

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(TABORA DISTRICT REGISTRY)**

**AT TABORA**

**PROBATE AND ADMINISTRATION CAUSE NO. 1 OF 2020**

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

**RAMADHANI MOHAMED KALINGONJI**

**AND**

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

**ADMINISTRATION BY KALINGONJI RAMADHANI KALINGONJI**

**AND**

**ZENA OMARY KALINGONJI**

**CAVEATOR**

**RULING**

*Date 27/5/2022&24/6/2022*

**BAHATI SALEMA, J.:**

The petitioner herein, **Kalingonji Ramadhani Kalingonji** has brought this petition under the provisions of the Probate and Administration of Estates Act, Cap. 352 [R.E. 2019] praying for the grant

of letters of administration of his late father, Ramadhan Mohamed Kalingonji, ("deceased") who died intestate on 18 January, 2020 at Muhimbili National Hospital in Dar es Salaam Region. The petitioner presented himself as a son and beneficiary of the deceased's estate.

While petitioning for the letters of administration, **Zena Omary Kalingonji** filed a caveat to the petitioner's application on the following grounds;

1. *Her consent as an heir has not been sought and obtained;*
2. *That is the list of heirs has not been sought and obtained;*
3. *That her properties on Plot No. 447 Block D Isevya; Plot No. 2 Kazima and Plot No. 223 Block B Kiziza area in Dar es Salaam were wrongly listed in the estate of the deceased.*

Upon filing the caveat, the matter turned contentious, and considering the requirement of the law under section 52(b) of the Probate and Administration of Estates Act, Cap.352 [R.E 2019], Kaligonji Ramadhani Kalingonji stood as a plaintiff while Zena Omary the Caveator stood as the defendant.

When the matter was placed for hearing, both parties were legally represented. The plaintiff was represented by Senior Counsel Mr.

Kamaliza Kayaga and the respondent enjoyed the service of Mr. Sichilima learned counsel who was also joined by Mr. Amos Gahise learned counsel.

The parties prayed to dispose of the matter by way of written submissions, which the court granted, and they both complied with the order. However, on 20/5/2022 the court summoned the parties to address the issue of the original copies of documents that they have attached in the application to which they all complied to submit the original one.

Submitting on the first ground, the caveator asserts that the applicant has violated the mandatory provisions of Rule 39(f) and (g) of the Probate Rules, 1963 for his failure to file the necessary consent of heirs including the caveator, and for failure to file an affidavit in the form prescribed as form 17 in accordance with Rule 32 of the Probate Rules, 1963.

It was contended further that the applicant did not file an affidavit to show why he failed to comply with the Probate Rules, 1963. He also submitted that the violation is very fatal to the proceedings as held by the Court of Appeal in **Hassan Salum Ahmed v Ally SALum Ahmed**, Civil Appeal No. 118 of 2015, CAT Dar es Salaam.

As to the second ground of objection, the learned counsel asserts that the petitioner has only listed 13 children as heirs to the estate of the late Ramadhan Mohamed Kalingonji and that the widow has been left out of the list of heirs. The Caveator has attached a copy of the marriage certificate to verify that. To substantiate his stance, he referred the court to the book of *Sharia ya Kiislam ya Mirathi na Wasia, First Published in 2010, by Mahmood A. Sameja* on page 98 which states:

*"wasiozuiliwa kurithi*

1. *iv) Mke wa maiti*

*hawa wanazuiliwa kurithi kwa sifa tu kama kuua  
mrithi wana mfano wake."*

To conclude on this ground, Mr. Kayaga submitted that, the caveator, as a widow of the late Ramadhan Mohamed Kalingonji is legally among the heirs, and there is no sound reason given by the applicant as to why she is not listed as one of them.

The third ground of objection relates to properties listed as "*Nyumba na Viwanja*", particularly Item No.3 *nyumba ipo Isevyu Majarubani* , Item No.16 *Shamba la Miemba ambapo kuna mashine ya kusaga* and Item No. 17 *Kiwanja cha Kigamboni*".

