

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DODOMA DISTRICT REGISTRY)

AT DODOMA

CIVIL CASE NO. 2 OF 2021

RAYMOND CALVIN MAIMU & 2 OTHERS.....PLAINTIFFS

VERSUS

NARINDWA CALVIN MAIMU..... DEFENDANT

JUDGMENT

31/03/2022 & 28/06/2022

KAGOMBA, J

This case traces its origin from Probate and Administration Cause No. 12 of 2020 filed in this court by Peniel Aitael Maimu, Raymond Calvin Maimu and Amin Kierakio Lema (henceforth "the plaintiffs) who petitioned for grant of Letters of Administration of the Estate of the Late Calvin Aitael Maimu (henceforth "the deceased").

The matter turned into a suit according to the law, after an appearance by caveator who is the deceased's wife one Narindwa Calvin Maimu,

(henceforth "the defendant") filed under section 59(2) and (3) of the Probate and Administration of Estates Act, [Cap 352 R.E 2019] read together with Rule 82(4) of the Probate Rules. It is significant to mention here that the registration of this suit was in full observance of Rule 82(6) of the Probate Rules, a mandatory provision of the Probate Rules which is sometimes less observed.

A brief background of this case reveals that the deceased died testate on 17/7/2020 in Dar es Salaam. He was survived by a wife, who is the defendant, and five children, namely; Raymond, Hansely, Sekela, Hope and Emmanuel. The deceased executed his Last Will and Testament on 8/5/2020 (henceforth "the Will") wherein the Plaintiffs were named as executors thereof. The said Will was read over to the family on 17/8/2020, in the presence of the defendant, among others. It is the contents of the Will which prompted the plaintiffs to file the Probate and Administration Cause aforesaid seeking the court to probate the Will. Likewise, the contents of the Will prompted the defendant to file her caveat and upon being cited she filed appearance by caveator, hence this suit.

In paragraph 13 of her affidavit, the defendant states three main reasons for opposing the grant of probate to the plaintiffs. The stated reasons are;

Firstly; that, document giving them such powers is incompetent. The alleged irregularities in the Will are particularized under paragraph 5 of the affidavit as follows:

- (a) The Will has included properties which did not belong to the deceased, and it provides a list of properties owned by existing

companies over which the testator did not have testamentary capacity.

- (b) The Will does not mention the name of a personal guardian for minor issues arising from the deceased's marriage.
- (c) The Will is also improperly attested thus ruining the purported testator's plan,

and additionally;

- (d) two issues of the deceased's matrimonial marriage namely; Joshua Calvin Maimu and Dyness Calvin Maimu were not mentioned as issues of the said marriage and consequently not beneficiaries to the deceased's estate, and no reason for doing so has been stated in the Will.

Secondly; the plaintiffs are unfit to handle the executor's office righteously as they have started to misuse the office of the executor before grant. Meddling into the affairs related to **Sinana Enterprises Company Limited** and **Nasai Transport Limited** were cited as examples. And;

Thirdly; the plaintiffs are incompetent of handling such office fairly. Particulars for incompetence of each nominated executors are stated under paragraph 7 of the defendant's affidavit.

On 30/7/2021 before Siyani, J (as he then was) issues to govern the conduct of this suit were framed and adopted as follows:

- (1) Whether the Will of the Late Calvin Altael Maimu which was executed at Arusha, Tanzania on 8/5/2020 was validly made.

- (2) Whether the appointed executors have intermeddled with the estate of the deceased.
- (3) To what reliefs are the parties entitled.

On the date of hearing of the suit before me, the plaintiffs were represented by Mr. Frank Mwalongo, learned advocate while Mr. John Massangwa, learned advocate, appeared for the defendant. Mr. Elirehema Sinyael Ayo, the deceased's brother-in-law adduced his evidence as PW1. Since the plaintiffs' case is built on PW1's testimony, the same is covered in length.

PW1 testified that on 16/3/2019 the deceased requested to have a meeting with him at Morogoro Hotel in Morogoro on 17/3/2019 at 11:00hrs. That, the deceased also asked PW1 to come with his wife, who is the deceased's sister and PW1 did as requested. At the meeting which was also attended by Pastor Grace from Dodoma, PW1 was told by the deceased that the defendant was at his parents' home in Morogoro because the two had some differences. That, the defendant was not honest in their marital affairs and she was segregating their children. That, the deceased elaborated that during preparation of the marriage ceremony of one of the deceased's son, Hansely Calvin Maimu, the defendant was opposing the expenditure that was being incurred. Hence, the deceased decided to return the defendant to her parents to avoid disruption of the marriage ceremony.

