IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(ARUSHA DISTRICT REGISTRY)

AT ARUSHA

PROBATE AND ADMINISTRATION CAUSE NO. 23 AND 24 OF 2019

IN THE MATTER OF THE ESTATE OF THE LATE JOHN PETER SILVEIRA

AND

IN THE MATTER OF PETITION FOR GRANT OF PROBATE OF THE LATE JOHN PETER SILVEIRA BY FRANCISCA HARUWERU SILVEIRA

AND

IN THE MATTER OF CAVIET BY GERALD FRANCIS SILVEIRA AND SOLOMON JOHN SILVEIRA

JUDGMENT

27/10/2021 & 13/12/2021

KAMUZORA, J.

Francisca Haruweri Silveira petitioned to be appointed the executor of the WILL of the late John Peter Silveira vide Probate and Administration Cause No. 23 of 2019. On the other hand, Gerald Francis Silveira and Solomon John Silveira petitioned for letters of administration of the same deceased's estate vide Probate and Administration Cause No. 24 of 2019. Owing to that, the causes were consolidated by the order of this court dated 21/10/2019 and the petitioners in Probate and Administration Cause No. 24 of 2019 were asked instead to file caveat in

Probate and Administration Cause No. 23 of 2019. Upon filing the caveat, the matter turned into contentious proceedings and considering the requirement under section 52(b) of the Probate and Administration of Estates Act, [Cap 352 R.E 2019], Francisca Haruweri Silveira stands as the petitioner/plaintiff while Gerald Francis Silveira and Solomon John Silveira stands as caveators/defendants. During hearing of the matter, Gerald Francis Silveira did not turn up may be, for reasons best known to himself and only one caveator Solomoni Peter Silveira appeared and testified in court.

Before indulging into the matter, I consider it proper to trace back the facts of the matter though briefly. The deceased died on 27th July 2017 and was survived by a wife and children from different wombs. While petitioning for the executor's office, the petitioner annexed thereto, a copy of a purported Will which *inter alia* appointed her the executor of the will for the estate of the deceased. The caveator is disputing the validity of the Will for reasons that it did not include other beneficiaries and was not witnessed by qualified witnesses according to the law. He further claimed that the petitioner is not a fit person to be appointed to administer the deceased estate because she did not list all the deceased's properties and she misappropriated some of the

deceased's properties before being appointed to assume the functions of the office of administrator. The caveator is therefore petitioning to be appointed administrator of the estate claiming to have been appointed in the clan meeting.

During hearing, the petitioner was legally assisted by Mr. Lobulu Osujaki of Law Guide Attorneys and Ms. Edina Mndeme of Haraka Law Associates, assisted the Caveator. To prove her case the petitioner paraded before this Court three witnesses who are Patrick George Bile, Augustine Mathias Temu and G. 1875 D/CPL Fikiri Temaunji. Also, three exhibits were tendered and admitted in Court for the petitioner's case which are the certificate of death (Exhibit PE1), the letter from Lesikari Meliari dated 23rd January 2013 (Exhibit PE2) and the WILL (Exhibit PE3).

On the other hand, the caveator was accompanied by two witnesses by the names of Hussein Mohamed Kallanje and Yusuph Gullam Sharif. Also, four exhibits which are Certificate of death of the deceased (Exhibit DE1), Certificate of birth of one Balkis John Peter (Exhibit DE2), Clan Meeting Minutes (Exhibit DE3) and official government gazette with reference No. 38 dated 13th September 2019 (Exhibit DE4) were tendered and admitted in Court for caveator's case.

From the evidence in records, issues for determination are the following: **One,** what is law applicable to the present matter. **Two,** whether the WILL by the deceased is valid. **Three**, the validity of clan meeting in appointing an administrator. **Four**, who is entitled to administer the estate of the deceased. **Five**, what reliefs are parties entitled to.

