

**IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM
CIVIL APPEAL NO. 154 OF 2020**

*(Arising from Probate and Administration Cause No. 26 of 2019
Ilala District Court at Kinyerezi)*

BENADETHA MARCO AMBROSE

MAGANGA1st APPELLANT

MARCELLINA MARCO AMBROSE

MAGANGA2nd APPELLANT

VERSUS

MARTIN MARCO AMBROSE MAGANGARESPONDENT

JUDGMENT

Date of Last Order; 12/06/2021

Date of Judgment; 22/11/2021

S.M. Kulita, J.

This is an appeal arising from Ilala District Court. The parties herein are brother and sisters. There at the lower court the Respondent preferred a petition for grant of letters of administration in respect of the estates of their late father namely Marco Ambrose Maganga who had passed away at Kiwalani area, Ilala District in Dar es Salaam Region on the 1st day of August,

2019. After the citation the Appellants herein lodged a caveat objecting the grant of letters of administration to the Respondent. They also objected admission of the *will* purported to have been made by the deceased which excludes them from inheriting the properties. Upon the matter being heard at the District Court, it was decided on favour of the Respondent, Martin Marco Ambrose Maganga. Dissatisfied with the decision of Ilala District Court the appellants knocked the door of the High Court to challenge the said decision of the District Court.

In their joint memorandum of appeal the appellants relied on the following three grounds;

1. That the trial Magistrate erred in law and in fact by in granting the decision positively to the respondent regardless the appellants' witness and evidence provided by the scientific examination and handwriting expert who was summoned to appear in court to testify as a court witness who proved the facts that the respondent's *will* is forged, that it was not signed by the deceased during his life time.
2. That the trial Magistrate erred in law and in facts in accepting the *will* which was brought unlawfully by the respondent to the family.

3. That the trial Magistrate erred in law and in facts in granting decision without directing facts of the case.

The matter was argued by way of written submissions and the scheduling orders were fully complied with by the parties. Both parties were unrepresented, they used to appear in person.

In their written submission in support of appeal the Appellants submitted in respect of the 1st ground that the trial Magistrate erred in law and in fact for disregarding the evidence of DW1 and DW2 that there were speculations of intention to rob the deceased's assets by the Respondent through forging the *will*, a few days before the family meeting.

Regarding the allegation that the *will* is forged the appellants submitted that the trial court failed to examine the will's contents in clause No. 5 which consist the words prohibiting the appellants from inheriting the deceased's assets for the reason that they had conspired to rob his (deceased's) house in corporation with the 1st appellant's husband one Zuberi Amrani Malimu by deceiting him to sign a wrong contract, pretending it to be the health insurance for him while not. The appellant further challenged that the trial court failed to examine the 6th clause of the purported *will* which shows that the house and the farm were inherited to the Respondent and

one Getruda Marco Ambrose only. They also challenged clause No. 7 that the appointment of the Respondent as the administrator was wrong as the same emanates from the forged *will*. On this, the appellants concluded that what was done by the respondent was just a selfish inheritance manipulated by him, it was not the intention of the deceased.

As for the issue of the trial court's decision in respect of validity of the *will*, the appellants stated that the trial court was wrong to validate the *will* while its authenticity on the signature was doubtful, that it was not proved to be authored/made by the deceased according to the Handwriting Expert (CW). The Appellants further stated that, the entire *will* or the signature marked on it having been regarded invalid, the solution was for the trial court to disregard the said *will* in its entirety instead of admitting it.

In the 2nd ground of appeal the appellants stated that the trial Magistrate erred in law and facts in accepting the *will* without inquiring the Respondent who is accused to have prepared and signed the said document.

Submitting on the 3rd ground of appeal that the trial Magistrate decided the matter without directing himself into the facts of the

case, the appellants stated that the trial court had not examined root of the case in reaching into the decision he did make. They insisted that the deceased had not left the *will*, that he died intestate, hence all four children have the right to inherit.

