IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

PROBATE AND ADMINISTRATION CAUSE NO. 39 OF 2019

IN THE MATTER OF THE ESTATE OF THE LATE DR. REGINALD ABRAHAM MENGI, DECEASED

IN THE MATTER OF THE PROBATE AND ADMINISTRATION OF ESTATES ACT [CAP 352 R.E. 2002]

IN THE MATTER OF THE PROBATE AND ADMINISTRATION OF ESTATES RULES

BENSON BENJAMIN MENGI ----------1ST PETITIONER

WILLIAM ONESMO MUSHI ----------2ND PETITIONER

ZOEB HASSUJI ----------3RD PETITIONER

SYLVIA NOVATUS MUSHI ----------4TH PETITIONER

AND IN THE MATTER OF CAVEAT FILED BY

ABDIEL REGINALD MENGI ----------1ST CAVEATOR

BENJAMIN ABRAHAM MENGI ----------2ND CAVEATOR

JUDGEMENT

Date of last Order: *03/03/2021*
Date of Judgment: *18/05/2021*

MLYAMBINA, J.

Following demise of the late Dr. Reginald Mengi on 2nd day of May, 2019 at Dubai in the United Arab Emirates, four (4) Petitioners above

mentioned, petitioned for Probate of the deceased's estate for execution of the deceased's "WILL" dated 17th August, 2017. After citation was issued by the Petitioners, the 1st and 2nd Caveators entered caveat under the provisions of *Section 58 (1) of the Probate and Administration of Estates Act.*[1] The said caveat is based on validity of the deceased's "WILL" on the following grounds:

(i) The "WILL" was not sealed and the signatures on the "WILL" are different from ordinary signatures of the deceased.

(ii) The "WILL" was not witnessed by any relative or wife of the deceased.

(iii) The deceased had no capacity to draw the purported "WILL" since he was facing serious health issues since 2016.

(iv) The "WILL" disinherited the deceased's legitimate children without adhering to Chagga customs or involving any of his relatives.

(v) The "WILL" is discriminatory as it only bequeathed his estate to his new spouse and twin children.

(vi) It complicates duties to uphold the family name and legacy by those who have been disinherited.

The Caveators put it in summary that the "WILL" contravenes the law pertaining making of "WILLS", it is discriminatory and was made out of undue influence. They objected any proposed grant of Probate to the Petitioners since the Petitioners have no interest in the deceased's estate and are all strangers to the estate of the late Reginald Abraham Mengi,

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[1] Cap 352 [R.E. 2002].

thus difficult and risky in running the affairs of the estate. The Caveators contended to have been duly appointed by their respective clan members to administer the estate of the late Reginald Abraham Mengi.

On the other hand, through their Counter Affidavits, the Petitioners answered it generally that, they believed the "WILL" to be valid. They asked the Court to declare it as such. Since the matter became contentious, it was treated as any other civil suit in accordance with *Section 52 (b) of Probate and Administration of Estate Act.*[2]

In this matter, the Petitioners were represented by learned Senior Counsel Elisa Abel Msuya, Counsel Regina Kiumba and Irene Mchau while the Caveators had legal services of Senior Counsel Mrs. Nakazael Lukio Tenga, Counsel Roman S.L. Masumbuko, Hamis Mfinanga and Grayson Laizer.

The following issues were agreed for disposition of the matter:

1. Whether the "WILL" of Dr. Reginald Abraham Mengi executed on 17th August, 2017 at Dar es Salaam Tanzania was validly made.
2. Whether the "WILL" of Dr. Reginald Abraham Mengi executed on 17th August, 2017 at Dar es Salaam Tanzania was properly made.
3. Whether the Court should grant Probate to the Petitioners or Letters of Administration to the Caveators.
4. To what relief (s) are the parties entitled to.

[2] Cap 352 [R.E. 2002].

In the course of the hearing, the Petitioners paraded four (4) witnesses, that is; PW1 Sylivia Novatus Mushi (Company Secretary), PW2 Florence Sawaya Msaki (Personal Secretary to the deceased), PW3 Grace Delicia Maleto, a Receptionist to IPP Limited and PW4 Benson Benjamin Mengi, a Nephew of the late Dr. Reginald Abraham Mengi. The Defence case had three (3) witnesses, that is; DW1 Abdiel Alese Mengi (son to the deceased), DW2 Benjamin Abraham Mengi (deceased's blood brother) and DW3 Regina Anchelita Mengi (daughter to the deceased). The Court in its discretionary powers, summoned two (2) witnesses, that is; CW1 Jacqueline Ntuyabaliwe Mengi (wife to the deceased) and CW2 Valentina Ochieng Khoja (the deceased's doctor).

The underlying reasons of the Court to summon its witnesses are underscored by my brethren Biron, J. (as he then was), in the case of **John Magendo v. N.E. Govani**[3] in which he observed as follows:

> It is deplorable that any Bench-holder could treat Court proceedings before him as a football match, with doubtless, the parties themselves being the ball and kicked around by their counsel, however inept they may be. It is the duty of a Judge or Magistrate conducting a case, to try the case and determine it on its merits doing justice to each party according to law. As remarked by Lord Godard, C.J. in **R. v. David Flynn**.[4] "Criminal trials are not a game. The object of a criminal trial is to acquit the innocent and convict the guilty". Likewise, the object of a civil trial is to do justice to the parties and determine the dispute between them judiciously in accordance with the law. It

[3] [1973] LRT No. 60.

[4] 52 Cr. App. R. 17.

cannot be overstressed that it is the duty of a Magistrate trying a case, not to sit back as a spectator or, to use the Magistrate's terminology, a referee, and watch the proceedings, but to try the case before him, whether a criminal or a civil one. And in order to arrive at a just decision, in civil case, *the Magistrate is expressly empowered by the Civil Procedure Code to summon witnesses of his own motion, and in criminal cases, he is not only empowered to summon witnesses of his own motion, but it is mandatory for him to do so, if it appears essential to the just decision of the case.* For the benefit of the Magistrate it is pointed out that failure by a Court to call witnesses when the justice of the case required it, has resulted in the Court's decision having been reversed on appeal to a superior tribunal. (Emphasis applied)

The case of **John Magendo v. N.E. Govani**[5] was cited with approval by the Court of Appeal of Tanzania in the case of **Director of Public Prosecution v. Peter Roland Vogel.**[6] Now, on basis of these legal authorities, as the Judge of this Court, I participated in this adjudication actively by calling the wife of the late Dr. Reginald Abraham Mengi and Valentina Ochieng Khoja, the deceased's doctor, as witnesses on my own motion.

At the hearing, it was PW1's testimony that she had been working with the deceased since 2007 and that she was present when the deceased signed the "WILL" which appointed her as an executor. To the surprise of the Court, PW1 further testified that; she didn't know the contents of

[5] [1973] LRT No. 60.

[6] [1987] TLR 100.

the "WILL" since it was not read to them on the day the said "WILL" was made. PW1 was of testimony that, in October, 2016, the deceased suffered stroke without recovery which affected his working capability and movements. It impaired his memory, resulting to his death. PW1 went on to testify that, Dr. Reginald Abraham Mengi had previously signed other "WILLS" where he distributed his estate to all his heirs including Regina Anchelita Mengi and Abdiel Alese Mengi, the last one being in the year 2014.

PW1 further testified that, the "WILL" was prepared by one Mr. Sabas Kiwango who retrieved the document from his computer using a flash disk, brought it into the deceased's office, got it printed and signed by the deceased.

PW1 informed the Court that, some properties in the "WILL" did not belong to the deceased, for example, the deceased had no shares in some of the mentioned companies whose shares have been bequeathed. For instance, regarding the companies named Tanza Diamonds Limited, Tanzania Oil & Gas Limited and Oil & Gas Resources East Africa Limited are dormant with promoters only and nominal shares and there are no paid-up shares. In the circumstances, there was nothing to bequeath from such companies. PW1 added that, some companies are family-owned companies where Abdiel Alese Mengi and Regina Anchelita Mengi are also Directors.

On her part, PW2 testified to had been a witness to the deceased's "WILL". She shared the same testimony with PW1 that they were not given opportunity to know the contents of the "WILL" apart from just being called as witnesses. PW3 also testified to have witnessed the

"WILL" adding as well that she did not know the contents of the deceased's "WILL" until death of the now late Dr. Reginald Abraham Mengi. PW3 further testified that; she did not even know whether the deceased disinherited his own children.

During cross examination, PW3 admitted that no relative from the deceased's side was present during signing of the said "WILL", adding that, the deceased had suffered a stroke and fallen sick.

PW4 on his part testified that, the deceased was his uncle "Baba Mdogo" and that he had a good relationship with him. PW4 was the one who helped the deceased to finalise publication of the deceased's book titled *"I Can, I Must, I Will"*. He further testified that the deceased was not well since he suffered from a stroke in October, 2016; and added that he was taken to South Africa. According to PW4, the deceased's elder children had difficulties in visiting their father as CW1 prevented them from doing so.

In defence, DW1 testified that; he is a son to the deceased. He proved so by tendering his Birth Certificate (Exhibit D1). DW1 briefed the Court on background of the life between the deceased and his mother (first wife of the deceased now also deceased) to the effect that, the deceased was in good relationship with his family and that he never had any conflict with his children. He further testified that; his father started to live with various concubines prior to his divorce to their mother. He added that, even his twin brothers with the second wife were born prior to the said divorce, thus out of wedlock. He further testified that, the deceased observed Chagga customs and was buried at Machame Kilimanjaro.

With regard to the contested "WILL", DW1 testified that, his father authored the "WILL" at a time when his health had deteriorated after suffering a serious stroke in October, 2016 from which he never fully recovered till his death. Besides, the envelopes containing the "WILL" were not sealed, hence leaving chances of being tempered with. Also, the "WILL" was witnessed by people who are not deceased's relatives and that the same was not witnessed even by the deceased's wife.

Also, the "WILL" bequeathed properties not belonging to the deceased, for example; matrimonial properties owned by the deceased and his first wife. Further, his father practiced customary life evidenced by them having Chagga names, adding that, though the deceased had a Christian marriage, he had open extra marital relationships. DW1 further testified that, his father could not have prepared the "WILL" if not having been dictated by his second wife since the deceased had access to many experts in law. It was because of the sickness that he did so.

Besides, if at all the deceased had an intention to deny them properties, he could have said so. The evidence given in Court by DW2 and DW3 resembles that of DW1 with DW2 concluding as to what he would do if the Court appoints him to be an administrator of the deceased estate.

According to the testimony of DW2, if the Court appoints him as an administrator of the deceased's estate: *Firstly,* both the widow and the issues will get fair share as they deserve. *Secondly,* he will lead both the elder issues and their mother by advising them to take care of the young issues who are 8 years old to raise them both academically and ethics-wise. *Thirdly,* he will ensure good relationship between the elder and the young issues to bond themselves as single family of Reginald Abraham

Mengi. *Fourthly,* he will prepare them mentally that they are the beneficiaries of the estate of the deceased Mengi in the coming 50 – 60 years and; *fifthly,* there must be fairness of the two families.

On part of the Court witnesses, CW1 who is the deceased's wife testified that her relationship with the deceased commenced in 2011 whereas they contracted a Civil Marriage 2015. She added that, her issues with the deceased were born prior to the marriage. CW1 admitted in her evidence that, in 2016, Dr. Reginald Abraham Mengi developed a mini stroke. He walked in pain, but speaking in the normal way. CW1 testified that, they went to Dubai for vacation. While in Dubai, Dr. Mengi made a health check-up and discovered that he needed a pacemaker in 2019. After the pacemaker was inserted, the deceased got chest pains and later, he passed away. CW1 supported the contested "WILL" and appointment of the Petitioners because they have been mentioned in the "WILL". She opposed the caveat.

On her part, CW2 testified that he attended Dr. Reginald A. Mengi medically for more than ten times, that is from 2015 up to December, 2017. CW2 went on to testify that the deceased had three diseases which needed specialists, that is; pressure, protest and complications of pressure leading to stroke. CW2 further testified that, in October 2016, the deceased suffered a stroke which affected part of the brain that controls muscles' motor function. CW2 added that, Dr. Mengi had gouts but he could not remember if Dr. Mengi had memory problems. He concluded that he has never referred the deceased to Dubai. During cross examination by Mr. Roman learned Advocate, CW2 testified that the stroke that Mengi suffered affected only ponds Section of the brain.