To start with item No. 16, the caveator asserts that it is her personal property known as *Shamba la Miemba*. Also as to Plot No.2 Kazima area, the caveator asserts that it is her personal property as she holds an offer letter of the right of occupancy in her name, Zena Omari, dated 27.2.2007.

As to item No. 3 on plot No 447, Block D, Isevya, the caveator asserts that it is her personal property given to her as a gift by her late husband, she submitted what she called a deed of gift executed before Urban Primary Court of Tabora on 16.12.1996.

As to item No. 17, described by the Caveator as "*Kiwanja Cha Kigamboni*" she asserts that plot No.223 Block B, Kiziza Area in Dar es Salaam was given as a gift from her late husband by actual delivery of the certificate of title to her.

Reinforcing the submission on issues of gift Mr. Kayaga referred this court to the Islamic law by referring to a book titled ***Mulla's Principles of Mahomedan Law, 19<sup>th</sup> Edition, 15<sup>th</sup> Reprint, 2007***, at p 118, which reads: -

149: "*The three essentials of a gift.*" it is essential to the validity of a gift that there should be

(1) *a declaration of gift by the donor*

*(2) an acceptance of the gift, express or implied, by or on behalf of the donee and*

*(3) delivery of possession of the subject on the gift by the donor to the donee as mentioned in s. 150. If these conditions are complied with, the gift is complete. "*

He submitted further that, under Islamic law, writing and registration are not necessary for the validity of a gift. (*SYED Khalid Rashid's Muslim Law, 4th edition, 2006, p. 249.*)

That, the caveator accepted the gift from her late husband and was also given possession of the titles, the so transferred gifts are her own properties and cannot be included as part of the deceased estate.

Also, as stated in *Sharia ya Kiislam ya Mirathi na Wasia (supra at pg 151)* that;

*'Alichompa mrithi wake katika uhai wake na katika uzima wake na kina ushahidi hakiingizwi katika mirathi."*

Finally, Mr. Kayaga stated that it is on all grounds that the objection be upheld. The properties owned by the caveator should be removed from the estate of the deceased husband. He asked that all properties wrongly removed from her plots be returned to her.

Responding against Mr. Kayaga's submissions, Mr. Sichilima submitted that at the clan meeting which was held on 22/1/2022, among other agendas, appointed an administrator of the deceased's estate was one, no person in attendance objected to the appointment of the deceased's elder son, Kalingonji Ramadhani Kalingonji.

It was further submitted that one Zena Omary Kalingonji, a caveator, was among the clan/family members who attended the meeting on that day. According to him, the meeting of the clan/family went smoothly and there was no will tabled before the said clan/family meeting. It was submitted further that the customary law, particularly Rule 6 of the second schedule of G.N. 279 of 1963 was complied with.

The rule provides in Swahili that:-

*"Baada ya matanga watu wa ukoo hukusanyika na wanahesabu urithi na kushauriana juu ya madai na madeni yote aliyokuwa nayo marehemu".*

Also, he stated that Zena Omary Kalingonji, a caveator, never raised the issue of personal property at the clan/family meeting as alleged in this matter. To fortify his stance he referred to Rule 10 of the second schedule of G.N. 279 of 1963 which provides in Swahili the following:-

*"Ikiwa mdai yeyote hataji madai yake ikiwepo katika mkutano madai yake hayapokelewi baadaye".*

Thus, in a question of law, the claim of one Zena Omary Kalingonji, could be considered at the clan/family meeting of 22/1/2020 but as long as she did not raise her wishes to the said meeting, her allegations should not be considered now.

