to touch HALIMA (Usimguse huyo si wako tena) and that SAFIA went to call the relatives who took HALIMA MOHAMED to Muhimbili Hospital where she died after three days. The caveator said after HALIMA MOHAMED died the caveator's husband brought her body to her house at Magomeni and the following day her relatives came to take the body for burial at Kibaha. The caveator said she never told the deceased's relatives that the deceased had made a will. She said they were already informed of the will by one SAIDI MBARAK when they were at Muhimbili Hospital.

DW2 MAWAZO SALUMU MLAWA told this court that he was a Primary Court Magistrate currently retired. He said he was at Magomeni Primary Court and knew HALMA MOHMED the day she went to his office at Magomeni Primary Court. He said she was brought by one CHAMBUSO and CHAMBUSO told DW2 that HALIMA MOHAMED wanted to see a Magistrate because she had something she wanted to tell the Magistrate. DW2 said he asked HALIMA MOHAMED what her problem was and she told him that she wanted to make a will. He asked her a will about what and she told him about her house at Magomeni and a shamba at Kibaha. DW2 said she told him that she wanted to leave her property to her grandson MOHAMED who was five years and 4 months old and that the mother of her grandson was outside and did not know what HALIMA MOHAMED was doing. He said she told him that even Chambuso did not know. DW2 said HALIMA MOHAMED told him that the grandson was not at the court. DW2 said he asked HALIMA MOHAMED if what she told new was of her own free will or

whether she was forced by someone and she told him that it was of her own free will and she was not forced by any person. DW2 said he drafted the will and asked HALIMA MOHAMED if she had a witness and she told him that her witness was Chambuso and DW2 himself. He said he asked her if she had any relatives and she said she did have but she was not in good relations with them. DW2 said he drafted the will and read it over to her and it was typed and he read it over to her and she affixed her thumb print and it was signed by Chambuso and himself. DW2 told this court that HALIMA MOHAMED had stated that the mother of the grandson would be the trustee and he put it in the will.

DW2 identified Exh D1 as the will which he drafted. Upon cross examination by the Applicant, Dw2 stated that in a written will when the maker does not know how to write and to read even one witness is enough. He further stated that in the will it is not stated that she had bad relations with her relatives. He said what should he followed is what is written in the will and that it is not required to state in the will the reason for not leaving her property to her relatives. DW2 said HALIMA MOHAMED wanted DW2 to be one of her witnesses.

DW3 SHEIKH ZUBERI YAHYA MUSA led by the Caveator as her advocate did not show up having notice of the hearing, told this court that he was a Sheikh at Mtoro Mosque at Kariakoo. He said a will in Islamic law requires that to the one who gives the will should be an adult, be of sound mind and to make that will voluntarily without being forced by any person. He said if the maker is of unsound mind or has been forced, the will will be invalid. Equally the will will be invalid if the maker was on the brink of death. He further stated that the will must be witnessed by two witness who are two males and if males are not available then one man and two women if the will is made before an Islamic institution and if the maker goes to a non Islamic institution, the will be made according to procedures obtaining in the institution.

He said Islamic law does not interfere with court procedures or tribal customs. The witness was shown Exh. DI. He said according to Islamic Law the maker of the will was of sound mind and as she was s 57 years old, her age was proper. He further said there is one witness but as it was made before a Magistrate the Magistrate because he was present he also witnessed the will DW3 said in Islamic law it was a proper will. Upon cross examination by the Applicant Dw3 said the will was acceptable in Islamic Law. He said in Islamic law the property willed should not exceed 1/3 . He said in the will the maker has willed all her property which in Islamic Law will be unlawful as only 1/3n of the property can be willed. DW3 further stated that in Islamic law the owner cannot will his/her property to those who inherit from him or her. He said this is because in Islamc law those who intent have their shares in the property. The owner can will his / her property to those who do not inherit from the owner. He said EXH D (1) has the heading, " WOSIA " (will) . He said the contents of the will can use any different words such as " nimemirithisha, " nimengawia " nimempa", what matters is the heading. Upon re-examination by the caveator DW3 said the will has been made in court it is not an Islamic will. It is made according to government procedures. He sold the court that an Islamic will is made before the KADHI but as we do not have Kadhis it is to be made before the Muft or his assistants. That was the end of the caveators evidence.

The issues for determination are whether the application for the letters of administration should be granted to the applicant pursuant to his application or whether should be rejected in view of the caveat and the caveator be appointed the administrator on the basis of the will of HALIMA MOHAMED under which the caveator is named as the trustee and executor of the will for the benefit the minor ABDULRASUL MOHAMED who is also the cavetor's son. To determine the second issue the validity of the

purported will which has been questioned by the Applicant, has also to be determined.