After hearing the paraded witnesses, Advocates for both sides filed their respective final submissions. The Petitioners' Advocates consolidated the first two issues and argued them in five parts. The two issues are on validity and appropriateness of the "WILL". They submitted that, according to **Black's Law Dictionary**,[7] "validity" is defined to mean;

> legally sufficient or binding properly, on the other hand, it means "correctly" or "satisfactory".

Reference was also made to a decision in the case of **Mark Alexander Gaete and 2 Others v. Grigitte Gaetje Defloor**,[8] where the Court of Appeal of Tanzania observed that:

> *...in petition for probate, the Court is concerned with the validity of a "WILL" as annexed to the Petition.* The questions which will come up are whether or not the "WILL" has been properly executed; whether or not the testator had the capacity to make the "WILL"; in the case where the testator has disabilities like blindness, deafness or illiteracy whether or not the contents of the "WILL" were made knowledgeable to him by reading over etc. and he had granted his approval; whether there were undue influence or not; whether there were forgery and fraud or not and whether the "WILL" has been revoked or not. If the "WILL" passes all that test enumerated above it is taken to be proved and the Court grant the executor the power to administer the "WILL".

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[7] 9th edition.

[8] Civil Revision No. 3 of 2017, (Dar es Salaam Registry), (unreported).

According to Petitioners' Advocate, the Caveators are questioning validity of the "WILL" basing on the ground that it disinherited the elder children without assigning any reason. The Petitioner's learned Advocate discredits the advanced argument on ground that *GN No. 436 of 1963 under the 3rd schedule clause 35* in particular, the same gives room for disinherited heirs to apply to the Court for a decision as to; *whether the disinheritance was justified* something which was not done in this case.

Regarding possession of the "WILL" by the widow who is also a beneficiary, the Petitioner's Advocate submitted that; beneficiaries to a "WILL" are not required to be custodians of the same as underscored by the Court in **Shaban Arshad Yusuf v. Zuberi Abdallah and 2 Others.**[9] However, such position is distinguished from the matter at hand for the reason that PW2, the trusted custodian, produced a copy of the "WILL" from which the two were compared and ruled out to be similar in terms of their contents. He further contended that, the issue of forgery was not proved within the standard required under *Section 110(1), (2) and 111 of the Evidence Act.*[10]

As to the other part in this issue, that the deceased was suffering from *dementia* when making the "WILL", the Petitioner's Advocate argued that, the proper persons to prove whether the deceased was of unsound mind during execution of the "WILL" are PW2 and PW3 who were the witnesses to the "WILL". He cited a decision of the Court of Appeal of Tanzania in the case of **Paulina Samson Ndawavya v. Theresia**

[9] Civil Case No. 300 of 2017, (Dar es Salaam Registry), (unreported).

[10] Cap 6.

Thomas Madaha,[11] with further reference to *Section 110 (1), (2) and 111 of Evidence Act,*[12] regarding duty to prove.

The final part in this issue is on the witnesses who are said to have witnessed the "WILL". In this part, the Petitioners' Advocate agreed that the "WILL" was not witnessed properly as the witnesses were not clan members. He cited *Rule 19 of G.N. No. 436 of 1963* whereas *the 3rd Schedule to the Customary Laws Declaration Act,*[13] the same states that:

> *Wosia ulioandikwa ushuhudiwe na mashahidi wanaojua kusoma na kuandika yaani mashahidi wasiopungua wawili, (mmoja wa ukoo na mmoja mtu baki) ikiwa mwenye wosia anajua kuandika na wasiopungua wanne (wawili wa ukoo na wawili watu baki) ikiwa mwenyewe hajui kusoma wala kuandika.*

According to the Petitioners' learned Advocate, the deceased's "WILL", that is, exhibit "P2" is at all folds an invalid "WILL" on account of witnesses who signed it.

Responding to the submission by the Petitioners' advocate, the Caveators' Advocate submitted that, the purported "WILL" by the late Reginald Abraham Mengi is invalid. He defined the term "valid" by referring the ***Black's Law Dictionary***[14] where the word "valid" has been defined as "legally sufficient; binding". He contended that, the "WILL" is invalid on the following grounds:

(a) The maker had no capacity to make the "WILL".

(b) The witnesses of the "WILL" lacked capacity.

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[11] Civil Appeal No. 45 of 2017, Court of Appeal of Tanzania (Mwanza Registry), (unreported).

[12] Cap 6.

[13] Cap 358 [R.E. 2002].

[14] 10th Edition, Thomson Reuters, 2014.

(c) The "WILL" disposed other properties which were not the deceased's property.

(d) The deceased disinherited his own children.

Regarding capacity, the Caveators' Advocate contended that, the paraded evidence by PW1, PW4, DW1 and DW3 had been there when the deceased suffered stroke in October, 2016 which impaired his memory and from that time, he never recovered fully till his death. Hence, when he made the "WILL", he was incapable of making it as established in Court through tendering and admission of exhibits "D4" and "D5". The Caveators' Advocate cited *Rule 7 of the 3rd Schedule to the Customary Laws (Declaration) Order,*[15] that expressly reads that:

> A *Will is invalidated if a testator is of unsound mind because of insanity, illness and drunkenness or sudden anger* with reference also made to the Indian Succession Act, 1865 that e*very person of sound mind and not a minor may dispose of his property by will.*

With regard to capacity of the witnesses to the "WILL", the Caveators' Advocate contended that, the witnesses who witnessed the "WILL", that is, PW2 Florence Sawaya and PW3 Grace Delicia Maleto testified that they did not read the "WILL" as revealed during cross examination, two who both had no blood relationship with the deceased being the reason why the clan meeting (Exhibits D8 and D9) did not accept the "WILL".

Furthermore, the deceased's wife was not present during execution of the said "WILL". Reference was made to **Jackson Reuben Maro v.**

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[15] G.N. No. 436 of 1963.

Halima A. Shekigenda[16] and **Jackson Reuben Maro v. Hubert Sebastian**,[17] where the Court of Appeal of Tanzania invalidated purported "WILL" as the deceased's wife was absent during making of the "WILL".

Regarding involvement in the "WILL" of properties not owned by the deceased, the Caveators' Advocate submitted that, the deceased's "WILL" has involved properties not belonging to the deceased contrary to the provisions of *Rule 1 of the 3rd schedule to the Local Customary Law (Declaration) No. 4 Order*,[18] which provides that; the testator should not bequeath what does not belong to him. To cement such supposition, he submitted that, according to DW1, DW2 and DW3, the deceased's "WILL" contains properties that were subject of division in the case of **Reginald Abraham Mengi v. Mercy Anna Mengi**,[19] whereby the deceased knew about evidenced by a letter written to his spouse's lawyer. Therefore, the deceased had no capacity whatsoever to bequeath such properties for the same belongs to someone else.

Concluding the first issue, the Caveators' learned Advocate submitted that, the "WILL" disinherited his own children unreasonably. He quoted the provisions of *Rule 38 of 3rd schedule to the Local Customary Law (Declaration) (No. 4) Order*,[20] that read:

> *Kama itaonekana mtu amenyimwa urithi katika wosia pasipokuwa na sababu ya haki, wosia unavunjwa na urithi utagawanywa kufuata mpango wa urithi usio wa wosia.*

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[16] [1998] T.L.R 254.

[17] Civil Appeal No 84 of 2004, Court of Appeal of Tanzania (Arusha Registry) (unreported).

[18] G.N. No. 436 of 1963.

[19] District Magistrates Court of Kinondoni at Kinondoni, Matrimonial Cause No. 8 of 2015.

[20] G.N. No. 436 of 1963.

He argued that, the deceased denied his legitimate heirs from his first marriage, that is, Abdiel Mengi (first Caveator) and Regina Mengi of their birth right of inheritance without assigning reasons in the "WILL". The two heirs were never given any chance to defend themselves when the "WILL" was made and thus illegal rendering the deceased's "WILL" invalid.

As to impropriety in the making of the "WILL", the Caveators' learned Advocate submitted that, the "WILL" was made under undue influence. He invited the Court to consider the confidential relationship which creates an element of influence between the beneficiary and the testator, for instance, under circumstances where the testator is sick and fully depending on the beneficiary for care, medication or other necessities of life. He argued by making reference to the testimony of PW1 who stated that, the lawyer for the deceased's wife one Sabas Kiwango printed the "WILL" for signing by the deceased and all witnesses, PW1 inclusive but not having opportunity to read the printed document. The above connotes that, even the deceased did not know contents of the document he was signing.

Also, CW1 had knowledge of the "WILL" in exclusion of other heirs. The said CW1 testified that, on the first day, they arrived with the deceased's body from Dubai. After they reached at home, she (CW1) opened the safe where the "WILL" was earlier stored and restored the same in another safe in her bedroom. Conclusively, the Caveators' learned Advocate argued that, the purported "WILL" of the late Dr. Reginald Abraham Mengi was procured under undue influence, in the circumstances; it is null and void and need to be set aside.

After going through the evidence on record and the respective submissions by the learned Advocates for both parties, the following are the deliberations of this Court in disposal of the issues at stake in this petition. Before doing so, it is a *conditio sine non quo* for this Court to determine applicable law of the estate of Late Reginald Abraham Mengi before this Court embarks on determination of question relating to legality of the Last Will and Testament of the late Reginald Abraham Mengi and other matters relating to probate and administration of estate of the said deceased person. In determining the applicable law, the Court is enjoined by judicial precedents to be guided by two legal tests, as it is reflected by myriad of case law including the famous cases of **Re Innocent Mbilinyi**[21] and the case of **Re Estate of the Late Suleman Kusundwa,**[22] among others. The said legal tests are as listed hereunder:

(1) Intention of Test.

(2) Mode of Life Test.

This Court is inclined to be guided by *Mode of Life Test* simply because the intention of deceased on which law should govern his estate can be inferred from his mode of life where the deceased dies without stating expressly this fact.

The evidence adduced before this Court clearly indicate that the mode of life of the late Dr. Reginald Abraham Mengi was two-fold. It was partly customary mode of life and partly modern way of life in a more or less the same degree. It legally implies that either customary law or

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[21] [1969] HCD No.283.

[22] [1965] E.A. 247.

statutory law may be applicable law to the estate of the late Reginald Abraham Mengi. However, it is legally impossible to apply both species of laws namely customary law and statutory law simultaneously as both statutory law and judicial precedents dictate that only one species of law should apply to the administration of estate of the deceased person. That being the case, this Court is required to determine the applicable law between customary law in one hand or statutory law on the other in a situation of **"hybrid mode of life"** of the late Reginald Abraham Mengi.

Unquestionably, this Court is facing unique situation where the deceased one Dr. Reginald Abraham Mengi lived, respected and practiced Chagga customs and culture in more or less the same degree as he lived, respected and practiced modern style of life as Christian by faith.

It is the firm legal position of this Court that where a deceased person lived **"hybrid mode of life"** concurrently or simultaneously during his life time, either customary law or statutory law qualifies to be applicable law to the estate of the deceased. Indispensably, the Court should assess which among the two between Customary Mode of Life in one hand, and the Modern Life Style on the other, is more dominant of mode of life of deceased person. Thereafter, the Court should proceed to apply the law which is applicable to *dominant part* of the mode of life of deceased person. That is what this Court refers to it as **"the Dominant Part Doctrine"**. If the Court makes factual finding that Customary Mode of Life was the *dominant part* of deceased person's mode of life, then the Court will proceed to declare customary law to be applicable law to the estate of deceased person but where the Court makes factual finding that Modern Life Style was the *dominant part* of deceased

person's mode of life, then the Court will proceed to declare statutory law to be applicable law to the estate of deceased person.

As testified by PW1, DW1 and DW2, the late Dr. Reginald Abraham Mengi substantially practiced Chagga tribal traditions, customs and culture as one of important component of his life alongside modern style of life during his life time. As Chagga tribesman; (i) the late Dr. Reginald Abraham Mengi was a Chairperson of Mengi Clan (ii) he assigned his daughter and his sons from his two marriage Chagga tribal names, for examble Regina was given Chagga name of Ndekiol, Rodney was given Chagga name of Mutie and Abdiel was given name of Mengiseni, Jayden was given Chagga name of Kihoza (iii) just like any Chagga Man he visited his ancestral area of Machame in Kilimanjaro Region every December of every year, (iv) his clan graveyard is in Machame and he was buried in Machame in the said clan graveyard (v) both Christian rites and customary rites were observed during his burial ceremony, (vi) though he contracted Christian marriage with his first wife, Chagga customs or Chagga marriage ceremony rites were observed, (vii) unlike Innocent Mbilinyi in the case of **Re Innocent Mbilinyi,** the late Dr. Reginald Abraham Mengi travelled to, and visited his ancestral area of Machame in Kilimanjaro Region regularly, (viii) he constructed house in his Machame Ancestral home, (ix) he was born in Machame and grew up in Machame (x) He participated in all Chagga rituals such playing Chagga drama, to slaughter a male goat "kuchinja ndafu" and to commission a head of family "kuvisha koti" and (xi) generally on basis of facts and evidence available on the records of this Court, the late Dr. Reginald Abraham Mengi practiced Chagga tribal traditions, customs and culture as one of important component of his life.

