

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

AT DAR ES SALAAM

PROBATE AND ADMINISTRATION CAUSE NO. 38 OF 2015

**IN THE MATTER OF ADMINISTRATION OF THE ESTATE OF THE
LATE BARNABAS ZILINDE**

AND

**IN THE MATTER OF APPLICATION FOR THE GRANT OF LETTERS OF
ADMINISTRATION**

BY

EMMY ZILINDE..... 1st PETITIONER

REMMY ZILINDE.....2nd PETITIONER

RULING:

13th December, 2020 & 19th January 2021.

A.K. Rwizile, J.

According to the death certificate, the late Barnabas Zilinde died on 4th June 2014. Basing on the pleadings, the same died intestate while survived by four children to wit two sons and two daughters. The 1st petitioner (now also deceased) survived him as a widow. Before this petition took off for hearing, one Ally Barnabas Zilinde filed a caveat. He claimed, to be another surviving son of the deceased Barnabas.

Before she passed away, Emmy Zilinde, a widow and the 3rd wife of the deceased, in company of Remmy, Gerald, Mariam and Erica disputed having known the caveator as a son of the deceased and so was not listed among the heirs of his estate.

As usual, the said Ally was required to prove the same. In order to do that, apart from his testimony, he also called other three witnesses to include his mother and two uncles namely; Abdallah Ali Zilinde (Pw2), Seleman Zilinde (Pw3) and Atanawe Kassimu Kambangwa (Pw4). While on the other side, Remmy Zilinde (Dw1), Gerald and Erica testified as Dw2 and Dw3 respectively. The caveator appeared in person while Mr. Japhat Mmuru learned advocate appeared for the respondents.

Upon hearing of the same, the only issue to be determined is whether the caveator is the son of the deceased Barnabas Zilinde. To prove the matter, the caveator testified and tendered a birth certificate. It was admitted as exh. P1 and photographs admitted as exhibit P2 collectively. He was of the evidence that he is a first-born child of the family even though the other children did not accept him.

According to the defence, as said by Dw1, their family is with four children. They are Gerald, Remmy and Mariam, whose mother is called Salma while Erica is the fourth child, whose mother is called Emmy Mkocha. He testified that he was close to his father before his death, but he never heard him say about the caveator being his son, neither did he introduce him to the other family members. He was of the evidence that the caveator was also absent at the funeral and none of them knows him as a child of the family.

His evidence was supported by his two other fellows. Dw2 and Dw3 all claim never saw or new the caveator as their brother.

Under section 35 of the Law of the Child Act [Cap 13 R.E 2019]. Parentage can be either proved by marriage performed in accordance with the Law of Marriage Act, the name of the parent entered in the Register of Births kept by the Registrar-General, public acknowledgment of parentage or DNA results. This has been a dictate of the law when dealing with application for parentage. I know this is not an application for parentage but a probate cause where the issue of paternity has come about. It is therefore important to have it clearly proved as it has the bearing in the cause itself for the purposes of inheritance.

According to the birth certificate, exhibit P1 which was admitted without objection from the respondents. It is shown that the caveator was born on 20th January 1979. He is therefore marking the 42nd birthday. The same shows, he is born to a mother called Atanawe Kassimu Kambangwa (Pw4) and Barnaba Zilinde. This in my view, as undisputed as it is, forms the evidence of parentage. But further, it was stated by Pw2 who is the elder son in the family of the late Zilinde, the evidence supported by Pw3, who is also another son of the same family, that the caveator is the son of their late younger brother. In actual fact, it is Pw2 who said, the caveator was taken from his in-laws when a child. He lived at their home when his father was at school. He was brought up by the caveator's grandfather and mother at Tandika. Both grandparents are now deceased.

According to him, when their brother broke the relationship with the caveator's mother, he got married to another woman. He fathered with her, three children Dw1 (Remmy), Dw2 (Gerald) and Mariam. When their mother died, he was married to another woman called Emmy Mkocha, who before passing away, got him one child called Erica. According to him, it this last wife who was legally married to their late brother.

But, all in all, he witnessed that all children are sons and daughters of their brother and this includes the caveator.

From the above, I have to take it that the evidence of Pw2 and Pw3 is independent. The same can be supported by that of Pw4 who is the biological mother of the caveator. Her story is interesting. She testified that she was made pregnant by the caveator's father, when a school girl. That happened, she testified, when she was in form I at Kinondoni Muslim Secondary School. According to her, the late Barnaba was in form II at Forodhani Secondary School. He was therefore born on 20th January 1979. She further testified that upon reaching 5 years, the caveator was taken away by Pw2 and his father Zilinde. He lived and was brought up at their home. He was later assisted by his father to go to South Africa in search for better life. It was according to her evidence that when the matter was at the Primary Court, a DNA test was ordered but before it was done, this the cause was transferred to this court.

From the above, it goes without saying that the defence against the evidence by the caveator is very weak. The caveator being older than Dw1, Dw2 and Dw3, they could not simply deny the existing facts from the caveator.

They had to call evidence, either scientific or otherwise to show that what Pw2 and Pw4 have testified are mere lies and concocted stories.

The evidence of a mother being supported with exhibit P1 and evidence of Pw3, it is sufficient to prove that the caveator is the son of the deceased Barnabas Zilinde. Having said so, it is my holding that the caveator is the son of the deceased and should be listed among the heirs of the estate of the late Barnaba Zilinde.

A. K. Rwizile

JUDGE

19.01.2021



Recoverable Signature

X



Signed by: A.K.RWIZILE