On the first issue whether the applicant should be granted letters of administration, except for the will in which the late HALIMA MOHAMED has purported to leave all her property to the minor ABDULRASUL MOHAMED under the trust of her mother who has been named as executor of the said will, there is no evidence which has been adduced to show that the applicant is otherwise unfit to be the administrator of the estate of the late HALIMA MOHAMED. The only thing which stands in his way is the purported will which passes all the said estate to the minor ABDULRASUL MOHAMED with her mother as the trustee and executor of the will. If the will is otherwise valid and all the deceased's estate validly passes to the minor under the purported will, it will follow that the Applicant cannot be appointed the administrator of the estate of HALIMA MOHAMED for the simple reason that there would be no estate left for the Applicant to administer. Before the first issue can therefore be conclusively answered, the validity of the will has to be determined.

On the evidence adduced on behalf of the Applicant, the validity of the will is being called into question on three grounds. The first ground is that in the will the testator has granted more than 1/3 of her estate contray to Islamic law in which according to PW3 USTAADH ABDALLAH OMAR, the Iman of Takader Masque a Magomeni, a moslem can only bequest 1/3 of the estate while the rest has been decreed by God to be distributed to relatives. This view is supported also by the caveators witness Sheikh Zuberi Yahya Mussa who gave evidence as DW3. Both witnesses who are experts in Islamic law appear to be in agreement that, in a situation where the maker of the will has granted more then 1/3 of her estate to someone, that person will only be entitled 1/3 of the estate. On this evidence, it does not appear that a mere grant of more than 1/3 of the

estate of a moslem will not vitiate the will but the grantee will only be entitled to 1/3 of the estate and not the whole of the estate as stated in the present will. Several treatises on Islamc law which have been available to us support this view. Syed Khalid Rashis Muslim Law fourth Edition by U.P. Bharatiya states at page 310 when considering the question of how much of the estate may bequeathed:

> " *No Muslim can bequeath more that one third of his estate this one third is calculated after deducting any debts, and funeral expenses."*

The author states further at the same page that, in the event of a bequeath of more than 1/3 " **Then the bequest would not take effect unless the heirs give their consent after the death of [the testator]"** In MULLAHS Principles of Monanedan Law 19th Edition by M. Hidayatulah and Arshad Hidayatullah it is stated at page 25 as follows:

> " *But since a Mohamedon cannot dispose of by will more than one third of what remains of his property after payment of his funeral expenses and debts, and since the remaining two thirds must go to his heirs as on intestacy unless the heirs consent to the legacies excluding the bequesthable third,....."*

The principal of 1/3 bequeaths is firmly stated by the two authors at page 104 para 118, as follows:

> " *118 Limit of testamentary power- A Mohamed cannot by will dispose of more than a third of the surplus of his estate after payment of funeral expenses and debts. Bequest in excess of*

the legal third cannot take effect, unless the heirs consent here to after the death of the testator."

There is no dispute therefore that under Islamic or Mohamedan law, a testator cannot bequeath more than1/3 of the estate, unless the heirs after the death the testator have consented to the surplus bequeath. In the present case, 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 Mohamed Abdulrasul Ismail. However, the bequeath of more than 1/3 of the estate does not in validate the will. Islamic law states the " **Bequeath in excess of the legal one these cannot take effect**".

In Mullas Principles of Mohamedan Law at page 104 the authors have quoted from Hidaya 6.7 P, Ballie 625 the following passage:

" *If the heirs do not consent, the remaining two third 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."*

As there was no consent of the heirs for bequeath of more than 1/3 of the estate of HALIMA MOHAMED, only 1/3 of the estate was validly bequeathed to Mohamud Abdulrasul , assuming that the will is otherwise valid. The rest of the estate 2/3 of the remaining estate after deduction of funeral expenses and debts by Islamic law, goes to the heirs of HALIMA MOHAMED.