Starting with the first issue, it is undisputed fact that the deceased was a Christian by religion. Despite the fact that the deceased had marital relationship with three different women at different times, still it is undisputed fact that his life was that of Christianity and he prophesied Christian rites. His relationship with the church was so obvious as he even kept the purported WILL in the Church premise confirming that he believed in the church. The validity of the WILL is another issue to be discussed later. The evidence by PW1 and PW3 (Augustine Mathias Temu who is a Priest at Roho Mtakatifu Parish, Ngarenaro church verifies that the deceased used regularly to worship and praise his almighty in that church. Also, the allegation that the petitioner was married by the Deceased through Christianity rites is not disputed by the Caveator and his supporting witnesses rather than arguing on being marrying the house maid which in my view does not refute the

submission contended by the petitioner and the witnesses. A petitioner's marriage validity is not substituted to invalidity by the reason that she was a house maid before marriage. What dictates the law to be applicable to the probate and administration of the deceased's estate is rather the lifestyle and intention of the deceased during his survivorship and in his testamentary than none. To appreciate this position, see the cases of **Re Innocent Mbilinyi** (1969) HCD No. 283 and **Re Estate of the Late Suleiman Kusundwa** (1965) E.A 247 where the mode of life and intention of the testator's test were set. In the circumstances therefore, it is apparent that the applicability of civil law than customary takes precedence.

Now coming to the second issue on the validity of the WILL, while the petitioner and her witnesses fortify that the WILL is valid as it encompasses all requirements of a valid WILL, the Caveator and his witnesses contend that it is a forged one. The caveators under paragraph 6 of the joint affidavit supporting the caveat challenged the validity of the WILL on account that it was not written by the deceased John Peter Silveira and insisted that the WILL is questionable for not including one of the deceased children and for not being signed by any of the deceased relatives.

The records reveal that before coming to this court parties had already had disagreements over the validity of the said WILL. It took them extra miles to report the matter to police station whereby forensic determination was involved. The handwriting expert G. 1875 D/CPL Fikiri Temauji (PW4) testified in Court on what he discovered during forensic investigation. The evidence of PW4 reveals that after going through all forensic procedures the signature and seal were found to be genuine. In other words, he justified that the purported WILL was not forged but it is a real document executed by the testator himself. So, what remains for determination is, whether the purported WILL meet the standards and requirements set by law.

One of the caveators Solomoni Peter Silveira being led by the learned counsel Ms. Edina Mndeme testified that the WILL is not valid because it was not witnessed by relatives and or siblings of the testator. The petitioner's evidence as well as the final submission by the counsel for the petitioner Mr. Lobulu were insisting that the WILL was properly witnessed. The WILL itself which was tendered and admitted as exhibit PE3 despite of having signed by the testator (The deceased John Peter Silveira) it was also witnessed by four other people excluding the attorney who prepared it. Those witnesses are Patrick Billy (The hamlet

Chairperson of Enyuata) who also appeared and testified in Court, Lesika (Ten-Cell leader), John Augustino and Salome Solomon. However, the very patent feature in the WILL is that all those witnesses to the WILL are not relatives as clearly submitted by the caveator.

Section 50 of the law of Indian Succession Act, 1865 which apply to Tanzania by virtual of section 14 of the Judicature and Application of Laws Act Cap 358 RE 2019, govern execution of unprivileged WILL. The section provides as follows: -

> *50. "Every testator, not being a soldier employed in an expedition, or engaged in actual warfare, or a mariner at sea, must execute his Will according to the following rules-*
>
> *First- N/A*
>
> *Second- N/A*
>
> *Third-* ***the Will shall be attested by two or more witnesses,*** *each of whom must have seen the testator sign or affix his mark to the Will, or have seen some other person sign the Will in the presence and by the direction of the testator, or have received from the testator a personal acknowledgement of his signature or mark, or of the signature of such other person; and each of the witnesses must sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary."* (Emphasis is mine)

Looking at such requirement of the law, it is apparent that the purported WILL of the late John Peter Silveira was legally attested and witnessed by four witnesses. The argument by the caveator that the WILL was supposed to have among the witnesses, a sibling and or relative does not fit into the circumstances where a testator is a Christian like in the present matter. That could only apply under customary rites which is not the case here.

Regarding, the contention that the testator did not bequeath properties to the Caveator and Samantha, I am a bit sceptical to the arguments by the caveator. The reason behind is very apparent. Reading the purported WILL especially paragraphs 2 and 5 it is very clear the caveator was not disinherited as he seems to suggest. At paragraph two of the WILL the testator said: -

> *2. "Ninapenda ifahamike kuwa Solomoni John Peter Nilishamgawia mali na nyumba niliyonunua NHC hakuna mali nyingine anayostahili kupewa kutoka kwangu."*

Under paragraph 5 the testator also said: -

> *5. "Kama Samantha atamuheshimu mama yake mdogo atapewa hatua 15 kwa 15 katika eneo lililoko Kilanyi au atatafutiwa eneo lingine tofauti na hapo Kilanyi."*

In the circumstance, the caveator can't say that the purported WILL disinherited him without reason for his not being included in the residuals after being given the property *inter vivos*. Also, in paragraph 5 the argument that the daughter of the deceased Samantha was not devolved by the deceased's estate is misplaced. I am at such view because, she was bequeathed the part of land at Kilanyi measuring 15 by 15 footsteps though with conditions of being disciplined to her aunt, the petitioner. Much as the petitioner has not mentioned disrespect from Samantha, the deceased WILL stands to be executed according to his wishes for Samantha.