Also, modern life style was substantially component of the late Dr. Reginald Abraham Mengi's mode of life. The late Dr. Reginald Abraham Mengi as modernist; (i) contracted Christian marriage with his first wife, (ii) contracted civil marriage with his second wife in 2015 at Kinondoni District and thereafter he went Mauritius for wedding reception party, (iii) he baptized his daughter and sons by assigning them Christian names, (iv) he resided in, and spent large part of his adulthood life in Dar es Salaam City which is a fountain of modern life rather than his ancestral home of Machame (v) Christian rites were observed during his burial ceremony, (v) he used to attend medical check-up in United Kingdom, South Africa and United Arab Emirates (UAE), (vi) the nature of his occupation as one of the richest businessman in Tanzania and Chairperson of IPP Group of Companies Limited made modern life inevitable for him.

Though the late Reginald Abraham Mengi lived "*hybrid mode of life*", from the assessment of this Court, it appears that Modern Life Style is the most "*Dominant Part*" of mode of life of the deceased Dr. Reginald Abraham Mengi than Customary Mode of Life. Therefore, this Court proceeds to apply the law which is applicable to *dominant part* of the mode of life of a deceased person. Since it is a factual finding of this Court that Modern Life Style was the *dominant part* of the late Dr. Reginald Abraham Mengi's mode of life than Customary Mode of Life then, the Court do hereby declare that statutory law is applicable to administration of estate of the late Reginald Abraham Mengi including determination of legality of His Last Will and Testament.

Having determined the applicable law, the Court will proceed to consolidate and address the first and second issues altogether, that is;

whether the "WILL" of the late Dr. Reginald Abraham Mengi made on 17th August, 2017 at Dar es Salaam was validly made and whether the contested "WILL" of the late Dr. Reginald Abraham Mengi alleged to have been made on 17th August, 2017 was properly made.

In preface to this issue, a "WILL" is defined under *Section 2 (1) of the Probate and Administration of Estate Act*[23] to mean:

> *Legal declaration of testator with respect to his property, which he desires to be carried into effect after his death.*

A "WILL" may be made orally or in written form. Whether written or oral, a "WILL" must satisfy certain conditions.

In the present case, it was the evidence per PW1 that, the "WILL" under scrutiny was drawn by an Advocate named Sabas Kiwango, whereas during its signing, the same was witnessed by two witnesses, that is; PW2 and PW3. The "WILL" was put under custody of Florence Msaki (the Deceased's Personal Secretary) who testified as PW2 in this case and who as such placed the said "WILL" in a safe in the office of the deceased in Dar es Salaam until on 22nd June, 2019 when the said "WILL" was read in a family meeting. The "WILL" was admitted and marked exhibit P2 with the two meetings dated 11th May, 2019 and 22nd June, 2019 which were attended by family members. The minutes thereof were admitted as exhibits "D8" and "D9".

The "WILL" under scrutiny by the deceased one Mr. Mengi bequeathed all properties to CW1 and his two little issues namely Jayden Kihoza Mengi and Ryan Saashisha Mengi but in exclusion of the deceased's two elder issues born from the first wife who was divorced. Reasons for such

[23] Cap 352 [R.E. 2002].

exclusion of the disinherited heirs were not provided in the said "WILL". Also, the disinherited heirs were not given right to be heard thus invalidating the "WILL".

Marking end to that issue, this Court finds it impeccable to address the issue on "capacity of the deceased" when making the said "WILL". It was submitted by the Petitioners' Advocate that the one who could prove *whether the deceased was of sound or unsound mind are witnesses to the "WILL", that is, PW2 and PW3.* In law, a person making a "WILL" is presumed to be of sound mental capacity, meaning that; he understands the nature of the act and its legal effects or consequences. Such position was made clear in the case of **Leah Ntambula v. Francis Wenceslaus Ntambula and Another,**[24] when approving the case of **Banks v. Goodfellow**[25] where the Court remarked that:

> *It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claim to which he ought to give effect and, with a view to the latter object, that no disorder of the mind shall poison his affection, pervert his sense of right or prevent the exercise of his natural faculties- that no insane delusion shall influence his will in disposing of his property and bring about a disposal of which, if the mind had been sound, would not have been made.*

In the present case, the Court finds and declares the deceased's "WILL" is legally invalid for failure to meet the four *Testamentary capacity tests*

[24] Civil Case No. 172 of 2020.

[25] [1861-73 All ER] Rep 47/ (1870) LR 5QB 549.

as enunciated by Cockburn, J. in the case of **Banks v. Goodfellow** on basis of the following reasons: **One**, there is sufficient evidence from PW1, DW1, DW2, CW1 and CW2 that the deceased suffered a stroke since October, 2016 and he never recovered fully till he met his death in terms of exhibits D4 and D5, meaning that, his rational thinking worth making decisions was impaired to make him unable to understand the nature of testamentary decision and its effect. **Two**, the "WILL" bequeathed some properties not falling in the deceased's personal ownership as clearly testified by PW1 and DW1. All the immediate shows that, if at all he was the one who so bequeathed the said properties, he did not rationally understand the extent within which he ought to have bequeathed the said properties, as his mental capacity was incapable of so doing. **Three**, the witnesses to the "WILL" were not professionals in the medical field to prove "soundness of the deceased's mind. **Four**, there were no given reasons, leave alone good reasons, to disinherit the elder issues. This is a manifestation that the testator was mentally impaired to the extent that he was unable to know the lawful heirs and disinherited them by deliberate design.

In addition, the witnesses to the WILL including PW1 (IPP Media Group of Companies' Corporate Secretary) were all literate but were not given opportunity to read content of the WILL. Worse indeed, the sanctity of the will is questionable on the ground that CW1 was a custodian of the "WILL" while she is one of the main heirs/beneficiaries.

In furtherance to the position taken hereinabove, this Court finds the WILL is invalid under the doctrine of Restrictive Testamentary Freedom adopted by this Court as a result of modification of common law principle of *Absolute Testamentary Freedom* on a ground of

disinheritance of lawful heirs in a manner provided hereinafter. I do preface this ground for nullification of a "WILL" with the wisdom of **N.W. Hines** in his scholarly work titled: ***Freedom of Testation and the Iowa Probate Code*** in which he said the following:

> *As a concept, liberty of testation has fuelled imaginations and sparked debate for almost as long as man has recorded his colloquies.*[26]

More still, under the provisions of *Section 46 of the Indian Succession Act, 1865,* every person of sound mind and of majority age is entitled to dispose his property by his Last "WILL" and Testament in the realm of statutory inheritance in Tanzania. There is no any provision in *the Indian Succession Act, 1865* or in any other written law which expressly imposes any limitation to, or dictate the owner of property in mandatory terms for him to bequeath his property by his Last "WILL" to persons he is related to them by blood, marriage or adoption such as his wife, sons and daughters or any kindred save for provisions of *Section 36 (4) of the Law of Child Act,*[27] which seems to impose obligation on biological parent of the Child to bequeath his estate to his child born out of wedlock in express terms. *Section 36 (4)* provides:

> Where the Court has made an order on a biological father, such biological father shall assume the responsibility to the child in the same manner as may be in respect of a child born in wedlock and *the child subject to religious belief of the biological father, have*

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[26] N.W. Hines "Freedom of Testation and the Iowa Probate Code", Vol. 49, *Iowa Law Review,* 724, (1964), at page 725.

[27] Cap 13 of 2009 (R.E. 2019).

such other rights devolving from the parent including a right to be an heir. (Emphasis applied)

However, absence of provision in *the Indian Succession Act, 1865* which expressly entitles testator a right to disinherit his kindred or members of his immediate family does not take away the right of testator to disinherit them under common law legal system simply because the Courts in Tanzania are required to dispense justice and interpret laws in conformity with substance of common law, doctrine of equity and statute of general application as existed in England on 22nd July, 1920 within purview of provisions of *Section 2 (3) of Judicature and Application of Laws Act,*[28] as judicially considered by Court of Appeal of Tanzania in the case of **Issa Athman Tojo v. Republic**[29] in which the Court held as follows:

Courts in this country are empowered by section 2 (2) of the Judicature and Application of Laws Ordinance to apply the common law as it existed in England on the twenty second day of July, 1920.

Other cases in which the provisions of *Section 2 (3) of Judicature and Application of Laws Act*[30] has been applied includes:

(1) **Dodhia v. National & Grindlays Bank Ltd. and Another.**[31]

(2) **Director of Public Prosecution v. Peter Roland Vogel.**[32]

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[28] Cap. 358.

[29] [2003] TLR 119.

[30] Cap. 358.

[31] [1970] E.A. 195 at pp. 198 to 200.

[32] [1987] TLR 100.

(3) **Tanzania Air Services Limited v. Minister for Labour, Attorney General & the Commissioner for Labour.**[33]

(4) **Nyali Ltd v. Attorney General.**[34]

In the case of **Director of Public Prosecution v. Peter Roland Vogel,**[35] the Court of Appeal of Tanzania held that:

> High Court is granted power by the *proviso* to *Section 2 (2) of the Judicature and Application of Laws Ordinance, Cap. 453* to applying English law only so far that the circumstances of Tanzania and its inhabitants permit and subject to such qualification as local circumstances may render necessary.

In the case of **Nyali Ltd v. Attorney General,**[36] Denning, LJ at page 653 observed as follows:

> *The ... proviso says, however, that the common law is to apply "subject to such qualifications as local circumstances render necessary". This wise provision should, I think, be liberally construed. It is a recognition that the common law cannot be applied in a foreign land without considerable qualification. Just as with an English oak, so with the English common law. You cannot transplant it to the African continent and expect it to retain the tough character which it has in England. It will flourish indeed but it needs careful tending. So, with the common law. It has many principles of manifest justice and good sense which can be applied with advantage to peoples of*

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[33] [1996] TLR 217.

[34] [1955] 1 All ER 646; [1955]1 QB 1; [1955]2 WLR 649.

[35] [1987] TLR 100.

[36] *Ibid.*

every race and colour all the world over: but it has also many refinements, subtleties and technicalities which are not suited to other folk. These off-shoots must be cut away. In these far-off lands the people must have a law which they understand and which they will respect. The common law cannot fulfil this role except with considerable qualifications. The task of making these qualifications is entrusted to the Judges of these lands. It is a great task. I trust that they will not fail therein.

Therefore, if provision in *the Indian Succession Act, 1865* are interpreted in conformity with substance of common law and statute of general application as existed in England on 22nd July, 1920, inevitably the perceived *lacuna* or gap is filled by the Doctrine of Testamentary Freedom as enunciated by Cockburn, CJ (as he then was) in the landmark English case of **Banks v. Goodfellow**[37] and *Section 3 of the Wills Act, 1837* which is the statute of general application in England. The provisions of *Section 3 of the Wills Act, 1837* recognize the Doctrine of Testamentary Freedom.

Even in absence of provision in *the Indian Succession Act, 1865,* it is impregnable legal principle of ages in all common law jurisdictions that *"Everything is Permitted Except What is Forbidden by the Law"*, in other words, citizens are permitted to do things not only which the law expressly or impliedly permits them to do but also to do even those *"things which the law is silent".* This principle was well elucidated by Justice Laws in the case of **R. v. Somerset County Council, Exparte Fewings**[38] and Justice Robert Meggary in case of **Malone v.**

[37] [1870] 5 L.R. H.L. 549.

[38] [1995] 1 All ER 513 at page 524.

Commissioner for the Metropolitan Police.[39] Through the principle that "*Everything is Permitted Except What is Forbidden by the Law*" it was developed a legal proposition that "*a state shall do nothing except what it has been permitted by law and citizens shall do everything except what they are prohibited by law*". So, it goes without saying that absence of express provision in *the Indian Succession Act, 1865* does not bar testator's power to disinherit his own family and kindred.