Further, the learned counsels cited Rule 26 of the second schedule of G.N/ 279 of 1963 which is provided in Swahili as the following:-

*"Kama marehemu ameacha watoto wa kiume au wa kike hao, ndio watakaorithi mali yake yote."*

They submitted that it is in this circumstance Zena Omary Kalingonji and 3 other widowers, namely Amina Juma, Farida Suleman Fargo and Hilda Makeo were excluded in accordance with the principles of customary law. That is, rule 27 of the second schedule of G.N. 279 of 1963 which provides in Kiswahili the following:-

*"Mjane hana fungu lake katika urithi ikiwa marehemu aliacha jamaa wa ukoo wake, fungu lake ni kutunzwa na watoto wake, jinsi alivyowatunza".*



Thus, caveator Zena Omary Kalingonji finds her name omitted from the list of heirs.

Finally, Mr. Sichilima prays to the Court to consider and allow the application for letters of administration because other matters can be raised as questions of law at a future stage.

Rejoining, the caveator's counsel submitted that the petitioner has spent his time requesting the Court to be appointed as administrator of the estate of the late Ramadhan Mohamed Kalingonji. He submitted that on the first ground of the caveator's objection to the violation of the mandatory provisions of Rule 39 (f) and (g) of the Probate Rules 1963, the petitioner has failed to say anything. His silence means he has conceded to the objection.

As to the second ground of the Caveator's objection, he submitted that the petitioner's reply based on his reliance on Rule 27 of G.N. 279 of 1963 is that the caveator is excluded from the list of heirs as she is not entitled. He asserted that the said GN. 279 of 1963 is known as the Local Customary Law (Declaration) Order, 1963, and Rule 27 of the said Order deals with a person who has defaulted on paying dowry, which is not the subject here.

He stated that perhaps the petitioner had in mind GN. 436 of 1963, known as the Local Customary Law (Declaration) (No. 4) Order, 1963, which has rule No. 27 of the 2nd schedule dealing with the *Sheria za Urithi*, which does not apply to this matter either.

He valiantly submitted that the petition is not governed by the customary laws and that the petitioner himself filed this petition under the Probate and Administration of Estates Act, Cap. 352 [R.E. 2019].

On the third ground of objection, he submitted that personal landed properties were acquired by her, and also some were gifted to the caveator during the subsistence of their marriage with the deceased Ramadhan Mohamed Kalingonji.

Further, the petitioner seems to doubt whether the caveator was still married to the deceased Ramadhani Mohamed Kalingonji. In this regard, the caveator annexed her marriage certificate, and it was upon the petitioner to produce a decree or separation or even *talak* if he wanted to disprove the caveator's marital status. But the petitioner has nothing to challenge the marriage between the caveator and the deceased.

In addition, he submitted that the petitioner has failed to respond and give rational answers to the caveator's objection and that the

objection should be sustained. He consequently prayed to the court that the petition be struck out and order the petitioner to return all the movable properties removed from Plot No. 2 Kazima Area belonging to the Caveator; Plot No. 447 Block D Isevyu and Plot No. 223 Block B Kiziza Area in Dar es Salaam be removed from the list of properties of the estate of the late Ramadhan Mohamed Kalingonji; and the petitioner be ordered to return them to the owner-the Caveator; and that the petitioner be ordered to file a petition including the name of the Caveator as one of the heirs in accordance with Rule 115 A (1) (a) of the Probate Rules, 1963.

Having heard the rivalry arguments from both sides, the issues are drawn from the points raised by the caveator, and the determination of each follows below to decide whether or not they are jointly or severally meritorious.

Beginning with the first objection that her consent as an heir has not been sought and obtained;

The Probate and the Administration of Estate Act, Cap. 352 [R.E 2019] on Rules 39 and 72 respectively provides that a petition for letters of administration shall be in the prescribed Form No. 26 or 27, set out in the first schedule, whichever is appropriate, and shall be accompanied by the following documents:

1. *Subject to the provisions of Rule 63 a certificate of death of the deceased signed by a competent authority;*
2. *An affidavit as to the deceased 's domicile*
3. *N/A*
4. *N/A*
5. *N/A*
6. *Subject to the provisions of rules 71 and 72, consent of the heirs;and*
7. *In case of an application for a grant to a sole administrator, an affidavit is required by rule 32.*

