IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF KIGOMA)

AT KIGOMA

(APPELLATE JURISDICTION)

PC PROBATE APPEAL NO. 1 OF 2022

(Arising from Probate Appeal No. 04/2021 of Kigoma District Court before K.V. Mwakitalu-RM, Originated from Probate Case No. 21 of 2019 Ujiji Primary Court before V. Nombo, RM)

REHEMA D/O RAJABU RUTENGA..... APPELLANT

VERSUS

MWANTUMU D/O ALJIRAN KABEZA.....1st RESPONDENT

MTULLA S/O ALJIRAN KABEZA.....2ND RESPONDENT

JUDGMENT

30/5/2022 & 15/7/2022

L.M. Mlacha,J

The appellant, Rehema Rajabu Rutenge is the wife of the late Aljiran Kabeza who died on 26/9/2021 at Muhimbili Hospital Dar es salaam. She was the junior wife and the only serving wife at the date of the death of the deceased. The late Aljiran left 8 children. His parents had long died. So, the heirs of the deceased are the widow and the 8 children.

Following the death of Aljiran Kabeza, the family sat and proposed the respondents, Mwantumu Aljiran Kabeza and Mtulla Aljiran Kabeza to be the

administrators of the estate which was later listed as 4 houses (3 in Kigoma and 1 in Kijitonyama Dar es salaam), a farm (23 acres at Mkuti Kigoma), NBC Bank Account, Tigo Pesa, NSSF pension and domestic items. The primary court of Kigoma district at Ujiji (Y. Busungu PPCM) appointed them as administrators. They took over the administration. They collected the assets and made a distribution taking into account the wishes of the deceased which he made in 2014. This was in respect of the houses. He gave the houses to his children. He said that children of the senior wife should take two houses (one in Kigoma and one in Kijitonyama DSM). Children from the junior wife were given 2 houses (one in Bangwe and the other in Mlole, all in Kigoma). The administrator respected the words of the deceased and allocated the houses accordingly. They collected the money from NBC and Vodacom and sold the land. They made a distribution to the heirs according to Islamic law. The appellant received Tshs 1,400,000/=. Noting that this amount was too little as a wife, she returned to the primary court on 26/5/2021 and lodged an objection. She told the court that she was supposed to get her ***thumuni*** which is 1/8 of all the assets including the houses. She argued that the deceased had no mandate to make a Will which had a distribution exceeded 1/3 of his assets under Islamic Law. The primary

court found the claim as baseless and dismissed it. Her appeal to the district court of Kigoma made in Probate Appeal No. 04/2021 was dismissed hence this appeal.

The grounds upon which this appeal is based read thus:

1. That the appellate court erred in law and in fact for holding that the houses in dispute were distributed by the late ALJIRAN KABEZA before his death.
2. That the appellate court erred in law and in fact for holding that the late ALJIRAN KABEZA did not provide the will lather distributed the houses to his children.
3. That the appellate court erred in law and in facts by upholding the decision of the trial court while it was illegally decided that there was a will and not distribution.
4. That the appellate court erred in law and in facts by removing the four houses as among the properties of the late ALJIRAN KABEZA while were listed by the family meeting and in the ruling of the appointment of the respondents as administrators in case no 21/2019.
5. That the appellate court erred in law and in facts by upholding the decision of the trial court without considering the joint effort

contributed by the appellant for upbringing of the house in Mwanga – Kigoma which is still living to date.

Mr. Thomas Msasa appeared for the appellant while the respondents had the services of Mr. Mtete Kihiri. Hearing was done by oral submissions. Submitting on ground one, Mr. Thomas said that the district court erred in finding that the houses were divided by the deceased before death because the 4 houses formed part of the estate of the deceased at the primary court. The respondent recognized them as assets of the deceased, he said. He added that if there was an earlier distribution the respondents could not have entered them in the list.

In ground two, counsel submitted that the deceased never made a will according to Islamic Law. He said that Islamic Law allowed him to distribute $^1/_3$ of his assets only. To the contrary, the will distributed all the houses to the children, each side got two houses. He submitted that there was no will and called the court to distribute all the assets under Islamic Law and give the widow $^1/_8$ of all the assets including the houses. He asked the court to follow its decision in **Naima Ibrahim v. Isaya Sakilisi**, Civil Case No. 151/2007 (High Court of Dar es salaam) and **Ramadhani Myonga and**

Sanda Hussein v. Ismail Juma Sai, Civil Case No. 108/2018 (High Court of Dar es salaam).