Renown English Classical Philosopher, **John Locke** in his work titled **"Second Treatise of the Two Treatises of Government"** expressed his views on testamentary freedom in following terms:

> *...the end of Law is not to abolish or restrain, but to preserve and enlarge Freedom: For in all the states of created beings capable of Laws, where there is no Law, there is no Freedom. For Liberty is to be free from restraint and violence from others which cannot be, where there is no Law: But Freedom is not, as we are told, a liberty for every man to do what he lists...but a Liberty to dispose and order, as he lists, his person, Actions, Possessions and his whole Property, within the Allowance of those laws under which he is; and therein not subject to the arbitrary will of another, but freely to follow his own.*[40]

Doctrine of Testamentary Freedom is divided into two broad categories namely Doctrine of Absolute Testamentary Freedom and Doctrine of Restrictive Testamentary Freedom.

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[39] [1979] Ch 344.

[40] Chapter VI, Para 57. Extracted from Rosalind Frances Atherton (1993), "Family and 'Property: A History of Testamentary Freedom in N. E. W South Wales with Particular Reference to Widows and Children", the PhD Thesis submitted at Faculty of Law, University of New South Wales, at page 14.

(a) Doctrine of Absolute Testamentary Freedom

Under Doctrine of Absolute Testamentary Freedom, a testator with testamentary capacity has unfettered discretionary power without any limitation to dispose his estate by his "LAST WILL" and Testament to whomever person is pleased to bequeath his assets and to bequeath his estate to, or disinherit members of his own family who are related to him by blood, marriage and adoption *in lieu* thereof to bequeath his estate to the stranger who is not related to him by blood, marriage and adoption. The only and one legal requirement which testator is required to fulfil to enjoy absolute testamentary freedom are two: **One**, to possess testamentary capacity by exhibiting soundness of mind and; **two**, being of age of majority at a time of making "LAST WILL" and Testament. Once, the testator has testamentary capacity at the time of making his "LAST WILL" and Testament, then testators enjoys limitless testamentary power with unfettered discretion to carry out testamentary disposition without any limitation or interference from any person and even from the state or its public authorities.

The wishes of the deceased testator should be respected and implemented by the Court, executor or administrator of estate and heirs up to letter and spirit of his "LAST WILL" and Testament. That is why the "**overriding factor**" in interpretation of the "LAST WILL" and Testament is the "**Intention of Testator Principle**" and the jurisprudence underlying this overriding factor is the Doctrine of Testamentary Freedom. In the case of **Perrin v. Morgan,**[41] the Court observed that in construction of the "LAST WILL", the Court must give

[41] [1943] AC 399.

effect to the intention of the testator, which is gathered from reading the "WILL" as harmonious whole and giving the words the meaning which, having regard to the terms of the "WILL", the testator intended.

(b) Doctrine of Restrictive Testamentary Freedom

Several common law jurisdictions like England, USA, Canada, Kenya, Nigeria and Ghana embrace "Doctrine of Restrictive Testamentary Freedom". The laws of common law jurisdictions which embrace *"Doctrine of Restrictive Testamentary Freedom"* do impose some restrictions, limitations or exceptions on Testamentary Freedom of testator. In Restrictive common law jurisdictions such as England, Canada and Kenya, the Doctrine of Testamentary Freedom as general rule admits several limitations or exceptions that limit testamentary powers of testator. In Restrictive common law jurisdictions, Testamentary Freedom of Testator is restricted or limited by myriad of legal concepts or principles namely:

(i) Family Financial Provisions Doctrine;

(ii) Elective Share Doctrine;

(iii) Doctrine of Community Property; and

(iv) Public Policy.

For example, in England, *Doctrine of Testamentary Freedom* remains intact and undisturbed. However, if a dependent is disinherited by testator in exercise of his discretion under doctrine of testamentary freedom as result left without adequate financial support, a Court of law has power under provisions of *section 2 of the Inheritance (Provision for*

Family Maintenance and Dependants) Act, 1975[42] to order an estate of deceased testator to make appropriate payment to satisfy the family support obligations that the deceased testator assumed during his life time to such dependant[43]. However, the dependant is not entitled to receive financial support out of deceased testator's estate if such dependant either wife or adult or minor child did not receive financial support during the testator's lifetime or she or he is economically capable of self-support[44]. The Family Financial Provisions Doctrine serves as exception to the general rule on Testamentary Freedom.

Unlike Islamic Law of Inheritance as found in **the Holy Qur'an** and **Hadith of Prophet Muhammad** which is pegged on Doctrine of Forced Heirship, **the Indian Succession Act, 1865** confers unfettered discretionary power to testator to disinherit members of his family or his kindred.

Viewing this matter from context of Doctrine of Absolute Testamentary Freedom as enshrined in provisions of *Section 3 of the Wills Act, 1837*[45] and as enunciated by Cockburn, C.J (as he then was) in the landmark English case of in **Banks v. Goodfellow,**[46] it appears to me that absence of express limitation on testator's power to dispose his estate to his family or other kindred by his "LAST WILL" in the provisions of *the Indian Succession Act, 1865* is a deliberate design rather than

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[42] Cap 63 as amended in 2014.

[43] Elizabeth Travis High, "The Tension between Testamentary Freedom and Parental Support Obligations: A Comparison between the United States and Great Britain", (1984), *Cornell International Law Journal.* Vol. 17, Issue No. 2, at p. 321.

[44] *Ibid.*

[45] Cap 267 Will 4 and 1 Vict available at https://www.legislation.gov.uk/ukpga/Will4and1Vict/7/26/introduction (lastly viewed on 17th May, 2021 at 14hrs.

[46] [1870] 5 L.R. H.L. 549.

inadvertent omission by the law makers. It is my firm belief that this absence of express limitation on testator's power to dispose his estate by his "LAST WILL" was influenced by Common Law legal doctrine famously known as *Doctrine of Testamentary Freedom* also known as *Doctrine of Freedom of Testation* in which the Testator can disinherit his own wife, son, daughter or other kindred and *in lieu* thereof he can bequeath his estate to strangers who are not related to testator by blood, marriage or adoption.

The Doctrine of Testamentary freedom and the rationale underpinning it were well expounded by Cockburn, C.J (as he then was) in the landmark English case of **Banks v. Goodfellow**.[47] In that case, his Lordship had this to state:

> *The law of every civilised people concedes to the owner of property the right of determining by his will, either in whole or in part, to whom the effects which he leaves behind him shall pass ... The English law leaves everything to the unfettered discretion of the testator ... the common sentiments of mankind may be safely trusted to secure, on the whole, a better disposition of the property of the dead, and one more accurately adjusted to the requirements of each particular case than could be obtained through a distribution prescribed by the stereotyped and inflexible rules of a general law.*[48]

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[47] [1870] 5 L.R. H.L. 549.

[48] [1870] 5 L.R. H.L. 549, at 563 to 565. Also, see Rosalind Frances Atherton, "Family and Property: A History of Testamentary Freedom in New South Wales with Particular Reference to Widows and Children" (1993), Ph. D Thesis submitted at School of law of University of New South Wales, at p. 69.

Notwithstanding the silence of *the Indian Succession Act, 1865* on power of testator to disinherit his own family, it is clear that the position of law in Tanzania is that a testator has unfettered discretionary power to dispose his or her estate in whatever way he or she wishes without any limitation under the *Doctrine of Testamentary Freedom* introduced in Tanzania vide received laws particularly substance of common law and statute of general application namely *Section 3 of the Wills Act, 1837.* The provisions of *Section 3 (supra)* provide as reproduced *de verbo in verbum* hereunder:

> *It shall be lawful for every person to devise, bequeath, or dispose of, by his will executed in manner herein-after required, all real estate and all personal estate which he shall be entitled to, either at law or in equity, at the time of his death, and which, if not so devised, bequeathed, or disposed of, would devolve upon his executor administrator; and the power hereby given shall extend to all contingent, executory or other future interests in any real or personal estate, whether the testator may or may not be ascertained as the person or one of the persons in whom the same respectively may become vested, and whether he may be entitled thereto under the instrument by which the same respectively were created, or under any disposition thereof by deed or will; and also to all rights of entry for conditions broken, and other rights of entry; and also to such of the same estates, interests, and rights respectively, and other real and personal estate, as the testator may be entitled to at the time of his death, notwithstanding that he may*

become entitled to the same subsequently to the execution of his will.

The Law Reform Commission of Tanzania in it's 1995 Annual Report titled **"Report of the Commission on the Law of Succession/Inheritance"** described *the Doctrine of Absolute Testamentary Freedom* as it applies in Tanzania in following terms:

> The Indian Succession Act, 1865 is basically codified English law. It is an old piece of legislation which was imported to Tanzania (Mainland) from India as it was in India in 1907. While in India, the Indian Succession Act, 1865 has undergone a number of amendments and modifications, this has not been the case with the one in Tanzania. *The provisions of the Indian Succession Act 1865 differ from those under the English law today. The Act provides for freedom of testamentary disposition to the extent that the testator/testatrix may dispose of all his/her property by will without providing anything to his/her dependents.* It does not give recognition to illegitimate children and makes no distinction between movable and immovable property. It does not apply to Muslims though it may apply to Christians and those of European origin resident in Tanzania (Mainland). On the whole the Act is not often resorted to by the Parties, just as is the position in Kenya.[49] [Emphasis supplied]

While Tanzania continues to retain and recognize Absolute Testamentary Freedom Doctrine, other common law jurisdictions such as England,

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[49] The Law Reform Commission of Tanzania (1995), "Report of the Commission on the Law of Succession/Inheritance", Annual Report of Law Reform Commission submitted to the Minister of Justice and Constitutional Affairs, March 1995 in Dar es Salaam at p. 17.

USA, Nigeria, Kenya, Ghana and South Africa have already shifted from Absolute Testamentary Freedom Doctrine by adopting emerging new approach of Restrictive Testamentary Freedom Doctrine. These Countries have devised several doctrines and legal principles to limit testamentary freedom of testator.

(i) England

In England, the limitations on Testamentary Freedom was and still is imposed by *Doctrine of Family Reasonable Financial Provisions.* This doctrine was introduced by *the Inheritance (Family Provision) Act, 1938,* which was later repealed and replaced by *the Inheritance (Provision for Family and Dependents) Act, 1975.* The 1938 Act introduced a new principle without overruling the terms of the will. It gave the surviving spouse and the dependent children the right to apply to the Court for maintenance out of a deceased person's estate. If it was found the deceased testator failed to make reasonable financial provision for dependants, then the Court enjoyed legal power to order maintenance from the estate of deceased to the surviving spouse, unmarried daughter, children (minor), and incapacitated daughter or son, and unmarried former spouse of the deceased.

Under, *the Inheritance (Provision for Family and Dependents) Act, 1975* for time being in force, the provision for a surviving spouse is no longer limited to maintenance but rather was upgraded to reasonable share from deceased's estate and class of dependants who are entitled to. The provision was widened to include any person treated by the deceased as a child of the family and any person who was being wholly or partly maintained by the deceased immediately before his death. In the

landmark case of **Ilott v. The Blue Cross and Others**[50] decided by Supreme Court of the UK in 2017, the facts were that Heather Ilott was the only child of Melita Jackson and left home at the age of 17 after troubled relationship with her mother and had left home to cohabitate with her partner, whom her mother disapproved.

Consequently, a lifelong estrangement between mother and daughter followed. Mrs Jackson died in 2004, leaving her estate, valued at almost £ 500,000, to various animal charities. Despite living independently from her mother, Ms Ilott subsequently made a claim under *the Inheritance (Provision for Family and Dependents) Act, 1975* on the basis that her mother's "LAST WILL" did not leave her with any reasonable financial provision. The trial Court (County Court) awarded Ms Ilott £ 50,000 for her maintenance on the grounds that her mother's "WILL" did not leave any reasonable financial provision for her. However, Ms Ilott was aggrieved by amount awarded by trial Court as a result she appealed and the Court of Appeal increased Ms Ilott's award to about three times almost one-third of the value of the total estate.

The respondents aggrieved by the decision appealed to the Supreme Court. The Supreme Court overturned the Court of Appeal's decision and restored original award of £ 50,000 by trial Court. The Supreme Court in this case of **Ilott** seized opportunity to reassert that the Doctrine of Testamentary Freedom is still alive and healthy under laws of United Kingdom, however, it is subject to Reasonable Financial Provisions to the dependants of the deceased testator.

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[50] [2017] UKSC 17.

