IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

PC CIVIL APPEAL NO. 39 OF 2018

(c/f Arumeru District Court, Civil Appeal No. 21 of 2018 and Enaboishu Primary Court Probate Cause No. 9 of 2018).

ELIAHU LONYAMALI ..... APPELLANT

VERSUS

MOSSES LONYAMALI ..... 1ST RESPONDENT

SIMON LONYAMALI ..... 2ND RESPONDENT

JUDGMENT

ROBERT, J:

This appeal originates from the decision of the Primary Court of Enaboishu in Probate Cause No. 9 of 2018 where the Appellant, Eliahu Lonyamali and the first Respondent, Mosses Lonyamali, who was the objector, were appointed as co-administrators of the estate of the late Lonyamali s/o Abraham. Aggrieved, the 1st and 2nd Respondents appealed to the District Court of Arumeru District against the decision of the primary court challenging the appointment of the Appellant as administrator of estate and the validity of the will tendered in the trial court. On appeal, the District

Court declared the will void and upheld the appointment of the Appellant and the first Respondent as co-administrators of the said estate. Aggrieved with the decision of the District Court, the Appellant appeals to this court against the said decision on the following grounds:

1. That the appellate District Court erred on point of law and fact in that it rejected a valid will without any valid reason;
2. That the appellate District Court (Hon Nganga B.K RM) erred on point of law and fact in that he gave a decision against the weight of evidence as adduced at the trail court.

When the matter came up for hearing, the Appellant was represented by Mariam Saad, learned counsel, assisted with Andrew Malesi, learned counsel whereas the Respondents were represented by Francisca Gaspar, learned counsel.

Submitting on the first ground of appeal, the Ms. Mariam Saad argued that the appellate court rejected a valid will which was not contested at the trial court. She argued that, according to Black's Law Dictionary, a valid will is required to meet the following characteristics: One, the testator must have the capacity to make the will; two, the testator must write the will without

any influence; three, the will must have witnesses; four, the will must contain a signature of the testator.

She argued further that, the will produced at the trial court met all the characteristics mentioned. At the trial court, the court went further and called upon the drawer of the will (Mr. Mwale Advocate) who identified the said will to be the true copy of the will of the late Lunyamali Abraham (page 15 of the trial court proceedings). The said evidence was corroborated by the testimony of Saigurani Meishuraa Mollel (SM 7), Boza Maingeeki (SM 8) and Jacob Abraham Laizer (SM 9). He argued further that at the trial court, the court gave chance to caveators to bring any will they claim to be genuine but they failed to. He noted that even though the Respondents maintained that the will produced in court was not the original will but the same will was used to bequeath them as indicated at page 2 of the said will. The second Respondent is bequeathed plots located at different locations as seen at page 5 and 6 of the proceedings and the first Respondent is bequeathed two different plots, he built his house in one of them.

Submitting further he argued that, the late Lonyamali Abraham did not only distribute the properties through his will but he distributed them to his heirs before his demise that is why each of his 22 children are now living or

benefitting from the properties he distributed. Therefore it would be unfair for the children who are occupying properties given to them by their late father if the valid will of their late father is ignored. This will also create chaos within the family.

The learned counsel implored the court to allow the first ground of appeal and order for the administrator of estate to distribute the properties according to the will of the late Abraham Lonyamali.

Adding to the submissions made by Ms. Saad, Mr. Andrew Malesi, learned counsel, submitted that with regards to the definition of the term will, he wished to refer the court to section 2 of the Probate and Administration of Estates Act, Cap. 352. The definition carries the gist of intentions and wishes of the testator. The reasons for refusal of the will are seen at page 7 of the impugned Judgment of the District court. The will carries unreasonable or imbalance of division of the properties of the deceased. On the same page, the court noted that the estate of the deceased was not divided equally. He argued that, this means the District Court was trying to suggest on how the deceased was supposed to distribute his properties which contravenes the definition of the will according to the law.