PW1 further testified that the deceased told him his intention to make a Will to govern his estate after his death, as he sensed there could be frictions in division of assets. PW1 said that he was one of the four people

who were in the Chambers of Advocate Boniface Joseph, in Arusha on 8/5/2019 to witness the Will. He mentioned other people who were present as the deceased himself, Adolbert Maimu and Advocate Boniface Joseph.

PW1 further testified that Adolbert Maimu and himself were asked to read the Will that was prepared by Advocate Boniface Joseph and were asked to sign the same, and did sign on each page after reading and understanding its contents. The said Will of the deceased was tendered in court by PW1 and admitted as **Exhibit P2**, without objection.

On the other side, PW1 testified that during burial of the deceased on 21/7/2020, at Wandri Village in Siha, while in the church, Bishop Shoo in his greetings stated that he understood the deceased had left behind a Will. PW1 said, later after the burial a lawyer called Jaffar from Advocate Boniface's chambers, announced to the deceased's family and relatives that the Will was kept at their chambers and would be read to them after 30 days. That, on 21/8/2020 Advocate Boniface Joseph who was accompanied by Advocate Jaffar showed the Will which was in two sealed envelopes, opened and read it aloud to the family and relatives of the deceased who were about 40 people. That, one copy was given to Raymond Maimu and another copy remained with him. That, after discussion, the copy that was given to Raymond Maimu was given to PW1.

PW1 further told the court that he knew there were seven (7) children of the deceased but two of them namely, Joshua and Dyness were not mentioned in the Will. He recalled that on the date of sealing the Will he

asked the deceased the reason for leaving out the two children and the deceased replied that the two children were not his blood children.

During cross-examination, PW1 denied to be a beneficiary of the Will and said the name appearing at paragraph B on page 5 of the Will is the name of the deceased's elder sister who is PW1's wife. He replied further that the Will was written by the deceased.

PW1 further replied that all properties listed in the Will are deceased's properties but when shown page 15 of the Will where it is said Nasai Transport Limited is the owner a house and Yard on Plot No. 35/36 Block B with Title No. 35315 DLR at Kisasa B, Dodoma listed as Serial Number 1 thereat, and that Capital City Mall Company Ltd is shown to be the owner of the mall located at Block AB' Plot No. 2 Kisasa Medeli listed as Serial Number 7 thereat, PW1 said he is not a petitioner. He said he did not know how much shares the deceased owned in Nasai Transport Company Ltd and in Capital City Mall Company Ltd. He replied further that he knows the defendant as the deceased's wife. He said he knows some of the criteria for a lawful Will and that he believed the Will in Exhibit P2 is a valid Will.

In his further replies to cross examination questions, PW1 stated that it is common for misunderstandings to exist between spouses; it is not all the time a child is a result of sexual intercourse between spouses and that he had never heard that some of the seven known children of the deceased were not his, but he first heard it from the deceased when they met in Morogoro. PW1 further replied that the two disowned children have always known the deceased as their father.

PW2- Peniel Altael Maimu, an elder brother to the deceased, told the court that he knew the deceased had seven (7) children namely, Raymond, Hansely, Sekela, Hope, Joshua, Emmanuel and Dyness. PW2 further corroborated what was stated by PW1 with regard to the date, place and content of the Will particularly the names of nominated executors, children of the deceased and those who were excluded from the Will. He told the court that he doesn't know anything about the reason for exclusion of the two children. He also said that he is ready to do the work of the executor and to advise. He mentioned the defendant as the wife of the deceased.

PW3 – Raymond Calvin Maimu, the eldest son of the deceased, gave similar testimony to PW1's and PW2's with regards to the Will and its contents as well as where and who read it to the family meeting. Like PW2, he said the deceased was survived with seven (7) children including himself. He testified further that he is a director in the companies mentioned in the Will and was working very closely with his deceased father, and therefore he was aware of what was going on in those companies. He mentioned those companies as Sinana Enterprises, Capital City Mall, Nasai Transport and Cam Corporate.

