

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(IN THE DISTRICT REGISTRY)  
AT MWANZA  
PROBATE CAUSE NO. 01 OF 2018**

**IN THE MATTER OF THE ESTATE OF THE LATE KASSIM OMARY  
AND  
IN THE MATTER OF APPLICATION FOR LETTERS OF ADMINISTRATION  
BY  
OLUWA MKANDO ..... PETITIONER  
  
VERSUS  
  
HUSSEIN KASSIM OMARY .....CAVEATOR**


**JUDGEMENT**

**Date of Last Order 27/11/2020**

**Date of Judgement 14/12/2020**

**F. K. MANYANDA, J.**

On 20/03/2019, the Petitioner filed this Amended Petition for Probate and Administration Cause under Section 55 of the Probate and Administration of Estate Act, [Cap. 352 R. E. 2002] in respect of the estate of the Late Kassim Omary, who passed to his next eternal life on 25/05/2017 at Bugando Hospital and was buried at Nata burial cemeteries in the City of Mwanza. On 22/03/2019, the Caveator also filed a caveat against the petition. Therefore, pursuant to section 52(b) of Probate and Administration of Estate Act, [Cap. 352 R. E. 2002], the petition turned into



a normal civil case, whereas, the petitioner became a 'Plaintiff' and the Caveator a 'Defendant'.

Prior to that the Petitioner had filed a Petition on 10/1/2018 which was publicly advertised. When the Caveator got the knowledge of the application, lodged a caveat on 17/4/2018. On 17/5/2018 the Petitioner lodged an application to the Court so that citation should be issued to caveat and the same was done by the Court on 26/6/2018. The Caveator entered appearance by filing affidavit on the said application on 27/7/2018.

Then, as explained above, before hearing of the petition commenced, the Petitioner lodged an amended petition to which the Caveator lodged an amended caveat and the legal procedures of hearing commenced.

The Petitioner/Plaintiff is one Oluwa Mkando, a Congolese National, residing at Kilima Hewa in Kigoma-Ujiji Municipal. The amended petition is attached with a copy of a document termed as a "will" purporting to show that the deceased died testate.

The caveat was filed by one Hussein Kassim Omary, son of Late Kassim Omary. The caveator grounds of objection are that his father Late





Kassim Omary died intestate; he was selected by the clan meeting to petition for letters of administration and the purported "will" is not a valid will.

Hussein averred further that in November, 2017 Hussein and his fellow relatives were forced to sign an agreement purporting to show that they accepted the Petitioner as a will executor. It is his averments that his father Late Kassim Omary was a Tanzanian National and he was a sole owner of a building situated at Plot No. 250 Block "T" Kenyatta Road in Mwanza City.

At the hearing, the Petitioner/Plaintiff was represented by **Mr. Langa Charles Mvuna**, learned Advocate, while the Caveator/Defendant enjoyed representation services of **Mr. Boniface Sariro**, learned Advocate.

At the commencement of hearing of the suit in terms of Section 52(b) of the Probate and Administration Act, the court framed four issues for determination:

1. Whether the deceased person Kassim Omary left a will;
2. Whether the petitioner is capable of being appointed as executor of the estate of Late Kassim Omary; and

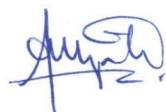


3. When the said will can be treated as a partnership agreement between the petitioner and the deceased person; and
4. To what relief(s) are the parties entitled to.

To prove his case the petitioner called three witnesses including the Petitioner/Plaintiff himself, Oluwa Mkando Mkondo, who testified as **PW1**. In his testimony he stated that he is a witch doctor for nine years now. He knew the deceased Kassim Omary as his brother, he was born by his mother in law. They were cooperating to each other and did find for joint life. Their cooperation started in Congo until they were in Tanzania where they arrived in 1965 and went to Kigoma Ujiji after living in Mwanza.

While in Mwanza each one specialized with a different means of earning life, the deceased continued to work as mechanics while he worked as a witch doctor, each making contribution of for their economic benefits.

Their properties expanded so the deceased said that they must make a 'will'. They built, bought land, extracted mineral, and boat construction and many other things. The 'will' stated that if the deceased died, he will stay with all properties. He tendered it as exhibit in Court and marked as Exhibit P1.





They wrote the will before one man called Kabuguzi, the government officer. Regarding the deceased children, the will stated that if one of them remains will be responsible for all the property as well as the inheritance, and if there is a child who need help will be assisted and anyone who is in need with school will be send by any one of us. He was given instructions to collect all of the deceased estate without selling any of them.