Mr. Malesi referred the court to the case of **Samson Kishosho Gaba vs Charles Kingongo Gaba (1990) TLR 133** where it was stated that courts have no power to distribute the estate of the deceased, It was irregular for the District Court to perform the duty which it was not required to perform. Based on that argument, the learned counsel prayed for the first ground of appeal to be allowed.

On the second ground of appeal, he submitted that the records of the trial court indicates that after the testimony of the drawer of the will, SM6, there was no any objection on the presented will which indicates that, the argument by the 1st and 2nd Respondents on invalidity of the will is an afterthought. The District court erred in a point of law by rejecting a valid will without any valid reason. He referred the court to page 6 of the impugned Judgment (3rd paragraph) and argued that it was wrong for the District court to suggest as if a will is a piece of evidence to be tendered. He argued that a will being part of the attachments during application for probate or letters of administration cannot be interpreted as evidence to be tendered. He therefore prayed for the second ground of appeal to be allowed.

In response, Ms. Francisca Gaspar, submitted that according to the Probate and Administration of Estates Act, Cap. 352 R.E. 2002 the gist of a will to a testator is that it carries his intentions and what he desires. However, in the present case, the procurement of the will was never shown where it originated, from which hands. The drawer was required to tender the document to the court but he failed and according to his testimony SM6 testified at page 13 to the effect that he appointed one Andew Maganga through the power of Attorney to write to all relatives and inform them about the will but they refused for the will to be read. SM6 testified further at page 14 of the trial court proceedings and showed his concern on being called again to testify while the will was not read to the family members.

She argued further that, at page 15 of the trial court proceedings SM6 testified that the entire will was typed and that there is no any place where he altered the will by handwriting. However, contents of the will contradicts what SM6 testified because at page 8 of the purported will, it appears that page no.6 was altered by handwriting to read page no.8. Further to that, she argued that the same will was tendered by one Salum Hamis in another case in Probate Cause No. 232 of 2016 at Arusha Urban Primary Court. The Administrator was one Eliahu Lunyamali. She stated that according to the

records of that case the will was tendered by one Salum Hamis. The person who tendered the will was not the drawer of the will and it was not filed at the trial court during application.

The learned counsel submitted further that, the purported will does not meet the requirement of a will as it already shows that there is an issue of forgery. As a result of the alleged forgery, at page 13 of the trial court proceedings, SM6 testified that one Robert Lunyamali and others went to him claiming that other beneficiaries were not mentioned in the purported will.

She submitted further that the purported will went to public before the death of the deceased. SM 7 testified at page 15 of the proceedings that he was given a copy of the alleged will as a witness. Hence the will did not meet the requirements of a valid will. Further to that, at page 17 of the proceedings Jacob Abraham Laizer (SM9) denied the purported will because SM6 stated that the will was deposited at the bank. It is not shown how the will was taken from the bank to the Advocate and then to the court.

The learned counsel argued that, based on the reasons submitted, the will is invalid and did not meet the requirements of a valid will. She prayed that the first ground of appeal should be dismissed.

On the second ground, the learned counsel submitted that SM6 testified that there was nowhere in the said will where the said will was handwritten and further that that he gave power of attorney to Andrew Maganga to procure the will but the will was not procured until the date of his testimony. By then the will was already in the public domain. She argued that, since the will was not valid, it was proper for the District Court to instruct/order the administrators to distribute the properties as if there was no will.

In a rejoinder, Ms. Mariam Saad started her submissions by responding to the argument on the alleged change of page number of the will. She submitted that the changed number was counter signed by the writer to indicate that the change was genuine. She submitted that, most importantly, the alleged change did not touch the contents of the will apart from the said page number. She maintained further that, SM6 who is the drawer of the said will testified at page 15 of the trial court proceedings that the will is genuine and it was the one written by him. His testimony was corroborated by SM7, SM8 and SM9.