When cross-examined by Mr. Massangwa, PW3 categorically denied to have sold Kizota Yard at Block WIA, Plot No. 50 and 51 Kizota WIA, Dodoma, mentioned as Serial Number 9 on page 15 of the Will. He said the deceased was indebted to Mr. Monabhan to tune of Tshs. 80 Million, and bank loans as mentioned in the Will. He said the debts are being serviced, adding that Sinana Enterprises and Nasai Transport took loans from banks. He said that after the deceased's death, banks coerced the companies to pay the debts

and they tried to pay those debts while bearing in mind that the Probate Cause was yet to be determined by the court. He added that the banks auctioned two (2) properties one of which was the Kizota Yard, at the price to the tune of the loan taken. He mentioned the other property sold as a plot at Kisasa. He conceded that he is one of the supervisors of the businesses left behind by the deceased.

Upon further cross-examination, PW3 conceded that Plot No. 130/2 Kisasa Medeli was leased to Feza International School at an annual rent of Tshs. 124 Million. He also conceded that Tshs. 100 Million is received annually from leasing of the Petrol Station on Plot No. 1 Block A/B Kisasa Medeli. He conceded further that, rents from Feza International School and from renting of the Petrol Station has been received for the period of one and half (1½) years since the death of the deceased, that the monies were banked and were spent to repay the loans and for other expenditures.

PW3 further conceded that the deceased had a pistol, which was not mentioned in the Will. He said the same was deposited at Tanganyika Arms in August, 2020. He conceded that the deceased told him that Joshua and Dyness were not his blood children, but those words were not written in the Will. He also conceded that Joshua and Dyness lived happily together with the rest of the deceased's family.

PW4 -Amin Weraikyo, a long-time friend of the deceased, testified the same as PW1, PW2 and PW3 that the Will was read to the family and that he is one of the people appointed by the deceased to execute it, alongside Peniel Mwaimu and Raymond Calvin Mwaimu.

PW4 further testified that the deceased is survived by seven (7) issues who are Raymond, Hansley, Sekela, Hope, Joshua, Emmanuel and Dyness. He said however that the Will mentioned only five children, adding that he did not know why the two other children were left out.

When cross-examined by Mr. Massangwa, PW3 conceded that he knew the children of the deceased were seven (7), that they are from different mothers. He replied further that the deceased's phone and all his IDs were given by him to Raymond and that the pistol was deposited at Tanganyika Arms. He conceded that the deceased did not state in the Will who shall inherit the said pistol.

PW5-Adolbert Zabron Maimu, a cousin from elder uncle of the deceased, testified that he witnessed the Will on 8/5/2020 at Advocate Boniface's chambers in Arusha. He testified that upon arrival there he found the deceased, the lawyer and Mr. Ayo (PW1). He said the first to sign was the deceased, himself was the second, then Mr. Ayo (PW1) followed, and the Advocate signed last. He added that each of them signed on all the pages and thereafter the Will was put in envelop and remained there with the lawyer.

PW5 also testified that the deceased was survived by seven (7) children but only five were written in the Will. He said the deceased told him that it was his wish to leave out the two children.

When cross-examined by Mr. Massangwa, PW5 conceded that the name Adolbert Zabron Maimu written at Clause 8(a) on page 6 of the Will is

his name and conceded that he took the car mentioned thereunder which he said the same is in Dar es Salaam. He added that he paid Tshs. 70 Million for it and that the monies were paid to different bank accounts as he was instructed to do by the family. He elaborated that he paid to banks where the deceased was indebted. He also conceded that he was given the car by Raymond Calvin Maimu on behalf of the deceased's family.

After the above five witnesses had testified, the plaintiffs' case was closed and the defence case was opened, whereby Mr. Massangwa called Narindwa Calvin Maimu, the defendant, who testified as DW1. Since her testimony builds the basis of defence case, the same is produced in *extenso*.

DW1- Narindwa Calvin Maimu tendered marriage certificate No. 00148417 dated 2/12/2000 which was admitted as **Exhibit "D1"** to prove her Christian marriage with the deceased. She narrated the sequencing of their matrimonial children and produced their birth certificates and Clinic Cards which were admitted as **Exhibits D2, D3A, D3B and D3C**.