PW1 went on testifying that after the death of the deceased, he called all children and informed them of the deceased property, the wife of the deceased went to Congo to take property. He showed them the 'will' and gave a copy to one Otieno. They kept their money in a bank account, as per their agreement which he tendered as Exhibit P2.

He moved the money from his bank account and gave the deceased children who banked it at Mwanza. He stated that the house from which they used to collect rent is located at Kenyatta Road on Plot No. 250 Block "T" the owner of the house is the deceased Kassimu Omary, we are all Congo people. We also built houses at Tabata in Dar es Salaam and Uyenyeembe in Tabora. There are also assets available at Congo being



houses which are my properties, and there are houses of the late Kassim including a school called SST built on a land measuring 6,000 square meters. Also, there are minerals mines, all being properties of the deceased Kassim Omary. There are also 24 fishing boats at Lala Kalagwe in Congo.

On cross examination he stated that not all the deceased's children went to Kigoma to sign **Exhibit P2**, the ones who went were Hussein Kassim Omary and Mariam Kassim Omary only. He also stated that he was not told about the distribution of the deceased's properties.

Then Court ordered the Petitioner to surrender all the titles of properties PW 1 mentioned and any title concerning the property of deceased Kassim owned abroad so that at the end of the day the Court may issue an order relating to the ownership of the said properties.

The second witness for the Petitioner was Hussein Said Simba, who testified as **PW2**. He stated that he knew well the deceased Kasimu Omary and that the said Kassimu Omary was a PW1 best friend. He saw PW1 and the deceased talking that if one of them dies, the remaining between them will remain with the estate of the one who dies. He stated further that he





was called to witness the writing of a 'will' together with another person called John Mwita Ishengoma who has passed away.

The third witness for the Petitioner was one Method Raymond Gabriel Kabuguzi, who testified as **PW3**. He stated that he is an enrolled Advocate and Commissioner for Oaths of the High Court and Courts subordinate thereto save for Primary Courts. He knew the petitioner, since 1999 that he resides at Kigoma and knew the deceased Kasimu Omary since 31/10/2013 when he went to his office at Kigoma. The Petitioner and the deceased wrote a 'joint will'. He advised them on writing the joint will that they should have at least two witnesses. He tendered the 'joint will' as **Exhibit P3**.

On cross examination, he stated that the will has to be witnessed by two witnesses one of whom is a relative of the deceased, if the will maker knew to how read and write. Further that PW1 and the deceased requested that the will should not mention the properties. Moreover, it was not his duty to know their properties.

He stated that he wrote things which his clients explained to him. He believed they did not lie on him. The name of the wife (wives) and of the



children was/were not mentioned. He stated that the will becomes effective upon death. He knew Ishengoma, now deceased, who witnessed the 'will', as a PW1's friend not a relative. The deceased had no witnesses. That Kassim Simba was a relative while Ishengoma, was not a relative but worked at Dr. Kulwa Hospital. He didn't doubt the said Ishengoma.

On **28/8/2020** I took over presiding this case from Hon. Madeha, Judge, on reasons which were explained to the parties, that Hon. Madeha was on 04/05/2020 transferred to another working station and I took her place.

The Caveator/Defendant's case commenced where the first defence witness one Johnson Otieno Steven testified as **DW1**.

He stated that his occupation is entrepreneurship as a motor vehicle technician working at a workshop at the yard garage of Late Kassim Omari from 1990. The yard garage is located at Kenyatta Road near NSSF Building. He knew Oluwa Mkando since 1988 when the said Oluwa Mkando was arrested on suspicion of practicing illegal witchcraft. A friend of Oluwa Mkando namely Panjie requested Late Kassim Omari to help Oluwa





Mkando. He was informed by the said Late Kassim Omary that his relative Oluwa Mkanda was arrested in suspicion of practicing witchdoctor without permit at mabatini area in Mwanza. It was at that moment that he knew Oluwa Mkando for the first time. After been helped and the criminal allegations coming to an end, Oluwa Mkando returned to his home at Kigoma.

The Late Kassimu Omary constructed the house in issue using money earned from the garage workshop.

During the whole of the period DW1 worked with Late Kassim Omary he never heard him telling that there was any other person cooperating with him in the construction of his house.

