

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

**AT DAR ES SALAAM**

**(ORIGINAL JURISDICTION)**

**PROBATE AND ADMINISTRATION CAUSE NO.4/2019**

**IN THE MATTER OF THE ESTATE OF THE LATE**

**ALBERT PATRICK NDAKIDEMI..... DECEASED**

**BETWEEN**

**STRATON PATRICE NDAKIDEMI..... PETITIONER**

**AND**

**MARGARETH ALBERT NDAKIDEMI.....1<sup>st</sup> CAVEATOR**

**ANGELA ALBERT NDAKIDEMI.....2<sup>nd</sup> CAVEATOR**

**ZENA ABDALLAH ATHUMANI.....3<sup>rd</sup> CAVEATOR**

**JOSEPHINE CHRISTOPHER RUTA.....4<sup>th</sup> CAVEATOR**

**FATUMA RAMADHANI MNYAWI.....5<sup>th</sup> CAVEATOR**

**JUDGMENT**

7/10/2021 & 21/10/2021

**I.C MUGETA, J.**

The late Albert Patrick Ndakidemi was a businessman who died on 4<sup>th</sup> November 2018 at Mwananyamala hospital, Dar es Salaam. He left nine surviving children whom he had from five different women including the 3<sup>rd</sup>, 4<sup>th</sup> and the 5<sup>th</sup> caveators. It is alleged by the petitioner that the deceased left a WILL mentioning him as executor. Consequently, he filed this petition to be granted probate. The petition is opposed by five caveators of whom two are daughters of the deceased and three are

among the women he had children with. After the caveators entered appearance, the petition became contentious and as per section 59(3) and 52(b) of the Probate and Administration of Estate Act [**Cap 352 R.E 2002**] the matter turned into a suit. The caveators dispute the will firstly, for disinheriting other heirs, secondly, that all witnesses to the will are relative of the deceased and thirdly, that the will has listed properties which does not form part of the deceased's estate as they belong to a company. From these facts the issues agreed for determination are: -

- i. Whether the deceased left a valid will*
- ii. If the first issue is answered in the negative who should be appointed administrator of the deceased's estate.*

During hearing the petitioner and the first, second and third caveators appeared in person whereas the fourth and fifth caveators were represented by Mr John Seka, learned advocate. Three witnesses testified for the petitioner. PW1 was Straton Ndakidemi who testified that the deceased was his half-brother. He said he was the one who helped the deceased with all his businesses and he was aware of the will which he tendered and was admitted as exhibit P2. PW2 and PW3 were witnesses to the said WILL who testified to have been present when the deceased affixed his signature to the will before the Rusumo learned advocate. PW2, Gabriel Ndakidemi, said deceased was his blood brother. He testified

further that through the WILL, deceased bequeathed all his property to his son Albert Junior. As for PW3 she said that she is not related to the deceased. Her evidence is to the effect that she was married to the deceased's brother and subsequently, used her husband's name.

The caveators' side brought six witnesses. These are Margreth Ndakidemi (DW1) Angela Ndakidemi (DW2), Zena Abdallah Athumani (DW3), Josephine Christopher Ruta (DW4), Bernard Thobias Ndakidemi (DW5) and Beda Samali Ndakidemi (DW6)

Their testimony was more or less the same in all material particulars. It revolved on the validity of the will that it was signed by relatives of the deceased only and that it disinherited eight children of the deceased. It is Margreth Ndakidemi (DW1) only who testified further that some of the properties which were mentioned in the purported Will do not belong to the deceased but to a company called Alpan Traders and Company Limited. Her witness Beda Samali Ndakidemi (DW6) who is a chairman of the Ndakidemi clan said the deceased was a chairman of Ndakidemi clan who observed their traditions and customs. He challenged the deceased's WILL as invalid for discriminating other children in inheriting their father's properties.

In determining this case I shall start with the first issue. Under section 2 of Probate and Administration of Estate Act [**Cap 352 R.E 2002**] WILL refers to the legal declaration of the intentions of a testator with respect to his property, which he desires to be carried into effect after his death. The Local Customary Law (Declaration) (No.4) Order 1963 **GN No.436/1963** (the Order) under the third Schedule provides for the standard or format of a written will. The caveators objected the WILL on grounds hereinabove already stated. However, I shall deal with two objections only which are sufficient to dispose of the first issue, namely:-

- i. That the purported Will was signed by two witness who are deceased's relatives.*
- ii. That the purported will disinherited other children without cogent reasons.*

Starting with the first ground of objection, the Law under item 19 of the third schedule of **GN. No.436/1963** provides that a written will of a literate person should be attested by two witnesses one from among the clan members and one outsider/stranger. The law reads: -