As noted in paragraphs (f) and (g) require the consent of the heirs and an affidavit thereof. Having traversed the submission, there is nothing in the record to show that these aspects were complied with, as the petitioner (now defendant) stated that Zena Omary Kalingonji declined to sign her presence at the meeting without giving reasons. The rules, 71(1), provide as follows;

*71(1) Where an application for the grant of letters of administration is made on intestacy, the petition shall except where the court otherwise orders, be supported by the written consent of all those*

*people who according to the rules for the distribution of the estate of an intestate applicable in the case of the deceased would be entitled to the whole or part of his estate."*

*72(1) Where a person whose consent is required under these Rules refuses to give such consent, or if such consent cannot be obtained without undue delay or expense, the petitioner shall, together with his petition for a grant, file an affidavit giving the full name and address of the person whose consent is not available (where such name and address are known) and giving the reasons why such consent has not been produced.*

The certificate anticipated in these rules was not filed.

Guided by the provision of the law the court finds that the petitioner never filed any affidavit to show why he failed to do so as required by the law. Hence this ground has adequate merit.

As to the second ground of objection in respect of the list of 13 children as heirs to the estate of the late Ramadhan Mohamed Kalingonji , the petitioner stated that the other 3 widowers, namely Amina Juma, Farida Suleiman Fargo and Hilda Makeo were also excluded in accordance with the principle of customary law. On the contrary, the caveator, Zena Kalingonji, is the widow of the deceased. From her

evidence submitted and attached a copy of the marriage certificate between her and the deceased contracted under Islamic religion in 1993, no evidence has been disputed that she was not the deceased's spouse.

As per the cited *Sharia ya Kiislam ya Mirathi (supra)* in respect of the list of heirs,

### **Wasiozuiliwa kurithi**

#### *1. iv) Mke wa Maiti*

*hawa wanazuiliwa kurithi kwa sifa tu kama kuua mrithiwa na mfano wake.*

Therefore, the caveator, as a widow of the late Ramadhan Mohamed Kalingonji is among the heirs, and there is no sound reason given by the petitioner as to why she is not listed as one. I also find this point of caveat to have merit.

On the last limb of the objection that the Caveator's properties on Plot No. 447, Block D Isevya; Plot No. 2 Kazima, and Plot No. 223 Block B, Kiziza in Dar es Salaam were wrongly listed as properties of the estate of the deceased.

The petitioner in his evidence stated that Zena Omary Kalingonji did not raise the issue of the properties being gifted by her late husband

during the clan/family meeting dated 22/1/2020, whereas the caveator alleges that the properties belong to her as attached in the records of this matter.

Section 111 of the Evidence Act, Cap. 6 [R.E 2019] provides that;

*"The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that, the proof of that fact shall lie on any particular person."*

Starting with the first property No. 16, which has been described as "Shamba la Miembe" Plot No. 2 Kazima area. To prove the matter, the Caveator has tendered a Letter of Offer of Right of Occupancy dated 27.2.2007 in the name of Zena Omari, on the other hand, the Petitioner upon official search has noted that the plot is not in the Government database and it doesn't show how the plot was transferred to Zena Omary from Ramadhani.

The caveator alleges that the said Shamba la Miembe which is Plot No. 2 Kazima Area belongs to her as she holds a letter of Offer of Right of occupancy dated 27.02.2007 but the record entails that sometimes in 2014 the deceased had filed a land case over the Kazima Plot before the District Land and Housing Tribunal for Tabora. The said case was

registered as Land Application No. 56 of 2014 between Ramadhani Kalingonji Mohamed vs The Chairman of Kazima Village Council and 5 others. No one has said the outcome of the above-mentioned case so this court could be in a better position to decide on the said plot.

