

**IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM**

CIVIL APPEAL NO 264 OF 2020

(Arising from Civil Revision No.1 of 2018 from Kinondoni District Court at Kinondoni)

(Hon. LIHAMWIKE, R.M.)

**IN THE MATTER OF THE ESTATE OF THE LATE VICENT PROTAS
KONGO**

BETWEEN

CATHERINE VICENT JOHN.....APPELLANT


VERSUS

FESTO VICENT.....RESPONDENT

24/11/2021 & 14/01/2022

JUDGMENT

N.R MWASEBA, J.

Aggrieved by the decision of the district court of Kinondoni in Civil Revision No 1 of 2018, the appellant has knocked the door of this court with the following grounds of appeal: 

1. *The trial magistrate erred in law and fact without considering that the deceased left a will on his properties. A copy of the will is attached as annexure "A".*

2. *The trial magistrate erred in law and fact holding that the trial court was right to order sale of the house so as to distribute the proceeds to their heirs. The appellant state that it was not right for the Magistrate to order for the sale of the house as the Administratrix had valued the house and was ready to pay the heirs and remain with the house as a widow and aged.*

3. *The trial magistrate erred in law and fact in stating that the matter was not a matrimonial matter but a Probate and Administration which is filed at Manzese/Sinza.*

4. *That the trial Magistrate erred in law and fact not considering that the widow was and is still staying in the same property which the lower court ordered for sale while sale ought to be the last resort and the Administratrix had not failed to pay the Respondent.*

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5. *That the trial magistrate erred in law and fact in ruling out that the opinions of the assessors are not fatal in reaching the decision of the court since the assessors are part of the court and ignoring the functions of assessors as provided in law.*
6. *That, the trial magistrate erred in law and fact and misdirected by saying that there is nowhere written that the assessors shall give their opinion on any issue to the court nor the magistrate sum up to them, since the assessor are the member of the court and their function is not only to appear but also to make a consultation with magistrate after they completed hearing the evidence from the parties.*
7. *That the trial magistrate erred in law and fact by ignoring the evidence adduced by applicant the house which is protected by the law, since there is no gain by saying that there was no evidence adduced to prove the same while the widow had interest in the property.*

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Before this court the appellant was represented by Mrs William, learned counsel while the respondent appeared in person. It was agreed by both parties that the matter be disposed of orally.

Mrs William submitted on the first ground that they have attached the will which was left by the deceased, but the appellate court did not consider it. She states that the district court ordered the deceased's properties be sold while it is not a duty of the court to sell the properties but rather the duty of the administrator. The administrator evaluated the properties. If one was dissatisfied with the evaluation, the procedure would involve looking for another evaluator.

She further states that the district magistrate did not consider the will by joining hands with the trial magistrate and ordering the house to be sold while it is the appellant's residence to date. She cited the case of **Selestina Paulo vs Mohamed Hussein** (1983) TLR in which the court elaborated that the will be it written or oral must be respected as they are the words of the deceased. So, deciding against it amounts to going against the words of the deceased. She therefore prays that this court quashes the decision of the district court which ordered selling the house, and hence the parties obey the will. *Handwritten signature*

She submitted on the second and seventh grounds of appeal that the duty of the administrator is to collect the deceased's properties, pay debts if any and distribute the proceeds to eligible heirs. The trial court erred in law to order the sale of the house. That, the appellant engaged the evaluator to evaluate the house then she was about to pay the heirs according to the evaluation. She further explained that if the administrator could fail to pay the heirs, then the second option could be selling the house.

On the third and fourth grounds of appeal, Mrs William states that the district court erred in law by saying that the said house was not a matrimonial asset. The appellant said she followed the directives as stated in the will which stated that she was supposed to remain in the house as a widow. So, she prays that the court considers the directives of the will.

She submitted on the fifth and sixth grounds which concern the fact that the district magistrate erred in law that the opinions of assessors are not compulsory. The learned council argues that the assessor's opinions are important to reach the decision. So, by not adhering to that procedure it means the appellate court misled itself. Thus, they pray that the appeal be allowed.

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In his reply, the respondent submitted briefly that all what has been submitted by the counsel for the appellant was not correct. He said the will which was brought in court was rejected by the court because it was invalid. Moreover, concerning the house, the court ordered so because there were some misunderstandings between the administrator and the heirs. It is also recorded in her appeal at the district court that the court found that the assessors were present. And also, the court found that the respondent had been denied his right for a long time. That is why it decided to uphold the decision of the primary court. In addition, the respondent explained that the appellant confessed that she would not give the heirs anything.