It was the testimony of DW1 that the Late Kassim Omary started construction of the house in 1990. And after completion he leased the house to tenants and collected rental fees. DW1 never saw any person sharing with Late Kassim Omary the rental fee from his rented house.



He started hearing about Oluwa Mkando claims to have shares in the house after the death of the Late Kassim Omary, when Oluwa wrote a letter to me requiring DW1 and two children of Late Kassim Omary namely Hussein Kassim, Omary and Mariam Kassim Kassim to go to Kigoma to meet him at his home at Mjimwema in Kigoma Town. He tendered the invitation letter which was marked as **Exhibit D1**.

In response to the letter, DW1 and the two children of Late Kassim Omary travelled to Kigoma, and held a meeting with Oluwa Mkando. He never showed any property except his residential house. They returned to Mwanza and continued with their application for appointment of the administrator of the estate which they had filed at the Urban Primary Court in Mwanza.

DW1 denied to know any relative of Late Kassim Omary because the said Late Kassim Omary never told him. The said Late Kassim Omary never told him whether he had any cooperation relationship with Oluwa Mkando despite the fact that he had stayed with him for about 27 years. DW1





added that Oluwa Mkando neither attended at the burial funerals nor knows where he was buried.

He prayed to this Court to appoint children of the Late Kassim Omary as administrators of the estate of their Late Kassim Omary so that they can deal with the estate of their deceased father as lawful heirs.

In cross examination DW1 stated that according to Exhibit D1, Oluwa Mkando and Kassim Omary joined their properties from 31/10/2003 but the construction of the house started in 1980. He added that Kassim Omary had no any relative Kassim Omary.

The second defence witness was **Hussein Kassim Omary** who testified as **DW2**. He testified that he was born in 1983, he knows Kassim Omary as his biological father. He also knows the house which Oluwa Mkando has applied to be administrator. It is a house which was built by his parents with their own efforts and earnings from a garage workshop.

According to narration by his father, construction started in 1984 and shifted into the building in 1991 while it was incomplete. The house is



located at Keyatta Road situated on Plot No. 250 Block "T". The house is a three storied house; it has 9 bedrooms in 5 apartments. He tendered a letter of offer issued on 04/09/1988 which was issued to Kassim Omary in respect of Plot No. 250 Block "T" Mwanza Municipal. The letter was admitted and marked as **Exhibit D2 tentatively**. According to the latter, the plot was for both uses residence and business.

He denied the contention that Oluwa Mkando and his father prepared a 'joint will'. He refuted that this allegation is not true because his father would have told him so. It was the testimony of DW2 that his father passed away on 25/05/2017 at Bugando Hospital in Mwanza. He maintained that his father never told them anything about a person known as Oluwa Mkando.

He knew Oluwa Mkando after his father's death when he sent a letter to Johnson Steven Otieno requiring them to travel to Kigoma as a family of Late Mzee Kassim. They decided to go and meet him in order to verify. However, when they requested verification of the properties which Oluwa Mkando claimed to belong to Late Kassimu Omary, showed no any property instead he became battery and there developed





misunderstandings between them and the said Oluwa Mkando. More badly he wanted them to concede that was their '*baba mdogo*' which they refused.

He denied knowledge of Exhibit P1 a 'joint will' of his father and Oluwa Mkando. However, he admitted that they signed Exhibit P2 in fear of their security because they were inside the Petitioner's house who is a witch doctor and more, they didn't know him well. He threatened to either kill or make them zombies.

He prayed the application to be dismissed and be appointed to administer the estate of their father.

This is the summary of the evidence by both sides.

After closure of the case by the Caveator, with leave of the Court, Counsels for the parties were invited to make closing submissions in writing. Mr. Mvuna started by submitting that the Petitioner produced a written will of the late Kassim Omari entered on 31<sup>st</sup> day of October, 2003 to support his petition of which validity is challenged by the caveator.

The Counsel insisted that the making of the will followed all important requirements provided by the law, which he did not mention. He



argued that the requirements include a testator has to have legal age, testamentary capacity, intent, voluntariness, appointment of executor; also the will must be signed, dated and witnessed by two persons who are not beneficiary and it must also be signed and dated by the testator in front of competent witnesses. He added that the law does not compel a person making the will to reveal it to the beneficiaries during his life time, but only to the witnesses of the will.