The other two grounds on which the validity of the will have been called to question are that the will was not witnessed by two witnesses and from the Applipcants evidence, the third ground appears to be that the will

did not state the reason for HALIMA MOHAMED not include her relatives. The last or third ground can simply be swept away because under Islamic law heirs cannot be mentioned in a will as their share in the deceased's property is decreed by Islamc law. So whether the testator Halima Mohamed did or did not mention the heirs as beneficiaries would not vitiate the will. In fact the will would have been invalid of the testator had purported to distribute her property to heirs as it is prohibited under Islamic law, unless the other heirs consent after the death of the testator. The second ground for challenging the validity of the will is on the number of witnesses and the words used. In Mullas Principal of Mohamdan Law cited earlier on, it is stated at page 101, as follows:-

> " *Under the Mohamndan 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 ....."*
>
> " *An Mohamedan will, though in writing, does not require to be signed, nor even if signed does it require attestation (i) the reason is that a Mohamed an will does not require to be in writing at all."*

Upon consideration of the requirement of a will under Islamic law, we find no support for the proposition that a will not witnessed by two witness is invalid. Even if that was a requirement, the purported will was first made orally and then reduced to writing before two witness, one Chambuso who at the time of hearing of this application was deceased and the Magistrate who drew up the will. The purported will cannot therefore be invalidated on grounds of there not being two witnesses to it. The purported will states in unambiguous and clear words that HALIMA Binti Mohamed being of sound mind and without being forced by any person

on 22/11/1999 bequeathed the following property to MAHAMUD ABDURASUL ISMAIL aged 5 years and 3 months:

> *"1. One house on Plot No. 65 Block 13, House No. 28 Kiyonga Street Magomeni.*
>
> *2. A farm (Shab 2 ½ at Kibaha kwa Motias.*
>
> *3. A plot at Kidenge Mawembe Tayari kwa Mjumbe Yahaya Hamisi unserveyed at Kibaha kwa Mathias."*

In the purported will NAIMA IBRAHIM the mother of MAHMUD ABDURASUL ISMAIL is appointed trustee and executor of the will. The intention of the testator to bequeath her property to the said minor MOHMUD ABDARASUL ISMAIL is clear. However, since under Islamic law the testator can only bequeath 1/3 of her property after deduction of funeral expertises and payment of debts, under the will, the said 1/3 of the estate of the deceased validly passes to MOHMOUD ABDULRASUL ISMAIL under Islamic law, " **Any person who is capable of holding property, whether male or female, Muslim or non muslim may validly avail the benefit of bequest**." See syed Khalid Rashid's Muslim Law at page 314). Since the mother of the beneficiary was appointed the trustee, the beneficiary is entitled to the legacy upon attaining the age of the majority as stated in the will. The testator under Islamic law, and as stated by the two Islamic law expert witnesses brought by both parties, had the right to bequeath 1/3 of the property to any person regardless of relationships, unless that person is otherwise disqualified to receive the bequeath. No evidence has been adduced on any valid disqualification of Mahamed Abdularasul Ismail to the grant of the bequeath under Islamic law.

Since the will of HALIMA MOHAMED is valid but only operative to bequeath 1/3 of the property after deducting the funeral expenses and debts, and since the beneficiary is a minor for whom a trustee was appointed under the said will and who is also appointed the executor of the will, the intention of HALIMA MOHAMED under the will must be given effect. For this reason the applicant though qualified to be appointed the administrator of the estate of HALIMA MOHAMED, since Halima Mohamed had by her will bequeathed 1/3 of her property, the Applicant can only validly administer 2/3 of the property, of the deceased, the bequeathed 1/3 being administered by the appointed executor of the will for the benefit of the beneficiary MAHAMUD ABDURASUL ISMAIL.

Accordingly, the caveator is partly successful in that she is entitled to as the executor of the will of Halima Mohamed to administer 1/3/ of the estate which is bequeathed to Mohamud Abdurasul Ismail, while the Applicant is entitled to apply to administer 2/3 of the remainder. For the above reasons, the Applicant and the caveator are hereby appointed to be joint administrators of the estate of the late Halima Mohamed, the Applicant being the adminstror of 2/3 of the estate and the caveator 1/3 of the estate. For the proper administrator of the said estate, the property listed in the will be valued, i.e the house at Magomeni, the shamba at Kibaha kwa Mathias and a plot of land at Kibaha kwa Mathias, and after the deduction of any funeral expenses and debts of the deceased, 1/3 of the realised value be granted to the caveator to hold for the benefit of the beneficiary and 2/3 of the reminder be distributed by the Applicant to the heirs of Halima Mohamed, according to the shares recognised under Islamic law. The cost of evaluation of the property be charged to the administration of the estate.

Accordingly letters of administration be issued jointly to the Applicant and the caveator.

Each party to bear own costs of these proceedings. It is ordered accordingly.

J. I. Mlay

JUDGE

Delivered in the presence of the Applicant and caveator this 13th day of July 2009.

J. I. Mlay

JUDGE

13/7/2009