In her rejoinder, Mrs William insisted that the appellant does not say the appellants were not present but rather she says their opinion does not appear in the decision of the primary court. The district court magistrate says this incidence is not fatal. But the fact is that this is a legal requirement, thus the opinion must be there. She went on to submit about the will that there are two judgments in the primary court's file. One accepted the will and the second one stated that the house should

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be sold; and that is what the appellate court approved. She denied the allegation that the appellant declared not to give the heirs anything. She reiterated what she submitted in chief that the appellant evaluated the house ready for distributing the proceeds to heirs.

After having the submission from both sides and the grounds of appeal the issues for determination are **one**: whether there was a valid will left by the deceased, **two**: whether it was proper for the trial court to order the sale of the house which the widow resides in and distribute the proceeds to the heirs.

Starting with the first issue, I have gone through the record and have come through the said will which is of its own type anyway. It is written in a brochure titled "JE UMEANDIKA WASIA?" The said brochure was prepared by the Legal and Human Rights Centre (LHRC) aiming to educate people on how to write a will. Now, the purported will shows that the deceased just filled in the blanks by mentioning his properties and stating the beneficiaries who are his mother and his wife. He excluded other beneficiaries with no reasonable ground. The record shows that the deceased is survived by seven children and none of them was included. Moreover, the said will is not witnessed by two witnesses

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as per legal requirement and it is not dated. The record does not show where the same was kept. I have seen the minutes of the meeting which was convened in April, 2015 soon after the deceased's demise, and the will was not disclosed. That is why the respondent stated in court when he was testifying that he is not aware of the will. Having pointed out those irregularities I find that the will is not valid at all. And thus, the cited case of **Selestina Paulo vs Mohamed Hussein (supra)** is distinguishable as the case at hand there is no valid will which ought to be respected. So, the first issue is answered in negative.

Coming to the second issue, as to whether it was proper for the trial court to order the sale of the house which the widow resides in and distribute the proceeds to the heirs. I have carefully gone through the records and found that the administrator has been filing inventory and final account but the court had ruled out several times that the distribution is not fair so it kept on ordering the administrator to amend the final account. For example, on 16/12/2016 the court recorded:

"Mgawanyo hauna uwiano"



However, the court did not describe how the distribution is disproportionate. The beneficiaries were not called up to state if they were satisfied with the distribution or not, but the court executed it on its own. What I see here is that the court assumed the function of the administrator of distributing the estate of the deceased. As if it is not enough, the trial court ordered the sale of the house so that the proceeds could be distributed to the heirs. What I see here is that the court was stepping into the administrators' shoes. In the case of **Monica Nyamakare Jigamba Versus Mugeta Bwire Bhakome as Administrator of the Estate of Musiba Reni Jigabha and Hawa Salum Mengele**, Civil Application No. 199/01 OF 2019 the Court of Appeal sitting at Dar es Salaam had this to say:

"It follows then that it is the duty of the administrator to collect the properties of the deceased and the debts, pay the debts, identify the rightful heirs of the deceased, to whom the amount of residue of the proceeds of the deceased's estate should be distributed and at what percentage each heir will be entitled to get depending on the law applicable in the administration of such estate."

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That being the legal position, the trial court erred in law to interfere with the ratio of distribution of the house without the beneficiaries being summoned to express their opinion on the final account. Further, the trial court erred in law to order the sale of the said house. The beneficiaries were supposed to be summoned to state if they are satisfied with the final account. The trial court was also supposed to let the administrator accomplish her duty and if she failed, the court's duty would be to revoke the appointment of the administrator instead of stepping into her shoes.

From the evidence of SM 1 and SM2, it was apparent that the house in question was jointly acquired by the deceased and his wife, the administrator. That means it is a shared property between the deceased and his wife (administrator). The administrator has her share and then the remaining share is subject to the division among heirs including the administrator herself as a deceased's wife. This was well considered by the administrator as she proceeded to evaluate the said house so that she pays the heirs and remain with the house. With due respect, I do not see the logic of the trial court to order the sale of the house while

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the administrator was still performing her legal duty. Therefore, the second issue is answered in negative as well.

Having so said I quash and set aside the order of selling the house but rather the administrator has to accomplish her duty of dividing the assets to the heirs. Due to the nature of this case each party will bear own costs.

DATED at **DAR ES SALAAM** this 14th day of January, 2022.




N.R. MWASEBA

JUDGE

14/01/2022