The Counsel also contended that the question raised by the caveator that the petitioner is not a relative of the deceased was answered to a nullity by DW1 one Johnson Otieno Steven who said he was first introduced to the petitioner by the deceased himself in the year 1998 as his relative and it proves that the petitioner and the deceased are relatives as it is stated in the will itself on paragraph one.

He added that it was the intention of the deceased that his joint estate with the petitioner be administered not according to Islamic law as they bequeathed all their properties to each other and their families.

Mr. Mvuna observed that, having an Islamic name and mere profess in Islamic region cannot suffice the need for the application of Islamic law for





the purpose of inheritance. The most considered tests will always be the intention of the deceased on whether he was to have his estate dealt in accordance with Islamic law

On the other side, Mr. Sariro argued stating that right from the beginning that there is no valid will that was left by the late Kassim Omary as it has been alleged by the petitioner. The said "will (exhibit P1) does not have the ingredients of a valid "will" like the name and the descriptions of the properties to be administered, the name of the beneficiaries and the manner of the distribution of such properties.

Moreover, it was views of Mr. Sariro that Exhibit P1 is not a proper will as it is not properly attested by the relatives of the both parties. PW2 who attested the said "will" said that he is not related at all with the petitioner and the late Kassim Omary who also alleged to be the parties to the said "will" (exhibit P1). The Counsel added that PW3 confirmed that even John Mutta Ishengoma who also attested the alleged "will" was not related to the parties to that document. The law demands that "will" drawn by Literate person similar to exhibit P1 must be attested by the members of the maker of that "will".



He cited the case of **George A. Mmari and Anande A. Mmari vs.**

**Afra Fuime** [1995] TLR 146, this Court insisted that: -

*"For a will drawn up by a literate person to be valid it must be attested, besides the wife (wives) by at least two persons of whom one must be a relative of the deceased."*

Mr. Sariro finished by stating that the said answer also covers the second and third issues.

He urged this Court to dismiss this application with costs and the Caveator Hussein Kassim Omary to be issued with the letters to administer the estate of his father the late Kassim Omary for the benefits and betterments of their family.

Those were the submissions by the parties, it is upon this Court to deliberate this matter. In order to determine this matter, this Court framed four issues, the first being whether the deceased person Kassim Omary left a will.

In his testimony PW1 tendered in evidence a document which he termed as a 'will'. Therefore, in order to answer the first issue, there is a sub issue that whether the document tendered by PW1 is a valid will.





A will is a disposition of real and personal property to take effect after the death of the testator. It may be oral or written in a document. The **Black's Law Dictionary**, 8<sup>th</sup> Edition, defines written will as

*'a document by which a person directs his or her estate to be distributed upon his death.'*

A scholarly definition of the term 'will' was given by Dr. N. N. N. Ndititi (Jr) in his book titled '**Succession and Trusts in Tanzania, Theory, Law and Practice**', Law Africa, 2017, at page 77 as follows:

*"To sum up a will can be comprehensively defined as a last testamentary declaration and its codicil(s) (if any), written or oral made by a person during his or her life time showing how his property should be devolved to his or her successors after death."*

Therefore, a will becomes operational upon death of its maker.

In this matter, PW tendered a document which he purports to be a will.

The Counsel for the petitioner argued that the making of the will followed all important requirements provided by the law. He also insisted that the law does not compel a person making the will to reveal it to the beneficiaries during his life time, but only to the witnesses of the will. But he did not cite any law to support him.



On the other hand, after citing the case of **George A. Mmari (supra)**, the Counsel for the Caveator argued that the law demands a "will" drawn by a literate person to be attested by the members of the maker of that "will".

The law governing the making and application of a 'will' was exhaustibly elaborated by my Sister, Hon. Mkapa, Judge, in the case of **Valeria Ludovick Ngatara vs. Flora Stanslaus Pima [Suing as Administrator of Estate of the Late Stanslaus Pima Mushi]**, Land Case Appeal No. 9 of 2019 (unreported) where she stated that:

*"Second, a WILL becomes valid as long as the maker complies with the requirement under Rule 5 of the 3<sup>d</sup> Schedule of the Local Customary Law (Declaration) (No.4) Order of 1963 (G.N. No. 436 of 1963).*

*A testator can express his desires by way of a WILL and such WILL has to be complied with. The position has been affirmed in **Celestina Paulo V Mohamed Hussein** [1983] T.L.R 291, **Elia Kisamo V Obediodom S. Chanjarika**, PC Civil Appeal No. 55 of 1997, (unreported) High Court at Moshi, and **Julius Petro V Cosmas Raphael** [1983] T.L.R 346.*