In ground three it was submitted that the district court erred in upholding the decision that there was a will. He said that the will is against Islamic Law and Illegal. He said that the houses were supposed to be part of the estates and be distributed according to Islamic Law.

In ground four the counsel submitted that the district court erred in removing the houses in the list of estates which was brought at the primary court. The counsel went on to say that the appellant was married in 2005 and lived with the deceased up to 2017 when he died. She has no kid with the deceased. It will not be just to remove her from the house where she lived from 2005 to 2017, he submitted. He asked the court to allow her to proceed to stay in the house. Counsel did not make a submission on ground five.

Mr. Matete Kihiri argued grounds one to four jointly and ground five separately. He started with ground five. He submitted that the question of contribution of the appellant in the assets of the deceased is an afterthought. It was not one of the issues at the primary court, he said. He referred the court to page 8 of the record of the primary court where the appellant is

recorded saying *"Niliolewa 2005. Nilimkuta akiwa na nyumba zake"* literally meaning that I was married in 2005. I met him with his houses. He requested the court to apply section 123 of the Evidence Act and declare that he is estopped to bring new issues at this stage. He asked the court to act within the limits of the objection raised at the primary court which was based on what she got, a small share.

Submitting on grounds 1 to 4, counsel said that Islamic Law was applied correctly. He said that the deceased never left a will, written or oral. Nothing of the sort was sent to the primary court. He referred the court to page 8 of the proceedings where it is written *"alizigawa mali kwa Watoto wake akiwa mgonjwa"* literally meaning that he distributed his properties to his children while sick. Counsel stressed that the deceased gave the houses to his children. That was a distribution not a will, he said. Counsel proceeded to say that the mere fact that the assets were listed in the primary court did not make them subject for distribution. He argued the court to dismiss the appeal.

Mr. Thomas Msasa made a rejoinder submission and joined issues with counsel for the respondents.

I had time to peruse the bulky records of the lower courts. I will take the approach taken by Mr. Matete. I will start with a discussion on grounds five followed by a discussion on grounds one to four. Ground 5 is simple to resolve. Like counsel for the appellant, I find the issue of contribution to the acquisition of the assets as being both baseless and an afterthought. The record is clear that the appellant was married at a late stage. She said that she met the deceased with his houses. There was no evidence that she took part in acquisition of any of the assets under discussion so the issue of contribution or a joint ownership cannot arise. But further to that, there is no evidence that the issue was raised in the lower court making it impossible to be raised at this stage of a second appeal. Ground five is thus baseless and dismissed.

Next for consideration is ground one to four. The record is loud that the deceased gave the houses in 2014 to his children. Many witnesses spoke of this fact but I will use the words of the appellant. She appeared as SM3 (PW3) at the primary court. She had this to say:

> *"**Marehemu aliacha wosia mbele ya Watoto** kuwa nyumba nne alizoacha Watoto wa mama mkubwa wachukue nyumba moja iliyoko Mwanga Center na ya Dar – es salaam. Na tumbo la pili*

wachukue nyumba iliyoko Banagwe na nyingine iliyoko Mlole.... ***aendelee kukaa kwenye nyumba anayoishi na Watoto wake mpaka atakapoondoka asisumbuliwe.*** *"* (Emphasis added)

This literally means that the deceased pronounced before his children that children of the senior wife should take the house at Mwanga center and the house in Dar es Salaam while the children from the junior wife should take the house at Bangwe and Mlole. Further that, the appellant should proceed to stay in the house without disturbance. Those words were said in 2014 and the deceased died in 2017.

The first issue to be resolved is whether what was said amounted to a will. Counsel for the appellant says that it was a will and it is illegal under Islamic law because a Muslim is not allowed to give more than 1/3 of his estate under a will. The counsel for the respondent says that it was not a will but he actually gave the house to his children while alive. I have tried to reason out. The deceased called his children and made the statement giving the houses to them. He did it publickly making it known to heirs and all the family members. Wills are not made that way. Once the contents of a will is known to the heirs, that is not a will any more. Wills are confidential in nature to all persons except witnesses and executors (if any). Heirs can be informed of

the existence of a will and place of storage, where there is need so to do, but the contents should always be confidential. The content of a will is made public only after the death of the testator. It is therefore clear that what was done by the deceased in 2014 was not a will but a distribution of the houses to his children. This fact remains the same despite the fact that the houses were listed in the list of estates at the primary court.