DW1 testified further that during baptismal ceremony of Emmanuel Calvin Maimu, a video was recorded whereby the deceased said he had five boys and one daughter, adding that of the five boys, one died. DW1 said, at that time of the interview their last born, Dyness, was not yet born.

DW1 testified further that they were doing various activities with her husband including running **Nasai Transport Company** for transportation of goods and **Sinana Enterprises Company** dealing with agricultural implements. She said the said companies are mentioned in the Will. She

further testified that she was a director as well as bank signatories for those companies.

DW1 further testified that after burial of the deceased, she visited Amin Lema (PW4) in Arusha whereby PW4 told her that he had deceased's bag, his weapon, mobile phones, documents and cheques. She said, after few days PW4 and his wife visited her and asked for bullets of the pistol whereby DW1 gave PW4 175 bullets.

DW1 told the court that the relationship between her and Raymond's cohort was no longer good as before. She said that, Hansely and Raymond stopped visiting home and were no longer paying school fees for Hope, Joshua, Emmanuel and Dyness. She added that it took a judge to order payment of Joshua's fees.

DW1 prayed the court to grant her right and right of the children. She also prayed to be appointed the administratrix of the deceased's estate. She promised to render justice to all the children concerned and all those who have right in the deceased's estate.

When cross-examined by Mr. Mwalongo, DW1 replied that she heard the Will when it was read in her presence and later got a copy from the court. She said she filed the caveat to question the two children who were left out of the Will. She conceded that all the five Plaintiffs' witnesses recognized all the seven children of the deceased in their testimonies. She said if she had known that the number of deceased's children is not disputed, she wouldn't have pleaded it in her caveat.

DW1 further responded that she also raised in her caveat the fact that the deceased had mentioned some properties which were not his. She said that in her caveat she questioned Lema (PW4) to be appointed an executor. She added that she has no problem with appointment of Peniel Altael Maimu but she has a problem with appointment of Raymond Calvin Maimu. She said the problem is on non-payment of school fess for the children which led the children to delay schooling which was an act of ruining their life. She insisted that she can no longer reconcile with Raymond as the boy breached her trust.

When DW1 was recalled, she tendered **a flash (Exhibit D5)** which was played in court's ICT room. The court watched the deceased saying that he had four boys and one girl. At that time the last born Dyness was not yet born.

DW2 – Hope Calvin Maimu (17 years) testified that life was good before her father passed away as school fees were paid in time, she had a school trip to USA which was paid for by the deceased. She said life has changed after the passing on of the deceased. she narrated her ordeal of being late for school because fees were not paid timely. She said that she lagged behind others in class after missing some classes, and she was forced to drop some of the subjects.

DW3 – Grayson Mhoka, a retired Pastor at Lutheran Church, testified that he was called for prayers by the deceased when Hope Calvin Maimu was born. He was also called for Joshua, Emmanuel and Dyness.

After hearing the evidence from both sides, the court received final submissions from both sides which addressed the issues framed for this suit. I thank the learned advocates for both sides for their good submissions which have helped the court in its decision.

In the plaintiffs' final submission, Mr. Frank Mwalongo, submitted to the effect that the Will is valid, citing the case of **David Samson Shunda & 2 Others v. Masimo Kibungi**, PC Probate Appeal No. 06 of 2021 High Court at Mwanza, where it was stated that for the Will to be valid, it requires to be witnessed by two witnesses as required under Order 19 of the Local Customary Law (Declaration) (No.4) Order GN. No. 436 of 1963. He also cited **In the Matter of Petition for grant of Probate of the Late John Peter Silveira by Francisca Haruweru Silvera and in the Matter of the caveat by Gerald Francis Suveira and Solomon John Suveira**, Probate and Administration Cause No. 23 and 24 of 2019, High Court at Arusha, on procedure for attestation of the Will. He argued that in this matter there is no issue raised with regards to testamentary capacity of the deceased.

As regards Issues of the deceased, Mr. Mwalongo submitted that the all the Plaintiffs' witnesses testified to the effect that they are aware the deceased left behind seven children who are Raymond, Hansley, Sekela, Hope, Joshua, Emmanuel and Dyness.

With regards to the argument that the deceased had named properties not his, Mr. Mwalongo submitted that the executors will take note and such properties accordingly.