*However, as mentioned out above, validity of the WILL as guided by the Rule 5 to the 3rd Schedule of G.N. No. 436/1963, has to be made voluntarily by the testator as to how he would wish his estate be administered upon his demise. Also, there has to be special witnesses to the intended WILL and a testator's wife or wives at his household must also witness."*





The alleged WILL which was before her lacked the said prerequisite, hence, its validity was questionable. She went on stating that:

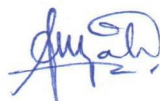
*"The requirement that the wife or wives must attest to the WILL is a mandatory according to the above provision of the law and the same was never complied with and no reasons were advanced as to why Stanslaus Pima's wife was not present as a witness. This omission is incurably fatal thus renders the purported WILL invalid. Thirdly it is a requirement under G.N. No. 436/1963 that beneficiaries mentioned as heirs in a WILL shall not witness the WILL except the wife or wives."*

Moreover, an extensive clarification on the 'will' and the law applicable was made some years back by this Court in the case of **John Lwehabura v. Edward Lwehanura** (1968) HCD 358. Where it was held, inter alia, that:

*"(1) The alleged will was invalid and insufficiently proved. [Citing ss. 3-5 of the Law of Wills, GN. No. 436/63, which provide that written wills must be attested by proper witnesses who must include testator's wife or wives if at home.*

*(2) Under section 19, two witnesses are required, one of them being a kinsmen and the other unrelated to the testator, if the testator is literate."*

The Court went on stating that:



*"Wills are governed by Government Notice No.436 of 1963, the Third Schedule which contains – 'Sheria za Wosia'. We will cite some of the pertinent provisions which are relevant to this appeal and to which Mr. Jonathan were referred:-*

*"(1-2) NA*

*(3) Wosia ushuhudiwe na mashahidi maalum ambao lazima wawepo wakati mmoja.*

*(5) Zaidi ya mashahidi maalum, mkewe (mwenye kutoa wosia) au wake zake waliopo nyumbani lazima washuhudie vile vile.*

*(6) to (18) - NA.*

*(19) Wosia ulioandikwa ushuhudiwe namashahidi wanaojua kusoma na kuandika yaani mashahidi wasiopungua wawili (mmoja wa ukoo na mmoja mtu baki) ikiwa mwenye wosia apajua kusoma na kuandika, nawasipungue wane (wawili wa ukoo na wawili watu baki) ikiwa mwenyewe hajui kusoma na kuandika.*

*(20) NA*



(21) *Mashahidi washuhudie sahihi  
au  
alama ya mwenye kutoa wosia,  
na  
wenyewe waweke sahihi zao  
katika  
wosia.*

On top of that, my Brother Hon. Tiganga, Judge in his judgement in the case of **Mtaki Maingu vs. Nyapilya Makuki**, PC. Probate Appeal No. 01 of 2020, cited with approval the case of **George A. Mmari (supra)** cited by the Caveator's Counsel where it was stated that:

*"the will was attested by single witness one Hitler G. Mtabi, which fact, in line with the provisions of Rules 5 and 19 of the Local Customary Law (Declaration) (No. 4) Order (1963) GN No. 436 of 1963, the 3<sup>d</sup> Schedule, vitiated the it".*

That is much, so far as the law governing the making of a will is provided under the law referred to above and the case laws interpreting the same.

I have examined the document tendered in this case by PW1 termed as a 'will' and found it expedient to reproduce it here for ease of reference:

**"WOSIA WA MAISHA NA MALI ZETU KWA UJUMLA**

*Sisi OLUWA MKANDO na KASSIMU OMARI, tukiwa na akili zetu timamu na bila kulazimishwa tunatamka na kuthibitisha leo hii Ijumaa tarehe 31/10/2003 mwaka 2003 mbele ya mashahidi walioorodheshwa hapa chini kama ifuatavyo:*

- 1. kwamba sisi watajwa hapo juu (Oluwa Mkando na Kassimu Omari) ni ndugu, kila mmoja wetu anazo mali*



*mbalimbali-zinazohamishika na zisizohamishika kama vile mashine, nyumba, mashamba, mifugo na mitumbwi;*