(ii) USA

Laws in United States of America impose restrictions on the Testamentary Freedom of testator through *Elective Share Doctrine and Doctrine of Community Property.* The laws in United States of America restrict Testamentary Freedom of testator in following terms:

(a) They restrict Testamentary Freedom of testator by affording a surviving spouse two options to choose either to inherit estate of the deceased spouse under his or her "LAST WILL" or opt for fixed statutory prescribed share of the estate which usually is one-third of the estate of deceased testator.

(b) They restrict Testamentary Freedom of testator by entitling each spouse automatic right of an equal share (50%) ownership of all properties acquired during the marriage upon death of either spouse. So, the man by his "LAST WILL" under this Doctrine cannot bequeath more than 50% of estate or property acquired during the subsistence of marriage as 50% thereof belong to his wife and same applies to wife.

(iii) Canada

In Canada, testamentary freedom is restricted by Public Policy in a sense that the "LAST WILL" made by testator of which its terms are contrary to Public policy is illegal thereby *null and void ab initio* to the extent such terms are inconsistent with, and repugnant to Public policy. Discrimination on basis of sex, nationality, race or any other forms of discrimination are taken to be contrary to Public Policy in Canada as discrimination is taken to be at variance with the democratic principles

governing pluralistic society of Canada and such democratic principles intend to protect, preserve and promote multicultural heritage of Canadians. To this end, in Canada, the "WILL" or Testamentary instrument which discriminates beneficiaries on basis of sex, nationality, race, religion or any other forms of discrimination is taken to be contrary to Public Policy thereby null and *void ab initio* to the extent it is inconsistent with, and repugnant to Public policy. The Court of Appeal of Ontario in Canada in the case of **Re Canada Trust Co. v. Ontario Human Rights Commission (1990)** held that testamentary disposition on basis of racism and religious superiority is contrary to Public Policy of Canada[51] and the Superior Court of Justice of Ontario in Canada took similar position in the case of **Royal Trust Corporation of Canada v. The University of Western Ontario *et al*.**[52]

(iv) Kenya, South Africa, Ghana and Nigeria

All these four African Countries namely Kenya, South Africa, Ghana and Nigeria Laws impose restrictions on the Testamentary Freedom of testator through Family Reasonable Financial Provisions Doctrine which is entrenched in their municipal statutes on law of succession. This jurisprudence on Reasonable Financial Provisions for Family members of deceased testator was copied from England by the said 4 African countries and pasted into their succession statutes. For example, in Nigeria, *Section 2 of Wills Law of Lagos State*[53] *and Section 127 of the*

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[51] Kerry O'Halloran, *Religion, Charity and Human Rights*, Cambridge University Press; 2014, at page 362.

[52] 2016 ONSC 1143.

[53] Act No. 2 of 1990.

Anambra State Administration and Succession (Estate of Deceased Persons) Law.[54]

The Court of Appeal of Kenya in the case of **Ndolo v. Ndolo**[55] held that testator enjoys unfettered discretion under *Doctrine of Testamentary Freedom* enshrined in provisions of *Section 5 of the Law of Succession Act,*[56] to dispose of his/her property as he or she wishes and to whoever pleases him. However, such unfettered discretionary power on testamentary disposition is subject to *Doctrine Family Reasonable Financial Provisions* enshrined in provisions of *Section 26 of the Law of Succession Act.*[57] In its own words the Court said:

> *This Court must, however, recognize and accept the position that under the provisions of Section 5 of the Act every adult Kenyan has an unfettered testamentary freedom to dispose of his or her property by Will in any manner he or she sees fit. But like all freedoms to which all of us are entitled the freedom to dispose of property given by section 5 must be exercised with responsibility and a testator exercising that freedom must bear in mind that in the enjoyment of that freedom, he or she is not entitled to hurt those for whom he was responsible during his or her lifetime.*

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[54] Cap 4 Laws of Anambra State of Nigeria Recognise Family Reasonable Financial Provisions Doctrine

[55] Nairobi. C.A No. 128 of 1995.

[56] Cap. 160.

[57] Ibid.

The *ratio decidendi* in the case of **Ndolo** *(supra)* was applied by High Court of Kenya at Meru in the case of the **Estate of Amina Juma Kassam (Deceased),**[58] as per Lesiit, J.

It is therefore desirable that Tanzania abandons the Absolute Testamentary Freedom Doctrine and adopt Restrictive Testamentary Freedom Doctrine just like its common law jurisdictions counterparts namely England, USA, Canada, Nigeria, Kenya, Ghana and South Africa, among others, which have already shifted from Absolute Testamentary Freedom Doctrine in favour of Restrictive Testamentary Freedom Doctrine. The dictates of shifting the law imposed by this Judgement is in line with the Law Reform Commission in its two annual reports of 1995 and 1996.[59] In the said Reports, it was opined that the Doctrine of Absolute Testamentary Freedom is unfair and harsh and that the Absolute Testamentary Freedom of Testator should have some limitations. The Commission in its 1995 annual report titled **"Report of the Commission on the Law of Succession/Inheritance"**, at page 49 made the following recommendation:

> *The rules on "WILLS" should limit the power of testamentary disposition to the extent that no person should be allowed to dispose of his property by way of a "WILL" in excess of one third (a) of the whole of his estate of whatever description.*[60]

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[58] Succession Cause No. 290 of 2010.

[59] Law Reform Commission "Report of the Commission on The Law Relating to Children in Tanzania", Annual Report of Law Reform Commission submitted to the Minister of Justice and Constitutional Affairs, (1996), Dar es Salaam.

[60] The Law Reform Commission of Tanzania *"Report of the Commission on the Law of Succession/Inheritance"*, Annual Report of Law Reform Commission submitted to the Minister of Justice and Constitutional Affairs, (1995), Dar es Salaam at page 49.

As matter of common sense and logic, the absolute general rule without its own exceptions is always unjust, unfair and socially unacceptable, so is the Doctrine of Absolute Testamentary Freedom in Tanzania which does not recognize any clear exception. As matter of legal common sense, *"every general rule must admit its own exceptions"* and a general rule without exceptions is extremely unfair and unjust.

Though, statutes in Tanzania in the realm of personal laws and family laws and several case law that judicially considered the same, suggest to a some extent the possibility of existence of exceptions to the general rule on Testamentary Freedom in Tanzania in a certain manner, there is a need to make the exceptions clear to be comprehended by ordinary legal practitioners, let alone ***common mwananchi***, who is a layman or laywoman of law. Therefore, judicial clarification by the Superior Courts of Record is needed to remove doubts and make such exceptions clearly visible in unequivocal terms and with certainty.

There are reasons that support the position that general rule on *Testamentary Freedom* in Tanzania must cease to be absolute general rule that does not admit any exception. In lieu thereof, this general rule must be transformed from absolute general rule to restrictive general rule that admits its own exceptions just like other common law jurisdictions particularly England, USA, Canada, Kenya, Ghana, Nigeria and South Africa. The following reasons make it inevitable for the Doctrine of Testamentary Freedom to admit its own exceptions:

(i) Inherent Unfairness of Absolute Rule without Exceptions;

(ii) Contemporary legal developments in Tanzania; and

(iii) The unsuitability of Doctrine of Absolute Testamentary Freedom to suit local circumstances.

Contemporary Statutory and Judicial Developments in Tanzania.

Though the Doctrine of Testamentary Freedom is absolute general rule without any exception in Tanzania, under provisions of *Section 46 of the Indian Succession Act, 1865* if interpreted in conformity with substance of English Common Law found in the *ratio decidendi* enunciated in the case of **Banks v. Goodfellow**[61] and the provisions of relevant statute of general application of England namely *Section 3 of the Wills Act, 1837* as existed in England on 22nd July, 1920 yet there are several contemporary statutory and judicial developments in Tanzania in the 2nd Decade of the 21st Century in the realm of personal and family laws that impliedly suggest the existence of exceptions to the general rule on *Testamentary Freedom.*

Therefore, judicial clarification by the Superior Courts of Record is needed to remove controversies, doubts and ambiguities by making such exceptions clearly visible in unequivocal terms and with certainty. With regards to contemporary statutory developments, provisions of *the Law of Child Act, 2009*[62] and *the Law of Marriage Act,*[63] as judicially considered by High Court in several cases impliedly appear to have imposed several exceptions to the general rule on Testamentary Freedom relating to right of the child born out of wedlock as reflected in

[61] [1870] 5 L.R. H.L. 549.
[62] Cap 13 (R.E. 2019).
[63] Cap. 29 (R.E. 2019).

the cases of **Elizabeth Mohamed v. Adolf John Magesa,**[64] **Judith Patrick Kyamba v. Tunsume Mwimbe,**[65] and **Beatrice Brighton Kamanga & Amanda Brighton Kamanga v. Ziada William Kamanga.**[66] However, such exceptions to the general rule on Testamentary Freedom needs be clarified to make them comprehensible and not only to ordinary legal practitioner but also to the ***common mwananchi.***

I will now have a look, albeit, briefly on the said statutory and judicial developments in Tanzania relating to Testamentary Freedom that by necessary legal implications suggest exceptions to the General Rule on Testamentary Freedom.

In Tanzania, there are two testamentary phenomena that operate to deny a wife her share in matrimonial property upon death of her husband namely testate phenomenon and interstate phenomenon. The Court of Appeal of Tanzania speaking through her Ladyship Sehel, J.A. in the case of **Joseph Shumbusho v. Mary Grace Tigerwa and 2 Others,**[67] had the following to speak on the testate and intestate phenomenon:

> The law recognizes the executor/administrator as personal representative of the deceased. Normally, when a person dies and leaves behind a WILL appointing one or more executors that named person (s), if there is no objection, then that named person

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[64] Probate Administration Appeal No 14 of 2011.

[65] Probate and Administration Cause No. 50 of 2016, High Court of Tanzania, (Dar es Salaam District Registry) (unreported).

[66] Civil Revision No. 13 of 2020, High Court of Tanzania, (Dar es Salaam District Registry) (unreported).

[67] Civil Appeal No. 183 of 2016, Court of Appeal of Tanzania, (Dar es Salaam Registry) (unreported).

becomes the executor of the WILL and by virtue of *section 99 of the Probate and Administration Act* he becomes a legal representative and it is said that the deceased dies intestate. But where there is no WILL to be executed, the deceased is said to have died intestate and upon petition, the Court appoints an administrator to be the legal representative of the deceased's estates.

To start with *testate phenomenon,* traditionally the male testator who is also a husband does bequeath through his "LAST WILL" and Testament all properties owned in his name or under his control and possession before his death alongside matrimonial assets acquired by joint efforts of the deceased husband and his surviving wife during the subsistence of their marriage without due regard to the share of matrimonial assets to which the surviving spouse (wife) is entitled.

In other words, a husband testator does unlawfully and unfairly alienates the share of his wife in, or denies his wife her share in matrimonial assets acquired by their joint efforts during the subsistence of their marriage through testamentary disposition ("LAST WILL" and Testament) by bequeathing his own share and share of her wife in matrimonial assets to heirs as if the wife is entitled nothing in matrimonial assets.

Coming to *interstate phenomenon,* the tradition in rural area and social practice in urban area is that when a man dies all properties owned in the name of the deceased husband or under control and possession of the deceased husband before his death including the matrimonial assets are usually included in the estate of deceased husband by administrator

of estate or clan/family members for distribution to the heirs as if the wife of the deceased husband is entitled nothing from matrimonial property acquired by joint efforts of the deceased husband and his surviving spouse (wife) during the subsistence of their marriage and this is observation made by my brethren Mruma, J. in the case of **Elizabeth Mohamed** (*supra*).

These two testamentary phenomena in Tanzania emanates from strong traditional belief and customary laws of majority patriarchal tribes in Tanzania that men are exclusively entitled right to own and inherit properties especially real property in exclusion of women who are entitled usufructuary rights only as reflected in the provisions of *Paragraph 20 of the Local Customary Law (Declaration) (*No. *4) Order,1964*[68] and as discussed in detail by my brethren Mwalusanya, J.(as he then was) in the case of **Bernardo Ephrahim v. Holaria Pastory and Another.**[69]

This unfair and unjust traditional and social practice of denying wife of deceased husband her entitlement in matrimonial assets through testate and interstate succession legally was canvassed in the case of **Elizabeth Mohamed** (*supra*) in the latter case, Mruma, J. held, as I quote in verbatim:

> If there are properties jointly acquired by the deceased person and his wife or her husband, the share of the surviving spouse must be ascertained first and excluded from the deceased's estate prior distribution of estate to heirs as the estate which is liable for administration and consequently distribution to heirs is

[68] (G.N. No. 436 of 1963).