Knowing that he had children from two different mothers, and fearing a future conflict, he decided to distribute and give the houses to the two sides while he was still alive. That was ***gift inter vivos*** not a will. It was a transfer or gift given to the children while both the father and the children were alive.

I agree with Mr. Mtete that a person has a right to dispose of his assets the way he wishes while he is still alive. There is no law which prevents him to do so. And the fact that they were listed at the primary court did not change the status. It was merely a mistake done by the respondents and the court which should not be used as peg to disturb the arrangement and direction of the deceased. I also agree with Mr. Mtete that assets of the deceased included assets others than the houses.

But it is worth noting that much as the deceased had a right to distribute his assets as he wished, but he had no power to make a distribution which could result in the eviction of his wife from the matrimonial home after his death. That was illegal and must be rectified by this court. I will thus make a direction that the appellant will continue to live in the matrimonial house for the rest of her life while the ownership remains with the children.

The next stage is to find out whether the distribution of the other assets was fair. The statement which was tendered at the primary court reads in part as under:

> *"Tulianza kwa kuzitambua (Kuorodhesha) mali za marehemu*
> *1.(a) Pesa NBC Bank - Tshs 3,434,510.86*
> *(b) Pesa Vodacom Tshs 1,347,000.00*
> *© Pesa NSSF Tshs 359,301.63*
> *(D) Deni (Pesa za wajukuu) 750,000.00*
> *2.* ***Shamba Ekari 23 lililoko Kijiji cha Mkuti*** *wilaya ya Kigoma Vijijini.*
> *Mheshimiwa Hakimu,*
> *Kwa muongozo wa Mahakama, tulifuatilia pesa za Benki na za Vodacom ambazo jumla yake ni Tshs 4,781,510.86 na kuziingiza katika Akaunti ya Kieletroniki ya Mahakama. Pia tulipofuatilia pesa za NSSF wahusika kule walitueleza kuwa utaratibu wao ni kuziingiza pesa hizo katika Akaunti ya mjane na walifanya hivyo.*

Tulikumbushwa pia kuwa marehemu Mzee alitunza pesa za wajukuu zake shs 750,000/= (Shilingi Laki Saba na Nusu) ambazo sasa ni deni.

Mheshimiwa Hakimu

Vilevile tulithamanisha shamba kwa kutumia mtaalamu/mthathimini na kubainishiwa kuwa thamani ya shamba letu lote (Ekari 23) ni shs. 11,500,000/= (Shilingi Milioni kumi na moja na laki tano tu) kwa wakati wa sasa.

Mheshimiwa Hakimu,

Baada ya kuendesha zoezi la kuzitambua kwa kuziorodhesha na kuzikusanya mali za marehemu, ***tulimalizia kwa kuzigawa mali hizo kwa taratibu za kiislamu na kuthibitishwa na Bakwata*** *kama ifuatavyo:-*

1. Tshs 3,434,510.86 + 1,347,000.00 = 4,781,510.86

Tshs 4,781,510.86 – 750,000.00 (Deni) = 4,031,510.86

Kumekuwa na gharama mbalimbali wakati tukiendesha zoezi hili katika Nauli, chakula kwa baadhi wasioishi hapa Kigoma, Usafiri, nyaraka, tathmini/uthamini wa shamba n.k.

4,031,510.86 – 750,000.00 = 3,281,510." (Emphasis added)

The appellant complain that what was given to her was not enough. I have perused the statement of account filed at the primary court closely. I could not see any problem with it. It has a fair distribution. That disposes grounds 1 to 4.

That said, the appeal is dismissed save for the direction that the appellant should proceed to stay in the matrimonial house for the rest of her life while ownership of the house remains with the children of the deceased. No order for costs.

L.M. Mlacha

Judge

15/7/2022

Court: Judgment delivered in the presence of parties. Right of Appeal Explained.

L.M. Mlacha

Judge

15/7/2022