- 2. kwamba kutokana na undugu wetu huo tunatamka kuwa mali zetu hizo tangu tarehe ya leo mali hizo zitakuwa mali zetu wawili kwa pamoja na kwa faida ya wote;*
- 3. kwamba kwa uthibitisho huu na undugu wetu, hata watoto wetu ni ndugu na watapaswa jufuata masharti ya uthibitisho huu. Hivyo mali zetu haziruhusiwi kuuzwa. Ikiwa mmoja wetu atafariki, mali zitabaki na mikonomi mwa atakaye tunza familia zote mbili;*
- 4. kwamba kuhusu maendeleo ya watoto wetu, watoto watakuwa huru kusoma, atayeshindwa kusoma atasubiri msaada tu kwa kuwa mali zetu wazazi wao haigawiki;*
- 5. kwamba kama wazazi wote tutakuwa tumefariki, watoto watapaswa kuchagua viongozi wa pande mbili walio na elimu ya kutunza mali iyopo;*
- 6. kwamba licha ya maendeleo yaliyomo katika kipengele Na. 3 hapo juu, sisi wazazi tukiwa pamoja tungali hai, tutaweza kuuza mali zetu aidha zilizopo Tanzania au Congo ili tuchague muelekeo mwingine wa maisha wa kufuata;*
- 7. kwamba wake zetu wataishi kulingana na hadhi zao, ikiwa bado ni mke au kaachika au kutoroka;*
- 8. kwamba tukiwa bado hai, mali yetu inayohamoshika kama vile pesa na magari, vitagawiwa kwa ridhaa au ushirikiano wetu wawili na itakapohitajika sahihi wote wawili tutaweka sahihi au dole gumba; na*
- 9. kwamba mahali pa kuhifadhi mali zetu hizi tutachagua wote wawili."*

*WOSIA HUU UMETOLEWA LEO HII TARHE 31MWEZI  
WA KUMI MWAKA 2003 NA OLUWA MKANDO ....  
SAHIHI.....(Sgd)..... NA  
KASSIMU OMARI . SAHIHI .....(Sgd)..... .*





WOSIA HUU UMESHUHUDIWA NA NDUGU ZETU  
 WAFUATAO  
 HUSSEIN KISIMBA ..... SAHIHI.....(Sgd).....  
 JOHN MUTA ISHENGOMA  
 .....SAHIHI.....(Sgd).....  
 MBELE YA  
 Jina Method R. G. Kabuguzi  
 Sahihi .....(Sgd).....  
 Cheo .. Wakili  
 S. L. P. 61, KIGOMA."

As it can be seen from the quotation above, the 'will' indicates that it is a joint statement made by the Petitioner and Late Kassim Omary claiming that they are relatives without elaborating the type of relation. Further to that by the words '*kila mmoja wetu anazo mali mbalimbali-zinazohamishika na zisizohamishika*' means each one of them has independently owned properties in Tanzania as well as in Congo. Such properties include machines, houses, shambas, fishing boats etc. None of the said properties are mentioned. This is because the properties are not jointly owned. Moreover, the 'will' does not mention the 'would be executor', instead it talks about management of properties while the statement maker are alive.

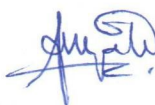
To my understanding a will is expected to state on how the estate of the testator would be administered after his death not when he is alive

because when he is alive it is him, with his sober mind, who administers his properties.

As regard to the witnesses, in the 'will' it is written that HUSSEIN KISIMBA and JOHN MUTA ISHENGOMA are relative to the statement makers. However, the testimonies of PW2 and PW3 made it clear that the said HUSSEIN KISIMBA and JOHN MUTA ISHENGOMA are not related to either Oluwa Mkando nor Late Kassim Omary.

On top of that, the 'will' though mentions the 'wife' or 'wives' without mentioning them. In the evidence led in this case none of the 'wife' or 'wives' was involved to witness the said 'will' let alone to be informed about its existence.

Also the 'will' makes reference to children whose names are unknown let alone their number, they were also not informed that there was a 'will'. Lastly, the Petitioner who, according to the wording of the 'will', appear to a beneficiary, did not only witness but also kept a copy thereof at his own benefit and interests to the exclusion of the Late Kassimu Omary. If the 'will' was genuine how comes a copy was kept by the Petitioner alone.