[69] Civil Appeal No. 70 of 1989.

the estate of the deceased spouse and not estate of surviving spouse.

At pages 27 and 28 of the computer's typed and printed Ruling, Mruma, J. had this to say:

> *The law therefore requires that when a person applies for Probate and /or Letters of administration, he/she must include only the properties of the deceased person otherwise there is a danger of administering the estate of a person who is alive. It is my opinion that if there are properties jointly acquired by the deceased and his/her wife/husband (as the case may be), the share of the surviving partner must be carefully ascertained and excluded from the list of the deceased's estate. The estate which is liable for administration and consequently distribution to heirs is that of the deceased person and not otherwise.*

The legal basis of this *ratio decidendi* according to my brethren Mruma, J. in the case of **Elizabeth Mohamed** (*supra*) are the provisions of *Sections 56, 58 and 60 of the Law of Marriage Act, 1971*[70] which entitle a wife right to acquire, own, hold and dispose both immovable and movable property during the substance of marriage separately (alone) or jointly with husband.

However, I'm of opinion that the provisions of *Section 114 (1) of the Law of Marriage Act,*[71] entitles a wife a share in matrimonial property acquired by joints efforts with her husband upon death of her husband.

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[70] Cap. 29.

[71] Ibid.

In the land mark case of **Bi Hawa Mohamed v. Ally Sefu,**[72] the Court of Appeal of Tanzania brought an *inter alia* principle that it is proper to consider contribution by a spouse to the welfare of the family as contribution to the acquisition of matrimonial or family assets; and that "joint efforts" and 'work towards the acquiring of the assets" have to be construed as embracing the domestic "efforts" or "work" of husband and wife.

In the case of **Gabriel Nimrod Kurwijila v. Theresia Hassan Malongo,**[73] the Court had this to observe in respect of what constitutes matrimonial assets:

> *It is evident that the Law of Marriage Act has not specifically defined the term "matrimonial assets." Unlike in other jurisdictions like India, the term "matrimonial assets" is defined in section 4 (1) of the Matrimonial Property Act, Chapter 275 of the Revised Statutes, 1989 as hereunder: "In this Act. "matrimonial assets" means the matrimonial home or homes and all other real and personal property acquired by either or both spouses before or during their marriage, with the exceptions of (a) gifts, inheritances, trusts or settlements received by one spouse from a person other than the other spouse except to the extent to which they are used for the benefit of both spouses or their children;* (b) *an award or settlement of damages in court in favour of one spouse; (c) money paid or payable to one spouse under an insurance*

[72] [1983] TLR at page 32. Also, see the case of **Happiness Lukenza v. Lucas Bulugu Ng'olo and Martine Benedictor Mshimba**, Land Case No 31 of 2014 High Court of Tanzania at Mwanza (unreported), p. 7.

[73] Civil Appeal No 102 of 2018 Court of Appeal of Tanzania, (Tanga Registry) (unreported).

policy; (d) reasonable personal effects of one spouse; (e) business assets; (f) property exempted under a marriage contract*or separation agreement; (g) real and personal property acquired after separation unless the spouses resume cohabitation. "The definition given is not far from what this Court stated in the famous case of* **Bi. Hawa Mohamed v. Ally Sefu**[74] *when trying to search for a proper definition of what constitutes matrimonial assets in line with section 114 of the LMA. The Court stated: "The first important point of law for consideration in this case is what constitutes matrimonial assets for purposes of section 114. In our considered view, the term "matrimonial assets" means the same thing as what is otherwise described as "family assets":*

The court of Appeal in **Gabriel Nimrod Kurwijila's case** quoted with Approval paragraph 1064 of Lord Hail Shams **Halbury's Laws of England**,[75] in which it is stated:

> *The phrase "family assets" has been described as a convenient way of expressing an important concept: it refers to those things which are acquired by one or other or both of the parties, with the intention that there should be continuing provisions for them and their children during their joint lives, and used for the benefit of the family as a whole.*
>
> *The family assets can be divided into two parts (1) those which are of a capital nature, such as the*

[74] [1983] TLR 32.

[75] Fifth Edition, p. 491.

matrimonial home and the furniture in it (2) those which are of a revenue nature - producing nature such as the earning power of husband and wife. The position in India, which we take inspiration, is quite similar to that in our jurisdiction when it comes to interpret the phrase "matrimonial assets", which in our view is similar to the phrase "family assets" used in the Indian Act. They refer to those property acquired by one or other spouse before or during their marriage, with the intention that there should be continuing provisions for them and their children during their joint lives.

The **Bi Hawa Mohamed's case** and the **Gabriel Nimrod Kurwijila's case** are both referring to the division of matrimonial assets of divorcing spouses. However, the principle that can be deduced from such cases is about contribution of each spouse during marriage life. As such, when either spouse dies, the surviving spouse testamentary powers of disposing his/her estate through his/her "LAST WILL" and Testament is subject to the share to which the other spouse is entitled under provisions of *Section 114 (1) of the Law of Marriage Act.*[76]

Now, the *ratio decidendi* enunciated by Mruma, J in the case of **Elizabeth Mohamed** (*supra*) that a share of the surviving spouse in matrimonial property should be ascertained and excluded or separated from estate of deceased spouse as it belongs to surviving spouse is exception to the general rule on Testamentary Freedom. The said *ratio decidendi* in the case of **Elizabeth Mohamed** *(supra)* and *Section 114*

[76] Ibid.

(1) of the Law of Marriage Act, (supra) impose exception on general rule on Testamentary Freedom by limiting Testamentary power of a testator who is a spouse with net effect that such spouse does not have testamentary power to dispose through the "LAST WILL" and Testament the share of surviving spouse in matrimonial assets. This is a clear exception to the general rule on Testamentary Freedom.

The Law of Child Act, Cap. 13 in mandatory terms by employing the word "shall" in relevant provisions introduced the concept of *"Statutory Heirs"* in which children are treated as statutory heirs of estate of their parents. Before, I make a detailed analysis of this subject matter of *"Child as Statutory Heir"* of estate of his or her parent, let me first revisit the meaning of two very important terms namely the term *"Child"* and the term *"Parent"* for purpose of thorough comprehension of this subject matter.

The term "Child" is defined by provisions of *Section 4 of the Law of the Child Act,*[77] to mean *"a person below the age of eighteen years"* as I judicially considered in the case of **Judith Patrick Kyamba**.[78] The term "Parent" means *"a biological father or mother, the adoptive father or mother and any other person under whose care of a child has been committed"* as defined by *Section 3 of the Law of the Child Act*, as judicially considered by High Court in the cases of **Beatrice Brighton Kamanga & Amanda Brighton Kamanga** and **Elizabeth Mohamed** (*supra*).

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[77] Cap 13 (R.E. 2019).

[78] Probate and Administration Cause No. 50 of 2016, High Court of Tanzania (Dar es es Salaam Registry) (unreported)

Under the concept of **"Statutory Heirs"**, children are treated as statutory heirs of estate of their biological or adoptive parent. Several provisions of the Law of the Child Act, Cap. 13 confer statutory right on a Child to inherit estate of his or her parent as follows:

First, the High Court in several cases interpreted provisions of *Section 10 of the Law of Child Act, 2009* that indiscriminately confer on children of all categories right to inherit estate of their deceased father in his capacity as a parent including children born out of wedlock and adopted children. This position was taken by High Court in the following cases:

(i) **Elizabeth Mohamed v. Adolf John Magesa,**[79] as per Mruma, J. on 17th April, 2012.

(ii) **Judith Patrick Kyamba v. Tunsume Mwimbe,**[80] as per Mlyambina, J. on 28th May, 2020.

(iii) **Beatrice Brighton Kamanga & Amanda Brighton Kamanga v. Ziada William Kamanga,**[81] as per Mlacha, J. on 10th July, 2020.

Though the term "Child" is defined by provisions of *Section 4 of the Law of the Child Act,*[82] to mean a person below the age of 18 years. However, the High Court of Tanzania in the case of **Judith Patrick Kyamba** (*supra*) held that; a child born out of wedlock is entitled right to inherit estate of his father even after he/she attains the age of majority of 18 years or above. The legal implication of *ratio decidendi* in

[79] Probate Administration Appeal No 14 of 2011, High Court of Tanzania (Mwanza Registry) (unreported).

[80] Probate and Administration Cause No. 50 of 2016, High Court of Tanzania (Dar es Salaam District Registry) (unreported).

[81] Civil Revision No. 13 of 2020, High Court of Tanzania (Dar es Salaam District Registry) (unreported).

[82] Cap. 13 (R.E. 2019).

the case of **Judith Patrick Kyamba** (*supra*) is that the statutory right of a child to inherit estate of his parent extend beyond 17 years in a sense that adult children of the deceased parent of the age of 18 years or above too are entitled to inherit estate of their parent alongside minor children.

The High Court in immediately aforementioned cases consolidated the argument that child born out of wedlock too is entitled with the statutory right to inherit estate of his parent just like child born in the wedlock on basis of legal and constitutional concept of right of equality before the law and anti-discrimination principle as enshrined in the provisions of *Article 12 (1) and 13 (1) and (2) of the Constitution of United Republic of Tanzania, 1977,*[83] *Section 5 of the Law of the Child Act,*[84] *and Article 2 of the United Nations Convention on the Rights of the Child, 1989.*[85]

Second, a child born out of the wedlock is entitled right to inherit estate of his father but subject to religious belief of his biological father under provisions of *Section 36 (4) of the Law of the Child Act, 2009.*

Third, adopted Child is entitled right to inherit estate of his adoptive parent who dies testate through testamentary disposition *i.e* the "LAST WILL" and Testament of his adoptive parent under provisions of *Section 66 (1) (a) and (b) of the Law of the Child Act, 2009.* Also, where an adoptive parent dies intestate, adopted Child is entitled right to inherit estate of his adoptive parent under provisions of *Section 65 (1) of the*

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[83] Cap 2 as amended from time to time.

[84] Cap 13 (R.E. 2019).

[85] Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 entry into force 2 September 1990, in accordance with article 49.

Law of the Child Act, 2009 as if the adopted child is the biological child of the adoptive parent.

Fourth, where a testamentary disposition made by the adoptive parent through his "LAST WILL" and Testament prior to the adoption order was made by the Court without making provision for the adopted child, then the adopted child is entitled right to apply to the Court to vary the testamentary disposition ("LAST WILL" and Testament) to provide for the adopted child from the estate of the adoptive parent under provisions of *Section 66 (1) (b) of the Law of the Child Act, 2009.*

In the light of the analysis immediately hereinabove, it is clear that the Law of Child Act in mandatory terms introduced the concept of "Statutory Heirs". Under this new concept of "Statutory Heirs" children are treated as statutory heirs of estate of their biological or adoptive parents. This new concept of "Statutory Heirs" appears to have imposed and introduced exception to General Rule on Testamentary Freedom in sense that testamentary power of testator is now limited by "Statutory Heirs Rule" as testator is dictated in mandatory terms by the law to bequeath his estate to his biological and/or adoptive children. Now, it is appropriate time that "**Statutory Heirs Rule**" under the Law of the Child Act, 2009 should now be recognized by Courts of law as new exception to the General Rule on Testamentary Freedom.

The only thing that can be regarded as exception rule under Absolute Testamentary Freedom Rule is lack of Testamentary Capacity. Testamentary capacity means a person's legal and mental ability to make or alter a valid Will and Testament. A person is said to lack Testamentary capacity if is of unsound mind and of age of minority at

time of making his "LAST WILL" and Testament. Notwithstanding the predominance of Absolute Testamentary Freedom in Tanzania in contemporary times and in England in 19th Century and early 20th Century, yet the *ratio decidendi* in the case of **Banks v. Goodfellow**[86] and provisions of *Section 7 of the Wills Act, 1837* as well as provisions of *Section 46 of the Indian Succession Act, 1865* concede to the principle that testator who lacks testamentary capacity cannot dispose his estate through his "LAST WILL" and Testament. The provisions of *Section 46 of the Indian Succession Act, 1865* provides as reproduced *verbatim* hereunder:

> *Every person of sound mind and not a minor may dispose of his property by Will.*

The Court of Appeal of Tanzania in the case of **Vaghella v. Vaghella**[87] while citing with approval the case of **Banks v. Goodfellow**[88] held that:

> validity of a will derives from the testamentary capacity of the testator and from the circumstances attending its making thereby testator must understand the nature of the act and its effects, the extent of the property he is disposing, understand the extent of the property of which he is disposing and that no disorder of mind shall poison his affections, pervert his sense of right or prevent the exercise of his natural faculties.