Another argument by the caveator regarding the validity of the WILL is that one of the children of the deceased by the name of Bilkis John Peter Silveira was neither mentioned in the Will nor bequeathed with any property of her deceased's father. To fortify the argument the caveator tendered the birth certificate of Bilkis John Peter which was admitted as exhibit DE2. Also, the testimony by Caveator was supported by DW3 who claimed to be a relative. The petitioner disputed this fact and insisted that in her lifetime being married to John Peter Silveira she had never heard of such a child and the deceased had never disclosed such fact to her.

I am alive to the law that, bequeathing properties in form of WILL is the right and duty only casted to the testator. The testator has right to bequeath his/her estate to whomever he/she wishes to pass the property. Section 46 of the Indian Succession Act, 1865 gives such freedom to the testator where it provides: -

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

However, such discretionary power conferred upon the testator is not such absolute. It is restrictive. As a matter of law and logic, the testator is obligated to bequeath part of his estate to his/her spouse, biological child/children and whoever depended on him including adoptive child/children. The portion or percentage of estate to be bequeathed to the heir is within unfettered discretionary powers of the testator provided that the same is reasonable depending to the circumstances of each case. Whenever the testator opts to disinherit his rightful heir, he is duty bound to assign reason(s) for not devolving entitlement to the beneficiary.

In the present matter, the caveator presented the birth certificate (Exhibit DE2) to prove that Bilkis is among the children of the Late John Peter Silveira who was unfortunately not mentioned in the WILL. He

wanted to establish a fact that the deceased disinherited Bilkis without assigning the reason. The records show that, apart from Solomoni who is a brother to Bilkis, DW3 claimed to be a relative to the mother of Solomoni and Bilkis and he supported the fact that Bilkis is the deceased's child. Unfortunately, his evidence was contradictory and could not establish or support that fact. While at one time he mentioned Solomoni and Bilkis as deceased's children at other time he mentioned that his sister had only one child who is Solomoni. He also mentioned that he knew only three children of the deceased and two of the children were born by the house maid referring the petitioner. When he was asked about the age of Bilkis, he mentioned that she is still under 18 years of age. In fact, there is contradiction of the caveator's evidence relating to the child by the name of Bilkis and that of his witnesses. Looking at the exhibit DE2 which is the birth certificate of Bilkis, she was born in 1982 meaning that by 2019, when this case was filed in court, she was 37 years old and by today she is almost 39 years. I see no reason that made her not to appear in court to justify the claim of her being the deceased child. I see no reason why DW3 who claimed to be a relative could have confused a 37years old lady with under 18 years girl. In my view, the circumstances leading to her exclusion from the WILL is

confusing and more evidence was needed to justify that the Bilkis was legal heir and the deceased wrongly excluded her from the WILL. The deceased mentioned all his heirs including those who was not to benefit from the residue of the estate. I see no reason for her being excluded if real she was the deceased child. After warning myself on the danger of relying in the birth certificate, I asked myself as to why other relatives did not appear to justify this crucial issue. The deceased brother was also a caveator but did not appear in court to justify his caveat jointly raised. In that I hesitate from basing my findings on the purported birth certificate and determine that the WILL was invalid for merely excluding Bilkis whom there is no other evidence to so prove. In my view, the circumstance of this case is tainted with hidden facts which in my view, even the birth certificate is not a safe document to rely upon to conclude that Bilkis is the deceased child and was wrongly disinherited by the deceased.

In concluding this issue, I am of the settled view that the deceased WILL was properly executed in compliance of legal requirement. It was well kept under the authority of a church and the priest in custody of the copy of the WILL appeared to justify the

existence of the same. The allegations by the caveators were not justified to amount to invalidation of the deceased's WILL.

