

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

AT DAR ES SALAAM

CIVIL APPEAL NO. 247 OF 2018

(Originating from the District Court of Kilombero at Ifakara in Matrimonial Civil Appeal No. 18/2018)

MICHAEL DAMAS MBANILEAPPELLANT

VERSUS

PASIENCE DAMAS MBANILE.....RESPONDENT

JUDGMENT

Date of last Order: 11/10/2019

Date of Judgment: 11/10/2019

MLYAMBINA, J.

The centre of controversy in this matter is the validity of the alleged will of the late Damas Mathelini Mbanile dated 21/04/2008. For avoidance of doubt, I shall reproduce it at a later stage of this Judgment.

The matter originated from Probate Cause No. 5 of 2018 before the Ifakara Primary Court in Kilombero District in which Pasience Damas Mbanile had un-successfully petitioned for letters of administration of the estates of the late Damas Matei Mbanile.

On appeal to the District Court of Kilombero at Ifakara Civil Appeal No. 18 of 2018, the Primary Court decision was quashed on ground that the contested will have some irregularities.

Aggrieved with the decision of the District Court of Kilombero at Ifakara, Michael Damas Mbanile preferred this appeal on the following grounds:

1. That, the learned District Magistrate erred in law and fact for holding that the Judgment of Ifakara Primary Court which favored the appellant be quashed since the same Court witnessed the testator the time of making the will.
2. That, the learned District Magistrate erred in fact by disregarding the importance of calling the two witnesses who witnessed the testator on making of the will and they both still alive and available.
3. That, the learned District Magistrate erred in law and fact by not considering the intention of the deceased to dispose his property in a manner directed in the will since the other two sons did not at all take care of the testator during the whole period of being sick up to the time when he had his last breath.
4. That, the learned District Magistrate erred in law and facts by not considering the age of the deceased during the time of making the will since he was order enough hence could not be able to embark on all formalities of a will that is why his intention was witnessed by the commissioner for oaths.

Wherefore, the appellant prayed to this Hon. Court to quash and set aside the Judgment and Decree of the Trial Court and the same be entered in appellant's favour.

Before considering the arguments of both parties, let me reproduce the contested will in its entirety.

"JAMHURI YA MUUNGANO WA TANZANIA

MAHAKAMA

YAH: HATI YA WOSIA

Mimi Damas Mathelini Mbanile wa Kijiji cha Ihanga Ifakara, nikiwa na akili timamu na bila kushawishiwa na mtu yeyote kwa hiari yangu natamka wosia wangu ni kama ifuatavyo:-

Kwamba mimi ndiye mmiliki halali wa shamba lenye ekari 22 lililopo Ihanga Ifakara.

Kwamba kuna kiwanja cha ekari 2, kuna nyumba moja (1) ya kudumu yenye vyumba vinne (4) na mazao aina mbalimbali ya kudumu kwamba kwa eneo hilo lililopo Ihanga –Ifakara natamka kama ifuatavyo kuwa namrisisha mtoto wangu aitwaye Michael Damas Mbanile. na kwa mali hizo zote awe nazo yeye bila kusumbuliwa na mtu yeyote.

Kwamba katika eneo hilo tumepakana na watu wafuatao

1. ALLY MBARUKU
2. YUFUPH LYAKUNGA

Katika wosia huu nimetoa mbele ya mashahidi wafuatao:

JINA

SAHIHI

1. NATANEL MWILENGA
2. HASHIMU NGOSWA

Signed

Signed

*Wosia huu umethibitishwa mbele yangu F. M. MWAMNYASI –PCM
1 Leo tarehe 21/04/2008*

ADA IMELIPWA TSHS 1500/= YA STK NO.....

TAREHE 21/04/2008

WOSIA HAUFUTWI KISHERIA

Signed and stamped by the PCM 1"

At the hearing, the appellant conceded before this Court that the deceased (donor of the will) did not sign or thumb print it. However, to the understanding of the appellant the will was complete because it was witnessed before the Court. The appellant went further to contend that their father was illiterate.

The respondent in reply, contended that the deceased was literate and that the valid will has to be signed.

I have carefully considered both parties argument, *Rule 20 of the local customary law (declaration) order (1963) G.N. No. 279 of 1963* requires the donor to sign the will if he is literate. If he is illiterate to thumb print it. It states:

"Mwenyewe atie sahihi yake katika wosia ulioandikwa ikiwa anajua kusoma na kuandika ikiwa hajui aweke alama ya kidole chake cha gumba cha kulia"

Taking into consideration that the contested will was neither signed nor thumb printed by the donor, it follows therefore, that the will was invalid regardless of being witnessed before the Primary Court Magistrate.

On the second ground of appeal, the appellant complained that the District Court did not do justice for not calling witnesses who witnessed the will. The appellant went on to argue that one of the witnesses Hashimu Ng'oswa was paralyzed. When asked by the Court as to whether the appellant requested the Court to take evidence of the said Hashim at his home, the appellant denied. The appellant denied further to had requested the Court to bring additional witness.

The respondent in reply conceded that Hashim Ng'oswa was paralyzed. In my found view, the issue of calling witness at appeal stage is not a normal procedure in our law. Hashim Ng'oswa could only be summoned if there was either a prayer by the appellant of bringing new evidence upon satisfying the Court that there was good reason for him not to have adduced evidence before the Trial Court or the Court suo moto found in the interests of justice to call him as a witness.


On the third and fourth grounds of appeal, the appellant argued that the District Court did not do justice by not taking into consideration of the intention of the will and that the Magistrate ought have advised him as the age is not an exception to Rule in reply, the respondent asserted that the will was invalid that is why the Court ruled that all the issues have the right to inherit the properties.

As properly replied by the respondent, discussing the intention of the testator of a non-signed will can serve an academic purpose. There was no will at all by the said Damas Mathelini Mbanile.


Whatever good intention he had, non-signing of the same rendered the entire will invalid. Indeed, it is not a right time to blame the

PCM as to why he never advised the testator properly. Even if the Court casts such blame to the Magistrate, it will not validate the invalid will at this stage.

In the premises, the appeal is hereby marked dismissed with costs for lack of merits.


Y. J. MLYAMBINA
JUDGE
11/10/2019

Judgment pronounced this 11th October, 2019 in the presence of both parties in person. Right of Appeal explained.


Y. J. MLYAMBINA
JUDGE
11/10/2019