*Wosia ulioandikwa ushuhudiwe na mashahidi wanaojua kusoma na kuandika yaani mashahidi wasipungue wawili (mmoja wa ukoo na mmoja mtu baki) ikiwa mwenye wosia*

*anajua kusoma na kuandika, na wasipungue  
wanne(wawili wa ukoo na wawili watu baki)  
ikiwa mwenyewe hajui kusoma na kuandika*

Exhibit P2 shows that it was signed by the testator, which means the deceased could read and write. The same was witnessed by two people, Leah George Ndakidemi and Gabriel Patrick Ndakidemi. It is undisputed that Gabriel is the deceased's blood brother. But Leah Ndakidemi who was PW3 denied to be related to deceased. She is a sister-in-law of the deceased. However, the law above refers to a clan member, so it is my view that since Leah was married to Ndakidemi's clan she became a member to deceased's family. For that matter, I am in agreement with the caveators that the WILL was signed by two clan members which renders the same invalid.

Coming to the second point of objection, it is undisputed that deceased bequeathed all his estate to one of his sons, namely, Albert Patrick Ndakidemi Junior (as per item 1 of the WILL) excluding other eight children for the reason that he inherited them education which they have already acquired. It is undeniable fact that when this WILL was written in 2013 and when the testator died in 2018 most of his children was still in school. It is, therefore, clear that the deceased disinherited his eight children in terms of physical assets. The Order is very precise when it

comes to disinheriting a heir. It is settled that a testator cannot disinherit a heir without giving reasons for doing so. Item 30 of the Order provides that a testator has the ability to change principles of inheritance on intestacy but he/she cannot disinherit or deny a heir his inheritance without giving cogent reasons. It reads: -

*Mwenye kutoa wosia anao uwezo kubadilisha  
mpango wa urithi usio na wosia, lakini hawezi  
kumnyima mrithi au kuwanyima warithi kabisa  
pasipo sababu nzito*

Item 31 of the same provides for reasons which can influence the testator to disinherit the heir. The same are; **firstly**, when the heir commits adultery with the testator's wife, **secondly**, when the heir attempted to kill, or assaulted the testator or caused the testator or his mother (heir's mother) grievous harm and **thirdly**, if the heir unjustly did not take care of the testator in his sickness or when he needed food.

In this case, the deceased denied other children inheritance for reason stated in item 6 of the WILL that other children inherited education. This ground is not only not recognised by the law but also is insufficient. It is insufficient because education given to a child does not form part of the deceased estate to be inherited. Education is a legal/fundamental right which any child should enjoy as per section 8 (1) (e) of the law of the

Child **[Cap 13 R.E 2019]**. Further, the evidence of the 4<sup>th</sup> caveator (DW5) is that her daughter was born in 2010, therefore, when the deceased passed on in 2018, she had hardly any education.

From the foregoing analysis, I uphold the two objection and hold that the WILL is invalid and therefore unenforceable. Consequently, I direct that the estate of the late Albert Patrick Ndakidemi falls under the principle of intestacy, as per Item 38 of the third schedule of the order. The first issue is answered in the negative.

As for the second issue, since the purported WILL has been declared invalid the question is who should be appointed as administrator of the deceased estate. It is provided under section 33(1) of the Probate and Administration of Estate Act that letters of administration can be granted to any person whom according to rules of distribution would be entitled to whole or part of the deceased estate. The same reads:-

*Where the deceased has died intestate, letters of administration of his estate may be granted to any person who, according to the rules for the distribution of the estate of an intestate applicable in the case of such deceased, would be entitled to the whole or any part of such deceased's estate.*

The petitioner is a half-brother of the deceased who has no share or interest in the deceased's estate. He is, therefore, as a matter of law, disqualified to act as an administrator. His interest in the estate was to the extent of the terms of the will which has been invalidated. Since some children of the deceased are of the age of majority, the administrator ought to come from among them as the evidence shows that the deceased never lived permanently with any of the women he had children with (the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Caveators). Among the children Margret is the eldest. It is my view that Margret Albert Ndakidemi should be appointed and I hereby appoint her as administrator of the deceased's estate mainly because she is the daughter (first born) of the deceased and entitled to a part of the deceased's estate. The petition is dismissed and caveats are upheld.



*Mugeta*  
**C MUGETA**  
**JUDGE**

**21/10/2021**

**COURT:** Judgment delivered in chambers in the presence of the petitioner and the 1<sup>st</sup> to 3<sup>rd</sup> caveators and John Seka, advocate for the 4<sup>th</sup> and 5<sup>th</sup> caveators.



**Sgd: I.C. MUGETA**

**JUDGE**

**21/10/2021**