Regarding the issue of clan meeting, the Caveator contends that the petitioner was not appointed by the clan meeting to administer the estate of the deceased. The petitioner countered this argument by saying that she tried her best to convene the clan meeting, but it was not possible because it was rejected by the Caveator and his allies, family members. To substantiate that argument the petitioner tendered the letter from the Ten-cell leader Lesikari Meliari which was admitted as Exhibit PE2.

This issue need not detain me much. Having determined that the WILL was valid, the petitioner only needed the WILL to justify in court that she was appointed executor of the WILL. But assuming that she was applying for letters of administration, still the question of family meeting to approve for a person to apply for administration of the estate of the deceased has never been a law in our jurisdiction. The requirement does not feature either under section 55 of the Probate and Administration of Estate Act, Cap 352 R.E 2019 which accommodates petitions for probates and letters of administration with WILL annexed or section 56 of the same act dictating petitions for letters of

administration. It has been a good practice of the court aiming at reducing and or swiping off all misunderstandings which are likely to geminate during Court determination that, the parties sit and approve a person to apply to be appointed administrator of the deceased estate. Whenever the parties are not at peace to have such meeting sit and approve for the one to administer the estate of the deceased, the requirement of clan meeting/ minutes remains of no use. The law is clear as to who can apply to be appointed administrator of the estate of the deceased. There is judicial development and different case laws have expounded on who can be appointed administrator of the estate of the deceased. In the case of **Sekunda Mbwambo vs Rose Ramadhan [2004] TLR 439** It was held that: -

> *"An administrator may be a widow or widows, parents or child of the deceased or any close relative; if such people 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".*

Footing on such authority therefore, the argument by the caveator on the requirement of clan meeting in approving the administrator to be appointed to administer the deceased's estate is of no merit, it is bound to fail.

Another issue which is at variance between the parties is that, the petitioner is not a trustworthy person. That she squandered some of the estate forming part of the properties of the deceased. The caveator being guided by Ms. Edina Mndeme, learned counsel testified that the petitioner sold deceased properties including a car make Toyota Land Cruiser with registration number T. 327 AEL, plots of land, the house at Arumeru Kilanyi and machines. He also claimed that one of the deceased's children by the name of Samantha who is schooling is not supported by the petitioner though she is the one who receives house rents. Also, the caveator faults the petitioner for not being affective to other children than hers and that some of the deceased's properties were not mentioned by the petitioner in the petition.

I would like to start with the latter regarding the issue of concealing information of some properties forming part of the deceased's estate. In my view, this argument is misconceived. The deceased properties were listed in the WILL and the executor is bound to execute the WILL according to the wishes of the deceased. Assuming that the petitioner was applying for letters of administration, still this argument is prematurely raised. This can properly be raised at the time

when the appointed administrator/administratrix is exhibiting properties of the deceased in Court and not at the time of appointment.

On the issue of selling some of the properties before being appointed, it is a trite law that the one who alleges must prove. This is the requirement of the Law of Evidence [Cap. 6 R.E 2019]. Section 110 of said law provides as hereunder: -

> *"110.- (1) Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."*

Neither the caveator nor his witnesses who managed to prove that the petitioner has sold some of the properties forming part of the deceased's estate. It is just a mere allegation left without substantiation. In the case of **City Coffee LTD versus The Registered Trustee of Ilolo Coffee Group**, Civil Appeal No. 94 of 2018 the Court of Appeal on the principle that the one who alleges must prove had the following to say: -

> *"Under the elementary principle of he who alleges must prove; the principle embodied in section 110 of the Evidence Act, Cap. 6 of the Revised Edition, 2002 (henceforth the Evidence Act), it was incumbent upon the appellant to prove that fact".*

Based on the evidence in records, the caveator was unable to prove any misappropriation by the petitioner. This Court cannot draw an adverse conclusion that the petitioner misappropriated the deceased's properties on mere allegations by the Caveator. He must prove it on the required standard as per the law.

In the event therefore, and subject to section 24 of the Probate and Administration of Estates Act, [Cap 352 R.E 2019], this court grant probate to an executor appointed by the WILL one Francisca Haruweri Silveira to execute the WILL of the deceased John Peter Silveira in Probate and Administration Cause No. 23 of 2019. Probate and Administration Cause No 24 of 2019 is therefore dismissed. Following the nature of the matter involving relatives, I make no order as to costs.

DATED at **ARUSHA** this 13th Day of December 2021

D.C. KAMUZORA

JUDGE