Lack of Testamentary Capacity is the oldest exception which is as old as the Doctrine of Testamentary Freedom itself. However, in common law jurisdiction including Tanzania it has always been treated as a mere rule

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[86] [1870] 5 L.R. H.L. 549.

[87] [1999] 2 EA 351.

[88] [1870] LR 5 QB 549.

of the law of succession rather than exception to the general rule on Testamentary Freedom. Now, Lack of Testamentary Capacity also should be recognized by Court of Law as the exception to general rule on Testamentary Freedom.

The legal and political lexicon "Public Policy" is most frequently employed by practitioners and scholars ranging from legal arena, political field to journalism, among others. However, it is too complex to define, though it is easy to recognize acts which are in line with it and that which are not in line with it. "Public Policy" is one of most controversial subject matters of law which happened to breed hottest legal debates among legal scholars and legal practitioners and this view is reflected way back in 1824 in the wording of Burrough, J., (*as he then was*) in the case of **Richardson v. Mellish**[89] in which he observed that:

> *Public policy is a very unruly horse, and when you get astride, you never know where it will carry you.*

However, 147 years later in 1971, my brethren Lord Denning, MR (as he then was) strongly opposed "unruly horse thesis" advanced by Burrough, J. (as he then was) in 1824 in **Richardson case** as the good Master of the Rolls came out with "unruly horse antithesis" in the famous case of **Enderby Town Football Club Ltd v. The Football Association Ltd**[90] in which he observed as reproduced *de verbo in verbum* hereunder:

> *I know that over 300 years ago Hobart, C.J. said the "Public policy is an unruly horse." It has often been repeated since. So*

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[89] (1824) 2 Bing. 229.

[90] [1971] Ch 591.

unruly is the horse, it is said [per Burrough, J. in **Richardson v Mellish,**[91] *that no Judge should ever try to mount it lest it run away with him. I disagree. With a good man in the saddle, the unruly horse can be kept in control. It can jump over obstacles. It can leap the fences put up by fictions and come down on the side of justice, as indeed was done in* **Nagle v. Feilden**.[92]

The legal controversies of the Doctrine of Public Policy substantially stems from dynamic nature of economic, political, cultural and social values, conditions and circumstance as well as scientific and technological developments which keep changing from time to time as accurately put by the Court in the case of **Re Beard**[93]wherein at page 342, the Court held that:

The truth of the matter seems to be that public policy is a variable thing. It must fluctuate with the circumstances of the time.

Also, the Australian Court in the case of **Re Jacob Morris (deceased)**[94] held that:

The phrase `public policy' appears to mean the ideas which for the time being prevail in a community as to the conditions necessary to ensure its welfare; so that anything is treated as against public policy if it is generally regarded as injurious to the public interest ...

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[91] (1824) 2 Bing. 229, 252].

[92] [1966] 2 Q.B. 633.

[93] [1908] 1 Ch. 383.

[94] [1943] N.S.W.S.R. 352.

These two cases were cited with approval by Ramadhan, J. (as he then was) in the case of **Asha Soud Salim v. Tanzania Housing Bank.**[95]

In view of the foregoing, it appears impracticable to define the lexicon "Public Policy" on ground of its multi-dimensional character and scholarly controversies surrounding it. Nevertheless, the best definition of the term "Public Policy" was offered by Lord Truro in 1853 which since then such definition has been repeatedly coined and reiterated by Courts of law in common law jurisdiction in subsequent judicial decisions. Lord Truro in the landmark case of **Egerton v. Brownlow** [96]held that:

> Public Policy is *that principle of law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against the public good, which may be termed the policy of law or public policy in relation to the administration of the law.*[97]

Also, earlier, Tindal, C.J (as he then was) in the case of **Horner v. Graves,**[98] held that:

> *Whatever is injurious to the interests of the public is void, on the grounds of public policy.*[99]

Winfield defines public policy as a principle of judicial legislation or interpretation founded on the current needs of the community.[100] The

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[95] [1983] TLR 270.

[96] [1853] 10 Eng. Rep. 359, 437 (H.L.)

[97] Farshad, G. *"The Concept of Public Policy in Law: Revisiting the Role of the Public Policy Doctrine in the Enforcement of Private Legal Arrangements."*, Vol. 94, Issue No. 3, Nebraska Law Review 685, (2015), page 700.

[98] 9 Bing. 735.

[99] Ibid

[100] Ghodoosi, *loc cit,* at page 700 and Percy H. Winfield, *"Public Policy in the English Common Law"*, (1928) 42 Harvard Law Review 76, 77–79; at 92.

definition of the term Public Policy offered by Lord Truro cited earlier was also quoted with approval in the case of **Asha Soud Salim** *discussed earlier.*

In some common law jurisdictions such as Canada, the Courts of law do refuse to enforce the "LAST WILL" and Testament of Testator or relevant clause thereof if such "WILL" or clause thereof contravenes or is inconsistent with, and repugnant to public policy. Refusal to enforce, or nullification of Will or clause thereof on contravention of public policy restricts or limits testamentary power of testator and serves as exception to the general rule of Testamentary Freedom. The circumstances under which the "LAST WILL" and Testament of Testator contravene public policy do vary from case to case and from time to time given the dynamic nature of economic, political, cultural and social values, conditions and circumstance as well as scientific and technological developments which keep changing from time to time.

In the case of **Royal Trust Corporation of Canada v. The University of Western Ontario et al**[101], (as per Mitchell, J.) the deceased testator **Dr. Priebe** created a "WILL" that created a scholarship for white, single, heterosexual, female or male science students who are not feminists or athletes. Consequently, Superior Court of Justice of Ontario in Canada held that the deceased's "WILL" was void for offending public policy as such "WILL" was discriminatory in its nature on grounds of race, sex orientation, marital status and ideology. Because of multi-cultural and multi-racial nature of Canada,

[101] 2016 ONSC 1143. See Kerry O'Halloran *"Religious Discrimination and Cultural Context: A Common Law Perspective"*, Cambridge University Press: United Kingdom, (2018), pages 344 and 345.

discrimination on any ground is treated as something which is inconsistent with, and repugnant to the public policy.

The Courts in Tanzania should intervene when the "LAST WILL" and Testament contravenes or it is inconsistent with, and repugnant to the public policy of United Republic of Tanzania. To this end, Tanzania's public policy on *inter alia* equality of people, non-discrimination and duties to the society should be treated as limitation and one of exception to the general rule on Testamentary Freedom.

The *"Doctrine of Ex Turpi Causa"* has its origin from the Latin maxim *ex turpi causa non oritur actio* which means that no action or cause of action which is founded on illegal conduct can be enforced by Court of law. In a simple language means, no one can benefit from his own wrong. Doctrine of *Ex Turpi Causa* sometimes is referred to as *"Doctrine of Illegality Defence"* is traced as far back as 18th Century in case of **Holman v. Johnson**[102] as per Lord Mansfield, CJ (as he then was). In that case Lord Mansfield, C.J had this to observe:

> *No Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, there the Court says he has no right to be assisted.*[103]

The public policy factor often cited by the Court of law for *ex turpi causa non oritur actio,* is that it is wrong to allow a criminal or wrong doer to

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[102] (1775) 1 Cowp 341.

[103] Andrea Gattini et al (eds.) "General Principles of Law and International Investment Arbitration", Brill Nijhoff; Boston (2018), p. 285 and 286 and Jenny Steel *"Tort Law: Text, Cases, and Materials"*, 2nd edn (2010) Oxford University Press Inc.; New York: p. 295.

profit from his crime or wrongful act under "No benefit principle" as it was held in most persuasive English judicial decisions in the cases of **Gray v. Thames Trains,**[104] **Murphy v. Culhane,**[105] **Gray v. Barr,**[106] and **Meah v. McCreamer.**[107]

In Tanzania, the *Doctrine of Ex Turpi Causa* was applied by Court of Appeal in the case of **Florent Rugarabamu v. Hassan Maige Goronga**[108] and case of **Zakaria Barie Bura v. Threasia Maria John Mubiru**[109] as well as in the case of **Rock City Tours Ltd v. Andy Nurray.**[110]

The Courts in Tanzania should intervene when the "LAST WILL" and Testament was made *ex turpi casusa* by refusing to enforce such Will and declare the same *null et void ab initio* on ground of violation of positive law of the land. To this end, in Tanzania, Doctrine of *Ex Turpi Causa* should be treated as limitation and one of exceptions to the general rule on Testamentary Freedom.

More still, the Doctrine of Absolute Testamentary Freedom does not suit local circumstances of Tanzania and its people as elucidated hereinabove, now it is just and fair in the circumstances for this Court to modify and qualify this doctrine to suit the local circumstance and cure harshness, injustice and unfairness which have been always caused by this alien doctrine.

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[104] [2009] 3 WLR 167,

[105] [1977] QB 94.

[106] [1971] 2 QB 554.

[107] (No. 2) [1986] 1 All ER 943.

[108] [1988] TLR 243.

[109] [1985] TLR 211.

[110] Revision No. 69 of 2013, High Court (Labour Division) (unreported).

The Doctrine of Absolute Testamentary Freedom does not suit local circumstance of Tanzania where there is a strong sense of fairness at different levels in the society.

Since the Doctrine of Absolute Testamentary Freedom being a legally binding principle in Tanzania derived from English Common Law and statute of general application as existed in England on 22nd July, 1920 but does not suit local circumstances of Tanzania and its inhabitants, now it is just and fair in the circumstances for this High Court to modify and qualify this doctrine to make it suits the local circumstances of Tanzania and its people within purview of *proviso* to *Section 2 (3) of the Judicature and Application of Laws Act.*[111]

Now, therefore, this Court do hereby modify and qualify the Doctrine of Absolute Testamentary Freedom as applicable in Tanzania in the following terms:

Under statutory inheritance, the testator by the terms of his "LAST WILL" and Testament under provisions of *Section 46 of the Indian Succession Act, 1865* is entitled right to bequeath his estate to whomever he chooses to pass his property without limitation or interference from any person or from state and its public authorities and he shall possesses testamentary discretionary power to bequeath or disinherit any person to whomever he chooses but subject to the following modifications, qualifications and exceptions:

One, where there are assets jointly acquired by the testator and his or her wife or husband (as the case may be), testator shall have no power to make testamentary disposition on, or to dispose the share in

[111] Cap. 358.

matrimonial assets of the surviving spouse by his "LAST WILL" and Testament. The share in matrimonial assets of the surviving spouse should be ascertained and excluded from the estate of testator. *It applies the same when the other spouse has passed away but her/his shares are yet to be administered fully.*

Two, testamentary power of testator is now limited by **"Statutory Heirs Rule"**, in which a testator is mandatorily required to bequeath part of his estate to his biological, or whoever dependent on him prior his death and/or adoptive children. However, the portion or percentage of estate to be bequeathed by testator to his child or children is within unfettered discretionary power of a testator provided that such portion or percentage of estate is reasonable in the circumstance of each case.

Three, a testator shall not make testamentary disposition through his "LAST WILL" and Testament save where he has testamentary capacity to make his "LAST WILL" and Testament. A testator shall be deemed in law to have testamentary capacity to make his "LAST WILL" and Testament if is of sound mind and of age of majority at time of making his "LAST WILL" and Testament. A testator shall be deemed in law to lack testamentary capacity to make his "LAST WILL" and Testament if is of unsound mind and of age of minority at time of making his "LAST WILL" and Testament.

Four, any testamentary disposition which is inconsistent with, or repugnant to, or contrary to Public Policy of Tanzania should be deemed to be null and void and should not be enforced by Court of law just like all other transactions which are contrary to public policy in Tanzania in particular on building a society founded on *inter alia* non-discrimination,

justice towards ensuring human dignity and human rights are respected and cherished in accordance with the spirit of the Universal Declaration of Human Rights, 1948.[112]

Five, any testamentary disposition made *ex turpi causa* by testator in violation of positive laws of Tanzania should be deemed to be *null et void ab initio* and should not be enforced by Court of law.