On probate Cause No. 232 of 2016 filed at Arusha Urban Primary Court, she argued that the case was filed in a non-competent court hence the District Court in Miscellaneous Revision No. 2 of 2018 nullified the proceedings and

ordered for the proceedings to be instituted to a court with proper jurisdiction, that is why this case was instituted at Enaboishu Primary Court.

The learned counsel argued that the argument that the witness had the copy of the will is not fatal provided the beneficiaries did not understand the content of the will.

Lastly, she submitted that if the properties of the deceased are distributed without regard to the contents of the will, wishes of the deceased would not be met. She therefore prayed for the appeal to be allowed with costs.

Having heard the submissions of the parties, I will now pose here and deliberate on the grounds of appeal argued by the parties.

Starting with the first ground of appeal which faults the first appellate court for rejecting a valid will without any valid reason. Records indicate that the first appellate court while dealing with the issue whether the will was properly admitted by the trial court, rejected the deceased's will on a number of grounds. First, the court made a finding that the proceedings of the trial court did not show how the will came to court. SM6, Median Mwale, the author of the will informed the court that he kept the written will in a bank but he did not tender the said will in the court. The court was of the view

that the proper person to tender the will before the trial court was SM6 or custodian of the said will.

Secondly, the first appellate court had a concern on the fact that one of the persons who allegedly witnessed the signing of the said will had a copy of the said will even before the death of the deceased.

Thirdly, the court pointed out the fact that page number 8 of the alleged will was changed by handwriting while SM6 who wrote the alleged will testified to the effect that the entire will was typed without any alterations by handwriting.

The fourthly, the first appellate court observed that since it was alleged that the deceased died testate and his will was not read before the family and beneficiaries, it was not proper for the family of the deceased to meet the will before the court for the first time without knowing how the will came before the court.

Lastly, the first appellate court looked at the contents of the alleged will and made a finding that that the estate of the deceased was not divided equally. He made reference to the testimony of SM6 at page 13 of the proceedings

where the witness stated that some of the beneficiaries complained to him that some of the deceased's children were not included in the will.

That the appellate District Court (Hon. Nganga B.K RM) erred on point of law and fact in that he gave a decision against the weight of evidence as adduced at the trail court.

Based on the stated reasons the first appellate court made a finding that relying on the said will is bound to create more problems in the family of the deceased than ignoring the same. He therefore declared the said will void.

I had an opportunity to peruse the annextures and proceedings in the original case file and realized that the will was not tendered during trial. In the premises, it was improper for the trial court to act upon it because it was not admitted in evidence. In the light of that, it was proper for the District Court to reject the alleged will, however, there was no justification to declare it void based on the reasons given by the District Court. Such reasons would be given where a will was properly admitted in evidence and the court had justification to act upon it.

Coming to the second ground of appeal, the Appellant faulted the District court for deciding on the case against the weight of evidence as adduced at

the trail court. Counsel for the Appellant submitted that the proceedings at the trial court indicate that after the drawer of the will (SM6) had testified that there was no any objection on the presented will. She maintained that the argument by the Respondents that the presented will was invalid is an afterthought. In the light of the fact that this ground of appeal relies mainly on the evidence of a will which was not properly admitted in evidence, this court finds that this ground is doomed to fail.

In the case of **Shemsa Khalifa and 2 others vs Suleiman Hamed, Civil App. No. 82 of 2012** the Court of Appeal of Tanzania held that Judgment of any court must be grounded on the evidence properly adduced during trial.

For the reasons stated, I find no reason to disturb the decision of the lower Court. I sustain the appointment of Eliahu Lonyamali and Moses Lonyamali as co-administrators of the estate of the late Lonyamali s/o Abraham. In the circumstances of this case I make no orders for costs.

HIGH COURT OF TANZANIA

K.N. ROBERT

JUDGE

26/11/2020