With regards to the named executors, Mr. Mwalongo submitted that DW1, the defendant accepts Paniel Aitael Maimu to be one of the executors, partly accepts Raymond Calvin Maimu and refuses Amini Wairakio Lema. To this effect he cited the case of **Sekunda Mbwambo v. Rose Ramadhani** [2004] TLR 439 on who can be administrators. He cited the provision of Section 22(1) of the Probate and Administration of Estate Act [Cap 352 R.E 2019] to the effect that a probate or letters of administration shall not be granted to more than four persons. Aided by the Francisca Haruweru Silveira' case, Mr. Mwalongo prayed the court to appoint the plaintiffs to be the executors of the Will as it was done in the cited case, because that is the wish of the deceased.

Mr. Mwalongo submitted that the defendant had not tendered any cogent evidence to prove unjustified interference to the deceased's estate.

As regards the reliefs to the parties, Mr. Mwalongo referred this court **In the Matter of the Estate of the Late Seifuddin Tayabali Essaji (2017) TLS LR 382** praying the court to find the Will valid, hence prayed the court to probate the same and appoint the plaintiffs as executors forthwith.

Mr. Massangwa, submitted the deceased's Will is invalid and thus the court should not enforce it. He said, rules on validity of Wills require the testator to understand the legal effects of the will. He cited to this effect the case of **Banks vs Goodfellow [1861-73] All ER 47**, a decision which was echoed by this court in **Re Benson Benjamin Mengi and Others vs Abdiel Reginald Mengi and Another**, Probate and Administration Cause No. 39 of 2019, High Court at Dar es Salaam. He added to the effect by the

testator bequeathing the properties of Hope Calvin Maimu and those owned by several of the companies where the testator claims to own shares, shows that he did not understand the nature of that act and its effect as per the above cited decisions. In the Will the testator bequeathed the landed property owned by Hope Calvin Maimu shown on page 5 and 6 of the Will to his relative called Rodrick Aitael Maimu, Peniel Aitael Maimu, Oldson Aitael Maimu, Betrina Aitael Maimu and Elirehema Sinyael Ayo. Other beneficiaries of the sai property are Glorious Aitael Maimu, Dashrudi Mndeme and Evaline Aitael Maimu. He referred this court to the Latin maxim nemo ***dat quod non habet*** to mean that one can cannot give something which he doesn't have.

Mr. Massangwa further added that the testator also did not understand the rule governing corporate legal personality of incorporated companies enshrined under section 15(2) of the Companies Act Cap 212, in the division of shares of the companies he was a shareholder. For these reason, Mr. Massangwa prayed the court to declare the Will invalid.

He also submitted to the effect that in preserving sanctity of the Will as required by law, witnesses to the Will must purge their interests under the Will by forfeiting their rights. He said both PW1 -Elirehema Sinyael Ayo and PW5 -Adolbert Zablou Maimu who witnessed the Will are beneficiaries to it. He argued that on page 5 of the Will one of the beneficiaries of the Will in PW1 who was among the relatives of the deceased given the house belonging to Hope Calvin Maimu. He said further that on page 6 of the Will a motor vehicle Toyota Lexus, with Registration No. T555 DLR is given to PW5, who is asked to pay Tshs. 70million for a motor vehicle worth more than Tshs. 400million. He said the above acts are condemned by section 15

of the Wills Act, 1837, a statute of general application in England received in Tanzania vide section 2(3) of the Judicature and Application of Laws Act, [Cap 358 R.E 2019] and that the same renders the Will attested as such invalid for want of sanctity of the Will.

On whether the appointed executors have unjustifiably intermeddled with the estate of the deceased person, Mr. Massangwa submitted affirmatively. He gave the example of admission by P5 Adolbert Zablon Maimu that Raymond Calvin Maimu handed him the motor vehicle, the said Toyota Lexus, with Registration No. T555 DLR, contrary to section 16 of the Probate and Administration of Estates Act, [Cap 352 R.E 2019] and section 266 of the Indian Succession Act, No. X of 1865. He also found faults with the way PW4 handed the pistol belonging to the deceased. He prayed that PW3 and PW4 who are listed as executors should never be appointed to execute the Will, for intermeddling of the will.