With the afore analysis, this judgment marks the jurisprudential shift from Doctrine of Absolute Testamentary Freedom to Doctrine of Restrictive Testamentary Freedom in Tanzania. Given the fact that case law through this judgment has imposed legal obligation on testator to mandatorily bequeath part of his estate to persons related to him by blood, marriage and adoption in a certain circumstances as matter of general rule, then it will be unfair and unjust if such obligation becomes absolute rule without any exception as absolute rules are usually unjust just like Doctrine of Absolute Testamentary Freedom. This Court is not prepared to commit the same legal sin namely **"legal absolutism",** the legal sin which this Court is trying to cure via this judgment by abolishing Absolute Testamentary Freedom as it amounts to committing the same legal sin of legal absolutism if this Court enunciates absolute rule without exception that compel testator to bequeath estate to members of his own nucleolus family related to him by blood, marriage and adoption.

To this end, it is the firm opinion of this Court that obligation under Restrictive Testamentary Freedom imposed by through this judgment on Parent to bequeath his estate to family members related to him by blood

[112] Article 9 of the Constitution of the United Republic of Tanzania of 1977.

namely sons, daughters and wife under statutory inheritance shall admit exceptions which ordinarily entitles a parent to disinherit his own sons, daughters and wife under Islamic law, customary law and under common law. In further endeavour to modify common law to suit the local circumstances, I do hereby hold that the Parent or spouse shall be entitled to disinherit his sons, daughters or wife in the following circumstances:

(a) Where the son or daughter of testator commits adultery with spouse of the testator;

(b) Where the spouse commits adultery with son or daughter of testator;

(c) Where a son, daughter or spouse attempt to murder the testator or his or her spouse;

(d) Where a son, daughter or spouse neglect to, fails to look after testator or fail to take care of testator in hunger or sickness or during old age without justifiable reasons;

(e) Mistreatment of testator by words or deeds;

(f) Where son, daughter or spouse by fraud, violence, intimidation, or undue influence causes the testator to make a will or to change one already made;

(g) Any other ground which the Court may determine to be sufficient cause for disinheritance of son, daughter or spouse.

In the instant case, the Last WILL and testament of the late Dr. Reginald Abraham Mengi is inconsistent with, and repugnant to the first three rules of the doctrine of Restrictive Testamentary Freedom. He

bequeathed assets jointly acquired by him and her wife, he disinherited his own blood issues without giving good reasons, and his testamentary capacity was impaired.

Regarding the 3rd issue as to whether the Court should grant probate to the Petitioners or letters of administration to the Caveators, the Petitioners' advocate had submitted that, since the application for probate is different from letters of administration, then; the Caveators must comply with *Sections 56 (1) (a), (b), (c) , (d), (e) and (f) of the Probate and Administration of Estates Act*[113] for grant of probate and Rule 39(9) while for letters of administration, it is forms No. 26 or 27 of the 1st schedule noting that, the attached documents are different.

On the other hand, the Caveators' Advocate contended that; in situations like this, the Court needs to invalidate the "WILL" and allow the caveat proceedings. Reference was made to a Court of Appeal decision in **Chantal Tito Mziray & Another v. Ritha John Makala & Another.**[114] He further argued that, since the Caveators have interest to the deceased's estate and are of good character, they will be fair thus qualifying to administer the deceased's estate.

As to this issue, this Court agrees with both learned advocates that in the circumstances of the present petition, the purported deceased's "WILL" is hereby declared invalid. Notably; this Court cannot at any rate grant probate to the Petitioners with all that has been argued above. That being the case, the entered caveat by the Caveators is hereby allowed.

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[113] Cap 352.

[114] Civil Appeal No. 59 of 2018, Court of Appeal of Tanzania, (Dar es Salaam Registry) (unreported).

It thus follows that; the deceased's estate will be dealt with in a manner where a person has died interstate. The immediate and consequential issue is as to whether or not that letters of administration can be granted automatically or in consequential when a caveat is allowed. It is true as correctly submitted by the Caveators' advocate, the Caveators have interest in the deceased's estate and so they qualify to be granted letters of administration. In the case of **Saleli Doto v. Maganga Maige and Others,**[115] the High Court of Tanzania had the following to say in deliberation as to who should be an administrator of the deceased in the circumstances:

> *In appointing the administrator of the deceased's estate, the main consideration is the reputation and capability of such person to act faithfully, diligently and impartially in administering the estate to the rightful owners. Therefore, Court can appoint any reputable person who is not even a member of the family or officer of the Court for that matter to be an administrator of the estate of the deceased.*

The High Court further quoted with approval the decision of this Court in the case of **Sekunda Mbwambo v. Rose Mbwambo,**[116] where the Court at pages 444 and 445 observed that:

> *An administrator may be widow/widows, parent or child of the deceased or any other close relative, if such persons are not available or if they are found to be unfit in one way or another, the Court has the power to appoint any other fit person or authority to discharge this duty.*

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[115] PC Probate Appeal No. 6 of 2018 (Shinyanga Registry), (Unreported).

[116] [2004] T.L.R 439.

Notably, the first Caveator is son to the deceased while the second Caveator is blood brother to the deceased. As stated in their evidence, both of them were appointed by their clan meetings (exhibits D8 & D9) for the purposes of administering the said estate. The Caveators have promised in their evidence to administer the estate of the late Reginald Abraham Mengi fairly to all beneficiaries. In his evidence, the second Caveator testified that, if appointed by this Court; he will administer the deceased's estate fairly to the widow and the four deceased's issues.

In light of the above, the said Caveators are fit persons to administer the estate. This Court wish to refer to the case of **Monica Nyamakere Jigamba v. Mugeta Bwire Bhakome & Another,**[117] where the Court of Appeal had the following in observation:

> *Where a Caveator appears and opposes the petition for probate or letters of administration then sub-Section 3 of Section 59 of the Probate and Administration requires the Court to proceed with the petition in accordance with paragraph (b) of Section 52 of the Probate and Administration which provides;*
>
> > *in any case in which there is contention, the proceedings shall take, as nearly as may be the form of a suit in which the Petitioner for the grant shall be plaintiff and any person who appears to oppose the proceedings shall be defendant.*

[117] Civil Application No. 199/1 of 2019, Court of Appeal of Tanzania, (Dar es Salaam Registry) (unreported).

In the same case of **Monica Nyamakere Jigamba**, the Court further and remarked that:

> *It follows then that where a petition has been opposed, the probate or administration proceedings change, as nearly as can be, into an ordinary civil suit, where the Petitioner becomes the plaintiff and the Caveator becomes the defendant and parties are required to file special pleadings. The main purpose of that procedure is to facilitate the investigation of a Caveator's objection and its effect is to enable the entire proceedings, but not just a part of it, to be dealt with in totality as in a suit and to be concluded as one whole.*

In the Estate of Sheikh Fazal Ilahi,[118] the East African Court of Appeal faced a similar situation as to what stands the position whenever citation is made in a probate cause. Dealing with that aspect, the Court said the following:

> *I now come to the main objection of Mr. Kelly which is as to the form in which the present matter including the petition is before the Court. Here I think Mr. Kelly is on good ground. I have tried to read r. 6 of G.N. 264 as liberally as I can; I cannot get away from the fact that the proceedings shall be numbered as a suit in which the Petitioner for a grant of probate... shall be the plaintiff, and the Caveator shall be the defendant, the petition for and grant of probate or letters of administration being registered "(my underlining)" as and deemed to be a plaint filed*

[118] [1957] 1 EA 697.

against the Caveator, and the affidavit or affidavits filed by the Caveator being deemed to be his written statement.

The legal mind of this Court is alive on the *ratio decidendi* of the Court of Appeal in the case of **Mark Alexender Gaetje, Wiebke Gaetje & Hedda Heerdegen v. Bright Gaetje Defloor,**[119] that it is wrong in law for the Court to grant letter of administration where Petitioner prays for probate as procedure, powers, and effect of executorship and administration of estate are different. However, the afore cited case of **Gaetje** is distinguishable from this case before this Court simply because in this case Caveators prayed to the Court be granted Letter of administration while Petitioner prayed for probate unlike **Gaetje Case** in which Petitioner prayed to the Court to be granted probate but she was granted letter of administration which was not prayed by Petitioner.

More so, where caveat is lodged, then petition for probate turns into ordinary suit under provisions of *Section 59 (3) and 52 (b) of the Probate and Administration of Estate Act* as judicially considered by Court of Appeal in the case of **Monica Nyamakabere Jigamba** and the petition for grant of probate or letters of administration is in law deemed to be a plaint filed against the Caveator and the affidavit filed by the Caveator is in law deemed to be written statement as it was held in the case of **In the Estate of Sheikh Fazal Ilahi.**[120]

Logically, it goes without saying that the Caveators being defendants in contentious probate and administration of estate proceedings they are entitled all reliefs prayed by them in their documents accompanying

[119] Civil Revision No. 3 of 2017, (Dar es Salaam Registry), (unreported).
[120] [1957] 1 EA 697.

their caveat which in law are deemed to be Written Statement of Defence.

From the above then, the matter having transformed into a normal civil suit following the caveat with evidence from both parties substantiating the probate and administration of the deceased's estate, there is no more need for an order to let the parties go and reconstitute themselves through family/clan meetings and then adduce in Court the same evidence which has already been availed. Allowing such processes will be detrimental to the deceased's estate thus defeating the purpose of probate and administration of a deceased's estate. It also it stands to be contrary to *Doctrine of Overriding Objective* enshrined in provisions *of Section 3 A and 3 B of the Civil Procedure Code,*[121] *as amended by provisions of Section 6 of the Written Laws (Miscellaneous Amendments) (No. 3) Act, 2018.*[122]

From the above reasons and for the sake of making litigation come to an end and for the purposes of avoidance of wastage of time, this Court firmly differs with the Petitioners' Advocate that the Caveators must comply with the provisions for an application for letter of administration, that is, *forms No. 26 or 27 to the 1st schedule.*

It is this Court's firm position that this very petition suffices to deal with the lingering issues on administration of the estate of late Reginald Abraham Mengi. What has been given in Court will not certainly differ from what will be later paraded in Court in terms of evidence so to be concise.

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[121] [Cap. 33 R.E. 2019].

[122] Act No. 8 of 2018.

Taking the matter differently would even cause further misappropriation of the deceased's estate or rather loss of value to the detriment of the deceased's beneficiaries/heirs unnecessarily. It is not the forms and or Sections which appoint an administrator, rather; the Court upon been satisfied that the best interest of the deceased's estate and beneficiaries are safeguarded. Henceforth, this Court hereby appoints the first and the second Caveators to be Co – administrators of the deceased's estate. The Administrators should comply with *Section 108 (1) of the Probate and Administration of Estate Act* [123] that provides:

> *The executor or administrator shall, with reasonable diligence, collect the property of the deceased and the debts that were due to him, pay the debts of the deceased and the debts and costs of administration, and distribute the estate to the persons or for the purposes entitled to the same or to trustees for such persons or for the purposes entitled to the same or to trustees for such persons or purposes or in accordance with the provisions of this Act, as the same may be.*

The above position has been reiterated and cemented in **Monica Nyamakare Jigamba case**.[124] That said and done, answers the issue in its totality.

In the end, therefore, the Last "WILL" and Testament of the late Dr. Reginald Abraham Mengi is *void abinitio* for *inter alia* want of testamentary capacity of the testator contrary to the provisions of *section 46 of the Indian Succession Act, 1865* and contrary to the *ratio*

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[123] Cap 352 (R.E. 2002).

[124] Civil Application No. 199/1 of 2019, Court of Appeal of Tanzania, (Dar es Salaam Registry) (unreported).

decidendi enunciated in the case of **Banks v Goodfellow** (*supra*) as approved by the Court of Appeal of Tanzania in the case of **Vaghella v. Vagella** (*supra*), for bequeathing some properties not fully belonging to him and for not giving good reasons to disinherit the elder issues. The first and the second Caveators are appointed Co – administrators of the estate of the late Dr. Reginald Abraham Mengi. The administrators are fully informed of their duties including of filing with the Court within six (6) months an inventory of the properties of the deceased. Having considered the nature of the matter, to answer the last issue, parties to this petition are ordered to bear for their own costs. Order accordingly.

Y. J. MLYAMBINA

JUDGE

18/05/2021

Judgement pronounced and dated 18th day of May, 2021 in the presence of Senior Learned Counsel Elisa Abel Msuya and Learned Counsel Irene Mchau, Ndehirio Ndesamburo and Gloria Sempasa for the Petitioners, Senior Learned Counsel Mrs. Nakazael Lukio Tenga, Learned Counsel Roman S.L. Masumbuko, and Grayson Laizer for the Caveators.

THE HIGH COURT OF TANZANIA

Y. J. MLYAMBINA

JUDGE

18/05/2021