The appellants concluded by praying the judgment of the District Court to be set aside and this appeal be allowed.

In the reply thereto the Respondent, Martin Marco Ambrose Maganga submitted that section 110(1) of the Tanzania Evidence Act [Cap 6 RE 2002] requires the one who alleges to prove the facts. He said that the trial court was right to decide for the Respondent because the Appellants had failed to prove their allegations that the *will* was forged. He said that the Appellants just relied on the speculation that the *will* was prepared and signed by the Respondent and not the testator without any proof.

The respondent submitted that the testimonies of PW3, PW6 and PW7 are watertight to prove that the deceased's *will* was genuine and free from forgery. He said that the record is clear that PW3 and PW6 witnessed the deceased signing the said *will* before the Commissioner for Oaths (PW7). Hence, the appellants' assertion that the *will* was forged by the respondent is devoid of merit and cannot found in law and facts.

The Respondent further stated that the trial Magistrate did not leave without addressing on the evidence of opinion of the Handwriting Expert (CW). He said that the Magistrate asserted detailed reasons for him not to rely on that kind of evidence, that features of signatures in all documents examined by the expert differ. Hence, no justification that the signature appearing on the *will* was made by the respondent. He further said that the law does not bind the court to rely on expert's opinions in making decision.

As for the contract of construction (Exh. D1) and the Deceased's Identity Card the respondent submitted that the signatures cannot tally as they have been endorsed by different persons, that is Michael Maganga for that transpires in Exh. D1 and Marco Ambrose Maganga in the Identity Card. On this, the respondent concluded that the trial Magistrate was right to disregard the expert's opinion (Exh. CW1) as it could not be strong evidence to ascertain the genuineness of the signature of the late Marco Ambrose Maganga.

It is the submission of the respondent that the *will* was made in compliance of all procedures as per section 50 of the Indian Succession Act, 1865 which is applicable in our jurisdiction by virtue of Section 14 of the Judicature and Application of the Laws Act [Cap 358 RE 2019]. Hence prays for the 1st ground of appeal to be dismissed.

As for the 2nd ground of appeal, the respondent submitted that the trial magistrate was correct in law and facts to accept the *will* as the evidence was watertight to prove that it was genuine and free from forgery. He said that the way in which the said *will* was disclosed or handled does not make it invalid.

Replying the 3rd ground of appeal, the respondent submitted that the trial court was satisfied that the respondent did prove that the *will* was genuine and free from forgery, after he had considered facts of the case. He opposes the appellant's assertion that the District Court did not examine the root of the case and the circumstantial evidence thereof.

The respondent concluded by submitting that the appeal is devoid of merit hence deserves to be dismissed in its entirety.

In rejoinder the Appellants reiterated what had been stated in their submission in chief that the *will* is forged, that it was not made by the deceased, hence the trial court was wrong to admit it and use the same in deciding the matter for the respondent. The appellant just added that where the authenticity of the *will* is disputable for being attached that it was forged or not freely and voluntarily made by the testator, evidence like the testator's statements or instructions made during or before making the said *will* was

necessary, that the respondent had a duty to prove it. The appellants also stated that even if the testator so decided still the Advocate had a duty to advise the testator accordingly while recording his *will*.

Having gone through the parties' submissions and the lower court records, here is my analysis; Starting with the 1st ground of appeal, as for Exh. D1 and the Identity Card of the Deceased, I can agree with the trial Magistrate's findings that the **Contract for Renovation of the deceased's house (Exh. D1)** is doubtful for the reason that the same mentions the name **Michael** Maganga instead of **Marco** Maganga which is the real name of the deceased. It is my further considered view that, the holder of the said house purported to have been mentioned in the contract, be it Michael or Marco Maganga could have not easily signed the purported contract involving a great sum of money, Tsh. 61,500,000/= without confirming the correctness of his name in the contract sheet, unless he was not in a position of knowing what he was doing. All in all, notwithstanding that comment of mine, the trial Magistrate was right to disregard the said contract (Exh. D1).