Therefore, I understand this is an application for letters of administration. It is therefore important to have it proved as it has the bearing of land ownership. Since this landed property is disputed the court cannot interfere at this stage because I am not invited to determine whether or not it was a matrimonial property or rather. Therefore, lacking the decision of the District Land and Housing Tribunal on the said case I consider the said land to be still in dispute; the parties have to resolve at matter out of this application.

*As to the second property, Item No.3 Plot No. 447, Block D, Isevyu Majarubani.* Upon perusal of the original copy of the deed of gift, it is noted that the deed of gift is not signed by both parties. It has some deficits to be called a "Deed of Gift" because it has only the names of the parties. Also, the court has noted that the disposition was never accomplished as per sections 68(1) and 2 of the Land Registration Act, Cap 334.

Therefore, the court is of the view that the claim that, the suit house was gifted to her by her late husband is not supported by any



other evidence. Based on the above, the caveator has miserably failed to prove her ownership or that she has a better title than that of the deceased's. Thus she has failed to support her objection.

*As to item 17, described as Kiwanja cha Kigamboni, the caveator asserts that Plot No. 223 Block B, Kiziza area in Dar-es-salam was given as a gift by her late husband by actual delivery of the certificate of title to her. As submitted by Mr. Kayaga, the said certificate ZOK C is titled Ramadhani Kalingonji and dated 25th June 2007. Also, upon perusal of the deed of gift marked as ZOK B, its authenticity is doubtful since it is incompletely filled out. There is nothing significant that has been adduced to substantiate this. To determine the above-posed issue, it is imperative to revisit the Land Act, Cap. 113 and then gauge the evidence on record to the law applicable.*

Section 2 of the Land Act, Cap. 113 [R.E 2019],

*"Disposition of land includes, among other transactions, a gift or grant, as is alleged in this case. Specifically, the Land Act defines disposition as:-"any sale, mortgage, transfer, grant, partition, exchange, lease, assignment, surrender or disclaimer and includes the creation of an easement, usufructuary right or other servitude or any other act by an occupier by a right of occupancy or under a lease whereby*

*his rights over that are affected and an agreement to undertake any of the dispositions so defined."*

Section 54(1) of the Land Act specifically requires every disposition of land to be in writing. According to **Charles Watkins, Principles of Conveyancing: Rayner and Hodges, London**, on page 306,

*"A gift is a voluntary conveyance not founded on the consideration of money or blood." For it to be valid, it has to be effected by deed."*

Likewise, it is settled law under Mohamedan section 149, which provides that;

*"It is essential to the validity of a gift that there should be (1) a declaration of gift by the donor, (2) an acceptance of the gift, express or implied, by or on behalf of the donee, and (3) delivery of possession of the subject of the gift by the donor to the donee as mentioned in sec. 150. If these conditions are complied with, the gift is complete. "*

It was stated in the case of **Bhaskaran and George Vedakkal, JJ Beepathunma v Mohamed Nakoor Meera Rowther AIR 1977 Ker 54** that,

*"A gift cannot be implied. It must be express and unequivocal and the intention of the donor must be demonstrated by his entire relinquishment of the thing given, and the gift is null and void when he continues to exercise any act of ownership over it."*

Neither is there any reference to probable evidence of the alleged verbal conveyance. Since the evidence submitted by the caveator does not suffice, I find this to have no merit since the caveator had no good title over the disputed plot.

From the above reasons, I find the objections raised by the caveator are partly meritorious though the effect of which is to render the present petition for letters for administration to be and is hereby struck out. Any competent person may, if so wishing, file a fresh petition in accordance with the law.

Order accordingly.



**A. BAHATI SALEMA**

**JUDGE**

**24/6/2022**



Ruling delivered in chambers under my hand and seal of the court in the presence of the parties through a virtual court link.

*Ahah*

**A. BAHATI SALEMA**

**JUDGE**

**24/06/2022**



Right of appeal is hereby explained to the parties.

*Ahah*

**A. BAHATI SALEMA**

**JUDGE**

**24/06/2022**