In my opinion there is lot to be desired in the alleged 'will' as explained above. It falls short of a valid legal will. I say so because in his testimony, PW1 stated that he is a Congolese and the Late Kassimu Omary was a Congolese, hence relatives without any proof of nationality. DW1 denied this allegation in his testimony that Kassimu Omary was a Tanzanian National. This raises doubt if the Petitioner allegations that they are related, hence questioning the truth and reliability of the document.

Be it as it may, this Court finds that the 'will' do not meet the tests of a valid will due to shortcomings explained above, it is not a valid will in law. The first issue is answered in negative.

Having disposed the first issue in negative, it follows therefore that the second issue that is whether the petitioner is capable of being appointed as executor of the estate of late Kassim Omary is in negative as well. Executor of a will is a person named in the will that he will be responsible with execution of the will when the testator dies. Now in this case this Court has already found that there is no valid will, the Petitioner cannot be appointed an executor of a 'will' which is a nothing.



The third issue drawn was when the said 'will can be treated as a partnership agreement between the petitioner and the deceased person. I think this issue was misplaced. Neither of the Counsel has addressed this issue, this Court finds it irrelevant as well.

The last issue is about relief(s) to the parties. This Court has been unable to find any prayer in the amended petition other than a statement in the Petitioner's testimony that it was agreed if Kassimu Omary dies the Petitioner would stay with all his properties despite the fact that each one earned property separately. The meaning obtainable from this statement is that he was bequeathing all the properties of Late Kassimu Omary to himself to the exclusion of the rightful heirs of Late Kassim Omary. Therefore, he is requesting this court to bless his bequeathing of the Late Kassimu Omary properties.

On the other hand, the Caveator prayed to be appointed the administrator of the estate of his father, the Late Kassimu Omary.

My understanding of the law is that, the duty of the court is to appoint executor of a will where there is a valid one or appoint an administrator of the estate in an appropriate petition. It is the duty of the





will executor or appointed administrator to distribute the deceased's estate to the heirs according to the law.

Now this Court has found that the 'will' is not valid, therefore, no executor, then the next step is to have an administrator of the late Kassimu Omary appointed.

On 28/01/2019 the Petitioner filed an application under certificate of urgency praying him to be appointed a temporary administrator of the estate of Kassimu Omary according to the 'will' pending determination of the petition. My Brother, Hon. Gwae, Judge, declined to grant the prayer on grounds that there were a lot of inconsistencies in the Applicant (Petitioner) affidavit as such it was not safe to determine the application in his favour.

The inconsistencies touched the validity of the 'will'. Moreover, predicting possibilities of misunderstanding among heirs to arise, Hon. Gwae, J. directed the Deputy Registrar to handle the misunderstanding in case they arise.

It is my strong conviction that the administration of the estate in this matter appear to be a complex one involving the petitioner, who is a

foreigner. Whereas under our laws foreigners are precluded from owning landed properties. There are also allegations of existence of properties owned abroad. I think this is a fit case for the Administrator General to come in and make an appropriate application under section 5 of the Administrator General (Powers and Functions) Act, [Cap. 27 R. E. 2002]. Therefore, this Court makes the following orders:

- 1) The petition is hereby dismissed for want of merit
- 2) The Administrator General to apply for and take out letters of administration of the estate of the deceased Kassimu Omary by making the appropriate application in the High Court of the United Republic of Tanzania.
- 3) The Deputy Registrar of the High Court of Tanzania of Mwanza to transmit to the Office of the Administrator General requiring that Office to appoint an Officer who shall apply for grant of letters of administration of the estate of the deceased Kassimu Omary per provisions of the Administrator General (Powers and Functions) Act, [Cap. 27 R. E. 2002];





- 4) At the meantime, the order given by Hon. Gwae, Judge, on 28/01/2019 that appointed a son of the deceased Kassimu Omary one **Hussein Kassimu Omary** and her step mother **Mariam Kassimu** to be temporary administrators/supervisors of the estate of Late Kassimu Omary taking care of rent proceeds and distributing the same to heirs **is hereby extended**, pending appointment of the Administrator General as administrator of the estate in issue per provisions of the Administrator General (Powers and Functions) Act,
- 5) In the event of misunderstanding among the heirs before finalization of appointment of Administrator General as such, the same shall be mutually resolved by the Deputy Registrar, save in event of commission of criminal offence where the law shall take its course accordingly.
- 6) Costs to be borne by the Petitioner.

Order accordingly.



**F. K. MANYANDA**  
**JUDGE**  
**14/12/2020**