Furthermore, the contents read in the contract sheet (Exh. D1) at the **paragraph 3** mentions the **heirs** instead of Michael (Marco) Maganga himself who is a party to the said contract, as the persons

who shall indemnify the person contracted to renovate the house in case the house is sold before fulfilment of the contractual terms. This creates a doubt if the said contract is genuine. I didn't expect such a contract to involve the deceased's beneficiaries while the owner of the property (Marco Maganga) was still alive on that 13/03/2017 when the said contract was purported to have been made. It is possible that maker of the said document had back dated it so as to reflect the same with the *will* (Exh. P1) purported to have been authored by the deceased, Marco Maganga on the 04/06/2018.

As for the **Identity Card** of the deceased which was also examined by the Handwriting Expert (CW); signature of the deceased that transpires thereon has not been suggested to have been forged, even the trial Magistrate correctly never said so in his findings. On this, there is also a possibility of the signature transpiring in the Identity Card not to tally with those seen in the said two mentioned documents, as the said Identity Card might have been signed by the deceased himself while those other two are forged. The Deceased's Identity Card can be genuine as nobody challenged on its authenticity. Hence, I don't find any reason to disregard its genuineness.

I fully concede with the Magistrate's findings that the **signatures** that transpire in the **Will (Exh. P1)**, the deceased's **identity card** and the **Contract** for Renovation of the deceased's house which is part of Exh. D1 purported to have been made by the deceased **do not tally**. I can agree with the trial Magistrate because the records transpire that he had adopted the said findings from the opinion of the Handwriting Expert, Cpl. Hamis Nankaha (CW), who was called as the court witness (CW) at the trial court. However, it happened that the said trial Magistrate decided to waive from that expert's opinion and regarded the said *Will* (Exh. P1) genuine. Among the reasons for disregarding the CW's evidence is that the court is not bound to rely on the expert's opinion in making its decision, which is true but it depends on the nature of the case.

Be it noted that, basically the CW's duty on that task was just to make comparison of the handwriting, specifically the signatures transpiring on those three documents. That is examining the said signature samples tabled before him by the trial court and come up with the findings as to whether there is/are similarity or not. The results, be it similarity or discrepancy could determine the authenticity of the disputable document (*will*), if it is doubtful, it should not be regarded, otherwise it should be carefully scrutinized. What has been misconceived by the trial Magistrate is

when he disregarded the evidence of the expert (CW) for his opinion that the signatures on those three documents do not tally. In my view, discrepancy is possible, because the signatures in those three documents have been proved inconsistent.

Having so said, it is obvious that the signatures in the said three documents cannot tally. I therefore find the expert's opinion was necessary in resolving the matter. Though, the court is not compelled to rely in the expert's opinion in making findings of the evidence adduced before it, there must be a reason(s) for waiving from such opinion.

The trial Magistrate regarded the *will* as genuine, that it was freely and voluntarily made by the maker before PW7 in the presence of witnesses, PW3 and PW6 but the court still had to speculate on the likelihood of the same being attested by the maker while he was sober and all other procedures had been followed in the attestation.

Generally, a *will* is not valid if it is made by a person who has no legal capacity to create it. Under the concept of Testamentary Capacity, the person making a *will* must be sound mind, meaning thereby the testator must know that he or she is making a *will*. He should also be capable of knowing its effect. A testator must have

intended to make a *will* and he should have done it voluntarily. It means the *will* executed by a person who was coerced to sign it, or signed it under duress, or undue influence is not considered to be a valid *will*.

Be it noted that the deceased passed away at the age of 88 years on that 01/08/2019, which means that on 04/06/2018 when the *will* is purported to have been signed, he was 87 years old. Though age does not limit one to author *will*, but if this disputable *will* was authored by the deceased, the extremeness of age might have affected him in making such decision. Thus, there is a possibility that he was incapable of knowing what he was doing while attesting.