On the third issue, Mr. Massagwa submitted to the effect that the two issues who are disinherited without any reason, namely Hope Calvin Maimu and Emmanuel Calvin Maimu, who are below 18 years hence and thus subject to the law of the Child Act, [Cap 13 RE 2019] should not be discriminated in the inheritance of the estate of their father. He cited section 10 of the law of the Child Act, *"a person shall not deprive a child of reasonable enjoyment out of the estate of a parent"*. he also prayed for widow – DW1, to be given her fair share of the estate in accordance with the law citing Bi Hawa Mohamed vs Ally Sefu [1983] TLR 32 for guidance. For the above reasons, Mr. Massangwa prayed the court to find the Will, Exhibit P2 to be invalid, that the executors are incompetent to execute the

Will which is unjustifiably discriminative. He prayed that the court declares that the deceased died testate and allow rules of testacy to take over the rules of intestacy. He went ahead to pray the court to appoint DW1 to be the administratrix of the deceased's estate perhaps together with PW2 Peniel Aitael Maimu

With regard to the first issue as to whether the deceased's Will was validly made, I have considered the opposing arguments by both parties. Evidence adduced by PW1, and PW5 has proved that the said Will was duly signed by the deceased, it was duly witnessed by PW1, PW5 and Advocate Boniface Joseph and the same sealed in an envelope and eventually read out to the family. DW1 and all the plaintiffs' witnesses have testified that the Will was publicly read.

There are more to the validity of the Will than signing by testator and two people witnessing it. It is trite law that those who witness the Will should not be beneficiaries. As correctly submitted by Mr. Massengwa PW1 and PW5 cannot avoid to be said that they are beneficiaries. This is sufficient reason to invalidate the will.

I should state, further, that there has been uncontroverted evidence by DW1, that there are some irregularities in the Will with regards to its contents. DW1 pointed out that the Will has discriminated two issues of the matrimonial marriage namely Joshua and Dyness Calvin Maimu by rendering them disinherited. For as long as discrimination, comes in clear conflict of the law, in this case the Law of the Child Act, section 10, such a discriminative Will becomes unenforceable.

The above reasons making the Will unenforceable, are further worsened by the fact that the testator did not seem to understand the act he was doing by bequeathing properties not in the testator's ownership. For these reasons If this court should probate the Will and appoint executors to execute it, rights of some of the legitimate heirs will be forsaken, and provisions of others laws, particularly the companies Act, will be contradicted. For this reason, I find the Will invalid and unenforceable.

The second issue is whether the executors have intermeddled in the deceased's estate. The evidence of PW5 has revealed that Raymond Altael Maimu did intermeddle with the deceased's estate even before he was appointed by the court. He sold the Car listed in the Will to PW5. This is contrary to section 16 of the Probate and Administration of a Estates Act, which prohibit people from intermeddling with deceased's properties before appointment of executors. Raymond had no powers to sell the car to PW5. Doing so was illegal as the sale of the car was not proved to fall under the exceptions provided under section 16 (a) to (d), of the Act, and no title has passed thereby. See section 100 of the Probate and Administration of Estate Act.

As to what reliefs the parties are entitled to, having declared the Will of the deceased invalid and unenforceable, I declare that the deceased Calvin Aitael Maimu died intestate. For this reason, the rule of intestacy shall take over in the administration of the deceased's estate. Since there are mandatory requirements to be observed under the rules of intestacy for anyone to be appointed as an administrator of deceased's estate, the prayer to appoint DW1 as administrator at this stage is untenable, without fulfilling the requirements of the law. Parties are advised to maintain peace in the

family and to follow proper procedure to appoint administrator(s) of the deceased estate.

Since no reason has been assigned in the Will as to why the two children of marriage were left out of their father's inheritance, such an exclusion is declared to be arbitrary, legally unjustified and an utter denial of the right of the children. Accordingly, the exclusion is reversed. The said Joshua Calvin Maimu and Dyness Calvin Maimu are hereby declared to be legitimate issues of the deceased with full right to enjoy from the deceased's estate and to inherit from the same according to the law.

Having determined all the issues as above, the defendant's case succeeds to the extent shown herein. No order as to costs.

Ordered accordingly.

Dated at Dodoma this 16th day of August, 2022



A handwritten signature in blue ink, appearing to read "Abdi S. Kagomba".

ABDI S. KAGOMBA

JUDGE