The records also reveal that PW6 met with the deceased before he (deceased) had attested the *will*. This witness stated that the deceased told her that **the Defendants grabbed the whole house rent for the reasons that they are the ones who repaired it**, hence he wouldn't bequeath for them. But it was not clarified in her (PW6) testimony as to when the said Defendants did so against the deceased. I expected her to state as to how long had passed since that had happened before the deceased attested the *will*. If it is true that the said allegation real happened and immediately thereafter the deceased attested the *will*, the said *will*

cannot be regarded freely and voluntarily made by the testator, as it must have been made under the influence of anger, hence should be expunged.

Regarding the allegation that the *will* is forged, I went through said *will*, particularly clause no. 5 whose contents prohibit the **appellants** from inheriting the deceased's assets for the reason that they **had conspired to rob his (deceased's house) in corporation with the 1st appellant's husband one Zuberi Amrani Malimu by enabling him (deceased) to sign the wrong contract, pretending it to be the health insurance for him while not.** This story was concluded with the suggestion stipulated under clause No. 6 of the said *will* that the whole deceased's estates, which includes a landed property (house) located on Plot no. 772 Block "B" Kipawa, Dar es Salaam and farm located at Kitanga, Kisarawe were inherited to the Respondent and one Getruda Marco Ambrose only.

Back to the testimony of PW6 in the records, particularly on the reason behind the decision of the testator (deceased) not to bequeath his estates to the **appellants** being that they **did grab the whole house rent for the reasons that they are the ones who had repaired it**, these discrepancies, regarding the reason behind the purported decision of the testator is among the doubts

on the authenticity of the *will* of which the trial court ought to have considered before concluding that it was genuine and real authored by the deceased.

Actually, there is a great doubt if the purported *will* was real authored by the deceased, and if that is the case, it was not freely and voluntarily made by him. If it happens that the authenticity of the *will* is disputable for being attacked that it was forged or it was not freely and voluntarily made by the testator, the evidence like statements or instructions of the testator made during or before attestation are necessary to be produced for court's consideration. The trial court was therefore wrong to admit the purported *will* and use it in deciding the matter for the respondent without sufficient evidence to prove its validity.

Among the reasons for the **Revocation/Annulment of letters of administration** according to **Section 49(1) of the Probate and Administration of Estates Act [Cap 352 RE 2002]** as elaborated at paragraph **(b)** is when it is proved that the grant was obtained fraudulently by making a false suggestion, or by concealing from the court something material to the case. As for the matter at hand it has been proved that **the grant was obtained through fraudulent means.**

Another thing that which is still disputed by the parties the according to the submissions is the issue of location of the farm left by the deceased, while the Appellants mentioned it to be located at Chanika Maguruwe in Dar es Salaam, the Respondent stated that it is located at Kitanga, Kisarawe in Pwani (Coastal) Region. As rightly decided by the trial Magistrate that there is only one farm, sized 4 (four) acres, located at Kitanga, Kisarawe in Pwani Region.

Conclusively, I can agree with the appellant's assertion that the trial court was wrong to validate the *will* while its authenticity on the signature was not proved to be authored/made by the deceased. That, the entire will or the signature of a person purported to have made it being regarded invalid, the solution was for the trial court to disregard the said *will* in its entirety instead of admitting it.

In upshot, the appeal is decided on favour of the Appellants; Benadetha Marco Ambrose Maganga and Marcellina Marco Ambrose Maganga. The deceased is regarded to have died interstate, the purported *will* is declared null and void, hence expunged. As the Respondent, Martin Marco Ambrose Maganga was appointed in the Probate and Administration Cause No. 26 of 2019 Ilala District Court, to be the administrator regarding his

name being mentioned in the *will* which is forged, the family should convene another meeting for the purpose of appointing the administrator of estate.

The appeal involves family matter hence I grant no order as to costs.



A handwritten signature in black ink, appearing to be "S.M. Kulita".

S.M. KULITA

JUDGE

22/11/2021